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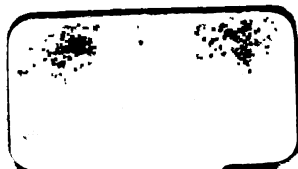
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REPORTS

OF

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CASES ARGUED AND DECIDED

IN

THE SUPREME COURT

OF

THE UNITED STATES.

COMPLETE EDITION, WITH NOTES AND REFERENCES

BY

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Counselor at Law.

BOOK XIV.

Containing HOWARD, Vols. 13, 14, 15 and 16.

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REPORTS

OF

CASES

ARGUED AND ADJUDGED IN

THE

Supreme Court of The United States,

IN DECEMBER TERM, 1851.

BY BENJAMIN C. HOWARD,

Counselor at Law, and Reporter of the Decisions of the Supreme Court
of the United States.

VOLUME XIII.

JUDGES
OF THE
SUPREME COURT OF THE UNITED STATES
DURING THE TIME OF THESE REPORTS.

THE HON. ROGER B. TANEY, *Chief Justice.*
THE HON. JOHN M'LEAN, *Associate Justice.*
THE HON. JAMES M. WAYNE, *Associate Justice.*
THE HON. JOHN CATRON, *Associate Justice.*
THE HON. JOHN M'KINLEY, *Associate Justice.*
THE HON. PETER V. DANIEL, *Associate Justice.*
THE HON. SAMUEL NELSON, *Associate Justice.*
THE HON. ROBERT C. GRIEB, *Associate Justice.*
THE HON. BENJAMIN R. CURTIS, *Associate Justice.*

JOHN J. CRITTENDEN, Esq., *Attorney-General.*

WILLIAM THOMAS CARROLL, Esq., *Clerk.*

BENJAMIN C. HOWARD, Esq., *Reporter.*

RICHARD WALLACE, Esq., *Marshal.*

RULES OF COURT.

RULE No. 61.

WHEN the death of a party is suggested, and the representatives of the deceased do not appear by the tenth day of the second term, next succeeding the suggestion, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

This rule shall apply to cases now on the docket, as well as to cases hereafter brought. And those now on the docket, and falling within the rule, shall abate on the tenth day of December Term, 1852, unless, upon special cause shown, the court shall direct otherwise.

RULE No. 62.

In cases where a writ of error is prosecuted to the Supreme Court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied from the date of the judgment below, until the same is paid at the same rate that similar judgments bear interest in the courts of the state where such judgment is rendered.

The same rule shall be applied to decrees for the payment of money, in cases in chancery, unless otherwise ordered by this court.

This rule is to take effect on the first day of December Term, 1852.

ADMIRALTY RULES.

[NOTE BY THE REPORTER. The first forty-seven rules in Admiralty are printed in 3 Howard, and four additional ones in 10 Howard. The following were added at December Term, 1851.]

ORDERED. That further proof, taken in a circuit court upon an admiralty appeal, shall be by deposition, taken before some commissioner appointed by a Circuit Court, pursuant to the Acts of Congress in that behalf, or before some officer authorized to take depositions by the thirtieth section of the Act of Congress of the 24th of September, 1789, upon an oral examination and cross-examination, unless the court in which such appeal shall be pending, or one of the judges thereof, shall, upon motion, allow a commission to issue to take such deposition upon written interrogatories and cross-interrogatories. When such deposition shall be taken by oral examination, a notification from the magistrate before whom it is to be taken, or from the clerk of the court in which such appeal shall be pending, to the adverse party, to be present at the taking of the same, and to

put interrogatories if he think fit, shall be served on the adverse party or his attorney, allowing time for their attendance after being notified, not less than twenty-four hours, and, in addition thereto, one day, Sundays exclusive, for every twenty miles' travel.

Provided, That the court in which such appeal may be pending, or either of the judges thereof, may, upon motion, increase or diminish the length of notice above required.

Ordered: That, when oral evidence shall be taken down by the clerk of the District Court, pursuant to the above-mentioned section of the Act of Congress, and shall be transmitted to the Circuit Court, the same may be used in evidence on the appeal, saving to each party the right to take the depositions of the same witnesses, or either of them, if he should so elect.

THE DECISIONS

OF THE

Supreme Court of the United States,

AT DECEMBER TERM, 1851.

1*] **THE UNITED STATES, Appellants,**
v.
JOSEPH HUGHES.

*Spanish grant—inchoate title extinguished by
long neglect of grantee to perfect.*

Where a grant of land, in Louisiana, was made by the Spanish Governor, in February, 1799, but no possession was ever taken by the grantee, during the existence of the Spanish government, or since the cession to the United States, and no proof of the existence of the grant until 1835, when the grantee sold his interest to a third person, the presumption arising from this neglect is, that the grant, if made, had been abandoned.

The regulations of Gayoso, who made the grant, were, that the settler should forfeit the land, if he failed to establish himself upon it within one year, and put under labor ten arpents in every hundred within three years.

THIS was a land case, arising under the Acts of 1824 and 1844, and brought up by appeal from the District Court of the United States for the Eastern District of Louisiana.

The petition in this case was filed in the District Court of the United States for the Eastern District of Louisiana, on the 16th day of June, 1846.

Hughes, the petitioner, represented therein that, on the petition of Joseph Guidry, the Spanish Governor of Louisiana, Gayoso granted to him (said Guidry), on the 1st of February, 1799, a tract of land, having a front of 40 arpents on the Atchafalaya, with a depth of 40 arpents, adjoining the land of André Martin, on the west bank of the said river, near where the Point Coupée trace from Opelousas crosses said river. Petitioner further alleges that the said claim was presented to the board of commissioners, under the Act of Congress of 6th of February, 1835, and reported on favorably, but never acted on by Congress; that the United States have sold none of said land, except a small part to John L. Daniel; and that he, 2*] Hughes, has *become owner of one thousand arpents of said grant by a chain of conveyances, &c.; he therefore prays for a decree confirming his title, &c.

The answer of the United States denies all the allegations of the petition.

Depositions to prove the genuineness of Gayoso's signature were given in evidence.

The chain of title to the petition was a conveyance from Guidry to André Martin, on the 19th of April, 1837, and conveyance by Martin to Hughes, on the 1st of March, 1846.

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The District Court confirmed the claim, and the United States appealed.

It was argued by **Mr. Crittenden** (Attorney-General) for the United States, and by **Messrs. Janin and Taylor** for the appellee.

Mr. Justice Nelson delivered the opinion of the court:

This is an appeal from the decree of the District Court of the Eastern District of Louisiana.

The plaintiff, Hughes, in the court below, filed a petition, founded upon a Spanish claim, under the Act of 17th of June, 1844, which revived the Act of 26th of May, 1824, for the purpose of recovering a tract of sixteen hundred arpents of land, situate in Louisiana, on the Atchafalaya River, near where the Point Coupée road crosses the said river.

The petition states that the concession was made to one Joseph Guidry, on the 1st of February, 1799, by Governor Gayoso, under whom the plaintiff derives title.

The proofs in the case show that the grant was made on the application of Guidry at the date mentioned; that he sold and assigned his interest in the same to one André Martin, at the risk of the purchaser, 19th of April, 1835, who assigned the same to the plaintiff, 1st of March, 1846, in pursuance of a contract made with his agent in 1840. The latter purchase was also made at the risk of the purchaser.

This concession was an incomplete grant, and did not vest a perfect title to the property in the grantee, according to the Spanish usages and regulations, until a survey was made by the proper official authority, and the party thus put in possession, together, also, with a compliance with other conditions, if contained in the grant, or in any general regulations respecting the disposition of the public domain. Possession, with definite and fixed boundaries, was essential to enable him to procure from the proper Spanish authority a complete title. If, however, the concession itself contained a description of the land sufficient to enable *the grantee to locate the same without the aid of a survey, the incipient grant, and possession thus taken, have always been regarded as such a severance of the tract from the public domain, as to entitle the grantee to a confirmation of the grant within the provisions of the Act of 1824.

In such a case, there would be no discretion to be exercised by the public surveyor in putting the party in possession, which, under the Spanish usages, in disposing of the public land,

was regarded as essential, in case of grants indefinite as to the location. The survey would be rather matter of form than of substance, and might, therefore, very well be dispensed with.

In this case, the description in the grant is, perhaps, sufficiently specific to have enabled the grantee to take possession without the necessity of a survey; and if possession had been taken in pursuance of the grant, he, or those claiming under him, would have presented a proper case for confirming the title under the Act; and the decree of the court below in favor of the claim might well be sustained.

But no possession of the land was ever taken under this imperfect and incomplete grant, either during the existence of the Spanish government or since the cession to the United States. Not only has no possession been taken, but, for aught that appears in the record, no action has been had, or claim set up, under the grant, during the whole of the period, from its date down to the institution of the suit, 16th of May, 1847.

Nor have we any proof of the actual existence of the grant, at all, until the 19th of April, 1835, when the grantee sold and quitclaimed his interest to Martin, under whom the plaintiff claims. No account has been given of it for the period of some thirty-six years. The plaintiff rests his claim exclusively upon the evidence of the signature of the Governor to the concession, under date of 1st of February, 1779, and its production, 16th of May, 1846, before the court when the suit was commenced, together with the transfer from Guidry, the grantee, to Martin, in 1835, and from the latter to himself, in 1846; and this unconnected with any possession of the premises, or claim of right of possession to the same, in the mean time.

In view of this state of facts, it is impossible to deny, but that the claim comes before us under circumstances of very great suspicion; or to resist the conclusion that the grant, if made, had been abandoned. It is difficult to account for the neglect to take possession, or to set up any right or claim to the land for so long a period, upon any other supposition; especially when we see that the description of the premises in the concession is sufficiently specific to have enabled the grantee to take possession under it without the aid of a previous survey. 4*] *This conclusion is strengthened, when we take into view the regulations of Governor Gayoso himself, who made the grant in question, respecting the disposition of public lands, published at New Orleans, 9th of September, 1797, about a year and a half before it was made. According to the 14th article, it is declared that the settler shall forfeit the lands, if he fails to establish himself upon them within one year, and shall have put under labor ten arpents in every hundred, within three years. And in the regulations of the Intendant, Morales, published at the same place, July 17, 1799, some six months after the date of this grant, possession and cultivation, within a limited time after the concession, are expressly enjoined, under the penalty of forfeiture.

The neglect to comply with these regulations, thus positively enjoined, within the three years that the Spanish government continued after the date of the grant, together with the

absence of claim or assertion of right to the land, and absence even of any proof of the actual existence of the grant for the period of more than thirty-six years, we are of opinion, lay a foundation for the inference or presumption of abandonment of the original concession made by Gayoso, too strong to be resisted; at least, a presumption of abandonment that called for explanation on the part of the plaintiff, accounting for the neglect to take the possession, for the great delay in the assertion of the claim, and for the absence of any evidence of even the existence of the grant itself for so long a period of time.

On these grounds, we think the decree of the court below erroneous, and should be reversed, proceedings remitted to the court below, and petition be dismissed.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said District Court in this cause be, and the same is hereby reversed and annulled; and that this cause be, and the same is hereby remanded to the said District Court, with directions to dismiss the petition of the claimant.

Cited—13 How., 6, 8.

THE UNITED STATES, *Appellants,*

v.

JOSEPH HUGHES.

Spanish grant—inchoate title lost by neglect to perfect.

The court again decides, as in the preceding case, that where a Spanish grant was made in 1798, and no evidence was offered that possession was taken under the grant, nor any claim of right or title made under it until 1837, nor any evidence given to account for the neglect, the presumption is that the claim had been abandoned.

In this case, also, there was no proof that the persons who purported to convey as heirs, were actually the heirs of the party whom they professed to represent.

THIS was a land case, arising under the Acts of 1824 and 1844, and came up by appeal from the District Court of the United States for Louisiana.

The parties were the same as in the preceding case.

The petition in this case was filed in the District Court, for the Eastern District of Louisiana, on the 16th of June, 1846.

The petitioner, Hughes, claims under a grant alleged to have been made by Governor Gayoso to André Martin, on the 10th of October, 1798, of a tract of land of twenty-eight arpents front, with a depth of one hundred arpents, situated on the west bank of the Atchafalaya, about one league above where the trace or road from Opelousas to Point Coupée crosses the said river. The petitioner alleges further, that said Martin took immediate possession, &c., and that the board of commissioners made a favorable report on the claim in the year 1840,

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but that Congress never acted on it, and that he holds a title to one thousand arpents thereof, &c. He thereupon prays that his title may be decreed to be good.

The answer of the United States is a general denial of the allegations of the petition.

The evidence of the original title is the petition of André Martin to the Governor for the said tract of land, and the Governor's decree thereon, signed by him in these words: "Granted forever, that he may establish it," and dated "New Orleans, October 10th, 1798."

Hughes claimed title under a deed from certain persons who represented themselves to be the heirs of Martin, dated 14th of July, 1848.

The District Court decided in favor of the petitioner, and the United States appealed.

It was argued by *Mr. Crittenden* (Attorney General) for the United States, and by *Messrs. Janin and Taylor* for the appellee.

Mr. Justice Nelson delivered the opinion of the court:

This is an appeal from a decree of the District Court for the Eastern District of Louisiana.

The plaintiff, Hughes, claimed in the court below 8,800 arpents of land, situate in Louisiana, on the west bank of the Atchafalaya River, about one league above where the road from Opelousas to Point Coupée crosses said (6*) river under a concession from *Governor Gayoso to one André Martin, 10th of October, 1798.

The petition was presented to the District Court on the 16th of June, 1846, under the Act of 17th June, 1844, reviving the Act of 26th May, 1824, praying for a confirmation of the grant in pursuance of the provisions of the Act.

Evidence was given of the handwriting of Martin to the application to the Governor for the grant of the tract in question; and of the handwriting of the Governor to the grant.

The plaintiff also gave in evidence a conveyance by notarial act under date of 14th of July, 1848, purporting to be made by the heirs of André Martin, the original grantee, to himself, conveying one thousand arpents, part of the tract of 8,800 arpents, to be taken off the front part of the tract.

Evidence was also given of a notice to the registers and receivers of the Land Office at Opelousas in Louisiana, of a claim on behalf of the heirs of Martin by their attorney, for confirmation of the claim under date 1st of February, 1837. What action took place before these officers on the application, if any, does not appear on the record, nor have we been referred to any proceedings therein.

There is no evidence that possession was ever taken of the land by the grantee, or any person claiming under him; nor of any claim of right to the possession; or of any right or title under the concession, or of the actual existence even of the concession itself, until the application to the register and receiver in 1837, a period of over thirty-eight years from its date.

Nor is there any evidence in the record accounting for the neglect to take possession, or for the absence of evidence of an assertion of right under the grant, or of even the existence of the grant itself for so long a period of time.

HOWARD 18.

The plaintiff rests his claim exclusively upon the production and proof of this incomplete grant by Governor Gayoso in 1798, of his title as derived from the grantee in 1848, and of the application to the officers of the Land Office at Opelousas in 1837.

We have already held, in a previous case of this plaintiff and the United States, that the neglect to take possession, and the absence of any claim under the grant, and of any evidence even of the existence of the grant itself, for so long a period of time, afford such a violent presumption of abandonment of the claim, that unless explained to the satisfaction of the court, it is impossible, consistent with any sound principles of law or of equity, to uphold it. We refer to the opinion given in that case on this point as decisive of the present one.

There is also an additional objection to a recovery in this case, that did not exist in the one referred to. The plaintiff *shows no [*7 title to the land in question. There is no proof in the record that the persons joining in the conveyance to him of the premises in July, 1848, were the heirs of Martin, the original grantee. The recital in the instrument is no evidence of the fact. The proper proof should have been furnished of the heirship.

For these reasons we are of opinion that the decree of the court below is erroneous, and should be reversed, and remit the proceedings to the court below, with directions to dismiss the petition.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said District Court in this cause be, and the same is hereby reversed and annulled; and that this cause be, and the same is hereby remanded to the said District Court, with directions to dismiss the petition of the claimant.

Cited—13 How., 8.

THE UNITED STATES, *Appellants*,

v.

JOSEPH HUGHES.

The decision in the two preceding cases again affirmed.

THIS was a land case arising under the Acts of 1824 and 1844, and came up by appeal from the District Court of the United States for Louisiana.

The parties were the same as in the two preceding cases.

Joseph Hughes filed his petition on the 16th June, 1846, claiming 3,200 arpents of land, as having been granted by the Governor of Louisiana, Gayoso, on the 26th April, 1798, to André Martin. He alleges that said Martin took immediate possession, and held it till his death. That in the year 1840, the board of commissioners reported favorably on said claim, but that Congress had never acted upon it; and that he will, on the trial, produce good and

legal sales and transfers of the said tract of land from the heirs of the said Martin to himself.

The answer put in, on the part of the United States, consists of a general denial of the statements in the petition.

The evidences of title exhibited on the part of the petitioner were,

1st. The petition of André Martin to the Governor for a grant of 3,200 arpents, &c., dated March 28, 1798.

2d. The concession and order of survey made by Governor Gayoso, and dated 26th April, 1798.

3d. The sales and deeds of conveyance by the heirs of André Martin, under which the petitioner, Hughes, claims, dated respectively the 13th and 14th of July, 1848.

Testimony was offered to prove the genuineness of Gayoso's signature to the order of survey.

The District Court decided in favor of the petitioner and the United States appealed.

It was argued by *Mr. Crittenden* (Attorney-General) for the United States, and by *Messrs. Janin and Taylor* for the appellee.

Mr. Justice Nelson delivered the opinion of the court:

This is an appeal from a decree of the District Court of the Eastern District of Louisiana.

The plaintiff claimed three thousand arpents of land situate in Louisiana, and fronting on the back part of lands of Oliver Thibodeaux, Theodore Thibodeaux, and Claude Martin, under a concession to André Martin from Governor Gayoso, 26 April, 1798. The proceedings were under the Act of 17th June, 1844, reviving the Act of 26th May, 1824.

Evidence was given of the handwriting of Martin to the application for the land, and of Governor Gayoso to the concession.

The plaintiff also produced evidence of a conveyance of the premises to himself by an instrument bearing date 14th July, 1848, purporting to have been executed by the heirs of André Martin the original grantee. And also notice to the register and receiver of the Land Office at Opelousas, Louisiana, of an application on behalf of the heirs, by their attorney, for confirmation of the grant under date of 23d December, 1836.

The concession was an inchoate and incomplete grant; and there is no evidence that any possession was ever taken of the land, nor of any claim set up under the grant to the same, from its date down to 1836, when notice was given to the officers of the Land Office; nor any evidence of the existence of the grant during the whole of this period. The case falls directly within the principles of the two previous cases just decided.

There is, also, no proof of any title in the plaintiff derived from the original grantee. The conveyance purporting to be executed by the heirs notwithstanding the recitals to that effect, furnishes no evidence of the fact of heirship.

We think the decree of the court below erroneous, and should be reversed; and that the proceedings be remitted to the court below, and the petition be dismissed.

*ORDER.

[*9]

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said District Court in this cause be, and the same is hereby reversed, and annulled; and this cause be, and the same is hereby remanded to the said District Court, with directions to dismiss the petition of the claimant.

THE UNITED STATES, *Appellants*,

v.

ARMAND PILLERIN ET AL.

THE UNITED STATES, *Appellants*,

v.

A. B. ROMAN.

THE UNITED STATES, *Appellants*,

v.

CARLOS DE VILLEMONT'S HEIRS ET AL.

THE UNITED STATES, *Appellants*,

v.

JEAN B. LABRANCHE'S HEIRS.

French grants made after cession of Louisiana to Spain not valid—continued possession, presumption of confirmation by Spain.

This court again decides, as in 9 How., 127, and 10 How., 609, that French grants of land in Louisiana, made after the Treaty of Fontainebleau, by which Louisiana was ceded to Spain, are void, unless confirmed by the Spanish authorities before the cession to the United States.

But if there has been continued possession under the grants so as to lay the foundation for presuming a confirmation by Spain, then the cases are not included within the Acts of 1824 and 1844, which look only to inchoate and equitable titles. The District Court of the United States has therefore no jurisdiction.

THESE four cases were land cases, arising under the Acts of 1824 and 1844, and were appeals from the District Court of the United States for Louisiana.

They were cases of French grants made after the Treaty of Fontainebleau by which Louisiana was ceded to Spain.

They were argued by *Mr. Crittenden* (Attorney-General) for the United States, and by *Messrs. Janin and Taylor* for the appellees, except the second, which was argued by *Mr. Soule*.

Mr. Chief Justice Taney delivered the opinion of the court:

These four cases are all French grants made after the Treaty of Fontainebleau, by which Louisiana was ceded to Spain. We have already decided in the cases of *The United States v. Reynes*, 9 How., 127, and *The United States v. D'Auterive*, 10 How., 607, that grants of this description are void, unless confirmed by the Spanish authorities before the cession to the United States. In some of these cases evidence has been offered of continued [*10] possession by the grantees of those claiming under them, ever since the grants were made.

But if there has been such a continued possession, and acts of ownership over the land as would lay the foundation for presuming a confirmation by Spain of these grants, or of either of them or any portion of either of them, such confirmation would amount to an absolute title, and not an inchoate or imperfect one. For all of the grants are absolute, or upon conditions subsequent; and if they had been originally made by competent authority, would have passed the legal title at the time, subject only to be divested by a breach of the condition, in the cases where a condition subsequent is annexed. Such a title, if afterwards recognized by the Spanish authorities, is protected by the Treaty, and is independent of any legislation by Congress, and requires no proceeding in a court of the United States to give it validity.

Titles of this description were not therefore embraced in the Acts of 1824 and 1844, under which these proceedings were had. These laws were passed to enable persons who had only an inchoate and equitable title, to obtain an absolute and legal one, by proceeding in the District Court in the manner prescribed. And when the title under which the party claims would be a complete and absolute one, if granted by competent authority or established by proof, the District Courts have no jurisdiction under the Acts of Congress above mentioned to decide upon its validity. The Act of 1824 is very clear upon this point; and it has always been so construed by this court.

Upon this ground the decree of the District Court in each of these cases is erroneous and must be reversed and a mandate issued directing the petitions to be dismissed for want of jurisdiction.

But this decision is not to prejudice the rights of the respective petitioners or either of them in any suit where the absolute and legal title to these lands or any portion of them may be in question, or prevent them from showing if they can that the French grant was recognized as valid or confirmed by the Spanish authorities before the Treaty of St. Ildefonso.

ORDER.

These causes came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and were argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said District Court in these causes be, and the same is hereby reversed and annulled; and that these causes be, and the same are hereby remanded to the said District Court, with directions to dismiss the petitions of the claimants for want of jurisdiction.

Cited—15 How., 37.

11*] *ALEXANDER CRAWFORD, Appellant,
v.

JAMES POINTS, Assignee in Bankruptcy of
HENRY HOTTLE.
Jurisdiction—Appeal.

An appeal does not lie to this court, from the decision of a District Court in a case of bankruptcy. Even if it would, the decree of the District Court in this case is not a final decree.

HOWARD 13.

THIS was an appeal from the District Court of the United States for the Western District of Virginia.

The facts in the case are stated in the opinion of the court so far as they bear upon the question of jurisdiction; and it is unnecessary to state the other facts.

It was argued in this court by *Mr. Fultz* for the appellant, and by *Mr. Stuart* for the appellee.

Mr. Chief Justice Taney delivered the opinion of the court:

These cases may be disposed of in a few words. James Points, the appellee, was appointed assignee of Henry Hottle who had been declared a bankrupt, by the District Court of the United States for the Western District of Virginia. And, upon the petition of the assignee and the hearing of the parties concerned, certain settlements and transfers of property made between the bankrupt and the appellant, were declared to be fraudulent, and set aside by the court. From this decree Crawford appealed to this court.

It is very clear that the appeal cannot be sustained. The appellant endeavors to support it, upon the ground that there is no Act of Congress now in force establishing a Circuit Court for the Western District of Virginia. But, assuming this to be the case, it does not follow that an appeal to this court can be taken from the decree of the District Court. For we can exercise no appellate power, unless it is conferred by law; and there is no Act of Congress authorizing an appeal to this court from the decision of a District Court in a case of bankruptcy. It was so held in *Nelson v. Carland*, 1 How., 265, and in the case *Ex-parte Christy*, 3 How., 314, 315.

Indeed, if an appeal would lie from a final decree of the District Court, this appeal cannot be maintained. For the decree is not final. An account is directed to be taken of the rents and profits of certain lands, with an option to the appellant to purchase them at a price named in the decree; and in that event he is to be discharged from the account for rents and profits. And, moreover, he is permitted to retain possession of certain slaves, until it should be ascertained whether the other assets of the bankrupt's estate would not be sufficient to pay his debts; and an order to account for their hire and the profits of their labor is suspended in the mean time. While these things remain to be done the decree is not final, and no appeal from it would lie to this court, even if it had been the decree of a circuit court exercising its ordinary equity jurisdiction.

Upon either ground, therefore, this appeal cannot be maintained, and is therefore dismissed for want of jurisdiction.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Virginia, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that this cause be, and the same is hereby dismissed for the want of jurisdiction.

Cited—2 Wall., 110.

JOHN DARRINGTON, LORENZO JAMES,
AND ROBERT D. JAMES, *Plaintiffs in*
Error,

v.

THE BRANCH OF THE BANK OF THE
STATE OF ALABAMA.

JOHN DARRINGTON AND LORENZO
JAMES
v.
SAME.

Bank bills are not "bills of credit," within the
Constitution.

The bills of a banking corporation, which has corporate property, are not bills of credit within the meaning of the Constitution, although the State which created the bank is the only stockholder, and pledges its faith for the ultimate redemption of the bills.

THESE cases were brought up from the Supreme Court of Alabama, by a writ of error issued under the 25th section of the Judiciary Act. The facts and pleadings are stated in the opinion of the court.

It was argued by *Mr. Campbell* for the plaintiffs in error, and *Mr. Hopkins* for the defendants.

Mr. Campbell contended that the transactions as described by the pleas, fell within the prohibitory clause of the Constitution of the United States, "that no State shall issue a bill of credit," and cited 4 Peters, 410; 11 Peters, 318; 7 Ala. Rep., 18.

Mr. Hopkins, for the defendants in error:

In the case of *Briscoe v. The Bank of the Commonwealth of Kentucky*, 11 Peters, 257, this court decided that the notes issued by such a bank as the one which is the defendant in error, were not bills of credit within the prohibition of the Constitution of the United States. In the case of *Owen v. The Branch Bank at Mobile*, [*14] *bills*, *which is the defendant in error, the Supreme Court of Alabama decided that the notes issued by this Bank were not bills of credit. (3 Ala. Rep., 258.)

The charter of this Bank is a public statute of the State of Alabama. (6 Ala. Rep., 289, 294.) This court takes notice judicially of such statutes, as it does of the Acts of Congress. (9 Peters, 607, 625, 626.)

This Bank had a large capital, and it is not denied in the pleas, and it was in the case of *The Kentucky Bank*, that the capital was paid. Its notes were received in payment of taxes and debts due to the State of Alabama. As a corporation the Bank incurred responsibility, and gave credit to its paper. It was liable for the notes and bills it issued, and its capital was bound, like that of stock banks, for the payment of its notes in gold and silver. All its property, including its capital, was a fund for the payment of the debts of the Bank. The notes of the Bank were circulated upon its own credit, and every holder of the notes had the power to enforce payment, as the Bank could be sued. The notes were not issued by the State, but by the Bank in its corporate name,

and the Bank was not controlled by the State, but by a president and directors appointed by the Legislature. For the capital and powers of the Bank, see 3 Ala. Rep., 267. According to a previous judgment of this court, the issuance and circulation of its notes as money, by such a bank is no violation of the Constitution of the United States. (11 Pet., 811, 815, 318, 320, 321, 322.)

Mr. Justice McLean delivered the opinion of the court:

This is a writ of error to the Supreme Court of Alabama, under the 25th section of the Act of 1789.

An action was brought in the Circuit Court of Mobile County against the plaintiffs in error, by the commissioners and trustees of the banks of Alabama, under an Act of the State, by serving a notice on them in behalf of the Branch of the Bank of the State of Alabama, at Mobile, as the makers of a promissory note expressly made payable and negotiable at the said Branch Bank, dated 2d of December, 1843, and in which they promised, twelve months after date, to pay the said Branch Bank by the name and description of Henry B. Halcomb, cashier, or bearer, the sum of four thousand dollars, with interest thereon from date, for value received, which said promissory note is regularly due and unpaid, and is the property of the Bank.

The defendants below first pleaded *nil debet*, on which issue was joined.

In their second plea, they aver that the consideration of the note sued for consisted of certain bills of credit issued by the *State [*14] of Alabama, under the name and style of the Branch of the Bank of the State of Alabama, at Mobile, by which the State, under that name, promised to pay the bearer of the same on demand. That these bills of credit were for such sums as showed they were intended to be circulated as money. And that the object of the State was to circulate them as money, through the agency of the Bank, for a profit.

The third plea avers that the note, on which suit is brought, was made and delivered to the plaintiff as a trustee for the State, and that the bills were received of the Bank by the defendants, to put them into circulation as money for the profit of the State; that the Bank was controlled by the State, and that it was alone liable for the issues made by the Bank in the transaction stated.

The plaintiff below demurred to the defendant's pleas except the first one, which demurrer was sustained. And on a jury being called to try the issue they found the amount of the note and interest for the plaintiff, on which judgment was entered. This judgment was taken by writ of error before the Supreme Court of Alabama, which affirmed the judgment. And this writ of error is now prosecuted in this court to reverse the judgment of affirmance.

It is argued that this case should be dismissed, as there was no special assignment of error in the Supreme Court of Alabama, as required by the law and the practice of that court.

The Supreme Court of Alabama exercised jurisdiction in the case, and affirmed the judgment of the Circuit Court. This court cannot look behind that judgment and dismiss the

HOWARD 18,

NOTE.—What are "bills of credit" within the Constitution of the United States. See note to *Craig v. Missouri*, 4 Pet., 410.

cause here on the ground of a supposed violation of a rule of practice in the State Court. Whether there was an assignment of error or not in that court, can be of no importance, as we look to the judgment only and its effects. But it may be proper to say there was an assignment of error in the Supreme Court of Alabama, "that the court sustained the demurrer to the pleas, and gave judgment thereon in favor of the plaintiffs, whereas, by the law of the land it should have been for the defendants."

The judgment on the demurrer in the Circuit Court was not formally entered, but the record states, "and the plaintiffs moved the court for judgment against the defendants, which was resisted by the defendants, and the plaintiff demurred to all the defendants' pleas except the first one, which demurrer was by the court sustained," &c.

The writ of error brought before the Supreme Court of Alabama the judgment of the Circuit Court as well on the demurrer as on the verdict of the jury, and the affirmance of the judgment extended to both. The pleas demurred to raised the question whether the bills of the Bank were bills of credit.

15*] *Under certain restrictions, the Constitution of Alabama authorized the General Assembly to establish a state bank, with such number of branches as they should from time to time deem expedient.

In 1823 the State Bank was established on the funds of the State, then in the treasury, and a loan obtained by an issue of state bonds. The preamble to the charter states, "whereas it is deemed highly important to provide for the safe and profitable investment of such public funds as may now or hereafter be in possession of the State, and to secure to the community the benefits, as far as may be, of an extended and undepreciating currency; Be it enacted," &c.

In 1832 the Bank at Mobile was established with a capital stock of two millions of dollars, procured from the sale of bonds of the State, created for that purpose.

By the charter a president and fourteen directors were to be annually elected by the Legislature, who were required to make a report to each session of the Legislature. The corporation was authorized to issue notes of a denomination not less than one dollar, to discount notes and deal in bills of exchange, not exceeding certain amounts. The ordinary powers of a banking corporation were conferred, with a prohibition against owing debts exceeding twice the amount of the capital; and the directors were made personally responsible for any excess of indebtedment of the Bank assented to by them. Until one half of the capital stock was deposited in specie, in its vaults, the corporation was not authorized to commence operations. The remedy for collecting debts was reciprocal for and against the Bank. And the credit of the State was pledged for the ultimate redemption of the notes of the Bank.

The State of Alabama was the only stockholder of the Bank; but it was placed under the control of directors elected by the Legislature, and one half of the capital, amounting to the sum of one million of dollars, was in its vault for the redemption of its bills. With

the means possessed by the bank when it commenced business, is required only prudent management to sustain its credit, and effectuate the objects for which it was established.

The bills issued by the Bank were made payable on presentation to it, and they were signed by its President and Cashier. The bills issued being convertible into specie by the holder, were current, and in all transactions were received and paid out, as equal in value to specie.

It is impossible to say that bills thus issued come within the definition of bills of credit. The agency constituted, not only managed the Bank, but were made personally liable under certain *circumstances. The direct- [*16 ors, though elected by the Legislature, performed their duties under the charter, and like all other directors of banks, derived their powers and incurred their responsibilities from the law under which they acted.

It is not perceived that their action was not as free as those of directors who are elected by individual stockholders.

The promise to pay was made by the Bank, and its credit gave to its bills circulation: they were in no respect, therefore, like a bill of credit. That must issue on the credit of the State. The principles laid down by this court in the case of *Briscoe v. The Bank of the Commonwealth of Kentucky*, apply to this case. (11 Pet., 831.) In that case it is said, "to constitute a bill of credit within the Constitution, it must be issued by a state, on the faith of the state, and be designed to circulate as money. It must be a paper which circulates on the credit of the state; and is so received and used in the ordinary business of life."

"The individual or committee who issue the bill must have the power to bind the state; they must act as agents, and of course do not incur any personal responsibility, nor impart, as individuals, any credit to the paper."

Did the pledge of the credit of the State in the charter of the Bank, ultimately to redeem the notes of the Bank, make them bills of credit?

The charter is a public law and this court consider it as before them, the same as it was before the court of Alabama.

Upon the face of the bills there is no promise to pay, by the State, but an express promise by the Bank. In this there is an important difference between the notes of the Bank and bills of credit. Whatever agency has been employed to issue a bill of credit, the State promises to pay the bill, or to receive it in payment of public dues. And when a particular fund was designated out of which the bill should be paid, it depended upon the faith of the State, whether such fund should be so appropriated.

The Bank had not only an ample fund for the redemption of its paper, but a summary mode was provided by which the payment of its bills could be legally enforced. And the directors were personally liable, if the issues of the Bank exceeded twice the amount of its capital paid in. And besides, the notes and bills of exchange taken on its discounts, enlarged the means of the Bank, and increased the security of the bill holders.

The charter of the Bank gave to it all the means of credit with the public, that banks usually have or could desire. That some reli-

ance may have been placed on the guaranty, of the eventual payment of the notes of the Bank by the State may be admitted. But this was a [*17*] liability altogether different from *that of a state on a bill of credit. It was remote and contingent. And it could have been nothing more than a formal responsibility, if the bank had been properly conducted. No one received a bill of this Bank with the expectation of its being paid by the State.

But it is said the State employed the Bank as an agency, through which its bills should be circulated, for the profit of the State.

The State, as a stockholder, received a profit, if any profit was realized, through the operations of the Bank. But this is the condition of individual stockholders in all banks. And as well might it be said that the individual stockholders of a bank issue its notes, as that the State of Alabama issued the notes of the Branch Bank at Mobile.

A bank in either case acts under its corporate powers, and the directors derive their powers and incur their responsibilities under the law which governs them. The directors of the Mobile Bank, in the discharge of their duties, it would seem, were as independent as the directors of other banks.

A bill of credit emanates from the sovereignty of the State. It rests for its currency on the faith of the State pledged by a public law. The State cannot be sued ordinarily on such bill, nor its payment exacted against its will. There is no fund or property which the holder of the bill can reach by judicial process. Such an instrument is altogether different, in form and in substance, from the notes issued by the Branch Bank at Mobile. The fact that the State of Alabama may be sued by one of its citizens, does not alter the case. Such law may be repealed at pleasure, and if judgment could be obtained, the payment of it could not be enforced.

The State, as a stockholder, held its property as a corporation or individual could hold it, in the Mobile Bank. The specie in its vaults, notes taken on discounts, and every description of property managed by the directors of the Bank, were subject to judicial process by its creditors. And in such a procedure the State, in its sovereign capacity, could not interfere. Its powers would be no greater than the powers of individual stockholders of a bank, under similar circumstances.

The affirmance of the judgment of the Circuit Court which sustained the demurrer to the pleas by the Supreme Court of Alabama was right, and its judgment is therefore affirmed.

Mr. Justice Grier dissented.

18*] *ORDER.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Alabama, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court in this cause be, and the same is hereby affirmed, with costs and damages at the rate of six per centum per annum.

*Att'g 14 Ala., 192.
Cited—15 How., 809, 318; 8 Wall., 553; 1 Abb. U. S., 266; 1 Bank. Reg., 108.*

32

CHARLES BALLANCE, Plaintiff in Error,
v.

**ROBERT FORSYTH, LUCIEN DUMAIN,
AND ANTHONY R. BOVIS.**

Land patent—village of Peoria—ejectment by subsequent patentee against prior patentee—Tax sale of part of section, for taxes on the whole, void for irregularity.

On the 15th of May, 1820, Congress passed an Act (3 Stat. at Large, 605) for the benefit of the inhabitants of the village of Peoria, by which every person claiming a lot in the village was to give notice to the Register of the Land Office, whose report was to be laid before Congress.

On the 3d of March, 1823, Congress passed another Act (3 Stat. at Large, 786), granting to each of the French and Canadian inhabitants and other settlers according to the report, the lot upon which they had settled; and directed the surveyor of the public lands to make a plat of the lots, for which patents were to be issued to the claimants.

This survey and plat were not made until April and May, 1837.

In November, 1837, a person who was not a settler, purchased at the Land Office, at private entry, the fractional quarter of land which included some of the above lots, and soon afterwards obtained a patent. Both the certificate and patent reserved the rights of the claimant under the Acts of Congress above mentioned.

In 1845 and 1847 these claimants obtained patents.

They were entitled to recover in ejectment from the persons who held under the private entry and patent.

The title of the plaintiffs was not devested by a tax sale in 1843. The whole fractional quarter section was taxed and one acre off of the east side sold. This sale was irregular.

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of Illinois.

It was an ejectment brought by Forsyth, Dumain, and Bovis, to recover two lots of ground, viz.: Nos. 47, and 65, in the town of Peoria. The bills of exceptions extended over thirty-seven pages of the printed record, and included deeds and dispositions and proceedings under a tax sale, &c., &c. It is therefore impossible to insert them. The following is a summary notice of the evidence offered on the trial by plaintiffs and defendant:

Plaintiffs' Evidence.

1. The Act of Congress passed on the 15th of May, 1820 (3 Stat. at Large, 605). It directed that every person who *claimed a [*19] lot in the village of Peoria should give notice of his claim to the Register of the Land Office, whose report should be laid before Congress.

2. An Act of Congress passed on the 3d of March, 1823 (3 Stat. at Large, 786), after the report of the register had been received. It granted to such of the French and Canadian inhabitants and other settlers in the village, as had settled there, prior to the 1st of January, 1813, the lot so settled upon and improved. The second section of the Act required the surveyor of the public lands to cause a survey to be made of the several lots, and to designate on a plat thereof the lot confirmed and set apart to each claimant, and to forward the same to the Secretary of the Treasury, who should cause patents to be issued in favor of such claimants, as in other cases.

This survey and plat were not made until April and May, 1837.

HOWARD 13.

8. A patent to Boushier for lot No. 47, issued on the 27th of March, 1847.

4. A plat of the village.

5. A plat of lot No. 47.

6. Testimony taken under a commission relative to the settlement of the lots.

7. Deed to plaintiffs, 11th December, 1836.

8. Patent for lot No. 66, December 16, 1845.

9. Plat of lot No. 65.

10. Deed to plaintiffs, September 16, 1836.

11. Plats of an addition to the town.

13. An agreed statement of certain facts.

Defendant's Evidence.

1. A certificate from the register, showing, that on the 15th of November, 1837, John L. Bogardus entered and purchased the southeast fractional quarter of section, No. 9, containing $23\frac{1}{4}$ acres. This included the lots in question.

2. Deed from Bogardus to Underhill of the whole southeast fractional quarter.

3. Two deeds from Underhill to Ballance, the plaintiff in error.

4. Proceedings relative to a tax sale. The taxes were assessed on the fractional quarter, and an "acre off east side" was sold to Ballance.

5. Deed under the sale from the sheriff conveying the land in dispute.

6. An award between Ballance, Bigelow, and Underhill, whereby the lots in dispute were assigned to Ballance.

20*] *7. Copies of certificates relative to Bogardus' pre-emption.

8. Patent to Bogardus, January 5, 1838.

The plaintiffs then offered in evidence a copy of the certificate of entry which the register gave to Bogardus, and which contained the following reservation:

"Now, therefore, be it known, that, on presentation of this certificate to the Commissioner of the General Land Office, the said John L. Bogardus shall be entitled to receive a patent for the lot above described, subject, however, to the right of any and all persons claiming under the Act of Congress of 3d March, 1823, entitled 'An Act to confirm claims to lots in the village of Peoria, in the State of Illinois.'

SAMUEL LEECH, Register."

The patent contained a similar reservation.

The above was all the material evidence given in the case. Each party saved the right on the argument of the cause, to object to any of said evidence on the ground of the incompetency or effect of the evidence, but not to make merely formal objections, such as, proof of authenticity of papers offered.

It was further agreed that the property in controversy was worth more than two thousand dollars; whereupon the court instructed the jury to bring in a verdict for the plaintiffs, as by law they were entitled to recover on the above facts. To all of which opinions of the court the defendant excepted, and prayed this, his bill of exceptions, be sealed, signed, and made of record, which is accordingly done, &c.

NATH'L POPE. [SEAL.]

Upon this bill of exception, the case came up to this court.

It was argued by *Mr. Ballance* for the plaintiff in error, and *Mr. Gamble* for the defendants in error.

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Mr. Justice McLean delivered the opinion of the court:

This cause is brought before us, from the District of Illinois, by a writ of error.

It is an action of ejectment to recover the possession of three lots, numbered 47, 65, and 68, in the Town of Peoria, under the Act of Congress of the 3d of March, 1823, entitled "An Act to confirm certain claims to lots, in the Village of Peoria." The claim 47 contains twenty-seven thousand four hundred and forty nine square feet and seven hundredths; surveyed and designated as covered by claim 47, in the southeast fractional quarter of fractional section nine, in township 8, north of range eight, and east of the fourth principal meridian, &c.

*Lots 65 and 68 contain the same number of square feet, and, in fact, constitute but one lot, situated in the same fractional quarter section. Separate suits were brought for these lots, but, being consolidated, they are included in one. The defendant below pleaded not guilty.

At the trial exceptions were taken to the rulings of the court, which present the points of law to be decided.

The whole of the evidence was copied into the bill of exceptions, on which the court instructed the jury to find a verdict for the plaintiffs, as by law they were entitled to recover on the facts, to which instruction the defendant excepted.

The parties must have considered this case as a demurrer to the evidence, or as a special verdict. As there was evidence on both sides, some of which was conflicting, it could not be considered as strictly a demurrer to evidence. Nor was it strictly a special verdict, as the instruction was given before the jury found the facts.

From the whole of the evidence being set out in the bill of exceptions, we may suppose it to have been the intention of the parties to treat the facts as agreed or undisputed, in order that the law applicable to them might be pronounced by the court.

In sustaining the jurisdiction of this case, it is not to be considered as a precedent. It imposes a labor on the court which they are not bound to incur. But, as there seems to be not much difficulty in the facts, the court will decide the questions of law, as far as it shall be necessary to examine them.

By the Act of 15th of May, 1820, Congress provided that every person, or the legal representative of every person, who claims a lot or lots in the Village of Peoria, shall, on or before the first day of October next, deliver to the Register of the Land Office, for the district of Edwardsville, a notice of his claim, and the register was required to examine the evidence in support of the same, and report to the Secretary of the Treasury such as in his opinion should be confirmed; and the Secretary was required to lay the same before Congress for its determination.

On the 3d of March, 1823, an Act was passed granting to each of the French and Canadian inhabitants, and other settlers in the Village of Peoria, whose claims are ascertained in a report made by the Register of the Land Office at Edwardsville, in pursuance of the Act of 1820,

and who had settled a lot in the village prior to the 1st of January, 1818, &c., where the same shall not exceed two acres; and when the same shall exceed two acres, more than four acres shall not be confirmed. "Provided nothing in this Act contained shall be so construed as to affect the right, if any such there be, of any other person or persons to the said lots, or any part of them, derived from the United States or any other source whatever, or as a pledge on the part of the United States to make good any deficiency," &c.

And the surveyor of the public lands was required to survey the lots, designating those confirmed, which survey and plat were to be returned to the Secretary, who was required to issue patents to the claimants. The surveys, it appears, were not executed for several years; but, at length, having been made and forwarded to Washington, a patent was issued to the legal representatives of Louis Le Boushier for lot No. 47, the 27th of March, 1847. The proviso in the Act of 1823 was copied into the patent.

A plat was in evidence showing that lot No. 47 was situated in the southeast fractional quarter section 9.

Testimony was introduced to show that this lot was inhabited by Le Boushier prior to 1818. On the 11th of December, 1836, Joseph Touchette and Madeline, his wife, who was the daughter of Le Boushier, and his only living child and heir, executed a deed to plaintiff for the above lot.

A patent was also read to Antoine Bourbonne, or to his legal representatives, dated the 16th of December, 1845, for lot 65, also covered by claim 68. By the recitals in this patent, it appeared that this claim had been presented to the Register, at Edwardsville, and recommended by him for confirmation, on which the grant was issued under the Act of 1823. A plat was introduced, showing the locality of this lot to be in the same fractional quarter section as No. 47, and also a description of its boundary.

A deed from Bourbonne to the plaintiffs was in evidence for the above lot, dated 16th September, 1836.

Charles Ballance was admitted to defend in the place of Lincoln, that suit having been consolidated with the one brought by the plaintiffs against Goudy for the other lot. Ballance admits himself to be in possession of lots No. 47 and 65-68, described in the declaration.

It was agreed that Ballance was in possession of that portion of said premises covered by lots 1 and 2 in block 51, more than seven years before the commencement of this suit, by actual residence with his family thereon, up to 1845, and from that time by his tenants; and that portion of said premises northwest of Water Street, in Bigelow and Underhill's addition to Peoria, was possessed more than seven years by the inclosure and cultivation of the same as a garden.

It was agreed that J. L. Bogardus, in 1832, was in possession of the southeast fractional 23rd quarter of section 9, township 8, north of range 8, east of the 4th principal meridian, and continued in possession until 1834, when Isaac Underhill went into possession under

Bogardus, and that Ballance was in possession of the premises in dispute under title from Bogardus; neither of them resided on the premises, but had tenants.

On the 15th of November, 1837, Bogardus purchased the southeast fractional quarter of section No. 9. A deed for the same was made by Bogardus to Isaac Underhill, dated the 5th of August, 1834. On the 7th of July, 1841, Underhill and wife conveyed to Ballance, lots Nos. 8, 9, and 7, in block No. 34, and lots 5 and 6, in block No. 38, in the above addition to the town. And, on the 1st of February, 1842, Underhill and wife conveyed to Ballance lot No. 3, in block 51, in the above addition to the town.

A record and proceeding of the County Commissioners of Peoria County shows that a tax was laid upon real property in the county, for 1843, and that such tax was imposed on the southwest and southeast quarters of said section, and that, on a return of the collector, that the owner had no personal property in the county out of which the taxes could be made, a judgment was rendered against the land by the Circuit Court, under the statute of Illinois, and an order was issued to the sheriff, directing him to sell the delinquent land to such person as should pay the tax for the smallest quantity of the tract.

And the defendant offered to read a deed from the sheriff on said tax sale to Charles Ballance, covering a part of lot No. 65, which was objected to by the plaintiffs, and the court sustained the objection, on the ground that the sale was contrary to law; to which decision the defendant excepted.

As there appears to have been no specific exception taken, and as we have not the opinion of the court, except that the evidence was defective, and could not sustain the tax title, we are left to conjecture as to the particular ground of the decision.

One acre of land was sold by the sheriff, "off of the east side of the southwest and southeast fractional quarters of section number nine," &c. In these two fractional quarters there appear to have been about one hundred and fifty acres. It is not said in what form the acre was to be surveyed. Certainty, in such a case, is necessary to make the sale valid, for on the form of the acre its value may chiefly depend. And there is nothing on the face of the deed or in the proceeding, previous to the sale, which supplies this defect.

It is singular that the land should be sold in the name of Ballance, and that he should become the purchaser; especially as he appears to have been in possession of the land as owner. *Although the [24] right of Bourbonne to lot 65 was recognized by the government, by the Act of Congress of 1823, yet, until the public surveyor marked the lines, its position and extent could not be ascertained. And it appears that this duty was neglected by the public surveyor for many years. The patent was not issued until in 1845, two years after the tax was assessed. And it is not perceived how the specific lot could be taxed when its boundaries were not known. It seems to have been included in the southeast fractional quarter section, but it was not taxable as a part of that tract. Both the

entry and the patent of Bogardus for the fractional quarter section contained an exception of the rights of all persons claiming under the Act of Congress of the 3d of March, 1823. So that the whole or any part of the lots claimed by the plaintiffs, which may have been included in either of the fractional quarter sections, both having the same exception, the claim to such lots was not affected by the patent. And consequently, neither of the lots were liable to be sold for the taxes on the tracts which included them.

The court will not, unless fraud be shown, look behind the patents for the lots in controversy. That the patent covers the lots, as surveyed, seems not to be disputed. We cannot, therefore, in an action at law, inquire whether the lots, as originally claimed, are accurately described in the patents. The survey having been made by a public officer and sanctioned by the government, the legal title must be held to be in the patentee.

If the patent to Bogardus be of prior date, the reservation in the patent, and also in his entry, was sufficient notice that the title to those lots did not pass. And this exception is sufficiently shown by the acts of the government.

These lots were surveyed before the taxes were assessed for 1843; but the assessments were made on the fractional quarter section, without regard to the lots reserved. Such lots were neither assessed nor sold for the taxes due on them, and they were not liable for the taxes due on the quarter section.

That Ballance, being liable for the tax, should permit his own land to be sold, and purchase one of the lots, or a part of it, to pay the taxes on the larger tract, would seem to require explanation. Had a stranger purchased at this sale a part of the quarter sections, from the irregularity of the procedure, it is not perceived how the tax title could have been sustained. But, however this may be, we are clear that the sale of lot sixty-five, or a part of it, under the circumstances, is void, and, consequently, that the sheriff's deed on such sale was properly rejected. As the whole law of the case seemed to have been submitted to the court, the deed, if admitted as *prima facie* evidence, could not have changed the result.

25*] *The statute did not protect the possession of the defendant below. His patent excepted these lots; of course he had no title under it, for the lots excepted.

The judgment of the Circuit Court is affirmed, with costs.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Illinois, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

AFF'G McLean, 562.

S. C., 24 How., 184.

Cited—19 How., 341; 4 Biss., 126; 1 Dill., 468.

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JOHN DOE, *Ex. Dem.* HALLETT & WALKER, Executors of JOSHUA KENNEDY, Deceased, *Plaintiffs in Error*,

v.

ALFRED R. BEEBE, GEORGE W. HILLIARD, ALEXANDER M. CARR, CHARLES T. KETCHUM, AND JOHN HORSFELDT.

In Alabama, after admission, Congress could not grant land between high and low water mark.

The principles established in the cases of 3 How., 212, and 9 How., 477, again affirmed, viz.: that after the admission of Alabama into the Union as a State, Congress could make no grant of land situated between high and low water marks.

THIS case was brought up from the Supreme Court of Alabama by a writ of error issued under the 25th section of the Judiciary Act.

The plaintiff in error brought an ejectment in the Circuit Court of Mobile County, under the circumstances stated in the opinion of the court. The judgment of that court was against them, and they then appealed to the Supreme Court of Alabama, where the judgment was affirmed. They then brought the case up to this court.

It was argued by *Mr. Campbell* for the plaintiffs in error.

Mr. Chief Justice Taney delivered the opinion of the court:

This is an action of ejectment; and the plaintiffs in error claim title to the premises under a contract of sale made by Morales, the Spanish Intendant at Pensacola, with a certain William McVoy, for twenty arpents of land on the west side of the River Mobile, bounding on the river; which contract was afterwards confirmed by an Act of Congress.

The contract with McVoy was made in 1806. He subsequently assigned his interest to William J. Kennedy and Joshua Kennedy, and *the latter became the sole owner by [*26 an assignment from the former. An Act of Congress was passed in 1832, confirming the title of Joshua Kennedy upon two conditions: 1st. That the confirmation should amount to nothing more than the relinquishment of the right of the United States at that time in the land; and, 2d. That the lands before that time sold by the United States, should not be comprehended within the Act of confirmation. And in 1837, a patent was issued to Joshua Kennedy, reciting in full this Act of Congress under which it was granted.

It is admitted in the record, that the land in question was below high water mark when the United States sold the land on which Fort Charlotte stood, in the Town of Mobile. These lands were divided into lots and sold in 1820 and 1821, and patents were issued to the purchasers in the year last mentioned. The de-

NOTE.—*Right of the United States, and the States, to shore lands, and accretions against piers.*

The shores of navigable waters and the soil under them between high and low water marks were not granted by the Constitution to the United States, but were reserved to the States respective-

fendants made title to three of these lots, which bounded on the river, and it was admitted that at the time of the sale high water extended over their eastern limits; and that the land now in controversy was reclaimed from the water and filled up by those under whom the defendants claimed.

The question, therefore, to be decided in this case is, whether the title obtained under McVoy's contract, confirmed by the Act of Congress in 1832; or the title obtained under the sale of the lots in 1820 and 1821, is the superior and better title.

The principles of law on which this question depends, have already been decided in this court in *Pollard v. Hagan*, 3 How., 212, and in *Goodtitle v. Kibbe*, 9 How., 477, 478. And according to the decisions in these two cases, the title under the sale of the lots is the superior one.

The judgment of the Supreme Court of the State of Alabama must therefore be affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Alabama, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court in this cause be, and the same is hereby affirmed, with costs.

Cited—23 Wall., 68.

CYRUS H. McCORMICK, *Appellant*,

v.

CHARLES M. GRAY, AND WILLIAM B. OGDEN.

Arbitration between partners—Right to appropriate assets—Award part good and part bad—when good part may stand.

Where two partners assigned all their partnership property to a trustee with certain instructions how to dispose of it, and afterwards agreed between themselves to appoint an arbitrator, recognizing in their bonds the directions given to the trustee, the arbitrator had no right to deviate from these directions, and make other disposition of the property.

The reason given by the arbitrator, that he preferred creditors before awarding a certain sum to one of the partners, is insufficient.

Nor had the arbitrator a right to depart, in any particular, from the arrangement of the property which the partners had designated in their deed to the trustee.

ly; and the new States have the same rights and jurisdiction on this subject as the original States. *Pollard v. Hagan*, 3 How., 312; *Pollard v. Kibbe*, 9 How., 471; *Mayor of Mobile v. Eslava*, 16 Pet., 224; *Mayor of Mobile v. Hallet*, 16 Pet., 261; *Mayor of Mobile v. Emanuel*, 17 Pet., 155; 1 How., 95.

The right and title to the lake shore of the great lakes is in the several States, not in the United States. 6 Op. Att.-Gen., 172.

The banks and shores of navigable waters, whether sea, lake, or river, in any of the States, belong either to the State, or to individuals, as the case may be, and not to the United States. 7 Op. Att.-Gen., 314.

The accretion of several acres of land at the mouth of the Chicago River, formed from earth washed there by the waters of Lake Michigan, and deposited against a pier constructed by the general government for the improvement of the harbor,

THIS was an appeal from the Circuit Court of the United States for the District of Illinois.

McCormick was the inventor of "McCormick's patent Virginia Reaper," and being desirous of manufacturing the same for sale in the States of Illinois and Wisconsin, entered into partnership with Gray. The articles were very specific but too long to be inserted here. The object was to manufacture five hundred reapers for the harvest of 1848, and the partnership was formed on the 30th of August, 1847. Three lots of ground were purchased in Kenzie's addition to Chicago, and the manufacture was commenced.

Some disagreement afterwards occurred, and both parties united in transferring all the assets of the firm to William B. Ogden, and a settlement was to be made according to the award of Judge H. T. Dickey. The principal parts of the assignment to Ogden are recited in the opinion of the court, and need not be repeated.

Afterwards, on the 20th of December, 1848, they formally agreed to the reference to Judge Dickey, and exchanged arbitration bonds. By these bonds it was made an express condition of the reference that the award to be made by the arbitrator, should "not in any way alter or affect the demands of property and assets in the hands of William B. Ogden, as the trustee of said parties, or the agreements between said parties relative to the collection and disposition of said demands, assets, and property, but the same shall remain under the provisions of said contract." The time for making the award, as originally limited, was afterwards extended to sixty days from the 20th of January, 1849.

The referee, on the 20th of March, 1849, made his award, which was as follows:

"Award between Cyrus H. McCormick and Charles M. Gray.

It having been submitted to me, by Cyrus H. McCormick and Charles M. Gray, by articles of agreement and submission dated the twentieth day of December, in the year of our Lord one thousand eight hundred and forty-eight, and a supplement thereto dated 19th (nineteenth) January, one thousand eight hundred and forty-nine, to arbitrate and determine certain differences and disputes between them growing out of the partnership *affairs, [*28 business, and dealing of the late firm of McCormick & Gray, submitting all their said partnership differences and all other differences to me as such arbitrator: And the said parties hav-

must be regarded as belonging to the United States. 5 Op. Att.-Gen., 284; *contra*, 7 Op. Att.-Gen., 314.

Congress cannot grant lands below low water mark on navigable water in a state. *Mayor of Mobile v. Emanuel*, 1 How., 97; 8 C., 17 Pet., 155.

The title to the vacant shore lands in California, as in each of the other new States, vested in California upon its admission into the Union. 8 Op. Att.-Gen., 422.

When by act of Congress a pier or breakwater is constructed for the improvement of a harbor, no right to the land on which it is construed accrues to the United States by that fact alone, and without purchase and cession from the State. 7 Op. Att.-Gen., 314.

If, in consequence of any such construction land is made by accretion, such accretion belongs to the owner of the land to which it attaches, and not to the United States. 7 Op. Att.-Gen., 314.

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ing appeared before me as such arbitrator on the fourteenth day of January last, and for several days thereafter, together with their respective counsel, and witnesses, vouchers and proofs having been then sworn, exhibited, produced, and examined, and the said differences and disputes having been finally submitted to me on the nineteenth day of January last, and it appearing to me that such differences and disputes so existing grew out of the partnership business and dealing of the said late firm of McCormick & Gray, and in the accounts of the said respective parties, and in the claims on their respective parts, one against the other, for alleged breaches of the copartnership articles, and in the final settlement and adjustment of all their copartnership business, dealings, and accounts, and all of the same having been by me fully examined and considered, I do find and award as follows, to wit:

I do find that the assets and liabilities of said late firm on the fourteenth day of January last, were as they are stated to be in an account of assets and liabilities hereto annexed, and marked A, that is to say:

Real estate constituting assets of said firm, amounting to	\$ 9,406 08
Machinery amounting to	3,637 17
Bills receivable, &c., for reapers,	36,853 15
Iron on hand	\$ 623 14
238 sickles, \$3.50,	833 00
13 reapers, \$120,	1,560 00
	<u>8,021 14</u>
	<u>\$52,917 52</u>

Liabilities.

Debt to Fitch, Barry & Co.	\$ 1,802 82
Debt to Seymour & Morgan,	1,750 60
Debt to Seymour & Morgan,	1,635 29
Debt to O. Orcutt,	30 00
Debt to M. & M. Stone,	105 00
Debt to H. Rowell,	204 08
Debt to George M. Gray,	73 75
Debt to Charles M. Gray,	4,051 88
Debt to C. H. McCormick,	12,050 67
	<u>\$21,710 09</u>
	<u>81,207 43</u>
	<u>\$52,917 52</u>

Profit and loss,	- - - - -
	<u>\$52,917 52</u>

29*] *And I do therefore award as follows:

1st. I award out of the money and assets of said firm, whether in the hands of either of said copartners or of their agents, there in the first place be paid the following of said debts and liabilities of said firm, *pro rata*, until the same shall be fully paid, viz.: the above-mentioned debts and liabilities, principal and interest, to the time of payment due to Fitch, Barry & Co., Seymour & Morgan (both claims), O. Orcutt, M. & M. Stone, H. Rowell, and George M. Gray, and all other outstanding debts, if there should be any found to be omitted in the above account due or coming due by said firm to third persons.

2d. I award that in the next place there be paid to Cyrus H. McCormick, one of said copartners, out of money and assets, the sum of fourteen thousand six hundred and ten dollars (\$14,610), for his patent fees, as stipulated by the articles of copartnership, for reapers sold by said firm.

3d. I award that in the third place there be paid out of the assets of the said firm, and in the manner hereinafter stated to each of said copartners, viz.: to the said Charles M. Gray,

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and to the said Cyrus H. McCormick, the amount due by said late firm to each of said copartners as stated above, and in the annexed account marked A, viz.: to the said Charles M. Gray, the sum of four thousand and fifty-one dollars and eighty-eight cents (4,051.88), and to the said Cyrus H. McCormick, the sum of twelve thousand and fifty dollars and sixty-seven cents (12,050.67), the said two last-mentioned sums to be paid to each of said copartners in the manner specified hereinafter fifthly; and the balance coming to said McCormick over and above his half of his real estate and machinery mentioned hereinafter to be paid to him in money.

4th. I award that out of the balance of the money and assets of said firm, as profits, after paying the items above mentioned, there be paid to the firm of Ogden and Jones, of Chicago, on account of the sale made to them by the said Charles M. Gray, by deed dated the fifteenth day of January, one thousand eight hundred and forty-eight, one fourth part to Cyrus H. McCormick, one of the said copartners, one fourth part, and to Charles M. Gray, the other of the said copartners, the remaining two fourth parts; the said parts to be paid to each of the said parties, *pro rata*, as the moneys and assets are received and collected.

5th. I do award that the real estate and machinery and their appurtenances, and the tools of the said late firm of McCormick & Gray, amounting together, according to the above statement, to thirteen thousand and forty-three dollars and twenty-three cents [*30 (\$13,043.23), that is to say, the real estate to nine thousand four hundred and six dollars and six cents (\$9,406.06), and the machinery, &c., to three thousand six hundred and thirty-seven dollars and seventeen cents (\$3,637.17), be taken, one half part thereof by each of the said copartners, viz.: the said McCormick and the said Gray, at the above-mentioned rate, that is to say, six thousand five hundred and twenty-one dollars and sixty-one and a half cents (\$6,521.61½) each, and that such appropriation by each of said copartners of one half of the said real estate and machinery at the sum of six thousand five hundred and twenty-one dollars and sixty-one and a half cents (\$6,521.61½) each, be applied towards the payment of the respective balance due to each of them by the said firm, that is to say, of the balance of twelve thousand and fifty dollars and sixty-seven cents due to the said McCormick, and the balance of four thousand and fifty-one dollars and eighty-eight cents (\$4,051.88), due the said Charles M. Gray, and that the balance of the said Charles M. Gray's half of said real estate and machinery, over and above the payment of the said sum of \$4,051.88, be applied in part payment of the two fourth parts of the profits of said firm, coming to him as awarded fourthly above.

6th. I do award that the thirteen reapers belonging to said firm, on hand and unsold, be sold with all convenient despatch, and at the best price that can be had for the same, and that out of the proceeds thereof, there be paid to Cyrus H. McCormick the sum of thirty dollars for each of said reapers so to be sold, as a patent fee; but if the said reapers shall sell for a less amount than one hundred and twenty

dollars a piece, then the patent fee aforesaid shall be apportioned to the amount of the sale of each reaper in the same proportion as thirty dollars is to one hundred and twenty dollars, and the said patent fee to be paid as aforesaid upon the sale of the said thirteen reapers shall be deducted from the profits to be divided as above fourthly stated.

7th. I do award that the bills receivable, accounts, and debts due the said firm, not already collected, whether in the hands of either of said copartners or their agent or agents, be collected and caused to be collected in money by the said copartners, and each of them, with all reasonable diligence and despatch; and that the iron and sickles on hand mentioned in said account, and all other assets of the said firm (excepting the real estate and machinery and tools above stated), not already sold, be sold and converted into money with all convenient and reasonable diligence, and at the best price that can be procured for the same, and the proceeds of all of the above applied in pursuance of the direction and provisions of this award.

8th. I do award that all moneys, notes, and other property and assets of said late firm, in the hands or possession of or under the control of either of said copartners, shall be forthwith applied by them, and each of them, according to the terms and provisions of this award.

9th. In case any part of the debts mentioned in the first above-mentioned item, or of the patent fees mentioned in the second above-mentioned item, shall have been paid since the hearing of the arbitration aforesaid, the amount of such payment shall be deducted from the amounts directed thereby to be paid.

10th. I do award that all necessary costs and expenses which may be expended or incurred in the sale of any of the copartnership property, and in the collection of the bills receivable and debts due the said firm, shall be paid out of the balance of the partnership moneys and assets fourthly above mentioned, before the whole of such balance shall be finally divided as mentioned in said above-mentioned fourth item.

11th. This award shall be a final settlement of the accounts of the late partnership firm of McCormick & Gray, and of the manner in which the assets of said firm are to be paid, appropriated, and applied, and embracing as well, the settlement of the accounts of the respective partners, as an adjustment of their respective claims one against the other, growing out of their said partnership dealings, and of all differences and matters of difference between the said Cyrus H. McCormick and Charles M. Gray, which have been submitted by the arbitration.

All of which is signed by me in duplicate, as my award in the premises, this twentieth day of March, one thousand eight hundred and forty-nine.

HUGH T. DICKEY "

In June, 1849, McCormick filed his bill in the Circuit Court of the United States for the District of Illinois, against Gray and Ogden for an account, &c., upon the ground that the award was null and void for the following reasons:

"First. The said award is not within the terms or spirit of the said submission; and the

said arbitrator exceeded the power and jurisdiction conferred upon him by the said parties, in this, to wit:

1st. That in and by the said assignment from the said McCormick and Gray to said trustee, William B. Ogden, it is expressly declared in the first section thereof, that said Ogden shall proceed to collect said assets as speedily as may be, and after first paying all expenses, costs, and commissions attending the collection and disbursement of the same, shall pay over to said McCormick the sum of \$14,610, on account of patent fees due him for the manufacture of said Virginia Reaper as aforesaid; whereas the said arbitrator, wholly disregarding the said assignment and the said proviso of said arbitration bond hereinbefore mentioned and set forth, in and by his said award, awarded and directed in the seventh section thereof (amongst other things), that the bills receivable, accounts, and debts due the said firm, not (then) already collected, whether in the hands of either of said copartners, or of their agent or agents, be collected or caused to be collected in money by the said copartners, and each of them; and in and by the said first section of said award, the said arbitrator awarded (amongst other things) that out of the money and assets of said firm, whether in the hands of either of the said copartners or of their agents, there in the first place be paid certain debts and liabilities of said firm, mentioned and specified in said section, *pro rata*; and the said section of the said award directed and awarded, in substance, that in the next place there be paid to your orator out of the funds of said copartnership the sum of \$14,610 for his said patent fees. Thus attempting to subvert and annul the said assignment so made to said Ogden, by directing the said parties to collect the said debts and assets so assigned to him, instead of said Ogden, and in utter disregard of his rights and duties as trustee, and to disburse and distribute the funds of said partnership in a different manner from that provided in and by the trusts of said assignment, and postponing the payment of the said sum of \$14,610 so due to your orator for patent fees, until after the payment of said debts mentioned in said first section of said award, contrary to the tenor and effect, true intent, and meaning of the said assignment, and of the said arbitration bond.

2d. The said assignment provides, in the second section thereof, that said Ogden shall pay all legal liabilities and debts of the said McCormick and Gray as they shall become due; whereas the said award in the first section thereof awards and directs, in substance, that certain debts in said last-mentioned section specified, shall be paid *pro rata* until the same shall be paid.

3d. The said assignment in the third section thereof (amongst other things) provides, in substance, that the balance of said assets, as fast as collected, shall be paid in *pro rata* sums as follows; to said McCormick one half of all moneys collected, to Ogden and Jones one fourth, and the remaining fourth to said Gray; provided, however, and it is in said third section agreed and understood, that the respective sums therein provided to be paid to said McCormick and Gray, respectively, shall be re-

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tained by said Ogden to await the award of said Dickey, and shall in no case be paid over to either of said parties, until said award shall be made; and when said award shall be made, 33*] in case it "should be made against either party, the amount of such award shall be taken out of the moneys going to the party against whom the said award shall be made, and paid over to the party in whose favor the said award shall be made; and when said award shall have been paid, the balance of said moneys going to said McCormick and Gray, if any there shall be, shall be paid over to them, respectively, in the proportion in said assignment provided; whereas, in and by the fourth section of the said award, it is awarded and directed, that of the balance of the money and assets of said firm, as profits, after paying the items therein mentioned, there be paid to said Ogden and Jones one fourth part, to said McCormick one fourth, and to said Gray the remaining two fourths; and no sum certain is awarded to either party within the intent and meaning of the said assignment and submission, but the assets of the said firm are directed to be distributed and divided as last aforesaid.

4th. That the said arbitrator has exceeded his powers in other respects, and the said award is uncertain, unjust, illegal, and tends to the manifest injury, wrong, and oppression of your orator; and your orator humbly insists and submits that the said award ought to be annulled and wholly set aside, and the said Gray ought to be enjoined and restrained from commencing any suit or other proceeding to enforce the collection thereof, or from interfering with said assignment aforesaid, or intermeddling with the property and assets in said assignment mentioned; and that the said Gray ought to come and account with your orator, of and concerning the said partnership dealings and transactions from the commencement thereof; and that the said pretended award, so made as aforesaid, is no bar to such account."

The defendants appeared, and demurred to the bill; and the Circuit Court, then holden by the district judge, sustained the demurrer and dismissed the bill.

The complainant appealed to this court.

It was argued by *Mr. Johnson* for the appellant, and submitted, on a printed argument, by *Mr. Butterfield* for the appellee.

Mr. Johnson, for the appellant, made the following points:

1. That the averments in the bill gave the court jurisdiction over the parties and the subject.

2. That the award, being beyond and against the terms of the submission, was void. (*Archer v. Williamson*, 2 Harris & Gill, 68; *Adams v. Adams*, 8 N. H., 82; *Carnochan v. Christie*, 11 Wheat., 446; *Lyle v. Rogers*, 5 Wheat., 894.)

3. The award being out of the way, the bill presents a familiar case for discovery and relief, being by one partner against "another for an account and settlement of partnership transactions: an averment, of itself, vesting the court with jurisdiction, and entitling the complainant to relief. (1 Story's Eq., sec. 450, 672, 688; *Scott v. Pinkerton*, 3 Edw. Ch. Rep., 70.)

Mr. Butterfield, for the appellee, made the following points:

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1. The first point made by the respondent upon this appeal is, that there is nothing in the case to show that the matter in controversy, or the difference between what the appellant is entitled to under the award and what he would be entitled to if the award should be set aside and a new account should be taken, is sufficient in amount to sustain the jurisdiction of the court.

2. The complainant, by applying to the court below, and obtaining leave to amend his bill after the allowance of the demurrer, waived the right to appeal from the decision of the court, allowing the demurrer; and no appeal lies to this court from a decision of the court below, refusing to amend. The dismissal of the suit was a necessary consequence of the neglect of the complainant to amend within the sixty days allowed to him by the court, and no appeal lies from that decision. (*Wright et al. v. Lessee of Hollingsworth*, 1 Pet., 165; *Matheson's Administrator v. Grant's Administrator*, 2 How., 263; *Read v. Hodgins*, 2 Mol. Rep., 881.)

3. The award of the arbitrator was not an excess of power in any respect, and was not inconsistent with the spirit of the assignment of the debts of the firm to William B. Ogden, as trustee.

4. The courts, in support of the validity of an award, will make every reasonable presumption in favor of its being certain and final, as a determination of all the matters in dispute; especially when, as in this case, the award states that the arbitrator has examined and considered all the matters in difference between the parties, and that the award is intended to be a final settlement of all such matters as were submitted to the arbitrator. (*Wood v. Griffith*, 1 Swanst. Rep., 43; *Doe, ex dem. Madkins, v. Horner*, 8 Adol. & Ellis, 235; *Smith v. Demarest*, 3 Halst. Rep., 195; 9 Adol. & Ellis, 522; 3 Greenl. Rep., 421; 6 N. H. Rep., 264; 1 Leigh, 491; 9 Wend., 649; 2 Johns. Ch. Rep., 551; 2 Bay, Rep., 870; 2 N. H. Rep., 179; 1 Dall., 174, 188.)

5. An award cannot be set aside, either at law or in equity, except for errors apparent on its face, misconduct in the arbitration, or for some palpable mistake, or on account of the fraud of one of the parties. And nothing *dehors* the award can be pleaded or given in evidence to show that it is unreasonable or unjust. (*Hunch v. Blair*, 1 Johns. Ch. Rep., 101; *Shepherd v. Merrill*, *2 Id., 276; *Todd v. [335]* *Barlow*, Id., 551; *Heard v. Muir*, 8 Rand. Rep., 121, 128; *Shermer v. Beale*, 1 Wash. Rep., 11; *Pleasants v. Ross*, 1 Id., 157; *Administrator of Schenck v. Cuttrel*, 1 Green's Ch. Rep., 297; *Strodes v. Patton*, 1 Brock. Rep., 228.)

The bill in this case, which seeks to raise a question as to the decision of the arbitrator, that the complainant should, out of his share of the profits of the partnership, pay the defendant an amount equal to the one half of the defendant's share thereof, transferred to Ogden and Jones, by reason of the neglect of the complainant to supply his portion of the capital of the firm, pursuant to his agreement, cannot be sustained; for the award estops the complainant from alleging anything contrary to it. (*Garr v. Gomes*, 9 Wend., 649.)

6. If a part of the award is invalid, as being contrary to the provisions of the assignment, that does not render the whole award void, but only so much thereof as is inconsistent with the provisions of the assignment, will be rejected, leaving the residue of the award in full force. (*Taylor's Administrator v. Nicolson*, 1 Hen. & Mun., 67; *McBride v. Hagan*, 1 Wend. Rep., 328; *Bacon v. Wilber*, 1 Cow., 117; *Martin v. Williams*, 13 Johns., 264; *Cox v. Jagger*, 2 Cow., 649; *Gordon v. Tucker*, 6 Green., 247; *Lyle v. Rodgers*, 5 Wheat., 394.)

Mr. Justice Curtis delivered the opinion of the court:

This is a bill for an account of certain partnership transactions between McCormick and Gray, and to set aside an award by which that account has been stated. The bill was demurred to, and, by a decree of the Circuit Court of the United States for the District of Illinois, it was dismissed, and the complainant appealed.

The demurrer raises the question, whether the award is valid. The objection to the award is, that it is not pursuant to the submission. To decide this question, it is necessary to examine the terms of the submission and the award. The submission is contained in arbitration bonds, mutually executed by the parties, bearing date on the 20th day of December, 1848, submitting, generally, all their partnership and other differences with this limitation: "Provided, that the award so to be made by said arbitrator shall not in any way alter or affect the demands of property and assets in the hands of William B. Ogden, as the trustee of said parties, or the agreements between said parties, relative to the collection and disposition of said demands, assets, and property; but the same shall remain under the provisions of said contract."

This clause in the submission refers to an assignment of the principal part of the choses ^{36*} in action of the partnership, in trust *to collect them, made by the partners before the execution of the submission bonds, which assignment recites the fact of the submission, and contains agreements as to marshaling this part of the partnership assets. Amongst other trusts declared in this assignment are the following:

"1st. Said Ogden shall proceed to collect said assets as speedily as may be, and, after first paying all expenses, costs, and commissions attending the collection and disbursement of the same, he shall pay over to said McCormick the sum of \$14,610, on account of patent fees due him for the manufacture of said Virginia Reapers, as aforesaid.

"2d. To pay all legal liabilities and debts of said McCormick and Gray as they shall become due.

"3d. The balance of said assets, as fast as collected, shall be paid in *pro rata* sums, as follows: To said McCormick, one half of all moneys collected; to Ogden and Jones, one fourth part of said moneys, being the amount heretofore sold and assigned by said Gray to them; and the remaining one fourth part to said Charles M. Gray. Provided, however, and it is hereby expressly understood and agreed between the said McCormick and Gray, that the respective sums herein provided by this clause, to be paid to said McCormick and Gray,

respectively, shall be retained by the said Ogden, to await the award of Judge Dickey, in the submission above referred to, and shall in no case be paid over by him to either of said parties until said award shall be made; and when said award shall be made, in case it shall be made against either party, the amount of such award shall be taken out of the moneys going to the party against whom said award shall be made, and paid over to the amount thereof, to the party in whose favor said award shall be made; and when said award shall have been paid, the balance of said moneys going to said McCormick and Gray, if any there shall be, shall be paid over to them, respectively, in the proportion hereinbefore provided for. Provided, further, that, if said Gray shall not pay to said McCormick, within thirty days from the date hereof, the sum of \$2,500, on account of the indebtedness of Gray and Warner to said McCormick, then the said Ogden shall retain and pay over to said McCormick, out of the rest of the moneys to be paid to said Gray, as aforesaid, after first paying any award which said judge may make in the submission above mentioned, against said Gray, the aforesaid sum of \$2,500, on account of the said indebtedness of said Gray and Warner, aforesaid, together with ten per cent. damage thereon, as a penalty for any delinquency on the part of said Gray, to pay said sum of \$2,500 within the time above limited, everything hereinbefore contained to the contrary notwithstanding; and the said Gray agrees *to furnish the said [37 McCormick, within the thirty days aforesaid, a full, true, and correct account or statement of the indebtedness of said Gray and Warner to said McCormick; and any excess over and above the said sum of \$2,500, which said account or statement shall show to be due to said McCormick, shall also be paid to him by said Gray, within the thirty days above limited; or in default thereof, the said Ogden shall pay the same out of the same funds, in the same manner and with the like penalty that the said sum of \$2,500 is hereinbefore provided to be paid."

These stipulations, by which this part of the partnership assets is disposed of, are, in legal effect, incorporated into the submission, and limit the authority of the arbitrator. He could do nothing to alter or affect them. But, instead of observing this limitation, his award treats the entire property of the partnership, and the respective rights of the partners, as if no such agreements had been made.

He postpones the payment of the fourteen thousand six hundred and ten dollars to McCormick, for his patent fees to the payment of the debts of the firm, though the agreement of the parties was, that it should be first paid out of the choses in action assigned. It is argued, that this was justified by the prior right of creditors. But, as between the partners, they had a perfect right to control the possession of the partnership funds, and determine that the whole, or any part, should go into the possession of either partner. Both are ultimately liable for the debts, and whether one or other member of the firm shall have possession of the funds, either under a claim as a creditor of the firm, or otherwise, while they act in good faith, is a matter wholly subject to their control. Indeed, it is only through them, and by

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means of their equity to have the partnership property applied to the payment of the partnership debts, that creditors have any lien on, or specific rights to, the property of the firm, as distinguished from the property of its members. (*Ex-parte Ruffin*, 6 Ves., 119; *Ex-parte Fell*, 10 Ves., 347; *Ex-parte Williams*, 11 Ves., 5.)

This partnership was solvent, and the object of the submission was to adjust the relative rights of the partners. The payment of the debts, and a provision for them out of the partnership funds, was probably necessary, in order to make a final settlement, without recourse over, in consequence of payments compulsorily made by one partner, which might disturb the balance between himself and his copartner. But it certainly was not within the authority of the referee to make this provision out of a fund which the partners had otherwise disposed of by an express agreement, which they made part 38* of the submission, and which constituted a limitation on his authority.

It is said that, by the terms of the agreement between the parties contained in the assignment, these debts were to be paid as they should become due, and that to support the award the court will intend, they were all payable at the time it was made. But if this were intended, the agreement would nevertheless remain, by force of which McCormick's patent fees were to be first paid, out of the proceeds of that particular part of the property assigned.

The partners agreed in the assignment, that, after paying McCormick the sum of \$14,610; and discharging the legal liabilities of the firm, the balance of the assets assigned, as fast as collected, should be paid, one half to McCormick, one fourth to Gray, and the remaining fourth to certain assignees of Gray, but that each partner should have a lien on the share of the other, for any balance found due to him by the arbitrator: and that McCormick should have a lien on Gray's share, in the hands of the assignee, for a specific claim of twenty-five hundred dollars, together with any further amount which might prove to be due to him according to an account therein agreed to be rendered.

Upon the face of the award we are unable, by any fair intendment, to reconcile it with these stipulations. The radical error of the arbitrator seems to have been, that he disregarded these arrangements of the parties, by which they had finally bound so much of their assets as were in the hands of the assignee. It was his duty to assume that their contract, in respect to this part of the partnership property, was to be specifically executed, and then proceed to consider the equities of the parties in consequence of such an appropriation of those funds, as well as in consequence of the other facts. But each partner had a right to the specific performance of the trusts declared in the assignment, and the submission gave no power to the arbitrator to make an award inconsistent with their execution. But this award is so. In one aspect of this bill, it is a bill for the execution of those trusts, and no reason appears why they should not be executed, except the award. If the award is valid, the court below rightly decided that the bill must be dismissed, for it not only bars the general account of the partnership transactions, but destroys the particular trusts created by the assignment

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in favor of each partner, in respect to the proceeds of the choses in action assigned. Yet it was expressly agreed that the arbitrator should do nothing which could have that effect, and so far as the award is relied on as a defense to the bill against Gray and Ogden, the trustee, to have these trusts performed, it is in direct conflict with the express words of the submission.

It is suggested that the award may be held valid in part, and so far as it does pursue the submission. There are cases in which, after rejecting part of an award, the residue is sufficiently final, certain, and in conformity with the submission, to stand; but it is indispensable that the part thus allowed to stand should appear to be in no way affected by the departure from the submission. In the present case this does not appear. On the contrary, the basis of this whole award is erroneous, resting on the assumption that the disposal of the entire assets of the partnership was the subject of the award, and it is certain the arbitrator could properly have made no part of this award, as it stands, if he had assumed that the trusts declared in the assignment were to be executed.

It is objected that the amount in controversy is not sufficient to justify an appeal to this court; but this is a suit for an account involving very large sums of money, the complainant claiming sums greatly exceeding two thousand dollars, by force of the assignment and otherwise, and the defendant Gray insisting on the award, as a bar to the whole claim. It is no answer to say that, if this suit should be defeated, the complainant may have some other title, which will not be worth two thousand dollars less than the value of what he now claims. The question is, whether the matter in dispute in this suit is of the value of two thousand dollars. Besides, this matter is a claim for an account far exceeding that amount, and it does not appear that the defendant concedes to the complainant his whole claim, except some sum less than two thousand dollars. There remains, therefore, a dispute concerning this large claim, not narrowed by any concession of the defendant, so as to be reduced below the sum which is required by law for an appeal. It is urged, also, that the appeal is not well taken, because the complainant obtained leave to amend, after the decree dismissing the bill was entered. But it appears from the record that this decree to dismiss the bill was regularly stricken out before the leave to amend was granted, and afterwards, when the complainant elected not to amend, the bill was ordered to be dismissed by reason of the demurrer. From this last-mentioned decree the appeal was taken, and it was regularly and properly allowed.

The decree of the Circuit Court must be reversed, and the case remanded with directions to that court to overrule the demurrer, and order the defendants to answer the bill.

*ORDER.

[*40

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Illinois, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is

hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to overrule the demurrer, and order the defendants to answer the bill.

THE UNITED STATES, *Appellants*,

FRANCIS P. FERREIRA, Administrator of
FRANCIS PASS, Deceased.¹

No appeal lies from decision of District Judge of U. S. for Florida, upon claims for war damages adjudicated as commissioner, under special statute.

The Treaty of 1819, between the United States and Spain, contains the following stipulation, viz.: "The United States shall cause satisfaction to be made for the injuries, if any, which by process of law shall be established to have been suffered by the Spanish officers and individual Spanish inhabitants by the late operations of the American army in Florida."

Congress, by two Acts passed in 1823 and 1834 (3 Stat. at Large, 768, and 6 Stat. at Large, 569), directed the Judge of the Territorial Court of Florida to receive, examine, and adjudge all cases of claims for losses, and report his decisions, if in favor of the claimants, together with the evidence upon which they were founded, to the Secretary of the Treasury, who, on being satisfied that the same was just and equitable, within the provisions of the Treaty, should pay the amount thereof; and by an Act of 1849 (9 Stat. at Large, p. 788), Congress directed the Judge of the District Court of the United States for the Northern District of Florida to receive and adjudicate certain claims in the manner directed by the preceding Acts.

From the award of the District Judge, an appeal does not lie to this court.

As the Treaty itself designated no tribunal to assess the damages, it remained for Congress to do so by referring the claims to a commissioner according to the established practice of the government in such cases. His decision was not the judgment of a court, but a mere award, with a power to review it, conferred upon the Secretary of the Treasury.

THIS was an appeal from the District Court of the United States for the Northern District of Florida.

The facts of the case are stated in the opinion of the court.

It was argued by *Mr. Crittenden*, who placed the case upon the ground which will be presently stated, and by *Mr. Johnson* for the appellee. There were also briefs filed on the same side by *Messrs. Sherman, W. Cost Johnson, and Ewing*.

Mr. Crittenden, after giving a history of the cause and the laws, proceeded:

41*] "The District Judge, being satisfied with the causes assigned why this claim was not presented under the Act of 1834, adjudicated to the petitioner, upon his claim and proof, as the amount or value of his losses, \$6,080, and for interest thereon at the rate of 5 per cent. from the tenth of May, 1813, to the 26th June, 1835, \$6,726.83, making in all \$12,806.88.

From this decision the District Attorney prayed an appeal to the Supreme Court of the United States, "to the end that he might, if the laws allowed it, prosecute such appeal if instructed to do so." I know nothing more of this proceeding than that, upon this appeal, the

case has been brought to this court; and being here, it would be quite agreeable to me if the court would, by its high authority, settle and determine all the questions that arise out of this case, and which are presented before the Treasury Department in many others of a like character, and especially the question respecting the allowance of interest on the amount of the losses or injuries sustained by the claimants.

These questions have from the first been subjects of controversy between the claimants and the Secretary of the Treasury, and are likely to continue so till some higher authority shall interpose. It would be conducive to the public interest, and certainly desirable to the government, to obtain the judgment and directions of this enlightened court on this vexed subject.

In the adjustment or adjudication of these Florida claims by the Florida judges, interest was allowed, except in a few instances. The first of these adjudications were presented to the Secretary of the Treasury for payment in the year 1825, and others have been constantly and successively presented from that time to the present. The number of claims thus presented is about two hundred, and the amount paid has exceeded one million of dollars. But from the first and in every case where interest had been allowed by the Florida judge, the principal only was paid, and the interest disallowed and rejected by the Secretary of the Treasury. For the period of the last twenty-five years this has been the unvaried and uniform course of decision and action by every successive Secretary of the Treasury, who has acted on the subject, sustained by the official opinions of several attorneys-general, and without the expressed dissent of any one of them officially declared.

It is respectfully insisted on the part of the United States that such a uniform and long-continued series and course of decision has made the disallowance of interest, in whatever form awarded, a *res adjudicata*.

Congress had power to create a special tribunal, with jurisdiction to examine and adjust or adjudge these claims arising under the Treaty with Spain. Their power in this respect was *plenary and discretionary. By the Acts [*42 above referred to they exercised that power, and created such a tribunal. It was a judicatory tribunal which they established, consisting of two parts or members, namely, one of the territorial judges of Florida to act and decide in the first instance; and second, the Secretary to exercise a revisory power or jurisdiction over the decisions of the Florida judge, paying the amount of them only "on being satisfied that the same is just and equitable within the provisions of the Treaty." To this tribunal, thus constituted, Congress gave authority to decide on these claims; the decision of the Secretary of the Treasury being revisory and final. His decision was in its nature judicial, and made of the matter decided, a *res adjudicata*, in every rational and legitimate sense of those terms. The decision of a special or limited tribunal upon a subject within its jurisdiction is just as conclusive and binding as the judgments of courts of the highest and most unlimited jurisdiction.

The present case is, in its origin, and in re-

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1.—*Mr. Justice WAYNE* did not sit in this cause.

spect to the question of interest, identical with the other Florida cases above alluded to.

I take it for granted that the substitution of the judge of the District Court of the United States, &c., in place of the territorial judge, as the person to adjust or adjudge these claims, can in no respect make any material difference. The authority of the one and the other is exactly the same, and the effect of their acts the same, whether they be called judges, or commissioners as in the above cited Act of Congress of 22d February, 1847. The Act of Congress is the measure of their authority and of the effect of their proceedings under that authority.

Mr. Johnson was the only counsel who argued the case orally, for the appellee; the other counsel filed briefs. It is proper to say, that a motion had been made by the counsel for the appellee to dismiss the case for want of jurisdiction. This may serve to explain the preliminary remarks of Mr. Johnson, which were as follows:

It is our earnest wish, in behalf of the appellee, that this court should take jurisdiction of the case, and hear and decide it upon the merits, that if the decision of the court below be wrong, its errors may be corrected, and we may know the limits of our rights; and if the decision be correct, that it may be so pronounced by the authoritative voice of this high tribunal.

Nevertheless, in order to raise such questions as may be thus raised, we have found it necessary to move to dismiss the appeal. In the consideration of that motion, however, we do not feel bound to use such arguments only as will [43*] tend to show that an appeal does not lie in this case, but think we may with propriety present such views on the subject, and refer to such authorities, as in our judgment in any manner bear upon the question, and which will enable the court the more readily to apprehend and decide it.

The question now strictly before the court involves the nature of the claim, and the character of the tribunal whose decision is here for revision. We will therefore consider it in this order, and—

I. As to the nature of the claim; is it, and is the class to which it belongs, the proper subject of judicial investigation and decision?

(Then followed an explanation of the case, after which the inference was drawn.)

There can be, therefore, no objection to the ordinary jurisdiction of the courts of the United States arising from the nature of these claims. They are proper subjects for the investigation of courts of justice, involving as they do questions touching the rights of property and injuries thereto. They fall properly within the jurisdiction of courts of the United States, as the judicial injury, and the rights to which it refers, arise out of treaty stipulations, and Acts of Congress to carry the Treaty into effect.

They are, therefore, wholly unlike the duties attempted to be imposed by the Act of March 3, 1792, on the Circuit and District Courts, relative to pensions, and which they refuse to perform because they were not judicial, holding the Act for that, among other things, unconstitutional and void. (*vide* 2 Dall. Rep., 410, *note*.)

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Whatever analogy, therefore, may be found in other respects, or if not found, made by construction, between the Act of 1792 and that of 1823, they differ wholly in this, that the duty imposed by that Act was not judicial in its nature; in this, it is strictly so; and the instructions of the Legislature to the judicial tribunals on whom the duty is imposed "to receive, examine, and adjudge," is an explicit instruction to perform that duty judicially.

II. We have next to consider the character of the tribunal whose decision is before this court for revision; and on this point several inquiries suggest themselves:

1st. Was it a mere commission, not judicial in its character, whose decision might be taken up to, and revised by, the Secretary of the Treasury in his capacity as an executive officer?

2d. Or was it a judicial tribunal, part of a judicial system, created by the Acts of 1823 and 1834, under the Treaty, which acted and decided judicially, but from which an appeal lay, not to this court, but to the Secretary of the Treasury, as the highest appellate tribunal in that special system created under the Treaty by those statutes?

3d. Or was it a judicial tribunal whose decision was final in all cases coming within the special jurisdiction conferred upon it under the Treaty?

4th. Or was it an ordinary judicial tribunal, from which, in these, as in other cases, an appeal lies to this court?

(Upon each of these questions the argument was very elaborate.)

III. Then arises the question, is the decision final, or does an appeal lie from it to this court?

There is nothing in the nature of the case itself, or the mode of proceeding directed by the Acts of 1823 and 1834, which tends to settle this question. If the United States had not assumed the satisfaction of these injuries, suits would have been brought against the trespassers in the usual form, and a writ of error would have lain to revise the judgments. But the United States assumes the liability, agrees by Treaty to open her courts, and allow the injuries to be established by her legal process, and binds herself to make satisfaction for the injuries, if any, which shall be so established. But the United States is not formally made defendant on the record; this was not directed by the Acts of Congress, but the claims were presented to the tribunals which she designated "to receive, examine, and adjudge" them. They were claims against the United States, and it is not a matter of substance whether she was named on the record as defendant or not; they were, nevertheless, "cases," within the legal meaning of the term; whether belonging to that numerous class of cases called in the books *ex-parte*, or the still more numerous class of cases *inter partes*, is immaterial. But what militates against the right of appeal is the provision, that the judges shall report their decision to the Secretary of the Treasury, who shall "pay the amount thereof."

But, on the other hand, we perceive nothing in these statutes to cut off an appeal, if the decision be against the claimant. The case before the court was prosecuted in, and decided by, the District Court of Florida, and there seems to be no other reason, than that named, why

the general law authorizing appeals from those courts should not extend to and embrace this case. If, however, an appeal do not lie, it must be, as we think, because the decision of the Judge of the District Court of Florida was final, not because the Secretary of the Treasury is the appellate tribunal.

Mr. Chief Justice Taney delivered the opinion of the court:

This purports to be an appeal from the District Court of the United States for the Northern District of Florida. The case brought before the court is this:

The Treaty of 1819 by which Spain ceded Florida to the United States, contains the following stipulation in the 9th article:

"The United States shall cause satisfaction to be made for the injuries if any, which by process of law shall be established to have been suffered by the Spanish officers and individual Spanish inhabitants by the late operations of the American army in Florida."

In 1828 Congress passed an Act to carry into execution this article of the Treaty. The 1st section of this law authorizes the judges of the superior courts established at St. Augustine and Pensacola respectively, to receive and adjust all claims arising within their respective jurisdictions, agreeably to the provisions of the article of the Treaty above mentioned; and the 2d section provides "that in all cases where the judges shall decide in favor of the claimants the decisions, with the evidence on which they are founded, shall be by the said judges reported to the Secretary of the Treasury, who, on being satisfied that the same is just and equitable, within the provisions of the Treaty, shall pay the amount thereof to the person or persons in whose favor the same is adjudged."

Under this law the Secretary of the Treasury held that it did not apply to injuries suffered from the causes mentioned in the Treaty of 1812 and 1813, but to those of a subsequent period. And in consequence of this decision, another law was passed in 1834, extending the provisions of the former Act to injuries suffered in 1812 and 1813, but limiting the time for presenting the claims to one year from the passage of the Act. This law embraced the claim of the present claimant.

He did not, however, present his claim within the time limited. And in 1849 a special law was passed authorizing the District Judge of the United States for the Northern District of Florida, to receive and adjudicate this claim and that of certain other persons mentioned in the law, under the Act of 1834; the several claims to be settled by the Treasury as in other cases under the said Act. Florida had become a State of the Union in 1849, and therefore the District Judge was substituted in the place of the territorial officer.

Ferreira presented his claim according to the District Judge, who took the testimony offered to support it, and decided that the amount stated in the proceedings was due to him. The District Attorney of the United States prayed an appeal to this court from this decision; and under that prayer the case has been docketed here as an appeal from the District Court.

*The only question now before us is whether we have any jurisdiction in the case.

And in order to determine that question we must examine the nature of the proceeding before the District Judge, and the character of the decision from which this appeal has been taken.

The Treaty certainly created no tribunal by which these damages were to be adjusted, and gives no authority to any court of justice to inquire into or adjust the amount, which the United States were to pay to the respective parties who had suffered damage from the causes mentioned in the Treaty. It rested with Congress to provide one, according to the treaty stipulation. But when that tribunal was appointed it derived its whole authority from the law creating it, and not from the Treaty; and Congress had the right to regulate its proceedings and limit its power; and to subject its decisions to the control of an appellate tribunal, if it deemed it advisable to do so.

Undoubtedly Congress was bound to provide such a tribunal as the Treaty described. But if they failed to fulfill that promise, it is a question between the United States and Spain. The tribunal created to adjust the claims cannot change the mode of proceeding or the character in which the law authorizes it to act, under any opinion it may entertain, that a different mode of proceeding, or a tribunal of a different character, would better comport with the provisions of the Treaty. If it acts at all, it acts under the authority of the law and must obey the law.

The territorial judges, therefore, in adjusting these claims, derived their authority altogether from the laws above mentioned; and their decisions can be entitled to no higher respect or authority than these laws gave them. They are referred by the Act of 1823 to the Treaty for the description of the injury which the law requires them to adjust; but not to enlarge the power which the law confers, nor to change the character in which the law authorizes them to act.

The law of 1823, therefore, and not the stipulations of the Treaty, furnishes the rule for the proceeding of the territorial judges, and determines their character. And it is manifest that this power to decide upon the validity of these claims, is not conferred on them as a judicial function, to be exercised in the ordinary forms of a court of justice. For there is to be no suit; no parties in the legal acceptance of the term, are to be made—no process to issue; and no one is authorized to appear on behalf of the United States, or to summon witnesses in the case. The proceeding is altogether *ex parte*, and all that the judge is required to do, is to receive the claim when the party presents it, and to adjust it upon such evidence as he may have before him, or be able himself to obtain. But neither the evidence, nor his award, are to be filed in the court in which he presides, nor recorded there; but he is required to transmit, both the decision and the evidence upon which he decided, to the Secretary of the Treasury; and the claim is to be paid if the Secretary thinks it just and equitable, but not otherwise. It is to be a debt from the United States upon the decision of the Secretary, but not upon that of the judge.

It is too evident for argument on the subject, that such a tribunal is not a judicial one,

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and that the Act of Congress did not intend to make it one. The authority conferred on the respective judges was nothing more than that of a commissioner to adjust certain claims against the United States; and the office of judges, and their respective jurisdictions, are referred to in the law, merely as a designation of the persons to whom the authority is conferred, and the territorial limits to which it extends. The decision is not the judgment of a court of justice. It is the award of a commissioner. The Act of 1834 calls it an award. And an appeal to this court from such a decision, by such an authority from the judgment of a court of record, would be an anomaly in the history of jurisprudence. An appeal might as well have been taken from the awards of the board of commissioners, under the Mexican Treaty, which were recently sitting in this city.

Nor can we see any ground for objection to the power of revision and control given to the Secretary of the Treasury. When the United States consent to submit the adjustment of claims against them to any tribunal, they have a right to prescribe the conditions on which they will pay. And they had a right therefore to make the approval of the award by the Secretary of the Treasury, one of the conditions upon which they would agree to be liable. No claim, therefore, is due from the United States until it is sanctioned by him; and his decision against the claimant for the whole or a part of the claim as allowed by the judge is final and conclusive. It cannot afterwards be disturbed by an appeal to this or any other court, or in any other way, without the authority of an Act of Congress.

It is said, however, on the part of the claimant, that the Treaty requires that the injured parties should have an opportunity of establishing their claims by a process or law; that process of law means a judicial proceeding in a court of justice; and that the right of supervision given to the Secretary, over the decision of the District Judge, is therefore a violation of the Treaty.

The court think differently; and that the government of this country is not liable to the reproach of having broken its faith with Spain. The tribunals established are substantially the same with those usually created, where one nation agrees by treaty to pay debts or damages which may be found to be due to the citizens of another country. This Treaty meant nothing more than the tribunal and mode of proceeding ordinarily established on such occasions; and well known and well understood when treaty obligations of this description are undertaken. But if it were admitted to be otherwise, it is a question between Spain and that department of the government which is charged with our foreign relations; and with which the judicial branch has no concern. Certainly the tribunal which acts under the law of Congress, and derives all its authority from it, cannot call in question the validity of its provisions, nor claim absolute and final power for its decisions, when the law by virtue of which the decisions are made, declares that they shall not be final, but subordinate to that of the Secretary of the Treasury, and subject to his reversal.

And if the judicial branch of the government

had the right to look into the construction of the Treaty in this respect, and was of opinion that it required a judicial proceeding; and that the power given to the Secretary was void as in violation of the Treaty, it would hardly strengthen the case of the claimant on this appeal. For the proceedings before the judge are as little judicial in their character as that before the secretary. And if his decisions are void on that account, the decisions of the judge are open to the same objections; and neither the principal nor interest, nor any part of this claim could be paid at the Treasury. For if the tribunal is unauthorized, the awards are of no value.

The powers conferred by these Acts of Congress upon the judge as well as the Secretary, are, it is true, judicial in their nature. For judgment and discretion must be exercised by both of them. But it is nothing more than the power ordinarily given by law to a commissioner appointed to adjust claims to lands or money under a treaty; or special powers to inquire into or decide any other particular class of controversies in which the public or individuals may be concerned. A power of this description may constitutionally be conferred on a Secretary as well as on a commissioner. But is not judicial in either case, in the sense in which judicial power is granted by the Constitution to the courts of the United States.

The proceeding we are now considering, did not take place before one of the territorial judges, but before a district judge of the United States. But that circumstance can make no difference, for the Act of 1849 authorizes him to receive and adjudicate the claims of the persons mentioned in the law, under the Act of 1834; and provides that these claims may be settled by the Treasury, as other cases under the said Act. It conferred on the District Judge, therefore, the same power, and the same character, and imposed on him [*49] the same duty that had been conferred and imposed on the territorial judges before Florida became a State.

It would seem, indeed, in this case, that the District Judge acted under the erroneous opinion that he was exercising judicial power strictly speaking under the Constitution, and has given to these proceedings as much of the form of proceedings in a court of justice as was practicable. A petition in form is filed by the claimant; and the judge states in his opinion that the District Attorney appeared for the United States and argued the case, and prayed an appeal. But the Acts of Congress require no petition. The claimant had nothing to do, but to present his claim to the judge with the vouchers and evidence to support it. The District Attorney had no right to enter an appearance for the United States, so as to make them a party to the proceedings, and to authorize a judgment against them. It was no doubt his duty as a public officer, if he knew of any evidence against the claim, or of any objection to the evidence produced by the claimant, to bring it before the judge, in order that he might consider it, and report it to the secretary. But the Acts of Congress certainly do not authorize him to convert a proceeding before a commissioner into a judicial one, nor to bring an appeal from his award before this court.

The question as to the character in which a judge acts in a case of this description, is not a new one. It arose as long ago as 1792, in *Hayburn's case*, reported in 2 Dall., 409.

The Act of 28d of March, in that year, required the Circuit Courts of the United States to examine into the claims of the officers and soldiers and seamen of the Revolution, to the pensions granted to invalids by that Act, and to determine the amount of pay that would be equivalent to the disability incurred, and to certify their opinion to the Secretary of War. And it authorized the Secretary, when he had cause to suspect imposition or mistake, to withhold the pension allowed by the court, and to report the case to Congress at its next session. The authority was given to the Circuit Courts; and a question arose whether the power conferred was a judicial one, which the Circuit Courts, as such, could constitutionally exercise.

The question was not decided in the Supreme Court in the case above mentioned. But the opinions of the judges of the Circuit Courts for the Districts of New York, Pennsylvania, and North Carolina, are all given in a note to the case by the reporter.

The Judges in the New York Circuit, composed of *Chief Justice Jay*, *Justice Cushing*, and *Duane*, District Judge, held that the power could not be exercised by them as a court. But [50*] in *consideration of the meritorious and benevolent object of the law, they agreed to construe the power as conferred on them individually as commissioners, and to adjourn the court over from time to time, so as to enable them to perform the duty in the character of commissioners, and out of court.

The judges of the Pennsylvania Circuit, consisting of *Wilson* and *Blair*, Justices of the Supreme Court, and *Peters*, District Judge, refused to execute it altogether, upon the ground that it was conferred on them as a court, and was not a judicial power when subject to the revision of the Secretary of War and Congress.

The judges of the Circuit Court of North Carolina, composed of *Iredell*, Justice of the Supreme Court, and *Sitgreaves*, District Judge, were of opinion that the court could not execute it as a judicial power; and held it under advisement whether they might not construe the Act as an appointment of the judges personally as commissioners, and perform the duty in the character of commissioners out of court, as had been agreed on by the judges of of the New York Circuit.

These opinions, it appears by the report in 2 Dall., were all communicated to the President, and the motion for a *mandamus* in *Hayburn's case*, at the next term of the Supreme Court, would seem to have been made merely for the purpose of having it judicially determined in this court, whether the judges, under that law, were authorized to act in the character of commissioners. For every judge of the court, except *Thomas Johnson*, whose opinion is not given, had formally expressed his opinion in writing, that the duty imposed, when the decision was subject to the revision of a secretary and of Congress, could not be executed by the court as a judicial power; and the only question upon which there appears to have been any difference of opinion, was whether it might not be construed as conferring the power on

the judges personally as commissioners. And if it would bear that construction, there seems to have been no doubt, at that time, but that they might constitutionally exercise it, and the Secretary constitutionally revise their decisions. The law, however, was repealed at the next session of the Legislature, and a different way provided for the relief of the pensioners; and the question as to the construction of the law was not decided in the Supreme Court. But the repeal of the Act clearly shows that the President and Congress acquiesced in the correctness of the decision, that it was not a judicial power.

This law is the same in principle with the one we are now considering, with this difference only, that the Act of 1792 imposed the duty on the court *eo nomine*, and not personally on the judges. In the case before us it is imposed upon the judge, and *it appears from [51 the note to the case of *Hayburn*, that a majority of the judges of the Supreme Court were of opinion that if the law of 1792 had conferred the power on the judges, they would have held that it was given to them personally by that description; and would have performed the duty as commissioners, subject to the revision and control of the Secretary and Congress, as provided in the law. Nor have *Justices Wilson*, *Blair*, and *Peters*, District Judges, dissented from this opinion. Their communication to the President is silent upon this point. But the opinions of all the judges embrace distinctly and positively the provisions of the law now before us, and declare that, under such a law, the power was not judicial within the grant of the Constitution, and could not be exercised as such.

Independently of these objections, we are at some loss to understand how this case could legally be transmitted to this court, and certified as the transcript of a record in the District Court. According to the directions of the Act of Congress, the decision of the judge and the evidence on which it is founded, ought to have been transmitted to the Secretary of the Treasury. They are not to remain in the District Court, nor to be recorded there. They legally belong to the office of the Secretary of the Treasury, and not to the court; and a copy from the clerk of the latter would not be evidence in any court of justice. There is no record of the proceedings in the District Court of which a transcript can legally be made and certified; and consequently there is no transcript now before us that we can recognize as evidence of any proceeding or judgment in that court.

A question might arise whether commissioners appointed to adjust these claims, are not officers of the United States within the meaning of the Constitution. The duties to be performed are entirely alien to the legitimate functions of a judge or court of justice, and have no analogy to the general or special powers ordinarily and legally conferred on judges or courts to secure the due administration of the laws. And, if they are to be regarded as officers, holding offices under the government, the power of appointment is in the President, by and with the advice and consent of the senate; and Congress could not, by law, designate the persons to fill these offices. And if this be the con-

struction of the Constitution, then as the judge designated could not act in a judicial character as a court, nor as a commissioner, because he was not appointed by the President, everything that has been done under the Acts of 1833, and 1834, and 1849, would be void, and the payments heretofore made, might be recovered back by the United States. But this question has not been made; nor does it arise in the case. It could arise only in a suit by the United States to recover back the money. And *as the case does not present it, and the parties interested are not before the court, and these laws have for so many years been acted on as valid and constitutional we do not think it proper to express an opinion upon it. In the case at bar, the power of the judge to decide in the first instance, is assumed on both sides, and the controversy has turned upon the power of the Secretary to revise it; and it is in this aspect of the case that it has been considered by the court in the foregoing opinion.

The appeal must be dismissed for want of jurisdiction.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Florida, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that this cause be, and the same is hereby dismissed for the want of jurisdiction.

Cited—14 How., 120; 17 How., 505, 584; 18 How., 220; 1 Wall., 253; 7 Wall., 193; 9 Wall., 247; 1 Abb., U. S., 333.

NOTE BY THE CHIEF JUSTICE, INSERTED BY ORDER OF THE COURT.

Since the foregoing opinion was delivered, the attention of the court has been drawn to the case of the United States v. Yale Todd, which arose under the Act of 1792, and was decided in the Supreme Court, February 17, 1794. There was no official reporter at that time, and this case has not been printed. It shows the opinion of the court upon a question which was left in doubt by the opinions of the different judges, stated in the note to Hayburn's case. And as the subject is one of much interest, and concerns the nature and extent of judicial power, the substance of the decision in Yale Todd's case is inserted here, in order that it may not be overlooked, if similar questions should hereafter arise.

The 2d, 3d, and 4th sections of the Act of 1792, were repealed at the next session of Congress by the Act of February 28, 1793. It was these three sections that gave rise to the questions stated in the note to Hayburn's case. The Repealing Act provided another mode for taking testimony, and deciding upon the validity of claims to the pensions granted by the former law; and by the 3d section it saved all rights to pensions which might be founded "upon any legal adjudication," under the Act of 1792, and made it the duty of the Secretary of War, in conjunction with the Attorney-General, to take such measures as might be necessary to obtain an adjudication of the Supreme Court "on the validity of such rights, claimed under the Act aforesaid, by the determination of certain persons styling themselves commissioners."

It appears from this case, that Chief Justice Jay and Justice Cushing acted upon their construction of the Act of 1792, immediately after its passage and before it was repealed. And the saving and proviso, in the Act of 1793, was manifestly occasioned by the difference of opinion upon that question which existed among the Justices, and was introduced for the purpose of having it determined, whether under the Act conferring the power upon

the Circuit Courts, the judges of those courts when refusing for the reasons assigned by them to act as courts, could legally act as commissioners out of court. If the decision of the judges, as commissioners, was a legal adjudication, then the party's right to the pension allowed him was saved; otherwise not.

In pursuance of this Act of Congress, the case of Yale Todd was brought before the Supreme Court, in an amicable action, and upon a case stated at February Term, 1794.

The case was docketed by consent, the United States being plaintiff and Todd the defendant. The declaration was for one hundred and seventy-two dollars and ninety-one cents, for so much money had and received by the defendant to the use of the United States; to which the defendant pleaded *non assumpsit*.

*The case as stated, admitted that on the 3d of May, 1792, the defendant appeared before the Hon. John Jay, William Cushing, and Richard Law, then being judges of the Circuit Court held at New Haven, for the District of Connecticut, then and there sitting, and claiming to be commissioners under the Act of 1792, and exhibited the vouchers and testimony to show his right under that law to be placed on the pension list; and that the judges above named, being judges of the Circuit Court, and then and there sitting at New Haven, in and for the Connecticut District, proceeded, as commissioners designated in the said Act of Congress, to take the testimony offered by Todd, which is set out at large in the statement, together with their opinion that Todd ought to be placed on the pension list, and paid at the rate of two thirds of his former monthly wages, which they understood to have been eight dollars and one third per month, and the sum of one hundred and fifty dollars for arrears.

The case further admits, that the certificate of their proceedings and opinions, and the testimony they had taken, were afterwards, on the 5th of May, 1792, transmitted to the Secretary of War, and that by means thereof Todd was placed on the pension list, and had received from the United States one hundred and fifty dollars for arrears, and twenty-two dollars and ninety-one cents claimed for his pension aforesaid, said to be due on the 2d of September, 1792.

And the parties agreed that if upon this statement the said judges of the Circuit Court sitting as commissioners, and not as a circuit court, had power and authority by virtue of said Act so to order and adjudge of and concerning the premises, that then judgment should be given for the defendant, otherwise for the United States, for one hundred and seventy-two dollars and ninety-one cents, and six cents costs.

The case was argued by Bradford, Attorney-General, for the United States, and Hillhouse for the defendant; and the judgment of the court was rendered in favor of the United States for the sum above mentioned.

Chief Justice Jay and Justices Cushing, Wilson, Blair, and Paterson, were present at the decision. No opinion was filed stating the grounds of the decision. Nor is any dissent from the judgment entered on the record. It would seem, therefore, to have been unanimous, and that Chief Justice Jay and Justice Cushing became satisfied, on further reflection, that the power given in the Act of 1792 to the Circuit Court as a court, could not be construed to give it to the judges out of court as commissioners. It must be admitted that the justice of the claims and the meritorious character of the claimants would appear to have exercised some influence on their judgments in the first instance, and to have led them to give a construction to the law which its language would hardly justify upon the most liberal rules of interpretation.

The result of the opinions expressed by the judges of the Supreme Court of that day in the note to Hayburn's case, and in the case of the United States v. Todd, is this:

1. That the power proposed to be conferred on the Circuit Courts of the United States by the Act of 1792 was not judicial power within the meaning of the Constitution, and was, therefore, unconstitutional, and could not lawfully be exercised by the courts.
2. That as the Act of Congress intended to confer the power on the courts as a judicial function, it could not be construed as an authority to the judges composing the court to exercise the power out of court in the character of commissioners.
3. That money paid under a certificate from per-

sons not authorized by law to give it, might be recovered back by the United States.

The case of *Todd* was docketed by consent in the Supreme Court; and the court appears to have been of opinion that the Act of Congress of 1793, directing the Secretary of War and Attorney-General to take their opinion upon the question, gave them original jurisdiction. In the early days of the Government, the right of Congress to give original jurisdiction to the Supreme Court, in cases not enumerated in the Constitution, was maintained by many jurists, and seems to have been entertained by the learned judges who decided *Todd's* case. But discussion and more mature examination has settled the question otherwise; and it has long been the established doctrine, and we believe now assented to by all who have examined the subject, that the original jurisdiction of this court is confined to the cases specified in the Constitution, and that Congress cannot enlarge it. In all other cases its power must be appellate.

54*] *ROBERT R. BARROW, Plaintiff in Error,

NATHANIEL B. HILL.

Writ of error for mere delay—Damages.

Where the only exceptions taken in the court below, were to the refusals of the court to continue the case to the next term, and it appears that the continuance asked for below and the suing out the writ of error, were only for the purpose of delaying the payment of a just debt, and no counsel appeared in this court on that side, the 17th rule will be applied and the judgment of the court below be affirmed with ten per cent. interest.

THIS case was brought up by writ of error from the Circuit Court of the United States for the Eastern District of Louisiana.

Hill was a citizen of South Carolina, and sold two slaves to Barrow, a citizen of Louisiana. Barrow gave him note for \$2,000, dated 12th of February, 1848, payable twelve months after date. When due, it was protested. Hill then filed his petition in the Circuit Court of the United States. Barrow's answer admitted the execution of the note, but alleged that the negroes were unsound. In April, 1850, the cause came on for trial. The counsel for the defendant moved the court for a continuance "on the ground that William C. Fisher, a material witness for the defendant, is absent or does not appear on the trial of this cause; that

the said Fisher is in the city at this time; that defendant desired the clerk of this court to summon said Fisher, but that the marshal has not been able to find him and serve him with a subpoena. Nevertheless, it appeared that on the next day, Fisher was present in court and examined. The conclusion of the first bill of exceptions was as follows, viz.:

The defendant further declares that he has not induced or consented to said Fisher's absence; to all of which the defendant offered to swear, but the court overruled the motions on the ground that it appeared, by the declaration of the counsel for defendant, that the witness Fisher was, the day before, seen by him in the City of New Orleans, and therefore the court declared that the testimony of the said witness would be received before the conclusion of the trial. Accordingly, the next morning, the witness appeared in court, and was regularly examined by the counsel of both defendant and plaintiff, and his testimony was commented on by counsel before the cause was finally submitted; whereupon the counsel for the defendant excepts to the ruling of the court, and tenders this his bill of exceptions, praying that the same may be signed and made a part of this record.

THEO. H. McCALEB,

United States Judge.

*The second bill of exceptions was as [*55 follows:

Be it remembered, that at the trial of this cause before the court, at the term aforesaid, the counsel for the defendant moved the court for a continuance on the grounds that a commission was issued by this court on the 11th March, 1850, to take the testimony of William S. Green, a resident of the State of Kentucky, but supposed to be at that time on a plantation owned by said Green in the Parish of Terrebonne, Louisiana. That the testimony of said Green is important, material and necessary to the defense. That due diligence has been used to have this testimony of said Green taken, but that the said commission has not yet been returned to this court; to all of which the defendant offered to swear, but the court overruled the motion, on the ground that the commission had issued some time after issue joined, and subject to the right of the adverse party to

NOTE.—Error; the Supreme Court will not review the discretionary action of the court below.

If the rejection of evidence is a matter resting in the sound discretion of the court, this cannot be assigned as error. *Philadelphia & Trenton R. R. Co. v. Stimpson*, 14 Pet., 448.

Discretionary rulings upon evidence are not subject to review. *Parsons v. Bedford*, 3 Pet., 443; *Turner v. Yates*, 16 How., 14.

The decision of the court below to set aside a verdict in consequence of an irregularity committed by the jury, being within the discretion of the court, is not examinable on error. *United States v. Gillies*, Pet. C. C., 159; 3 Wheel. Cr. Cas., 308.

The granting or refusing to grant a motion for new trial rests wholly in the discretion of the court where it is made, and the action of such court cannot be questioned or reviewed on error. *Henderson v. Moore*, 5 Cranch, 11; *Marine Ins. Co. of Alexandria v. Young*, 5 Cranch, 187; *Barr v. Gratz*, 4 Wheat., 213; *Blunt v. Smith*, 7 Wheat., 248; *Brown v. Clarke*, 4 How., 4; *Warner v. Norton*, 20 How., 448; *United States v. Gilbert*, 2 Sumn., 19; *Henry v. Ricketts*, 1 Cranch, C. C., 545; *Hall v. Weare*, 22 U. S. (2 Otto), 728; *Philip v. Gardner*, 1 MacArthur, 185.

The Supreme Court will not hear, on writ of error, matters which are properly the subject of

application for new trial. *Freeborn v. Smith*, 2 Wall., 160.

The cross-examination of a party, as well as that of a witness, is subject to the control of the court in its discretion; and the exercise of that discretion is not reviewable on error. *Rea v. Missouri*, 17 Wall., 532.

The enforcement or disregard of a rule of the court below is a matter of discretion with that court, and not reviewable on error. *Life Ins. Co. v. Francisco*, 17 Wall., 672.

The allowance and refusal of amendments in the pleadings and most incidental orders made in the progress of a cause, before trial, are in the discretion of the court making them. The Supreme Court has always declined interfering in such cases. *Wright v. Hollingsworth*, 1 Pet., 168; *White v. Wright*, 22 How., 19; *Eberly v. Moore*, 24 How., 147; 4 Cranch, 237; 5 Cranch, 11, 187; 4 Wheat., 220; 20 How., 264.

The decision of the court below, granting counsel the right to open and close the argument to the jury will not be reviewed on appeal. *Hall v. Weare*, 22 U. S. (2 Otto), 728.

Granting a rehearing, or granting or dissolving a temporary injunction, rests in the sound discretion of the court, and furnishes no ground for an appeal. *Buffington v. Harvey*, 25 U. S. (5 Otto), 90.

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have the case tried when regularly docketed; and also upon the ground that a sufficient time had been allowed for the return of said commission. Whereupon the counsel for defendant excepts to the ruling of the court and tenders this his bill of exceptions, praying that the same may be signed and made a part of the record.

THEO. H. McCALLIS.

United States Judge.

After hearing Fisher and another witness for the defendant, and a witness for the plaintiff, the court gave judgment for the plaintiff; whereupon the cause was brought up to this court upon the two exceptions above mentioned.

It was argued by *Mr. Venable* for the defendant in error, no counsel appearing for the plaintiff in error.

Mr. Venable said: The only error assigned is, that the judge below overruled a motion for a continuance, for reasons set forth in the bill of exceptions; an application for a continuance being addressed to the discretion of the court, it is submitted that, in this case, that discretion was soundly exercised; and the defendant prays that the judgment be affirmed. And as it appears that this writ of error was sued out for delay, he further asks that damages may be awarded him, according to the seventeenth rule of this court.

Mr. Chief Justice Taney delivered the opinion of the court:

This case is brought up by a writ of error, directed to the Circuit Court of the United States for the Eastern District of Louisiana.

[56*] *No counsel has appeared in this court for the plaintiff in error. The case has been called in its regular order for argument, and thereupon the counsel for the defendant has, under the 19th rule of the court, opened the record and argued the case, and prays an affirmation of the judgment, with ten per cent. damages, on the ground that the writ of error was issued merely for delay.

Upon looking into the record, it appears that two exceptions were taken in the court below by the plaintiff in error; and both of them were taken to the refusal of the court to continue the case to the next term.

It has been repeatedly decided in this court, that a motion for the continuance of the cause addresses itself to the sound judicial discretion of the court, and its decision, for or against the motion, cannot be assigned as error in this court. The rule is so familiar in practice, that it is unnecessary to refer to cases to prove it. The decision of the Circuit Court, therefore, upon the motions above mentioned, is no ground for reversing the judgment, and does not afford any reasonable foundation for suing out this writ of error.

And, upon examining the statement in the exceptions, and the reasons assigned by the court for its refusal, the inference would seem to be irresistible, that the continuance was not asked for by the plaintiff in error, under the expectation that it would enable him to obtain testimony material to his defense, but to delay the payment of a just debt, and that the writ of error was sued out for the same purpose. The case, therefore, falls within the 17th rule of the court, and the judgment is accordingly

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affirmed, with ten per cent. interest on the amount, from the rendition of the judgment in the Circuit Court until paid.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel for the defendant in error; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs and with interest, at the rate of ten per centum per annum on the amount, from the rendition of the judgment in the Circuit Court until paid.

*JOHN D. BRADFORD AND BEN- [57
JAMIN M. BRADFORD, *Appellants*,

v.

THE PRESIDENT, DIRECTORS AND
COMPANY OF THE UNION BANK OF
TENNESSEE.

Substitution of one contract for another—rights of parties under—Retention of bill to complete equity without cross bill.

Where there was a contract for the sale of land for the purchase of which indorsed notes were given, but before the time arrived for the making of a deed, the purchaser failed, and the liability to pay the note became fixed upon the indorser; and a new contract was made between the vendor and the indorser, that, in order to protect the indorser, he should be substituted in place of the original purchaser, fresh notes being given and the time of payment extended, evidence was admissible to show that the latter contract was a substitute for the former.

A part of the land having been sold for taxes whilst the first set of notes was running to maturity (the vendee having been put into possession), and the vendor being ignorant of that fact when the contract of substitution was made, all that the indorser can claim of the vendor, is a deed for the land subject to the incumbrances arising from the tax sales. The notes given for the substituted contract must be paid.

The indorser having filed a bill for a specific performance upon the title bond, which he had received from the vendor, this court will not content itself with dismissing his bill without prejudice, and thus give rise to further litigation, but proceed to pass a final decree, founded on the above principles.

THIS was an appeal from the District Court of the United States for the Northern District of Mississippi, sitting as a court of equity.

The facts are sufficiently stated in the opinion of the court.

It was argued by *Mr. Volney E. Howard* for the appellants, and by *Messrs. Carlisle and Coxe* for the appellees.

The counsel for the appellees made the following points, namely:

1. The defense could not have been made at law in this case, because a court of law has no power to rescind a contract for part failure of consideration, especially on the ground that the inducement to the whole purchase had been defeated by such part failure of title. (*Greenleaf v. Cook*, 2 Wheat., 13; 2 Kent, 476; *Parham v. Randolph*, 4 How. Miss. Rep., 435.)

2. Although judgment had been obtained

at law, the complainant had a right to a good and valid title when he paid the money, and to ask the aid of a court of chancery for that purpose, especially against a foreign corporation seeking to enforce the judgment, after a tender of the money, demand and refusal of title. The bill should not, therefore, have been dismissed. He was not compelled to take part of the estate, if a main inducement to the purchase had failed. (2 Story Eq., sec. 778.)

8. The Bank does not even tender a deed or title for that portion of the land of which they are seised, or a quitclaim for that which was sold for taxes. It does not admit of doubt, that the court erred in not decreeing some sort of **58*** conveyance by the *Bank, on the payment of the purchase money. Bradford could not be put in a worse position than Brown, if he ought to suffer for Brown's neglect in not paying the taxes.

4. Whether the title bond to Bradford is to be viewed as a distinct independent contract, or a mere novation of that of 1841, the court cannot look beyond the bond for its terms, nor vary them by parol. It is a covenant, that the Bank was seised of the legal title in 1845. and would make a good and valid title when the notes were paid by Bradford. It was the consideration of the new notes, and the substitution of John D. and B. M. Bradford for the former and Brown. It was a contract of the Bank's own election, and by which it obtained a new and additional security. (1 Greenl., sec. 276-277.)

It is not competent to show a consideration essentially different from that recited in the deed. (Greenl., sec. 26; 4 Greenl., Cruise, 254, note 1; *Id.*, p. 24, note; 4 Cow., 431.)

Parol additions to a deed are rejected. (1 Sugd., 179, 153.)

5. The tax sales appear to have been regular, and in conformity to the laws of Mississippi; and, if so, vested in the purchasers the title to one half of the land. By the laws of that State, the assessment is a lien upon the land. (Hutch. Code, p. 176-177.)

The defendants admit they cannot make a good title to one section, if the tax title is valid. The vendee cannot be compelled to take a title thus incumbered as a good and valid title. It is selling him a lawsuit with an adverse possession.

Equity has jurisdiction to decree specific performance of a bond to convey lands (4 Pick., 1; *Mills v. Melcalf*, 1 A. K. Marsh., 477), and the prayer may be for specific performance or rescission. (*Id.*, *Woodstock v. Bennett*, 1 Cow., 711; *vide*, also, *Steenon v. Maxwell*, 2 Comst., 408.) As to part performance and damages, and decree against parties residing out of the State. (*Sulphen v. Fowler*, 9 Paige, 280; 11 *Id.*, 277.)

The vendee ought not to be compelled to take a title with such a cloud over it; neither should he be left to a suit on his bond against a corporation resident in another state. (7 Blackf., 31; 5 Mon., 189.) It is a clear case for equitable relief, either by a total rescission of the contract or specific performance with damages. Certainly, the court should have decreed a conveyance upon the payment of the money.

Mr. Coxe, for the appellees: The questions arising upon the record present no great diffi-

culty. It is a case of clear and undisguised fraud on the part of complainants. The court below ordered the bill to be dismissed, and such, it is confidently believed, will be the result in this court.

*The first question which arises was [**59** presented in the court below on the demurrer, and is again set up in the answer. It is, that if the allegation of complainants be true, as made in the bill, the facts, as averred, would have constituted a perfect defense in the action at law in which the judgment was obtained, which the bill seeks to enjoin; and that complainants, who were defendants in that action, having omitted to take such defense at law, or, if they did, having failed to sustain it, equity will not now interpose in their behalf.

In cases of fraud it is perfectly well settled, that the jurisdiction of the courts of law and of equity is concurrent. It becomes exclusive only when the case is brought before the one or the other. (*Gregg v. Lessee of Sayre et al.*, 8 Pet., 244; *Lessee of Swanze v. Burke*, 12 Pet., 11; *Russell v. Clark's Executors*, 7 Cranch, 69; *Lessee of Rhoades v. Selin*, 4 Wash. C. C. R., 715; 9 Wheat., 408, 532.)

In the present case the fraud which is in proof, is one committed by complainants, none such as is alleged being sustained even by a shadow of proof against defendants. If fraud, a good defense at law. (*Gilpin v. Smith*, 11 Sm. & Marsh., 129, and cases cited.)

In the bill claiming relief, complainants aver that an actual sale and purchase of certain real estate were made, and that at the time this contract was concluded, the property which he purchased was in part held in possession under an adverse claim with color of title, and has ever since been thus held, so that the purchaser has never been able to obtain possession or enjoy the benefit of his purchase. If this allegation is true, Bradford had a complete defense at law in the action upon his bonds; for such an adversary holding, places him in precisely the same predicament as if he had gone into possession under his purchase and then been ousted by a paramount title. In *Ducell v. Craig*, 2 Wheat., 46, 61, it was held by this court, that if a grantee be unable to obtain possession in consequence of an existing possession or seisin by a person claiming and holding under an older title, this would be equivalent to an eviction. The local law is in accordance. (*Dennis v. Heath*, 11 Sm. & Marsh., 206.)

Again, he alleges that the Bank cannot make him a good title to the property for which he contracted. Admitting that, under the circumstances, this would furnish a valid defense, yet it was equally available at law. (7 Sm. & Marsh., 340.) Had he tendered the purchase money, and demanded such deed as he claims under the bond, and it was then made to appear that the Bank was unable to make a good title, his defense at law would have been complete. (*Liddell v. Sims*, 9 Sm. & Marsh., 596.) Nor was it necessary for him to have proceeded thus far, for the simple *fact that the Bank [**60** did not demand payment and tender a deed, would have furnished a complete defense. (*Washington v. Hill*, 10 Smedes & Marsh., 550.)

Having thus, upon the facts which the bill

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alleges, a full, complete, and adequate remedy at law, and having omitted or neglected to avail himself at law of the defense to which those facts, if proved, would have entitled him, he is without remedy in equity. (*Graves v. Boston, &c., Ins. Co.*, 2 Cranch, 419; 2 Story, Eq., sec. 179 and 887; 1 Johns. C. R., 49-465; 6 How., Miss., 569; 5 *Id.*, 80; 7 *Id.*, 172; 3 Sm. & M., 433; 4 *Id.*, 358; 8 *Id.*, 131; 9 *Id.*, 98; 10 *Id.*, 112; and clearly in *Truly v. Wanzer*, 5 How. S. C., 141; *Id.*, 192; *Creath v. Sims*, 9 Wheat., 552; *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332.)

If we examine the merits of the case, as disclosed in the pleadings and evidence, the entire want of even a semblance of equity will be obvious. The evidence shows, beyond all possibility of doubt, that, in October, 1841, the Bank sold the lands in question to Brown, gave him a title bond, conditioned to make to him a good title upon the payment of the purchase money, and received from him an obligation to pay this purchase money as therein specified. In this obligation complainant, John D. Bradford, joined as surety. Payment not being made as stipulated, the Bank brought suit on the paper against Bradford, recovered judgment against him, and either, as the answer alleges, issued execution, or, as the bill avers, threatened so to do.

There is no allegation, proof, or pretense, that, in October, 1841, when this purchase and sale were consummated, the title of the Bank to the entire property which it contracted to sell was not absolute and perfect; that the contract of sale was not perfectly honorable, just, and lawful; that the consideration money was not reasonable and proper. Up to this period no allegation or imputation of impropriety, or unfairness, or want of capacity to carry out the contract, is alleged.

Under the circumstances which have thus been stated, Benjamin M. Bradford made, on behalf of his brother, an application to the Bank, in September, 1844, in the form of a letter, addressed to George W. Foster. In this letter he stated that John M. Bradford had been prevailed upon to become security for Brown; that Brown held the title bond, and if the purchase money is paid the land must be conveyed to him, and become liable to old judgments, which will absorb it and leave his brother remediless. It is then proposed that Brown shall surrender his title bond, and that a new one shall be given to Bradford, who, on his part, will then give security for the payment of the purchase money on an extended credit.

That this letter was written by John M. Bradford, or by his authority, and with his knowledge, is clearly shown in the record. In his letter of 2d December, 1844, to G. W. Foster, he says: "My friend, J. L. Brown, informs me that the Union Bank has acceded to our proposition made through you," &c. No other proposition appears to have been made in the letter of the brother, for both Foster and ~~Mass~~ say, the proposal contained in this letter was that which we submitted to the Bank, and on which alone it acted. It may also be inferred from the testimony of Gholson, and his letter of March 20, 1848, that the Bradfords, when they made their proposition to the Bank,

knew of the tax sale made in 1843, and then entertained the design now attempted to be accomplished, of using that sale as a means of defeating the Bank in the recovery of the debt.

The complainants' bill exhibits a strong case of the *suppressio veri*, for no allusion, however distant, is made to the position occupied by the parties at the date of the letter, in September, 1844. It certainly cannot be doubted that, had the entire case been presented to the court, no injunction would have been awarded.

The ground assumed, that it was incumbent on the Bank to pay the taxes assessed upon the lands subsequent to the contract of purchase and sale with Brown, has no foundation in principle or in authority. From the instant the contract for the purchase and sale of real estate is consummated, the party who has bought and obligated himself to pay the price stipulated, is the owner. Even if an absolute conveyance has been made the vendor retains a lien for the purchase money, and this tacit mortgage may be enforced in equity. If, however, the vendor retains the legal title, which has become the modern practice, and which closes the door against any attempt to perpetrate fraud upon third parties, the case is not essentially changed; the vendor retains the position of a mortgagee. Such is the settled law in Mississippi. (4 Sm. & M., 300; 6 *Id.*, 149; 10 *Id.*, 184.)

If the lands in this predicament should be sold for taxes, the vendor may be deprived of that security for the payment of the purchase money, but it by no means follows that the debt is extinguished. In truth, he may continue that security by paying these taxes; in which case he is entitled, as against his vendee, to add the amount thus paid to the original debt, and enforce re-imbursement of the aggregate sum. This is, however, optional with him, and not obligatory.

Mr. Justice Nelson delivered the opinion of the court:

This is an appeal from the District Court of the United States for the Northern District of Mississippi.

*The complainants in the court below, [*62 the appellants here, filed their bill for the specific performance of an agreement with the defendants for the conveyance of two sections of land in the Chickasaw cession.

The land was to be conveyed for the consideration of the sum of \$3,741, payable in installments, the last payment to be made on the 12th of October, 1847, at which time the deed was to be delivered.

The bill states that at the time of the purchase, the defendants had no title to the land, as both sections with the exception of the quarter of one of them, had been previously sold for taxes, and the time for redemption expired. That since then the defendants have redeemed one of the sections; but it is alleged that the purchase of the two sections was one entire contract, and that the main inducement was to obtain a title to the whole tract, and that the purchase would not have been made of either section separately on account of the situation, and state of the improvements. That it was the duty of the defendants to have paid the taxes, and to have prevented the sale therefor.

The bill further states that a judgment had been recorded against the complainants for the amount of the purchase money; and that the defendants were endeavoring to enforce the collection on execution. That they have tendered the amount of the judgment and interest, and have demanded a deed conveying a good and sufficient title to the land, which demand has been refused. That they are still willing to pay the judgment with interest and costs, and tendered the same in court, and to accept a complete title from the defendants if they can make one.

The bill prays for an injunction enjoining the defendants from collecting the judgment, that they be compelled to exhibit their title, and to execute the contract specifically, and to account for the rents and profits. And that, if the defendants are unable to execute the contract specifically and entire, it may be delivered up and canceled, and the injunction made perpetual.

The defendants, in their answer, admit the execution of the contract for the conveyance of the two sections as stated in the bill; but deny that the transaction was intended as a purchase of the land; on the contrary, they insist, it was intended as a substitution of John D. Bradford, one of the complainants, to the rights of one John L. Brown, who had previously purchased the same, and to whom the defendants had agreed to convey the title.

The defendants allege that they entered into a contract with Brown for the sale of the land on the 20th of October, 1841, that he executed to them his four several notes for the purchase money, payable in one, two, three, and four [63*] years, which notes *were indorsed by John D. Bradford, one of the complainants, as surety, and that the contract was conditioned to make to Brown a good and valid title on the payment of the purchase money.

That default was made in the payment, and a judgment recovered against Bradford as indorser, an execution issued, and about to be levied upon his property. And that thereupon an application was made to them on behalf of Bradford, for an arrangement by which he might have the benefit of the purchase of Brown, as he was insolvent and there were old judgments standing against him, which would bind the land if the title was made to him. That in consequence of these representations they assented to the arrangement, simply on the ground of favor and indulgence to Bradford, not being disposed to coerce the payment of the money from a surety, and that at the same time withhold from him the means of indemnifying himself.

And that, at the suggestion on behalf of Bradford, and as the simplest mode of effecting the object of the arrangement, they took up the title bond previously given to Brown, and gave a new one to him, agreeing, at the same time, to a request for further indulgence in the payment of the purchase money by extending it for the period of one, two, and three years. That it was under these circumstances the contract in question was entered into by the defendants, on the 9th of January, 1845, to convey the title to the two sections to Bradford instead of to Brown, the original purchaser.

The defendants admit they have been informed, and believe that both sections, with the exception stated, have been sold for taxes, prior to the date of this last arrangement; but aver that they had no knowledge of the fact at the time. They admit that they had not paid any taxes accruing after the purchase by Brown, 12th October, 1841, nor had they paid any attention to the same, as they considered it the duty of Brown.

They admit that they have redeemed one of the sections, and would have redeemed the greater part of the other, had it not been for the interference of the complainants to prevent the purchaser from assenting to it.

They also admit that they cannot make an unencumbered title to the east half and southwest quarter of section No. 12, if the tax sale is a valid one; but if the same is not, they can make a good valid title to the whole of both sections.

These are the material allegations as set forth in the pleadings. The proofs in the record sustain substantially the view of the case as stated in the answer.

The original purchase of the two sections by Brown from the defendants, of the 12th of October, 1841, extended the payment *of [*64] the purchase money, running through a period of four years; and although it contains no provision for possession in the mean time, it is conceded that the vendee was entitled to it, and that actual possession was taken accordingly.

Indeed, the courts of Mississippi regard the vendor in contracts of this description as standing, in most respects, upon the footing of one who has already conveyed the title, and taken back a mortgage as security for the purchase money, and the vendee as mortgagor in possession. (4 Sm. & Marsh., 300; 6 *Id.*, 149; 10 *Id.*, 184.)

Brown, therefore, during the running of the contract, was at least the owner of the equitable title, accompanied with the possession: and as such was under obligation to take care of and pay the taxes assessed, accruing after his purchase. And the loss of the title to the whole or any portion of the tract in consequence of neglect, in this respect, is attributable to his own fault, for which the defendants are not responsible. No doubt, with a view to the better security of the purchase money, they might have paid the taxes in case of the neglect of the vendee, and charged the amount to him. But this was a question they had a right to determine for themselves, and with which Brown had no concern.

It is quite clear, therefore, if the case stood on the original contract of purchase, the defendants, on the tender of the purchase money, would have been bound only to convey to the vendee a good and valid title to the land at the time, subject to any outstanding title or titles that existed under tax sales, where the payment of taxes had accrued subsequent to the purchase. For these titles they would not have been responsible, as they arose from the neglect of Brown.

The question in the case is, whether or not the complainants stand in any different, or better situation.

John D. Bradford, one of them, was surety

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for Brown for the purchase money, and against whom a judgment had been recovered for the amount, execution issued, and about to be enforced, and, for aught that appears in the record, he was abundantly able to meet the demand. If payment had been enforced he would have been left to look to Brown, the principal, for indemnity, who, it is admitted, was insolvent. In this state of the proceedings, he applied to the defendants through his brother, the other complainant, for relief: first, to obtain from them the interest in the land which Brown was entitled to, he consenting that it might be thus transferred; and second, for further indulgence in the time of payment of the money, the brother offering to join in the security. To induce the defendants to make this change, it was urged that, if the deed [65*] was made to *Brown, judgments against him would bind the land, and Bradford be deprived of the means of security for his advance, and that he was sure, from his knowledge of the defendants, it was not their intention to distress him for an act of friendship to Brown, although he had made himself liable for the debt: that for this purpose he wished, with the concurrence of Brown, the title bond to be changed by the defendants from Brown to him; that this could work no detriment to them, and would afford him security for his liability; and also that the payment might be extended to one, two, and three years.

The defendants consented, and the arrangement was made accordingly, the new bond for the title corresponding with the old one, except in the change of the name of Bradford for Brown and the times of payment. The new bond thus given, 9th of January, 1845, on its face, bound them to make a valid title to the two sections on the 9th of January, 1848, when the last payment became due.

Under these circumstances, it is contended that the defendants are under obligation to make a deed to Bradford, conveying a complete title to the two sections, on his tender of the purchase money, or, in default thereof, that the agreement between them should be canceled, on the ground: 1st. That it is not competent for the court, upon settled principles of law, to admit parol evidence to alter or vary the terms or legal effect of the written agreement; and, 2d. Even if it is, that the new bond for the title is distinct from, and independent of, the one given to Brown, and hence the conveyance to Bradford is not subject to the qualifications as to the title to which the conveyance to Brown might have been, on account of the outstanding tax titles from his own neglect.

It is by no means clear that Bradford is not chargeable with notice of the condition of the title, at the time he made application to the defendants to have the bond changed from Brown to himself. These two sections seem to have been his only means of indemnity as surety, which circumstance would naturally have led him to have made an examination into it; and, especially, as his liability had passed into a judgment, and which was about to be enforced against him. It is fair, also, to presume that he would make the inquiry, with a view to the condition and value of the property in connection with his application to obtain the change of the bond, and get the title to him-

self. Besides, it is inferable from the evidence in the record, that he resided at the time in the same county in which the lands lie, and was in a situation to obtain readily the necessary information. And, assuming this conclusion to be well founded, the concealment of the facts from the defendants at the time *would [66 be a fraud upon them, which at once removes all difficulty in respect to the admissibility of the evidence as to the true character of the transaction.

But we do not propose to put the case upon this ground; as we are satisfied, independently of this view, the evidence is admissible and proper to show the understanding and real intent of the parties, although different from that which the written contract imports on its face.

"One of the most common classes of cases," says Judge Story, in his Commentaries on Equity Jurisprudence, "in which relief is sought in equity on account of a mistake of facts, is that of written agreements, either executory or executed. Sometimes by mistake the written agreement contains less than the parties intended; sometimes it contains more; and sometimes it simply varies from their intent by expressing something different in substance from the truth of that intent. In all such cases, if the mistake is clearly made out by proofs entirely satisfactory, equity will reform the contract, so as to make it conformable to the precise intent of the parties." (1 Story's Eq. Jurisprudence, p. 164.) And Lord Hardwicke remarked in *Henkle v. Royal Exchange Assur. Co.*, 1 Ves., 817, "No doubt but this court has jurisdiction to relieve in respect of a plain mistake in contracts in writing, as well as against frauds in contracts; so that if reduced into writing contrary to the intent of the parties, on proper proof that would be rectified."

And this ground, it is agreed, is available to a defendant by way of defense in the answer to a bill for a specific performance; as he may thus insist upon any matter which shows it to be inequitable to grant the relief prayed for. The court will not interpose to compel a specific execution, when it would be against conscience and justice to do so. (1 Story's Eq. Juris., 174; 2 *Id.*, 80.)

These principles have become elementary, and it is needless to refer to further authorities to sustain them.

Now, we are perfectly satisfied, upon the proofs before us, that it was the agreement and understanding of both parties in this case, that Bradford should be substituted in the place of Brown in the title bond, and should take such interest as he had in the two sections in question under it, and nothing more; and this, that he might become entitled to the deed, when the purchase money was paid, which otherwise must have been made to Brown; in other words, an agreement to put the surety in the place of the principal for the sake of indemnity, as it was seen that he would be obliged to advance the money. For this purpose, the defendants were appealed to, on the ground that there were judgments against Brown which would bind the land *if the deed was made to him, [67 and it was suggested that the simplest way to effect the object would be to take up the old, and give a new title bond to Bradford. The suggestion was readily acquiesced in by the de-

fendants, as a mode of making the change that would enable him to obtain the benefit of the security desired, Brown first consenting to it. But the suggestion was acquiesced in, and the new bond given for the title, in ignorance of the fact that portions of the land had been previously sold for taxes through the neglect of Brown, and the titles outstanding. This fact, as is apparent, affected most materially the character of the transaction, as the mode in making the substitution has had the effect of imposing upon the defendants responsibilities they were not under to Brown, namely: to make good the title to the two sections, notwithstanding it had been lost by his neglect.

Now, this they were not asked by Bradford to do, nor was such the agreement or understanding of either of the parties; but directly the contrary. The agreement was for a substitution of Bradford in the place of Brown, in the previous sale.

The form of the bond for the title, therefore, given to Bradford, and thus inadvertently adopted, and which imposes upon the defendants this new obligation, grew out of a mistake, and misapprehension of the facts as to the condition of the title at the time. Had the condition of the title been known, it is obvious the new bond would not have been given, or, if given, its terms would have been qualified according to the true meaning of the parties.

In its present form it does not at all carry out their understanding and agreement in making the arrangement desired, but defeats them; for in consequence of this misapprehension as to the state of the title, it is not a substitution of interest of Brown, but in effect a resale to Bradford, by which he is entitled not to such a deed as the defendants were under obligation to make to Brown, but to one investing him with a complete title to the land.

And as they are disabled from making this title by reason of the tax sales, if it is not competent for the court to correct the mistake and reform the contract, according to the real understanding of the parties, the result is, they have lost their land, and Bradford, the surety for the purchase money, is discharged from his liability—a result anything but within the contemplation of the parties at the time of the arrangement.

We admit, if the defendants had agreed to resell this land to Bradford, and to give him a title, the fact that they were ignorant of the tax sales would have afforded no ground of defense to a specific execution. The title bond in [68*] that case would have stood on the footing both parties intended, namely: that a good title should be given when the purchase money was paid.

But here there was no agreement to sell on the one side or to buy on the other. The agreement was to give Bradford the benefit of the sale already made, and to make him such a title as the defendants were under obligation to make to Brown. It was in truth but an assent on their part to an agreement on the part of Bradford with Brown that he should be substituted in his place in that sale—a sort of subrogation of the surety to the rights of the principal. The mode adopted to carry out the arrangement would have conformed to the intention of the parties had the facts been as the de-

fendants had every reason to believe, namely: that no change had taken place in the condition of the title. The mistake as to this fact has given an effect to the instrument far beyond the agreement and real understanding of the parties, and which will operate most unjustly and inequitably, if permitted to stand.

The hardship of the case, as well as the unconscientious advantage sought to be obtained, will be more apparent, when we recur to the fact that the defendants had no interest whatever in consenting to the change of the contract in favor of Bradford. Their debt was secure and in a situation to be immediately realized, as it was in judgment, and execution, and it is admitted he was able to meet it. They were actuated altogether from a disposition to assist him in obtaining some indemnity as surety for this debt, which it belonged to Brown to pay. And as it was a matter of indifference to them whether they made the deed to Brown or to him, they readily assented to the proposed arrangement. Indeed, it would have been hardly creditable, under the circumstances in which the application was made, to refuse it.

We are satisfied, therefore, that the case falls within the established principles of equity, in granting relief against contracts entered into upon a mistake, and misapprehension of the facts, and where the enforcement of which would enable one of the parties to obtain a most unconscientious advantage over the other.

The next question is as to the disposition to be made of the case.

The former course of proceeding in chancery, which was most usually adopted, would be to dismiss the bill without prejudice, and which in this case would lead us to affirm the decree of the court below. The effect of this would probably be to open up a new scene of litigation between the parties; as the complainant, John D. Bradford, could resort to his remedy at law upon the title bond; and the defendants would be obliged to file a cross bill for the purpose of staying his proceedings, and reforming the contract so as to make it conform to [69] the real understanding of the parties.

The more modern course of proceeding is to dispense with the cross bill and make the same decree upon the answer to the original bill that would be made, if a cross bill had been filed, if the defendant submits in his answer to a performance of the real agreement between the parties. The answer is viewed in the light of a cross bill, and becomes the foundation for a proper decree by the court. This practice has been adopted as most convenient and expeditious in settling definitively the rights of the parties, and for the sake of saving further litigation and expense.

In the case of *Staplyton v. Scott*, 13 Ves., 425, the Master of the Rolls dismissed the cross bill with costs, considering it unnecessary, as the court would upon the answer decree a specific execution of what was the real agreement.

This practice was followed by Lord Eldon in *Fife v. Clayton*, 13 Id., 546, on the ground that it was right in principle, and would save expense. A specific performance was also decreed upon the answer in *Guyn v. Lethbridge*, 14 Ves., 585, and it appears now to be a very common practice in chancery proceedings. (1 Dan-

ell's Pr., 436 and *note*; 2 *Id.*, 101, 102 and *note*; Story's Eq. Pl., sec. 394.)

These cases refer more particularly to the right of the defendant to have a decree for a specific execution of the agreement according to the answer so that he may be saved the expense of a cross bill, even against the claim of the complainant to have his bill dismissed.

The same principle, however, seems to be equally applicable to the complainant where he insists upon the decree for specific performance of the contract as established by the proofs, although different from that set up in the bill. Indeed, we perceive no solid distinction between the two cases. In both, the contract, of course, when ascertained and conformed to the real understanding of the parties, must be such a one as the court deems fit and proper to be enforced. (2 Danell, Pr., 1001, 1002; *London & Birmingham Railway Co. v. Winters, Craig & Phil.*, 63.)

We shall adopt this practice in the disposition of this case, as it will save all further litigation and expense, and settle the rights of the parties, as, in our judgment, the principles of equity and justice demand.

The bill was dismissed by the court below without prejudice, leaving the complainants at liberty to resort to any other remedy in the case which they might deem expedient.

We shall therefore reverse the decree, and re-
70*] mit the proceedings *to the court below, with directions that the defendants execute a deed of the two sections of land in question to John D. Bradford with covenant of warranty, subject, however, to any outstanding title or titles accruing from tax sales since the sale, and title bond to John L. Brown, 12th Oct., 1841, and deposit the same with the clerk of the court to be delivered to the said Bradford on his surrendering and canceling the title bond made to him on the 9th January, 1845, and paying the judgment the defendants have against the complainants for the purchase money, with interest; also that the injunction be dissolved, and the defendants be at liberty to enforce the execution of the judgment; that no costs shall be allowed to the appellant in this court, and that costs shall be decreed to the defendants in this court below.

Meers, Justices Daniel and Grier dissented.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Mississippi, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said District Court in this cause be, and the same is hereby reversed; and that this cause be, and the same is hereby remanded to the said District Court, with directions that a decree be entered that the defendants execute a deed of the two sections of land in question to John D. Bradford, with covenant of warranty, subject, however, to any outstanding title or titles accruing from tax sales since the sale, and title bond to John L. Brown of the 12th of October, 1841, and deposit the same with the clerk of the said District Court, to be delivered to the said Bradford on his surrendering and

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canceling the title bond made to him on the 9th of January, 1845, and upon his paying the judgment the defendants have against the complainants for the purchase money with interest; also that the injunction be dissolved, and the defendants be at liberty to enforce the execution of their judgment.

And it is further ordered and decreed that each party pay his own costs in this court, and that costs shall be decreed to the defendants in the court below.

Cited—§ Otto, 89.

*THE RICHMOND, FREDERICKS-[*71 BURG AND POTOMAC RAILROAD COMPANY, Plaintiffs in Error,

v.

THE LOUISA RAILROAD COMPANY.*

Charter granting a railroad an exclusive right for a number of years, is to be strictly construed as against corporation—Impairing obligation of contract.

The Legislature of Virginia incorporated the stockholders of the Richmond, Fredericksburg and Potomac Railroad Company, and in the charter pledged itself not to allow any other railroad to be constructed between those places, or any portion of that distance; the probable effect would be to diminish the number of passengers traveling between the one city and the other upon the railroad authorized by that Act, or to compel the said company, in order to retain such passengers, to reduce the passage money.

Afterwards the Legislature incorporated the Louisa Railroad Company, whose road came from the West and struck the first-named Company's track nearly at right angles, at some distance from Richmond; and the Legislature authorized the Louisa Railroad Company to cross the track of the other, and continue their road to Richmond.

In this latter grant, the obligation of the contract with the first Company is not impaired within the meaning of the Constitution of the United States.

In the first charter, there was an implied reservation of the power to incorporate companies to transport other articles than passengers; and if the Louisa Railroad Company should infringe upon the rights of the Richmond Company, there would be a remedy at law, but the apprehension of it will not justify an injunction to prevent them from building their road.

Nor is the obligation of the contract impaired by crossing the road. A franchise may be condemned in the same manner as individual property.

THIS case was brought up from the Court of Appeals of the State of Virginia, by a writ of error issued under the 25th section of the Judiciary Act.

The facts in the case are stated in the opinion of the court.

1.—Mr. Justice DANIEL did not sit in this cause.

NOTE.—What laws are void as impairing the obligations of contracts. Vested rights defined. How affected by subsequent repeal or modification of statute. See note to *Fletcher v. Peck*, 6 Cranch, 87.

As to corporations this case (*Rich., &c., R. R. Co. v. Louisa R. R. Co.* *supra*), explained in *Ohio Life Ins. & Trust Co. v. Debolt*, 18 How., 418.

As to strict construction, approved in *Thorpe v. Rutland R. R. Co.*, 27 Vt., 140.

This case and those of *Herrick v. Randolph*, 13 Vt., 525; *Laudon v. Litchfield*, 11 Conn., 251; *O'Donnell v. Bayley*, 24 Miss., 386, do not affect to justify express exemption from taxation being held inviolable, except upon the ground that it formed a part of the value of the grant for which the State received or stipulated to receive a consideration. *Thorpe v. Rutland, &c., R. R. Co.*, 27 Vt., 140.

It was argued by **Mr. Robinson** for the plaintiffs in error, and by **Messrs. Lyons and Johnson**, for the defendants in error.

Mr. Robinson, for the plaintiffs in error, made the following points:

1. That, under the Act passed the 25th of February, 1834, incorporating the stockholders of the Richmond, Fredericksburg and Potomac Railroad Company (Sess. Acts, 1833-1834, p. 127), there is, by force of the 38th section, copied in the record, at p. 165, and of what has been done under the Act, a contract, the obligation of which cannot be impaired by any state law. (*Fletcher v. Peck*, 6 Cranch, 135, 136, 137; *Terrill, &c., v. Taylor, &c.*, 9 Id., 50; *Wilkinson v. Leland, &c.*, 2 Pet., 657; *State of New Jersey v. Wilson*, 7 Cranch, 166; *Green v. Biddle*, 8 Wheat., 92; *Providence Bank v. Billings, &c.*, 4 Pet., 560; *Dartmouth College v. Woodward*, 4 Wheat., 637; *State of New Jersey v. Wilson*, 7 Cranch, 164; *Armstrong, &c., v. Treasurer of 72** *Athens Co.*, 16 Pet., 289; *Gordon v. The Appeal Tax Court*, 3 How., 183.)

2. That a court of equity has jurisdiction to protect the plaintiffs in the enjoyment of their chartered privileges, and should award an injunction to restrain the defendants from any acts which would impair the obligation of the contract under which the plaintiffs claim; from any acts which the defendants are bound (whether by contract or duty) to abstain from. (*Green v. Biddle*, 8 Wheat., 91; Opinion of Kent, J., in *Livingston v. Van Ingen*, 9 Johns., 585 to 589; *Coats v. Clarence Railway Company*, 1 Russ. & Mylne, 181; 4 Cond. Eng. Ch. Rep., 878; *Frederic v. Lewis*, 1 Mylne & Craig, 255; 18 Eng. Ch. Rep., 255; *Canal Company v. Railroad Company*, 4 Gill & Johns., 3; *Osborn v. United States Bank*, 9 Wheat., 838, 841; *Stevens v. Keating*, 2 Phillips, 384; 22 Eng. Ch. Rep., 334; *The Attorney-General v. The Great Northern Railway*, 3 Eng. Law and Eq., 263; *The Great Western Railroad Company v. The Birmingham and Oxford Railroad Company*, 2 Phillips, 597; *Williams v. Williams*, 2 Swanst., 253; *Dietrichsen v. Cabburn*, 2 Phillips, 52; 22 Eng. Ch. Rep., 52, and class of cases there referred to; *Kemp v. Sober*, 4 Eng. Law and Eq. R., 64.)

3. That the exercise of such jurisdiction should not be declined, because of the provision in the 18th section of the Act incorporating the stockholders of the Louisa Railroad Company (Sess. Acts, 1835-1836, p. 174, sec. 18), or in the 13th section of the Act prescribing general regulations for the incorporation of railroad companies. (Sess. Acts, 1836-1837, p. 107, sec. 13.) For even if those provisions apply to the defendants' work between the junction and Richmond (and the plaintiffs, p. 22, insist they do not), yet following, as they do, sections relating to proceedings for ascertaining the damages to a proprietor for the condemnation of his land, it is manifest they were only intended for the case of such a proprietor, asking for an injunction to stay the proceedings of a company which is taking his land for its work, and though under the case of *The Tuckahoe Canal Company v. The Tuckahoe and James River Railroad Company*, 11 Leigh, 42, cited in the answer, p. 169, 174, they may apply to land of one corporation taken for the work of another, yet they are not intended for, and are inapplica-

ble to the case of a company enjoying a right under a contract with the state, which asks to be protected in that enjoyment against another company, claiming, not under a prior but a subsequent grant. And 2, whatever may have been the intention of those Acts, yet being passed after the grant in the 38th section of the plaintiffs' charter, they cannot be allowed to impair the obligation of the contract arising under that grant: but the plaintiffs claiming under it, are entitled *to whatever is necessary to make that grant effectual and protect them in the enjoyment of their rights. (*Babcock v. Western Railroad Corporation*, 9 Metcalf, 556; *Blakesley v. Wheldon*, 1 Hare, 180; 23 Eng. Ch. Rep., 180; *Green v. Biddle*, 8 Wheat., 75; *Bronson v. Kintie et al.*, 1 How., 319; *McCracken v. Hayward*, 2 How., 612.)

4. That the court, in respect to those matters which are distinctly raised, should declare the right of the plaintiffs, and upon such declaration decree an injunction in terms ascertaining the extent of the right. (*Cotter v. The Midland Railway*, 2 Phill., 472; 22 Eng. Ch. Rep., 472.)

5. That from the facts stated in the bill, and not denied, and also from the map of Mr. Crozet, it is obvious that the probable effect of allowing the defendants to have a railroad between the City of Richmond and the City of Washington, for that portion of said distance which is from the junction to Richmond, will be to diminish the number of passengers traveling between the City of Richmond and the City of Washington, upon the plaintiffs' railroad, or to compel them, in order to retain such passengers, to reduce the passage money. And if such would be the probable effect, the defendants (as is contended in the petition, as well as in the bill) should, until the expiration of the thirty years mentioned in the plaintiffs' charter, have been enjoined from constructing their railroad for said portion of the distance. (*Rankin v. Huskisson*, 4 Sim., 13; 6 Eng. Ch. Rep., 7; *Blakemore v. Glamorganshire Canal Navigation*, 1 Myl. & Keen, 154; 6 Eng. Ch. Rep., 544, and cases before cited.) And the defendants having, notwithstanding the warning given by the letter of the 18th of December, 1848, and by the institution of this suit, proceeded with such construction, they might and should, at the hearing, have been enjoined, and ought now to be enjoined from further constructing or using their railroad for that portion of the distance. (*Lane v. Newdigate*, 10 Ves., 192.) And if the construction has been completed, the injunction against the use should continue, not only until the expiration of said thirty years, but for such time after the thirty years as it may reasonably be supposed would be occupied in the construction, if it had not taken place within the thirty years. For, as the bill insists, the protection will not be preserved to the extent to which it is granted, if immediately on the expiration of the thirty years there can be opened for transportation, a railroad constructed within that period.

6. That although an injunction to the extent mentioned in the preceding point would, as contended in the petition, give no higher security to the plaintiffs than was intended by the Legislature, yet if the court do not grant it to that extent, it *should, at least, pro- [*74

hibit acts, the probable effect of which would be to diminish the number of passengers traveling between the City of Richmond and the City of Washington, upon the plaintiffs' railroad, or to compel the plaintiffs, in order to retain such passengers, to reduce the passage money; it should make such prohibition to whatever extent may be necessary to protect the plaintiffs in the enjoyment of their rights.

7. That the prohibition should be of all transportation of passengers on the defendants' railroad between Richmond and the junction; 1st, upon the ground taken in the bill, and the answer, that he who travels only over a portion of the railroad, equally with him who travels over the whole line, is, within the meaning of the 88th section of the plaintiffs' charter, a passenger traveling between (that is over the whole, or some part of the intermediate space between) the Cities of Richmond and Washington; a ground sustained in part by the judge, and strongly fortified by the views presented in the petition; and, 2d, upon the ground that such prohibition is necessary to protect the plaintiffs in respect to passengers traveling the whole distance between those cities. For, in the absence of such prohibition, the Louisa Company may take passengers at reduced rates between Richmond and the junction, as pointed out in the bill, and between the junction and Washington or Alexandria give through tickets in conjunction with the Orange and Alexandria Railroad.

8. That if the court do not prohibit all transportation of passengers on the defendants' railroad between Richmond and the junction, it should, at the least, prohibit the transportation by the defendants on their railroad of passengers traveling between the City of Richmond and the City of Washington. The necessity for an injunction to this extent is not at all obviated by the concession remarked on in the answer. Nor is the remark of the judge, that "to award the injunction now would be to inflict a present, certain, and serious injury upon one party, to prevent a remote, uncertain, and possible injury to the other," well founded as to the injunction here proposed. For no injury is inflicted on the defendants by requiring them to abstain from what it is their duty to abstain from. While on the other hand, a remedy far more effectual than any at law can be had in equity through its restraining power, which besides awarding the injunction as here proposed, may, and it is submitted, should in aid of such injunction, prohibit through tickets between Richmond and Washington, at points south of Richmond and north of Washington, by the Louisa road.

9. That the final decree in these suits in the State Court, should be reversed in the Supreme [75*] Court; and this court should "proceed to pass such decree as the State Court which made such final decree should have passed, to wit: in the second case, for obvious reasons, some of which are stated in the answer to the bill in that case, it should dissolve the injunction and dismiss the bill with costs; and in the first and principal case, it should award such injunction as is proper, and decree against the defendants the costs. The writ of error issued under the Act of Congress, is to be so used as to effect the object. (*Gelston v. Hoyt*, 3 Wheat., 303.)

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The mandate for execution should issue to the Circuit Court of Chancery for the County of Henrico. (*Clerke v. Harwood*, 8 Dall., 342.)

The points made by the counsel for the defendants in error, were the following:

I. That this court has no jurisdiction of the case, the court of final resort in Virginia not having pronounced a final decree of judgment, but having simply refused to relieve the complainants by injunction, in the face of the statute of the State. This refusal to allow an appeal is no affirmation of the reasons of the court below.

II. That the appellants have not such a monopoly as they claim. That the grant which they insist upon as contained in the 88th section of their charter is void: 1. Because it is unintelligible. 2. Because it is impracticable, as no standard is furnished in the charter, or elsewhere, by which any tribunal can determine what is the extent of the grant or its limitation; and, therefore, no means exist by which to determine when the grant is violated, and when not, according to its terms; no distance being furnished within which, to the right or left of the existing road, another road shall not be made. The franchise claimed is, therefore, undefined, and therefore void; or, if defined, as the appellants insist, it confers upon them an unlimited power over the territory, highways and people of Virginia, and over the legislative power of the State, and the power to advance and improve the State, which the Legislature had no power to confer, and therefore it is void.

One Legislature had no power to say to all future Legislatures that there should never be more than one railroad between Richmond and Washington, without regard to the wants of the country and the capacity of this road to meet them; or that there should be but one for thirty years; and still less could it transfer the right so to declare to a petty corporation. The change of the form does not increase the power; the defect still is a want of power. The name of "contract" cannot conceal or justify the usurpation. The power of internal improvement over the State generally, or over a large portion of it, cannot be bartered away by the Legislature. The Legislature is "clothed [76*] with power for the benefit of the people, and the improvement of the State, and a law declaring that it shall not be improved, would be a gross abuse, a usurpation, in fact, of power, which would be void. To that extent the monopoly here claimed goes, if sustained.

III. If the grant is worth anything, it is only by giving it a reasonable interpretation, having regard to the end proposed, the general interest of the community, and the power of the Legislature; and thus interpreted, it only means that the appellants should have a monopoly of the passengers traveling from Richmond to Washington directly, or to such intermediate point as the Fredericksburg Railroad could carry them to. This interpretation the appellants deny, and thus make their grant unintelligible. It was not intended to forbid the construction of a railroad to Winchester, or the Ohio; because, when a passenger reached either of those points, he might get on the Baltimore and Ohio road, and thus get to Washington. Nor was it intended that the people residing

five, ten or twenty miles east and west of the Fredericksburg road, should be denied for thirty years the use of a railroad, unless they would first travel to, and then travel upon, the Fredericksburg railroad.

Taking this view, the most favorable for the appellants which can be taken, the decree in Virginia is correct.

IV. The grant to the appellants, under the most enlarged and extravagant view of it, relates only to the profits of passengers. It has no reference to freights, and was never intended to have; and if intended, cannot, by its words, have the effect to denude the Legislature of the power to authorize a railroad to carry agricultural products, and other freights; and therefore the decree in Virginia was right. The court had, therefore, no power to prevent the construction of the road. If it could do anything, it could only restrain the improper use of it, when a proper case should be made, which was not made by the appellants.

V. There was no violation of the rights of the appellants in authorizing the Louisa Company to cross their road, because they could do so only upon condition of paying the value of the privilege, even to the extent, if necessary, of the entire value of the franchise. A franchise is but a qualified property, and cannot, therefore, be more sacred and inviolable than the unqualified property of the owner in fee, whose property is condemned for the purposes of the franchise; over every franchise the "*ius publicum*" must prevail, as it does over all other property. (3 Leigh, 318; 11 Leigh, 42; 11 Peters, 544, 549, 567, 638, 641, 646; 6 How., 507.)

If the opposite conclusion can be maintained, then the monstrous result follows, that the railroad [77*] of the appellants is an impassable barrier between Eastern and Western Virginia, which can never, at any point, be crossed by another railroad. The Legislature never intended to erect such a barrier, and had not the power to do it if they would.

VI. If the appellants sustained any wrong, their remedy was not by injunction.

1. Because an injunction must have inflicted enormous and certain mischief upon the appellees, while the injury to the appellants, if it was denied, was uncertain, hypothetical, and might never occur, and could be redressed without an injunction. In such cases an injunction is never awarded.

2. Because the Chancery Courts in Virginia have, by law, no jurisdiction to grant an injunction in a case like the present. (See Acts referred to in the answer, viz.: 18th sec. of Gen. Railroad Law, 1837, and 18th sec. of the Charter of the Louisa Company.) And Virginia alone can prescribe the jurisdiction of her own courts. She can mold her remedies as she pleases. She can abolish her Chancery Courts as New York has done, or she can define their jurisdiction at pleasure; and this court has no power to say that she shall have Chancery Courts, or, if she has them, they shall exercise a jurisdiction forbidden by her laws. She may be bound to provide some remedy for wrong, but she is the exclusive and sovereign judge of the form of the remedy. But she is not bound to furnish any remedy for the courts of the United States. The Judiciary Act of the

United States applies only when she does provide a remedy.

VII. As to the last bill filed by the appellants, this court can have no jurisdiction. A refusal of an injunction is not a final decree under any interpretation of those words, for a new bill may be presented every day, and the refusal of one is no bar to another. A court may refuse an injunction, and yet at the hearing decide for the plaintiff.

The Supreme Court of the United States does not sit to revise the Virginia chancellors upon applications for injunctions.

The following authorities will be relied upon in the argument by the counsel for the appellees, viz.:

I. 6 Howard, 209; *Gibbons v. Ogden*, 6 Wheaton, 448.

II. 11 Peters, 467, 547; 6 Cranch, 138, 135; 3 Dall., 388; Vattel, 4, 14, 40, 41; Domat, book 1, tit. 6, sec. 1; Puffend., book 8, ch. 5, sec. 7; *Attorney-General v. Burridge*, 10 Price, 372, 373; Locke on Government, 304, 307.

III. Johnson's Dictionary—"Between."

V. Vattel, 40, 41, 108; *Hawkins v. Barney's Lessee*, 5 Peters, 457; *Coats v. The Clarence Railway Co.*, 1 Russell & Mylne, 181.

VI. Eden on Injunction, 236; *Earl of Ripon et al. v. Hobart*, 3 Mylne & Keen, 169, 174; *Attorney-General v. Nichol*, 16 Vesey, 342; [*78] *Bonaparte v. The Camden & Amboy Railroad*, 1 Baldwin C. C. Reps., 205; *Jackson v. Lamphire*, 3 Peters, 280.)

Mr. Justice Grier delivered the opinion of the court:

This case comes before us on a writ of error to the Court of Appeals of Virginia.

The appellants filed their bill in the Superior Court of Chancery for the Richmond Circuit, setting forth that, on the 25th of February, 1834, the General Assembly of Virginia passed an Act entitled "An Act to incorporate the stockholders of the Richmond, Fredericksburg and Potomac Railroad Company;" that in order to induce persons to embark their capital in a work of great public utility, the Legislature pledged itself to the said Company, that, in the event of the completion of said road from the City of Richmond to the Town of Fredericksburg, within a certain time limited by said Act, the General Assembly would not, for the period of thirty years from the completion of said railroad, allow any other railroad to be constructed between those places, or any portion of that distance, the probable effect of which would be to diminish the number of passengers traveling between the one City and the other upon the railroad authorized by said Act, or to compel the said Company, in order to retain such passengers, to reduce the passage money; that the stock was afterwards subscribed, the charter issued, and the road constructed, within the time limited by the Act; that on the 18th of February, 1836, an Act was passed incorporating "The Louisa Railroad Company, for the purpose of constructing a railroad from some point on the line of the Richmond, Fredericksburg and Potomac Railroad, in the neighborhood of Taylorsville, passing by or near Louisa Court House, to a point in the County of Orange, near the eastern base of the southwest mountains, with leave to extend it to the Blue Ridge,

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or across the same to Harrisonburg; that on the 28th of December, 1838, this railroad was opened from Louisa Court House to the junction with complainants' road. The bill then gives a history of the several contracts made between the two Companies for the transportation of the freight and passengers of the Louisa Railroad from the junction to Richmond, and of the frequent and protracted disputes and difficulties which arose between the two corporations on the subject of the compensation to be paid to the complainants for such services, the particulars of which it is unnecessary to mention; the result being, that the respondents insisting that the demands made by complainants for this service were exorbitant and oppressive, finally petitioned the Legislature for leave to extend their road from the junction to the City of Richmond. That complainants resisted, and protested against the 79*] passage *of such an Act, as an infringement of the rights guaranteed to them by their Act of incorporation. Nevertheless, the Legislature, on the 23d of March, 1848, passed an Act authorizing the respondents to extend their road from the junction to the dock, in the City of Richmond, unless the complainants would comply with certain terms which were deemed reasonable; and these terms being refused by complainants, the respondents commenced the construction of their road to Richmond, and to extend it across the road of complainants at the junction.

The bill insists that the grant of the Act of the 27th of March, 1848, to the Louisa Railroad Company, is inconsistent with the previous grant to complainants, and impairs the obligation of the contract made with them; that the lands condemned for their franchise cannot be taken from the complainants for the use of the respondents, and that they have, therefore, no right to build their road across the road of complainants. It prays, therefore, that the respondents may be enjoined: 1st. From entering upon any lands which have been condemned for the use of complainants' road for the purpose of constructing a railroad across it; 2d. That the respondents may be enjoined from all further proceedings towards the construction of a railroad between the junction and the City of Richmond; and, 3d. That they may be enjoined from "transporting on the railroad so proposed, persons, property, or the mail, and especially from transporting passengers traveling between the City of Richmond and the City of Washington."

The respondents, in their answer, deny "that the Act of Assembly which authorizes them to construct their road from its terminus at the City of Richmond, in any manner violates the bill of rights, or Constitution of Virginia, or the Constitution of the United States, or any right guaranteed to the complainants by their Act of Incorporation. They deny, also, that it is their purpose to invade or violate any right or privileges of the complainants by the manner in which they shall use their road if they are permitted to construct it."

The State Court decided: 1st. That the privilege or monopoly guaranteed to the complainants by the 88th section of their Act of Incorporation, was that of transporting passengers between Richmond and Washington; but that the Legislature, by that enactment, did not

part with the power to authorize the construction of railroads between Richmond and Fredericksburg for other purposes; that they had, therefore, the right to authorize the extension of respondents' road to the dock in the City of Richmond, and consequently the court refused to enjoin the respondents from constructing their road. 2d. That a grant of a franchise to one company to make a railroad or canal, is not *infringed by authorizing another rail-[*80 road or canal to be laid across it, on paying such damages as may accrue to the first, in consequence thereof. The injunction for this purpose was therefore refused.

3d. "That if the Louisa Company shall hereafter use their road by transporting passengers in violation of the rights guaranteed to complainants by the 38th section of their charter, the remedy at law seems to be plain, easy, and adequate; if, however, it should, from any cause, prove to be inadequate, it may be proper to interpose by injunction, and that will depend on the facts which may then be made to appear."

The decree having dismissed the complainants' bill, was "a final decree or judgment;" and that decree having been affirmed by the Court of Appeals by their refusal to entertain an appeal; and, moreover, the record showing that "there was drawn in question the validity of a statute and authority exercised under the State of Virginia," "on the ground of their being repugnant" to that clause of "the Constitution of the United States" which forbids a state to pass "any law impairing the obligation of contracts;" and "the decision of the court being in favor of their validity," there can be no doubt of the jurisdiction of this court to review the decision of the State Court.

For this purpose, it will be necessary to set forth, at length, the 88th section of the Act of Incorporation of the Company complainant, which contains the pledge or contract which their bill claims to have been impaired or infringed by the Act of 1848, authorizing the respondents to continue their road from the junction to the dock in Richmond. It is as follows:

"And whereas the railroad authorized by this Act will form a part of the main northern and southern route between the City of Richmond and the City of Washington, and the privilege of transporting passengers on the same, and receiving the passage money, will, it is believed, be a strong inducement for individuals to subscribe for stock in the Company, and the General Assembly considers it just and reasonable that those who embark in the enterprise should not be hereafter deprived of that which forms a chief inducement to the undertaking.

"88. Be it therefore enacted and declared, and the General Assembly pledges itself to the said company. That, in the event of the completion of the said railroad from the City of Richmond to the Town of Fredericksburg, within the time limited by this Act, the General Assembly will not, for the period of thirty years from the completion of the said railroad, allow any other railroad to be constructed between the City of Richmond and the City of Washington, or for any portion of the said distance, the probable effect of which would be to

81*] diminish the number *of passengers traveling between the one City and the other, upon the railroad authorized by this Act, or to compel the Company, in order to retain such passengers, to reduce the passage money: Provided, however, That nothing herein contained shall be so construed as to prevent the Legislature, at any time hereafter, from authorizing the construction of a railroad between the City of Richmond and the towns of Tappahannock or Urbana, or to any intermediate points between the said City of Richmond and the said towns: And provided, also, That nothing herein contained shall be construed to prevent the General Assembly from chartering any other company or companies to construct a railroad from Fredericksburg to the City of Washington."

Two objections were made by counsel to the validity of this Act, on which we do not think it necessary to express an opinion. They are: 1st. That one Legislature cannot restrain, control, or bargain away the power of future Legislatures, to authorize public improvements for the benefit of the people. 2d. That the grant made by this section is void for uncertainty, being both unintelligible and impracticable, furnishing no standard by which any tribunal can determine when the grant is violated and when not, according to its terms.

For the purposes of the present decision, we shall assume that the Legislature of Virginia had full power to make this contract, and that the State is bound by it; and moreover, that the franchise granted is sufficiently defined and practicable for the court to determine its extent and limitations.

It is a settled rule of construction adopted by this court, "that public grants are to be construed strictly."

This Act contains the grant of certain privileges by the public, to a private corporation, and in a matter where the public interest is concerned; and the rule of construction in all such cases is now fully established to be this: "That any ambiguity in the terms of the contract must operate against the corporation, and in favor of the public; and the corporation can claim nothing but what is clearly given by the Act." (See *Charles River Bridge v. Warren Bridge*, 11 Pet., 544.)

Construing this Act with these principles in view, where do we find that the Legislature have contracted to part with the power of constructing other railroads, even between Richmond and Fredericksburg, for carrying coal or other freight? Much less can they be said to have contracted, that no railroad connected with the western part of the State shall be suffered to cross the complainants' road, or run parallel to it, in any portion of its route. Such a contract cannot be elicited from the letter or spirit of this section of the Act.

On the contrary, the preamble connected 82*] with this section *shows that the complainants' road was expected to "form a part of the main northern and southern route between the City of Richmond and the City of Washington;" and the inducement held out to those who should subscribe to its stock, was a monopoly "of transporting passengers" on this route, and this is all that is pledged or guaranteed to them, or intended so to be, by the act. It contains no pledge that the State of Virginia

will not allow any other railroad to be constructed between those points, or any portion of the distance for any purpose; but only a road, "the probable effect of which would be to diminish the number of passengers traveling between the one city and the other, upon the railroad authorized by the Act," or to compel the company to reduce the passage money.

That the respondents will not be allowed to carry the passengers traveling between the City of Richmond and the City of Washington, is admitted; and they deny any intention of so exercising their franchise as to interfere with the rights secured to complainants. That the parties will differ widely as to the construction of the grant owing to the ambiguity created by the use of the word "between," as it may affect the transportation of passengers traveling to or from the west, is more than probable. But on this application for an injunction against the construction of respondents' road, the Chancellor was not bound to decide the question, by anticipation: and, although he may have thrown out some intimation as to his present opinion on that question, he has very properly left it open for future decision, to be settled by a suit at law, or in equity, "upon the facts of the case as they may then appear." But, however probable this dispute or contest may be, it is not for this court to anticipate it, and volunteer an opinion in advance.

The Act of 1848, authorizing the extension of the complainants' road, is silent as to any grant of power to transport passengers, so as to interfere with the pledge given to complainants; and it is sufficient, for the decision of the case before us, to say that the grant of authority to respondents to extend their road from the junction to the dock at the City of Richmond, does not, *per se*, impair the obligation of the contract, contained in the 38th section of complainants' charter. The conditions annexed to the grant to respondents, by which the complainants were enabled to defeat it, cannot affect the question in any way. If the 38th section of the Act of incorporation of complainants does not restrain the Legislature from constructing another railroad for any purpose, parallel or near to the complainants', the respondents have a right to proceed with the construction of their road, and the State Court was justified in refusing the injunction.

The counsel, very properly, have not insisted in their argument *in this court, on this [*83 point made in their bill, that the Legislature had no power to authorize the construction of one railroad across another. The grant of a franchise is of no higher order, and confers no more sacred title, than a grant of land to an individual; and, when the public necessities require it, the one, as well as the other, may be taken for public purposes on making suitable compensation; nor does such an exercise of the right of eminent domain interfere with the inviolability of contracts. (See *West River Bridge Company v. Dix*, 6 How., 507.)

Leaving, therefore, the question, as to the proper construction of the contract or rights guaranteed to the complainants, by this section of their charter, to be settled when a proper case arises, we are of opinion that the State Court did not err in refusing to enjoin respondents from constructing their road according to

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the authority given them by the Act of Assembly of 27th March, 1848, and that said Act does not impair the obligation of the contract made with the complainants, in the 88th section of their Act of incorporation.

The judgment of the Court of Appeals of Virginia is therefore affirmed, with costs.

Messrs. Justices McLean, Wayne, and Curtis dissented.

Mr. Justice Curtis:

I have been unable to agree with the majority of the court in this case, and some of the principles on which a decision depends are of so much importance, as affecting legislation, that I think it proper to state my opinion and the reasons on which it rests.

That the 88th section of the complainants' charter contains a contract between the corporation and the State, the obligation of which the latter cannot impair by any law, must, I think, be admitted. Whether "An Act for the extension of the Louisa Railroad to the dock in the City of Richmond," does impair that obligation, depends upon the interpretation which the contract requires; and, inasmuch as it is the duty of this court to determine whether the obligation of the contract has been impaired, it is necessarily its duty to decide, what is the true interpretation of the contract.

The 88th section, with its preamble, are as follows:

"And whereas the railroad authorized by this Act will form a part of the main northern and southern route between the City of Richmond and the City of Washington, and the privilege of transporting passengers on the same, and receiving the passage money, will, it is believed, be a strong inducement to individuals to subscribe for stock in the company, §4*) and the General Assembly *considers it just and reasonable that those who embark in the enterprise should be hereafter deprived of that which forms a chief inducement to the undertaking.

"§8. Be it therefore enacted and declared, and the General Assembly pledges itself to the said company, That in the event of the completion of the said railroad from the City of Richmond to the Town of Fredericksburg, within the time limited by this Act, the General Assembly will not, for the period of thirty years from the completion of the said railroad, allow any other railroad to be constructed between the City of Richmond and the City of Washington, or for any portion of the said distance, the probable effect of which would be to diminish the number of passengers traveling between the one city and the other, upon the railroad authorized by this Act, or to compel the company, in order to retain such passengers, to reduce the passage money: Provided, however, That nothing herein contained shall be so construed as to prevent the Legislature, at any time hereafter, from authorizing the construction of a railroad between the City of Richmond and the towns of Tappahannock or Urbana, or to any intermediate points between the said City of Richmond and the said towns. And provided, also, That nothing herein contained shall be construed to prevent the General Assembly from chartering any other com-

pany or companies to construct a railroad from Fredericksburg to the City of Washington."

The preamble in effect declares what general object the parties have in view, and the section makes known to what extent and by what means that object is to be accomplished. That general object is to secure the corporation from being deprived of the passenger travel on its railroad; and the means of prevention are, to prohibit for thirty years the existence of any other road, the probable effect of which would be to diminish the number of passengers traveling between Washington and Richmond upon the railroad of the complainants.

The first question is, whether what is called the extension of the Louisa road, is a railroad, the probable effect of which would be to diminish those passengers; and this depends on what passengers are referred to in the contract.

It is maintained by the appellees that only passengers traveling the distance between Washington and Richmond are intended; but this is not consistent either with the substantial object of the parties, or with the language they have employed to make known their agreement. "The privilege of transporting passengers on the same and receiving the passage money," and protection from being "deprived of that which forms the chief inducement of the undertaking," would be but imperfectly secured, if limited to one particular class of passengers only. Such a limitation *inconsistent [§85] with the apparent object of the parties is not to be engrafted on the contract unless clearly expressed. It is said that the words "passengers traveling between the one city and the other," contain this limitation, their meaning being passengers traveling from one city to the other. The word "between" in this clause admits of that interpretation, but does not require it. That word may also designate any part of the intermediate space, as well as the whole. It may be correctly said that the complainants' railroad is between Richmond and Washington, though it does not traverse the whole distance from one of those cities to the other, and the words which immediately follow, certainly tend strongly to show that it was in this last and more comprehensive sense the word "between" was here used. The whole clause is, "passengers traveling between one city and the other, upon the railroad authorized by this Act." But the railroad there referred to, upon the completion of which this contract was to take effect, was only to be from Richmond to Fredericksburg, so that, strictly speaking, passengers could not travel to or from the City of Washington upon the railroad authorized by the Act; they could thus pass over only a part of the intermediate space between Washington and Richmond. This clause therefore does not control the evident general intent of the parties to protect the passenger travel, but rather tends to make that general intent more clear. The question being whether the travelers referred to are only those going the whole distance, and one part of the descriptive words, designating where they are traveling, being ambiguous, and the other part which points out how they are traveling, being clear, the result of the whole is to include all who travel in the intermediate space between the two cities, upon the complainants' railroad. And this construction is

still further strengthened by the stipulation that the State will not authorize another road "to be constructed between the City of Washington and the City of Richmond, or for any portion of the said distance;" for if the object of parties was merely to protect the enjoyment by the complainants of the tolls derivable from passengers going from one of those cities to the other, it is highly improbable that the State would have agreed to this broad restriction. Construing the preamble and the section together, I think it was the intention of the parties to secure to the complainants, for the period of thirty years, the exclusive enjoyment of all the railroad passenger travel over every part of the line between Washington and Richmond; and that the mode of security agreed on by the parties was, that the State should not authorize the construction of any such railroad as might probably interfere with that exclusive enjoyment.

86* In coming to this conclusion I have not overlooked the rule, that grants from states to corporations of such exclusive privileges, are to be construed most strongly against the grantees. But this rule, like its converse, *fortius contra proferentem*, which applies to private grants, is the last to be resorted to, and never to be relied upon, but when all other rules of exposition fail. (Bac. Max., reg. 3; 2 Bl. Com., 380; *Love v. Pares*, 18 East, 86.) In *Hindekoper's Lessee v. Douglass*, 8 Cranch, 70, Chief Justice Marshall says: "This is a contract; and although a state is a party it ought to be construed according to those well established principles which regulate contracts generally." A grant such as is now in question, in consideration of the grantees risking their capital in an untried enterprise, which, if successful, will greatly promote the public good, in no proper sense confers a monopoly. It enables the grantees to enjoy, for a limited time, what they may justly be considered as creating. It is in substance and reality, as well as in legal effect, a contract, and in my judgment it is the duty of the court to give it such a construction as will carry it into full effect; imposing on the public no restriction, and no burden, not stipulated for, and depriving the company of no advantage, which the contract, fairly construed, gives. This is required by good faith; and to its demands all technical rules, designed to help the mind to correct conclusions, must yield. Having come to the conclusion that the intention of the parties to this contract was to secure to the complainants exclusive enjoyment of all railroad passenger travel over every part of the distance between Richmond and Washington for thirty years, and that the means adopted to effect this object was the promise of the State to authorize the construction of no railroad which might probably interfere with that exclusive enjoyment, the next inquiry is, whether the extension of the Louisa Railroad to the dock in the City of Richmond would probably have that effect. This Act enables the Louisa Railroad Company to extend their road, from its junction with the complainants' road, at a point about twenty-four miles from Richmond, to that city, and thus to make another railroad between Richmond and that point on the complainants' road.

That this authority comes within that part of the restrictive stipulation, which describes the route over which another railroad is not to be built, is clear; for it does authorize "another railroad," "for a portion of the distance" "between the cities of Richmond and Washington." But it is said that it does not come within the residue of the restrictive clause, because its probable effect will not be to diminish that passenger travel designed to be secured to the complainants. To this I cannot assent. The Louisa Company, by their original charter, are expressly authorized to [87 carry passengers on their railroad, and when they are empowered by the Act now in question to extend their road, it is a necessary implication that the extension is for the same uses, and subject to the same rights, and powers, and privileges as the original road, to which it is to be annexed. And accordingly we find, that by the 5th section of this Act, the Legislature has prescribed a limit of tolls, as well for passengers as for merchandise, coming from or going to another railroad and passing over the whole length of the Louisa road, and each part of it, including the extension.

Passengers using the complainants' road between Richmond and the junction, may be divided into three classes. Those who travel the whole, or a part of the distance between Richmond and the junction, and do not go beyond the junction; those who do go to, or come from points beyond the junction on the complainants' road; and those who travel on the Louisa road, beyond the junction, going west, or coming east. The extension of the Louisa road is adapted to carry all these, and by the Act complained of, the Louisa Company is authorized to construct a road to carry them. It may certainly be assumed, that a corporation, created to conduct a particular business for profit, will do all such business as it is its clear interest, and within its authority to do, and which it was created for the very purpose of doing. And if so, the effect of this extension must be, to transport thereon a part of all these classes of passengers, and thus to diminish the number of these same classes of passengers, who, at the time of the passage of the Act in question, used the complainants' road.

As to those passengers who do not use the Louisa road beyond the junction, I am at a loss to perceive any reason why they are not within the description of passenger travel designed to be secured to the complainants; and if they are excluded therefrom, I know of none who would be included, unless upon the interpretation already considered and rejected, that the contract was designed to embrace only passengers traveling the entire distance between Richmond and Washington. It is not absolutely necessary to go any further to find that this Extension Act impairs the obligation of the contract, by authorizing another road to be built, the probable effect of which would be to diminish the number of passengers traveling on the complainants' road between the junction and Richmond. But it is clear to my mind, that the third class of passengers using the Louisa road, are as much within this contract as any others. To explain my views on this point, it is necessary to refer to a few dates.

The complainants were incorporated in February, 1834, and their Act of incorporation 88^d] contained the compact now *relied on. Their road was completed and opened for use in January, 1837. In February, 1838, an Act was passed incorporating the stockholders of the Louisa Railroad Company. In December, 1838, the Louisa road was opened for use to the Louisa court house, and from that time to March, 1848, the passengers using the Louisa road, going to or coming from Richmond, and points between that city and the junction, passed over the road of the complainants. In March, 1848, the complainants and the Louisa Company having differed concerning the tolls to be charged by the former on passengers and merchandise going to or coming from the Louisa road, the Legislature passed the "Act for the extension of the Louisa Railroad," which contains the following section: "Be it further enacted, that in case the Richmond, Fredericksburg and Potomac Railroad Company shall, at the next annual meeting of the stockholders, stipulate and agree, from and after the expiration of the present contract with the Louisa Railroad Company, to carry all passengers and freight coming from the Louisa Railroad from the junction to the City of Richmond, at the same rate per mile as may at the same time be charged by the Louisa Railroad Company on the same passengers and freight; and shall also agree to carry all passengers and freight entered at the City of Richmond for any point on the Louisa Railroad, at the same rate per mile as is charged at the time for the same, by the Louisa Railroad Company; and shall also agree to submit to the umpirage of some third person or persons, to be chosen by the said companies, the compensation to the Richmond, Fredericksburg and Potomac Railroad Company for collecting at the depots in Richmond the dues of the Louisa Railroad Company, and any other matters of controversy which may arise between the said companies owing to the connection between them, then this Act to be void, or else to remain in full force." It will thus be seen that the passenger travel, which it is the object of this Act to take away from the complainants' road, had been *de facto* a part of its passenger travel between Richmond and the junction for about ten years. It is maintained that as the Louisa Railroad, from the junction westward, was the cause of the existence of this travel upon the complainants' road, between Richmond and the junction, the Louisa corporation might be empowered to construct another road between those points for the purpose of doing that business. In other words, that passenger travel actually existing on the complainants' road, may properly be diminished by the construction of another road for a part of the distance between Richmond and Washington, provided it be done by a party who at some prior time was instrumental 89^d] in increasing the passenger travel; *that we are to inquire whether by this new and competing road any more is to be taken away than was brought by the corporation which builds it, and if not, then the competing road does not diminish the number of passengers, traveling on the complainants' road, within the fair meaning of this contract. I cannot give

to this contract such a construction. It seems to me to be at variance with its express terms and with what must have been within the contemplation of the parties when it was entered into. The promise not to authorize any other railroad between Washington and Richmond, or for any part of that distance, the probable effect of which would be to diminish the number of passengers traveling on the complainants' railroad is absolute and unqualified. It contains no reservation in favor of parties who have been instrumental in bringing that travel to the complainants' road. It extends over the period of thirty years, and applies to the travel actually existing thereon during every part of that period, to whatever causes its existence there may be attributable. It must have been contemplated by the parties that the number of travelers on the complainants' road would increase during the long period of thirty years; it must have been known to them that this increase would be likely to arise, among other causes, from the increased number of passengers coming laterally to the line, in consequence of the construction of other railroads, as well as from increased facilities of access by other means. They enter into a contract which by its terms protects this increased travel during the whole period, and by whatever causes produced, just as much as it protects the travel existing during the first month after the opening of the road. How, then, can we engraft upon the contract an exception not found there, and say, that when it speaks generally of passengers traveling upon the road, it does not mean passengers which another railroad corporation has brought there? I am unable to see why not, as much as if a steamboat or stage company had brought them. In my opinion this class of passengers on the complainants' road, are as truly within the contract as any others; and a railroad, the object of which is to take away this class of passengers from the complainants' road, is one which the State has promised it would not authorize to be built.

Parties may agree, not only on the substantial rights to be protected, but on the particular mode of protecting them; and if they do agree on a particular mode, it becomes a part of their contract, which each party has a just right to have executed. In this compact the parties have agreed on the mode of protection. It is that the State will not authorize to be built any other railroad, which would probably have the effect to diminish the *number of 90^d] passengers on the complainants' road. It is the right to construct, and not the right to use which the contract restrains. To say that the State may properly authorize a road to be built, the purpose of which is to carry passengers, and thus diminish the number of passengers on the complainants' road, but that the road thus authorized must not be used to the injury of the complainants' rights, is to strike out of the contract the stipulation that such a road should not be authorized to be built. The power of the State to enable a corporation to build another road to carry merchandise only, seems to me to have nothing to do with this question. When the Legislature shall adjudge that the public convenience requires another railroad there, to carry merchandise only, and

that therefore the power of eminent domain may be exercised to build it, and when a company is found ready to accept such a charter, and risk their funds in its construction, then a case will arise under the power of the Legislature to authorize a road for the transportation of merchandise only. But in the law now in question the Legislature has not so adjudged; no such charter has been granted, or accepted, and no such road built: but one which the State is by its own promise restrained from authorizing. It seems quite aside from the true inquiry, therefore, to urge that the State might have empowered a company to make a railroad on which to transport merchandise only; for it has not done so.

It has been suggested by one of the defendants' counsel, that though the power of the Legislature to enter into a compact for some exclusive privileges is not denied, yet that the Legislature had not power to grant such privileges as are here claimed by the complainants, and therefore the State is not bound thereby. This is rested not upon any express restriction on the powers of the Legislature, contained in the Constitution of Virginia, but upon limitations resulting by necessary implication from the nature of the delegated power confided by the people of that State to their government. But if, as must be, and is admitted, it is one of the powers incident to a sovereign state to make grants of rights, corporeal and incorporeal, for the promotion of the public good, it necessarily follows that the Legislature must judge how extensive the public good requires those rights to be. Whether the State shall grant one acre of land, or one thousand acres; whether it shall stipulate for the enjoyment of an incorporeal right, in fee, for life or years; whether that incorporeal right shall extend to one, or more subjects; and what shall be deemed a fit consideration for the grant in either case, is intrusted to the discretion of the legislative power, when that discretion is not restrained by the constitution under which it acts. This has been the interpretation by all [*1] courts, and the practice under all *constitutions in the country so far as I know, and it seems to me to be correct. (See *Piscataqua Bridge v. New Hamp. Bridge*, 7 N. H. Rep., 35, and the cases there cited; *Enfield Bridge v. The Hart, & N.H. R. R. Co.*, 17 Conn. R., 40; *Washington Bridge v. State*, 18 Conn. R., 53.)

It remains to consider whether this court has jurisdiction to reverse the decision of the State Court.

The Court of Appeals having refused to entertain an appeal, the Superior Court of Chancery of the Richmond Circuit was the highest court of the State to which the complainants could carry the case; and it is to the decision of that court we must look. The questions are whether that court erroneously decided against a right claimed by the complainants under the Constitution of the United States, and whether the bill was dismissed by reason of that erroneous decision. The points decided are set out with great clearness upon the face of the decree. Their substance is, that the construction of this extension road is lawful, the Legislature having power to authorize it; that it may lawfully be used for the transportation of passengers, who, but for the existence of the Louisa road, would

never have come on to the line of the Fredericksburg road; that whether the Louisa Company will use the extension for the transportation of any other passengers, and thus infringe complainants' rights, does not appear; when the supposed case shall occur, it may be proper to interfere by injunction, if, upon the facts of that case as they shall appear, there is not a plain, adequate, and complete remedy at law.

It is clear, then, that the Chancellor decided, against the right claimed by the complainants, under the Constitution, that this extension should not be constructed. In my opinion, this decision was erroneous. It is clear, also, that he decided against their right, under the Constitution, to be protected in the enjoyment of the passenger travel coming upon their road, in consequence of the existence of the Louisa road. I think this was also erroneous. By reason of these decisions the bill was dismissed. They left nothing but a case of contingent damage, which would not happen at all, if the Louisa Company should carry only the passengers coming upon the line of the complainants' railroad by reason of the existence of the Louisa road; there was no certainty as to what extent, or under which circumstances, or whether at all, the complainants' rights would be infringed.

Upon these views of the contract of the State, and the rights of the complainants, it necessarily followed that the bill was to be dismissed; for equity would not interfere in a case where the defendants had valuable rights and powers, which they might not *exceed, and which [*02] they ought not to be restrained from exercising. But, on the other hand, if the defendants had no such rights, or powers; if they were claiming them, and about to exercise them, in a manner certain to inflict great and continuing injury on the complainants, the extent of which injury a court of law could not fully ascertain, and could redress, even partially, only by a great multiplicity of suits, then no court of chancery would hesitate to grant relief. It is certain, therefore, that this bill was dismissed, by reason of, what I consider, the erroneous views taken by the Chancellor, of the rights claimed by the complainant under the Constitution of the United States.

It has been argued that by the local law of Virginia, contained in the general Railroad Act of that State, the Chancellor had not jurisdiction to grant an injunction to restrain the construction of the extension road. If the Chancellor had so decided and dismissed the bill, for that reason this court could not reverse that decision. But he did not so decide it; and I cannot infer that he would so decide if this case were to be remanded, because I am of opinion that the statute relied on has no application to this case.

My opinion is that the decree of the Superior Court of Chancery should be reversed, and the case remanded, with such directions as would secure to the complainants the remedy to which they are entitled, to prevent the violation of rights, secured to them by the Constitution of the United States.

ORDER.

This cause came on to be heard on the transcript of the record from the Court of Appeals of the Commonwealth of Virginia, and was ar-

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gued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Court of Appeals in this cause be, and the same is hereby affirmed, with costs.

Cited.—16 How., 413, 430; 1 Black., 380, 446; 23 Wall., 306; 12 Otto, 254; 15 Otto, 71.

HENRY PARISH, DANIEL PARISH, LE-ROY M. WILEY, JOHN R. MARSHALL, THOMAS P. NORRIS, and THOMAS PARISH, Merchants and Partners trading under the Firm and Style of PARISH & Co.,
Appellants,

v.

CALEB MURPHREE, Administrator of GEORGE GOFFE, Deceased; LOUISA C. GOFFE, THOMAS WILLIAMS, JR., JOHN H. HENDERSON, Trustee, &c.; MARTHA LUCY, ADDISON BOYKIN AND WIFE, ELIZABETH G. GOFFE, CALVIN NORRIS, AND DAVID STRODER.

Post-nuptial settlement, when void as to creditors, whether party insolvent at time or not.

The Statute of Frauds in the State of Alabama declares void conveyances made for the purpose of hindering or defrauding creditors of their just debts.

§35] *Where a person made a settlement upon his wife and children, owing at that time a large sum of money, for which he was soon afterwards sued, and became insolvent, these circumstances, with other similar ones, are sufficient to set aside the deed as being fraudulent within the statute.

THIS was an appeal from the District Court of the United States for the Northern District of Alabama.

It was a bill filed by the appellants, as creditors, to set aside a deed of settlement made by George Goffe upon his wife and daughters, under circumstances which are detailed in the opinion of the court.

The District Court sustained the deed upon the following ground:

"The true practical rule which I think is fully authorized by the case of *Hinde's Lessee v Longworth*, is laid down by the Supreme Court of New York, in the case of *Jackson v. Town*. That rule is, that 'neither a creditor nor a purchaser can impeach a conveyance *bona fide* made, founded on natural love and affection, free from the imputation of fraud, and when the grantor had, independent of the property granted, an ample fund to satisfy his creditors.'

"Testing the case under consideration by this rule, we must look to the evidence to ascertain the amount and value of the property owned by George Goffe, as well as by the firm of G. & J. M. Goffe, at the period of the sale to Williams, and the conveyance of his notes for the benefit of Mrs. Goffe and her daughters, independent of the Blount Springs tract; and

also to determine whether these deeds are made *bona fide*, and free from the imputation of fraud."

The District Court considered that the facts of the case brought it within the operation of this rule, and therefore upheld the deed.

The complainants appealed to this court.

It was argued by **Mr. Volney E. Howard** for the appellants, for whom also a printed brief was filed by **Mr. J. A. Campbell**, and submitted by **Mr. Wilcox** for the defendants, on a printed brief.

The following sketch will present the views of the respective counsel upon the questions of fact and of law:

The counsel for the appellants stated that the defendants rely upon the following facts: 1st. That Goffe was fully able to pay his debts with the property that remained to him, and that his insolvency, which was declared and notorious in the early part of 1839, arose from the improvident dealings of 1837 and 1838, as a country merchant. 2d. That Goffe had been advanced by the father of his wife, and this settlement was a return for his "kindness." 3d. That Mrs. Goffe relinquished dower in the lands, and that her relinquishment was the consideration of the settlement.

Much evidence was taken on the first issue, none on the second, and Williams was examined as to the third, and proved that after the arrangements for a sale had been concluded by Goffe to him of the Blount Springs, Goffe proposed the settlement of four notes on his children, amounting to \$40,000. That he (Williams) insisted upon the settlement embracing the wife of Goffe, and threatened to interrupt the contract if his wishes were not fulfilled. That Goffe settled the last note due (due in 1849) for \$14,000 upon his wife, making the whole settlement \$54,000. (Record, 158, 159, 160.)

Much evidence was taken upon the first part of the case. The result of it was that Goffe in 1836 and 1837 carried on the business of selling merchandise. That he failed to meet his payments in the fall of 1837, in New York, and in the early part of 1838 a very large amount of his paper lay over, including the large debt of the plaintiffs. That suits were instantly commenced against him by a large number of creditors, and early in 1839 he was sold out. That in that year he "run off" with about \$10,000 worth of property, to Texas, and died in a year or two after.

The fact is shown that Goffe was largely indebted, and had sent to the north for a larger credit at the date of his contract with Williams, and had obtained it. That he did not disclose this transaction.

In the record, a statement of twenty-seven judgments will be found. Of these, four were rendered on notes dated in February, 1837, and four in the months of September and October, 1837, independent of the judgments recovered by the plaintiff.

The record also shows that Goffe sought and obtained credit in New York without any disclosure of the disposition of the notes of Williams, and the deed of trust on the Springs, to his wife and children.

The principal seat of the business of Goffe was at Tuscaloosa, then the capital of Alabama, and the Blount Springs are situate in a

NOTE.—*Marriage settlements, or conveyance for benefit of wife and child, when void, or void, as to creditors.* See note to *Sexton v. Wheaton*, 8 Wheat., 223.

secluded spot in a poor and mountainous country, having but little intercourse with commercial cities.

The judge of the District Court assumed that the fact that Goffe was able to pay his debts in September, 1837, was proven, and upheld the settlement.

The record shows that he (Goffe) sought and obtained credit for these plaintiffs at that time.

The evidence simply indicates insolvency at the date of the sale apart from the property of the Blount Springs.

95*] *Covington, his clerk, exaggerates the value of his property. The Tuscaloosa store was sold for \$1,000, and is put down at \$10,000.

The wild lands in Blount and Walker counties were unsalable at the government price.

In Alabama, the Statute of 18 and 27 Elizabeth, have been substantially re enacted. (Clay's Dig., tit. Frauds.) The construction of that statute by the Supreme Court is, that all voluntary conveyances as to existing creditors are in law fraudulent, and that the creditor is not required to prove circumstances of fraud. (2 Stewart's Rep., 336; 9 Ala., 937, 945; 16 Ala., 238; 8 Porter's Rep., 196; 6 Ala. Rep., 506; 10 Ala., 482; 14 Ala., 350.)

The Supreme Court of the United States, in *Sexton v. Wheaton*, 8 Wheat., 229, notice this construction of the Act. In construing this statute, the courts have considered every conveyance not made on consideration deemed valuable in law, as void against previous creditors. (1 Iredell, Eq., 180; 4 Wash. C. C. R., 129, 137; 4 S. & M., 303; 1 Brock., 501, 511; 3 Johns. Ch. R., 481; 12 Pet., 179, 198; 1 Robinson, Va. R., 125; 8 Metcalf, 411; 7 How. S. C., 220.)

The utmost relaxation of this rule is, that when the gift is reasonable in amount, where an ample estate is left to the debtor for the payment of existing creditors without hazard to their rights, or any material diminution of their prospects of payment, his settlement will not be held invalid.

Under this relaxed rule, the case of the defendants cannot be maintained.

The debts due by the donor were large, covering quite the whole of the property that remained to him, upon a favorable calculation. The settlement was enormous, and greatly impaired the prospects of payment of the creditors.

Insolvency for such an amount is proven, that the indebtedness of Goffe, in 1837, cannot have been fully ascertained in this case. (1 American Leading Cases, by Hare & Wallace, 60.)

The evidence of Williams to show a different consideration for the settlement than the one apparent on the deed of trust, has not succeeded. Goffe had already concluded to settle \$40,000, when Williams first conversed with Goffe, on the children. At the suggestion of Williams, he adds the last note due ten years after, to the settlement, in favor of the wife. The fraudulent motive was already in operation when Williams spoke, and we nowhere understood that the wife demanded the settlement, or that it was a consideration for the transfer itself. It seems rather to have been done to pacify Williams.

The deed of trust expresses no consideration of the kind now set up. It is a purely voluntary settlement on the face of the *deed. [*96 It is not competent to the defendants to change its character. (4 Phil. Ev., Hill & Cowen's notes, note 287, p. 583; 16 Ohio R., 488; 7 Johns., 841; 11 Wheat., 218.)

Mr. Wilcox, for the appellees, made the following points:

But two questions are presented by the record: one of fact, and one of law.

1. Was George Goffe indebted to insolvency, apart from the Blount Spring property, at the time he made the settlement on his wife and daughters? The deposition of Elam Covington, who was well acquainted with Goffe's affairs, settles this question. He states that Goffe owned at the time of the settlement, independent of the Blount Spring property, real estate to the amount of \$12,000—negroes worth \$13,000. There were debts due him from other persons to the amount of \$10,000; making in all \$35,000 of his individual means. The assets of the firm of G. & J. M. Goffe, at the same time, consisted of \$10,000 worth of merchandise, and \$10,000 in debts due them. In addition to this, Goffe still held the first two notes given by Williams amounting to \$10,000; making an aggregate of \$65,000 worth of property (partnership and individual), liable to the individual and firm debts. The debts of Goffe (both individual and partnership) according to the testimony of the complainants' own witnesses, only amounted to about \$25,000. The first question, then, is fully answered; for there is no conflict of testimony. The allegation of the bill, that the settlement was made to hinder and delay creditors, is fully denied by the answers, and a good reason shown for its being made, to wit: that Goffe, when a poor young man, had married his wife, and obtained by her a considerable amount of property, a portion of which he wished, while in prosperous circumstances, to settle on his children. Mrs. Goffe also had relinquished her right of dower to the Blount Spring tract of land; and, in consideration of this, the settlement was made on her. Goffe at first refused to make it, and only consented, finally, at the urgent solicitation of his friends. This conclusively shows that he was actuated by no fraudulent design. See deposition of Colonel Williams. It is also shown that Goffe paid his debts until the fall of 1839, two years after the settlement was made.

2. Will an indebtedness not amounting to insolvency, existing at the time of a voluntary settlement, invalidate it? Or, is such indebtedness *per se* evidence of fraud?

Whatever may have been the conflict of authorities (English and American) on this point, it can no longer be considered open, since the decision by this court, in the case of *Hinde's Lessee v. Longworth*, 11 Wheat., 199. The doctrine of *per se* *fraud is here expressly repudiated, and each case made to depend on the circumstances attendant on it. Indeed, common sense will dictate that a man who makes a settlement of this sort under ordinary circumstances, and at the same time retains a sufficiency of property to pay all the debts that may be existing against him, cannot intend a fraud. A fraud, or a desire to avoid the

payment of his debts, would lead him to cover up, or secrete all. (See; also, *Van Wyck v. Seward*, 6 Paige, 62; 1 Edwards, 497; 2 Bland., 26; 3 Desaus., 1.)

The decree of the court below dismissing the bill of complaint was therefore correct, and an affirmance is respectfully asked.

Mr. Justice McLean delivered the opinion of the court:

This is an appeal in chancery, from the District Court of Northern Alabama.

The bill was filed to set aside a deed of settlement, made by George Goffe, dated the 12th September, 1837, on his wife and four daughters, on the ground that it was made in fraud of creditors.

At the date above stated, Goffe and wife, by deed of general warranty, conveyed to Thomas Williams, Jr., six hundred and forty acres of land, including the "Blount Spring Tract," in Blount County, State of Alabama, for the consideration of sixty-four thousand dollars.

To secure the payment of the consideration, on the same day, Williams executed a deed of trust on the same property to Joseph M. Goffe and George Goffe, for which notes bearing interest were given, five thousand dollars payable 1st March, 1838, five thousand payable on the 1st of October following, ten thousand the 1st of October, 1840, ten thousand the 1st of October, 1842, ten thousand the 1st of October, 1844, ten thousand the 1st of October, 1846, and fourteen thousand the 1st of October, 1848. Williams was to remain in possession of the land, and was authorized to sell parts of it to meet the above payments.

On the same day, George Goffe executed a deed of settlement signed also by Joseph M. Goffe, by which he appropriated to his four daughters, the four ten thousand dollars notes above stated, and the fourteen thousand dollars note to his wife in consideration of "the natural love and affection he had for them."

The complainants represent that George and J. M. Goffe did business together as merchants, and that on the 2d of February, 1837, they executed to them their promissory note for \$5,169, payable in thirteen months; and on the same day another note payable in twelve months for five thousand one hundred and 98*] *sixty-eight dollars and twenty-five cents; also another note on the 22d September, 1837, for \$953.25, payable nine months after date. On all which notes judgments were obtained in the District Court, amounting to the sum of \$14,667.42, at November Term, 1841. Executions having been issued on the judgments, were returned no property, and the defendants are alleged to be insolvent. And the complainants pray that George Goffe may be decreed to pay the amount due them, and on failure to do so, that Williams may be decreed to pay the same, and in default thereof, that the lands and real estate or debts assigned to Mrs. Goffe and her children, may be converted into money by sale or otherwise so as to pay the sum due the complainants.

The defendants deny the allegations of the bill, and aver that at the time of the settlement the Goffes were able to pay their debts; that

their assets exceeded their liabilities, and that the complainants have failed to collect their claims through their own negligence.

The statute of frauds of Alabama declares that "every gift, grant, or conveyance of lands, &c., or of goods or chattels, &c., by writing or otherwise, had, made or contrived, of malice, fraud, covin, collusion or guile, to the end or purpose to delay, hinder or defraud creditors of their just and lawful actions, suits, debts, &c., shall be from henceforth deemed and taken only as against the person or persons, his, her or their heirs, &c., whose debts, suits, &c., by such means, shall or might be, in anywise disturbed, hindered, delayed or defrauded, to be clearly and utterly void," &c.

This statute appears to have been copied from the English statute of the 13th Elizabeth, and most of the statutes of the states, on the same subject, embrace substantially the same provisions. The various constructions which have been given to the statutes of frauds by the courts of England and of this country, would seem to have been influenced, to some extent, from an attempt to give a literal application of the words of the statute instead of its intent. No provision can be drawn so as to define minutely the circumstances under which fraud may be committed. If an individual being in debt, shall make a voluntary conveyance of his entire property, it would be a clear case of fraud; but this rule would not apply if such a conveyance be made by a person free from all embarrassments and without reference to future responsibilities. But between these extremes numberless cases arise, under facts and circumstances which must be minutely examined, to ascertain their true character. To hold that a settlement of a small amount, by an individual in independent circumstances, and which, if known to the public, would not affect his credit, is fraudulent, would be a perversion *of the stat- [*99] ute. It did not intend thus to disturb the ordinary and safe transactions in society, made in good faith, and which, at the time, subjected creditors to no hazard. The statute designed to prohibit frauds, by protecting the rights of creditors. If the facts and circumstances show clearly a fraudulent intent, the conveyance is void against all creditors, past or future. Where a voluntary conveyance is made by an individual free from debt, with a purpose of committing a fraud on future creditors, it is void under the statute. And if a settlement be made, without any fraudulent intent, yet if the amount thus conveyed impaired the means of the grantor so as to hinder or delay his creditors, it is as to them void.

In the case before us, two of the debts, exceeding ten thousand dollars, were contracted in February, 1837, seven months before the settlement deed was executed. The other debt of nine hundred fifty-three dollars and twenty-five cents was contracted the 22d of September, ten days after the settlement. The property conveyed amounted to sixty-four thousand dollars, fifty-four thousand of which were covered by the settlement.

This conveyance is attempted to be sustained on the ground that Mrs. Goffe relinquished her dower to the tract conveyed, and

that George Goffe, including the partnership concerns, held an aggregate property, after the settlement, amounting to the sum of sixty-five thousand dollars; and that the debts against Goffe individually and also against the partnership, did not exceed twenty-five thousand dollars. It appears that in the fall of 1837, and in the early part of 1838, a large amount of his paper being due, at New York, including the plaintiffs', was not paid. Suits were commenced against him, and early in 1839, his property, within the reach of process, was all sold. Goffe, it is proved, sent to Texas in 1839, by his brother, ten negroes and other property, worth about ten thousand dollars. In 1840, George Goffe went to Texas, where he afterwards died. Twenty-seven judgments were rendered against him, four of which were on notes dated the 27th of February, 1837, and four on notes given in September and October following, independent of the plaintiffs' judgments.

These facts are incompatible with the assumption that Goffe's assets were more than double his liabilities. His aggregate of property must have been made of exaggerated values, and too low an estimate was made of his eastern debts. After the settlement, and, as it would seem, before it was known to his eastern creditors, his purchases of merchandise were large, and his business at home was greatly extended. Several stores were established by him in partnership with his brother. After having abstracted from his means fifty-**100*** four thousand dollars, this *enlargement of his business shows a disposition to carry on a hazardous enterprise, at the risk of his creditors. In less than three years after the settlement, judgments were obtained against the partnership for between twenty-five and thirty thousand dollars; no inconsiderable part of which had been contracted and was due at the time of the settlement. These facts prove, that after the voluntary conveyance Goffe was unable to meet his engagements. Nothing can be more deceptive, than to show a state of solvency by an exhibit on paper of unsalable property, when the debts are payable in cash. Such property when sold will not, generally, bring one fifth of its estimated value. And such seems to have been the result in the case before us.

But to avoid the settlement, insolvency need not be shown nor presumed. It is enough to know that when the settlement was made, Goffe was engaged in merchandising principally on credit; his means consisted chiefly of a broken assortment of goods, debts due for merchandise scattered over the country in small amounts, wild lands of little value, a few negroes, and a very limited amount of improved real estate, the value of which was greatly overestimated. On such a basis, no prudent man with an honest purpose and a due regard to the rights of his creditors, could have made the settlement.

A conveyance under such circumstances, we think, would be void against creditors, at common law; and we are not aware that any sound construction of the statute has been given which would not avoid it. (*Sexton v. Wheaton et ux.*, 8 Wheat., 229; *Hynde's Lessee v. Longworth*, 11 Wheat., 199; *Hutchinson et al. v.*

Kelley, Robinson's Rep., 123; *Miller v. Thompson*, 3 Porter's Rep., 196.)

The decree of the District Court is reversed, and the cause is remanded to that court, with instructions to enter a decree for the complainants as prayed for in the bill.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Alabama, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said District Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said District Court, with instructions to enter a decree for the complainants, as prayed for in the bill.

Cited—5 Bank. Reg., 169, 459; 6 Bank. Reg., 143, 539; 10 Bank. Reg., 43; 12 Blatchf., 179; 5 Ben., 187; 3 Biss., 193; 2 Low., 91.

***EUCLID WILLIAMSON, THOMAS[*101
F. ECKERT, AND JOHN WILLIAMSON,
Plaintiffs in Error,**

v.

**ALEXANDER B. BARRETT, ROBERT
CLARK, NATHANIEL D. TERRY,
HENRY LYNE, JAMES D. DONALD-
SON, WILLIAM BROWN, AND JOHN B.
SPROWLE.**

*Rules of navigation on the Ohio—Measure of
damages in case of collision.*

The usage upon the River Ohio is, that when the steamboats are approaching each other in opposite directions, and a collision is apprehended, the descending boat must stop her engine, ring her bell, and float; leaving the option to the ascending boat how to pass.

The descending boat was not bound to back her engines, and it was correct in the Circuit Court to refuse leaving to the jury the question whether or not, in fact, such backing of the engines would have prevented the collision, where the ascending boat was manifesting an intention to cross the river.

The proper measure of damages is a sum sufficient to raise the sunken boat, repair her and compensate the owners for the loss of her use during the time when she was being refitted.

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of Ohio.

It was an action of trespass on the case brought by the owners of the steamboat Major Barbour (the defendants in error) against the owners of the Paul Jones, another steamboat, for injuries resulting from a collision between the boats.

NOTE.—Rights of steam and sailing vessels with reference to each other and in passing and meeting. See note to St. John v. Paine, 10 How., 557.

Collision, measure of damages for. See note to Smith v. Condry, 1 How., 23, and note to The Amiable Nancy, 3 Wheat., 546.

Allowance of damages in collision cases. The rule was very deliberately settled in this case and will be strictly adhered to. The Hermann, 4 Blatchf., 441.

Mode of ascertaining the value of a vessel. Does

HOWARD 18.



On the 3d of February, 1848, at a place upon the Ohio River, about one hundred miles below Louisville, the Major Barbour was descending the river, and a collision ensued between her and the Paul Jones, which was ascending; by means of which the Major Barbour became filled with water and sunk.

On the 17th of February, 1848, Barrett and others, being citizens of Kentucky, brought an action of trespass on the case, against Williamson and the other owners of the Paul Jones, in the Circuit Court of the United States for the District of Ohio.

In October, 1849, the cause came on for trial upon the general issue plea. The jury found a verdict for the plaintiffs for \$6,714.29. The following is the bill of exception taken upon the trial:

"Seventh Circuit Court of the United States, Ohio District, *Alexander B. Barrett, Robert Clark, Nathaniel D. Terry, Henry Lyne, James T. Donaldson, William Brown, John B. Sproule, v. Euclid Williamson, Thomas F. Eckert, John Williamson.* Be it remembered, that on the trial of this cause, evidence was given, showing that before and at the time of the collision mentioned in the pleadings in this cause, the plaintiffs' boat, the Major Barbour, was descending the Ohio River, and the defendants' boat, the Paul Jones, was ascending the same river, and heavily loaded, and the Major Barbour was light, the Paul Jones being a much larger boat than the Major Barbour.

It was claimed by the plaintiffs, and testimony offered by them, tending to show that ¹⁰² their boat was descending the middle of the river, and that the collision took place at or about the middle of the river.

It was claimed on the part of the defendants, and evidence was offered to show, that their boat was ascending near the Indiana shore, and that the plaintiffs' boat was also running near that shore, and that the collision took place near that shore. The plaintiffs also offered evidence tending to show that the Paul Jones, a short time before the collision, suddenly turned out of the Indiana shore, and ran across the river into the plaintiffs' boat; and the defendants offered evidence tending to show that the plaintiffs' boat, a short time before the collision, suddenly turned out from the Indiana shore, and crossed the bow of the Paul Jones.

Evidence was also given tending to show that the engines of the plaintiffs' boat were stopped, and the boat floated for some time previous to the collision; but it was admitted that she did not back her engines; and it was claimed by the plaintiffs that she was not bound by the rules or usages of navigation to back her engines.

Evidence was also given tending to show that the Paul Jones, some time previous to the collision, stopped her engines, and then reversed her engines to back the boat, and made from one to three revolutions back, and was actually backing at the time of collision.

And it was claimed by the plaintiffs, that their boat's engines were stopped, and the boat floating as soon as danger of collision was anticipated; and on the part of the defendants it was claimed, that the said Major Barbour's engines were not stopped sufficiently early, and that owing to that, and her not attempting to back her engines, she contributed to the collision.

The plaintiffs and defendants also offered evidence of pilots on the Ohio River, tending to show that boats navigating the Ohio River, were bound to observe the following rules in passing each other: The boat descending, in case of apprehended difficulty or collision, was bound to stop her engines, and float at a suitable distance, so as to stop her headway: and the boat ascending should do the dodging or maneuvering. And some of the pilots also testified, that it was also the duty of both boats to back their engines, so as to keep the boats apart when danger was apprehended, and to do all they could to prevent a collision; but the greater part of them said the rule of the river required the descending boat to stop its engines and float, being at the place of collision, near the middle of the river. And the defendants' counsel asked the court to instruct the jury that, if by backing the Barbour's engine, in addition to stopping and floating, the collision could have been avoided, and the plaintiffs did not back her engines, the plaintiffs could not recover, and that ¹⁰³ plaintiffs were bound to make use of all the means she had to prevent a collision. And thereupon the court charged the jury as follows:

That if the Major Barbour was in her proper track for a descending boat, as proved by sev-

not apply where there is no market price, for vessels of the description. *The Cayuga*, 2 Ben., 125; affirmed, 7 Blatchf., 385.

Collision; rules for avoiding; steamer meeting steamer.

The rule is well settled, that steamers approaching each other from opposite directions are respectively bound to port their helms and pass each other on the larboard side; and applies to a propeller having craft in tow meeting steamer. *New York & Baltimore Transportation Co. v. Philadelphia & Savannah Steam Nav. Co.*, 22 How., 461; *The Niagara*, 3 Blatchf., 37; *Williamson v. Barrett*, 4 McLean, 599; *Abbott on Shipping*, 5th Am. ed., 308, marg. p. 235, 248; *Lowry v. Steamboat Portland*, 1 Law Reporter, 313-318; *The Gazelle*, 1 W. R. 471; 1 W. Rob., 285; 2 W. Rob., 271; 10 How., 559; 18 How., 572; 2 Curt. C. C., 142.

The above rule is not of absolute obligation. *The Santa Claus*, Olcott, 428; 1 W. Rob., 157; 1 W. Rob., 478; 1 Abb., 308; 3 Kent's Com., 230, 231; *Westminster Review*, Sept., 1844, 117.

But must be acted on when there is any probable chance of collision by the two steamers keeping their courses. It is not enough for the party who departs from this rule to show that they would

have gone clear if each had kept its course; he must also show that the other party ought to have perceived there was no probable chance of collision by so doing. *Wheeler v. The Eastern State*, 2 Curt. C. C., 141.

Steamer held in fault for not changing her course on approaching another steamer. *Chamberlain v. Ward*, 21 How., 548; reversing *Ward v. The Ogdensburg*, 5 McLean, 622; 1 Newb., 639; *Clark v. The Ellen*, 32 Hunt's Merch., Mag., 716.

Where one of two approaching steamers observes the rule that each is to port the helm, the burden lies on the other which departed from the rule, to make out a justification. *The Washington*, 3 Blatchf., 276.

If two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side, shall keep out of the way of the other. Rules prescribed by Act of April 29th, 1864, art. 14; 13 Stat. at L., 58, 60.

This rule is a simple and plain one, and should, on all proper occasions, be steadily enforced. *The Chesapeake*, 5 Blatchf., 411.

If a collision occur from such other vessel not having kept on her course, the obligation rests on the latter to show sufficient excuse in the particu-

eral witnesses, near the middle of the river, and the Paul Jones in ascending the river was in her proper track, near the Indiana shore, and she turned out of her proper course, across the river, or quartering, in the language of some of the witnesses, so as to threaten a collision with the Major Barbour; and that as soon as this was discovered the Major Barbour stopped her engine, rang her bell, and floated down the stream, as the custom of the river required, leaving the ascending boat the choice of sides, and this was the law of the river, that on the near approach of the Major she was not required to back her engines, as that might bring her in contact with the other boat, but might presume that the Paul Jones did not intend to run into her, and that for an injury done to the Major Barbour under such circumstances, by the Paul Jones running into her, the plaintiffs are entitled to recover such damages as appears from the evidence was done to the Major Barbour.

That if the Major Barbour turned out of her course, running near the Indiana shore, and this turning out of her course contributed to the collision, the plaintiffs could not recover. That where both boats were in fault, the plaintiffs could not recover. That in such case, the fault of the Major Barbour must be such as led to or contributed to the collision. That if the collision was the result of an unavoidable accident the plaintiffs could not recover.

That should the jury find for the plaintiffs, they will give damages which shall remunerate the plaintiff for the damages incurred, necessarily, in raising the boat, and in repairing her; and also for the use of her during the time necessary to make the repairs and fit her for business. That the jury were not bound to give interest, as claimed by the plaintiffs, but they would give such sum in damages as they shall deem just and equitable under the circumstances.

To which charge of the court, so far as it relates to charging that the Major Barbour was not required to back her engines, but might presume that the Paul Jones did not intend to run into her; and also to so much of the charge as directs the jury that they might give damages for the use of the boat during the time necessary to make the repairs and fit her for business; and also to the refusal of the court to

charge or instruct the jury as requested, the defendants, by their counsel, except, and pray that this their bill of exceptions may be signed and sealed, which is done and ordered to be made a part of the record.

JOHN MCLEAN, [SEAL.]
H. M. LEAVITT, [SEAL.]

*Upon this exception, the case came [*104 up to this court and was argued by Messrs. Chase and Lincoln for the plaintiffs in error, and by Mr. Crittenden for the defendants in error. A brief was also filed by Mr. Fox for the plaintiffs in error.

The counsel for the plaintiffs in error contended that the action should have been "trespass" and not "trespass on the case," because the declaration charged the act to have been done by the defendants below, they being in possession of the boat at the time.

The counsel for the plaintiffs in error then contended, that there were errors in the instructions of the court, both as to the collision and the damages.

1. As to the collision, what was the question before the court below, and upon which the jury were to decide?

It was this: Was the defendants' boat navigated carelessly or unskillfully, and was the plaintiffs' boat from that cause injured? If so, did the plaintiffs in any way substantially contribute to such injury? The plaintiffs below were bound, 1st, to make out fault in those navigating the Paul Jones, directly causing their damage, and 2d, a freedom of those navigating the Major Barbour from any fault substantially contributing to the same.

If the plaintiffs below contributed in any way or to any extent, if they were in fault, although in a much less degree than the defendants, and such fault substantially contributed to the injury, they were not entitled to a verdict.

The judgment, if rendered, was to be for the whole damages, and the jury had no right to distinguish between the degrees of fault of the parties. Of this there is no dispute. I refer the court to a few of the many authorities upon the above position. (*Pucknell v. Wilson*, 24 E. C. L. Rep., 368; 5 Carr. & Payne, 375; *Luxford v. Lurge*, 24 E. C. L. Rep., 391; 5 Carr. & Payne, 421; *Handyside v. Wilson*, 14 E. C. L. Rep., 429; 3 Carr. & Payne, 527;

lar case for a departure from the rule. *The Corsica*, 9 Wall., 630; *The Chesapeake*, 5 Blatchf., 411.

Two steamboats on Mississippi River: held, both in fault, for collision, arising from neglect to use proper fog signals. *The Milwaukee*, 2 Bliss., 500.

Where two vessels under steam, meeting end on, neglect until it is too late to avoid a collision, to comply with the rule requiring each to port her helm, it is no defense for either to prove that she ported her helm before the collision actually occurred. The act of compliance must be seasonable, otherwise it is without merit. *The America*, 92 U. S. (2 Otto), 432.

Where, to avoid a collision between two vessels propelled by steam, one going with and the other against the tide, it is conceded that one should stop, it is the duty of the vessel proceeding against the tide to do so, as her movements can be controlled with less difficulty than those of the other vessel. *The Galatea*, 92 U. S. (2 Otto), 439.

A steamer which is bound to keep out of the way of another approaching so as to involve a risk of collision, has no right to attempt to pass to the left, unless there is an imperative necessity for it, if her so doing involves a change of course or speed by the other, until she has obtained the con-

sent of the other to such movement. *Studwall v. The E. H. Coffin*, 8 Reporter, 297.

When two steam vessels are approaching each other in a fog, the responsibility of keeping out of each other's way is thrown upon both, and they must slacken speed, stop or reverse, as may be necessary. The rule to keep to the right always yields to a contrary agreement made between the parties; and sometimes safety requires that this agreement shall be made before dangerous proximity is reached. *The D. S. Gregory*, 8 Reporter, 487.

Instances of collision between two steamers examined; and the questions of negligence and liability determined, with reference to the facts of the particular case. *The Sylph*, 4 Blatchf., 24; *The Hansa*, 7 Blatchf., 298; *The Cayuga*, 7 Blatchf., 385; *Hazlett v. Conrad*, 1 Dill., 79; *The Favorita*, 1 Ben., 30; *The Electra*, 1 Ben., 282; *The D. S. Gregory*, 2 Ben., 236; *The America*, 2 Ben., 475; *The Warren*, 2 Ben., 498; *The Mary Sandford*, 3 Ben., 100; *The Cambria*, 3 Ben., 334; *The America*, 3 Ben., 424; *The Franz Sigel*, 14 Blatchf., 480; *The Shady Side*, 3 Ben., 424.

Between two steamers, where the pilot of one did not give proper signals. *The Great Republic*, 23 Wall., 20.

Wolf v. Beard, 34 E. C. L. Rep., 435; 8 Carr. & Payne, 373; *Sills v. Brown*, 38 E. C. L. Rep., 248; 9 Carr. & Payne, 601; *New Haven, &c.*, v. *Vanderbilt*, 16 Conn. Rep., 420.)

There are numerous others to the same effect. There is nothing to be found in the books in opposition to the following statement of the law, taken from the case of *Plucknoell v. Wilson*, a case of collision between carriages:

"It is for the jury to say whether the injury to the plaintiff's chaise was occasioned by negligence on the part of the defendant's servants, without any negligence on the part of the plaintiff himself; for if the plaintiff's negligence were in any way concerned in producing the injury, he cannot recover."

105*] *Chancellor Kent very briefly states the rule thus: "But according to the English and American rules, the counts of common law, if there be fault or want of care on both sides, or the loss happen without fault on either side, neither party can sue the other." (8 Kent's Com., 5th Ed., 231.)

The question to be tried, then, was one of negligence or want of care.

2. Upon the subject of damages, the counsel contended that the court erred in charging the jury that the plaintiffs below could recover for lost time or for compensation for the use of the boat while undergoing repairs, there being no allegation of such damages.

There are authorities against such damages in cases where the pleadings are properly framed. (*Blanchard v. Ely*, 21 Wend., 343; *Boyd v. Brown*, 17 Pick., 453; *The Anna Maria*, 2 Wheat., 327; *The Amiabel Nancy*, 2 Wheat., 546; *De Armistad de Rue*, 5 Wheat., 385; *Smith v. Condry*, 1 How., 28; *Conrad v. Pacific Insurance Company*, 6 Pet., 262.)

The case of *Blanchard v. Ely* is direct to the point.

They are considered too speculative, or problematical. The use of the boat might have been of benefit, or might have involved the plaintiff in trouble; might have sunk them money by unprofitable business, or by a collision with some other boat, or she might have sunk by a danger of the river. It is not at all certain that she would have been of any value to them.

I admit, however, that there are cases directly in opposition to *Blanchard v. Ely*. But they are

cases where there was a special allegation of such damages, and in that, the case before the court is distinguished from them.

There was such allegation in the case of *New Haven Steamboat & Transp. Co. v. Vanderbilt*, 16 Conn., 420.

Also in the cases of *Haldeman v. Beckwith*, which was before this court two years ago. The declarations were so similar to these two cases, that I had that in the former case printed for the use of this court, when the case of *Haldeman v. Beckwith* was before them. (See Appendix, A.) In the report of the case in the 16th Conn. it does not appear that there was a special allegation of loss of time, and that the declaration gave the party direct notice of his claim. But there was such allegation.

Such damages could not be recovered in this case, unless it be what the law denominates general damages.

The object of pleading is to give notice to the other party of the claim set up, that he may come prepared to defend it; and nothing can be recovered but that which naturally and necessarily flows from what is alleged.

From the declaration in this case, no one would suppose that *anything but a [*106 total loss of the boat would be claimed. An entirely different claim was, however, interposed.

In case of a total loss, the value of the boat is the rule of damages. (*The Apollon*, 9 Wheat., 362.)

Now, the expense of raising and repairing the boat, with compensation for lost time, may have been much greater than the whole value of the boat.

If that be the claim set up, the party would come prepared with evidence, as to these points: was it prudent to raise and repair her? Was not the party too long in doing it? Did he not pay too much? And was not the value for use of the boat, as given in evidence by him, greater than it really was?

These considerations show, I think, that the allegation for a total loss does not necessarily or naturally include the damages allowed.

(Upon both of the above points, the arguments of the counsel were very elaborate.)

Mr. Justice Nelson delivered the opinion of the court.

Between two steamers in a dark and foggy night; where both were held in fault for too great speed. *The Teutonia*, 23 Wall., 77.

Between two steamers, where both were in fault. *The America*, 32 U. S. (2 Otto), 432.

Between two steamers, in the night time, on the Mississippi, where one of them disregarded the peculiar rules of local navigation. *Shirley v. The Richmond*, 2 Wood, 58.

Between two steamers approaching each other, where one was in fault for not porting her helm and passing astern. *The Vancouver*, 2 Sawyer, 381.

Between two steamers, about day break, where both were in fault for disregarding signals. *The Queens County*, 6 Ben., 146.

Between a steamship in tow unskillfully piloted, and another steamship. *The Merrimack*, 14 Wall., 199.

Between a steam tug having a schooner lashed alongside, and a ferry boat. *The Northfield*, 4 Ben., 112.

Between one steam vessel having barge in tow, and another steam vessel, at night. *The Atlas*, 10 Blatchf., 459; *Keye v. The Ambassador*, 1 Bond., 227.

HOWARD 13.

Between an ocean steamer and a ferry boat in the East River at New York. *The Favorite*, 18 Wall., 568.

Between steamer and tug boat in Boston harbor. *The American Eagle*, 1 Low., 425.

Between steam boat, and steam ferry boat crossing from New York to Brooklyn. *The America*, 10 Blatch., 155.

Between two large steamers in Hell Gate, at New York. *The Narragansett*, 5 Ben., 255.

Between two steam vessels at night, on Mississippi River. *Thorp v. The Defender*, 1 Bond, 397.

Between two steam vessels on the Ohio River. *Runk v. The Freestone*, 2 Bond, 235; *Bayard v. The Coal Valley*, 3 Pittsb. (Pa.), 165.

Between a steam tug and a propeller, in Chicago River. *The Allegany*, 2 Biss., 29; *The Little Giant*, 2 Biss., 23.

Between a steam tug and a ferry boat. *The General McCandless*, 6 Ben., 223.

Between a propeller and a ferry boat. *The John Taylor*, 6 Ben., 227.

Between steamer and canal boats in tow of a tug. *The Pleasant Valley and Samuel Rotan*, 7 Ben., 72.

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This is a writ of error to the Circuit Court of the United States for the District of Ohio.

The plaintiffs in the court below, the defendants here, who were the owners of the steamboat Major Barbour, brought an action against the defendants, the owners of the steamboat Paul Jones, to recover damages occasioned by a collision upon the Ohio River on the 3d February, 1848.

The Major Barbour was descending the river at the time, and the Paul Jones ascending, the latter heavily laden and of much larger size than the former.

Evidence was given by the plaintiffs tending to show that their boat was about in the middle of the river at the time the collision took place; that the defendants' boat was ascending the Indiana shore, and that a short time before the collision she suddenly changed her course and left the shore, running across the river into the Major Barbour, causing the damage in question. While on the part of the defendants, it was claimed, and evidence given to show, that the plaintiffs' boat was descending near the Indiana shore, and that the collision occurred near that shore, and that the plaintiffs' boat a short time before it happened, suddenly turned out from the shore and ran across the bow of the Paul Jones, causing the damage.

Evidence was also given tending to show that the engine of the plaintiffs' boat was stopped, and the boat floated as soon as the danger was discovered, and for some time previous to the collision, but, it was admitted she did not back her engines, and it was claimed that she was **107*** not bound to do so, according to *the rules and usages of the navigation. While, on the part of the defendants, it was claimed, and evidence given to show, that the Paul Jones, some time before the collision, stopped her engines, and reversed the same to back the boat, and had made from one to three revolutions back and was actually backing at the time of the collision; and also that the engines of the plaintiffs' boat were not stopped sufficiently early, and owing to that, and not attempting to back her engines, she contributed to the collision.

Evidence was further given tending to show that boats navigating the Ohio River were bound to observe the following rules in passing each other: The boat descending, in case of apprehended difficulties, or collision, was bound to stop her engines, and float, at a suitable distance, so as to stop her headway; and the boat ascending, to make the proper maneuver to pass freely.

When the evidence closed, the counsel for the defendants requested the court to instruct the jury, that the plaintiffs ought not to recover, if the collision could have been avoided by reversing the engines and backing their boat, in addition to stopping and floating; and, that the master was bound to use all the means in his power to prevent a collision.

And thereupon, the court among other things charged, that if the Major Barbour was in her proper track for a descending boat, near the middle of the river, and the Paul Jones in ascending the river was in her proper track near the Indiana shore, and the latter turned out of her proper course across the river or quartering, as stated by some of the witnesses, so as to

threaten a collision; and that as soon as discovered, the Major Barbour stopped her engine, rang her bell, and floated down the stream, as the custom of the river required, leaving the ascending boat the choice of sides to pass her, and this being the law of the river, she was not, on the near approach of the boat, required to back her engine, as that might bring her in contact with the other boat. She had a right to presume the Paul Jones did not intend to run directly into her. And that, if any injury was done to the Major Barbour, the plaintiffs' boat, under such circumstances, by the Paul Jones running into her, the plaintiffs were entitled to recover.

The court further charged, that, if the jury should find for the plaintiffs, they ought to give such damages as would remunerate them for the loss necessarily incurred in raising the boat, and in repairing her; and also for the use of her during the time necessary to make the repairs, and fit her for business.

I. As to the first branch of the instruction. In order properly to appreciate it, it is material to notice the relative position of *the **108** two boats at the time of the collision, which is assumed in the instruction, and in respect to which circumstances it was given, and, as claimed by the plaintiffs, the jury would be warranted in finding. For, the principle stated was not laid down as an abstract proposition, or rule of navigation, but one applicable to the state of the case specially referred to as supposed to have been made out upon the evidence.

The case was this: The plaintiffs' boat was in her proper track, descending the river near the middle, while the defendants' was ascending the same in her proper track near the Indiana shore. And as the boats were approaching each other in this relative position, the Paul Jones, the defendants' boat, changed her course across the river towards the middle of the same, somewhat in an oblique direction according to some of the witnesses, and thereby endangering a collision. That as soon as this was discovered the Major Barbour, the plaintiffs' boat, stopped her engine, rang her bell and floated, as the custom of the navigation required, leaving to the other boat the option to pass either her bow, or stern.

It was upon this state of facts, the court instructed the jury that the plaintiffs' boat was not bound to make the additional maneuver of backing her engines, as that might, under the circumstances, have brought about the collision she was endeavoring to avoid; and that for the injury done by the Paul Jones running into her, the plaintiffs were entitled to recover.

The counsel for the defendants had requested the court to instruct the jury, that if the plaintiffs' boat by backing her engines in addition to stopping, and floating, could have avoided the collision, she was bound to do so, and the defendants were not liable, as the master was responsible for the use of all the means in his power to prevent it. And the error, supposed to have been committed, consists in the refusal to give this instruction, under the peculiar circumstances of the case, and in giving that which we have stated.

It is not to be denied, that the Major Barbour, according to the position of the boats as assumed in the instruction, had observed strictly

the custom, and usages of the river. But it is claimed, that a state of facts had occurred from the position of the Paul Jones, whether by the fault of those in command or not, that made it the duty of the master of the plaintiffs' boat not sternly to have adhered to this usage, but, to have made the movement insisted upon, if by so doing the accident could have been avoided. This position is founded upon an exception to the general law of the navigation as modified by the circumstances of the particular case, by which the master of the vessel not in fault is bound to make every fair and reasonable effort, *in the emergency, within his power, from due exercise of skill and good seamanship, to avoid, if possible, the impending calamity. Upon the water as upon the land, the law recognizes no inflexible rule, the neglect of which, by one party, will dispense with the exercise of ordinary care and caution in the other. A man is not at liberty to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he does not use common and ordinary caution to avoid it. One person being in fault will not dispense with another's using ordinary care for himself.

And undoubtedly, if a state of facts had been shown in this case, arising out of the circumstances attending the sudden change of the course of the Paul Jones, from which an inference might fairly have been drawn, that it was the duty of the master of the Major Barbour not only to have stopped her engines, but to have reversed them, and backed his boat, in order to avoid the danger, and, that by so doing it might have been avoided, the point should have been put to the jury, with the instruction, if they so found, the plaintiffs could not recover. Before, however, any such instruction could be properly claimed, the defendants must have made out a state of the case to which it was applicable, and from which the omission to make the movement laid a foundation for the inference of fault on the part of the Major Barbour.

The fact that it would have prevented the catastrophe is not enough; circumstances must be shown that would make it the duty of the master to give the order.

There is no rule of law or of the river that imposes upon him, in such an emergency, the obligation, to give a particular direction to his vessel, simply because it might avoid the danger. The question in all such cases is, whether, in the exercise of due care and caution in the management of her at the time in any given case, such a direction should have been given. If it should, then he is chargeable with the consequences of the neglect.

Applying these principles to the state of facts in respect to which the instruction in question was given, we think it will be found that no error was committed.

The defendants' boat had suddenly turned out of the accustomed track, which was along the Indiana shore, apparently for the purpose, if she had any in view, of crossing to the other side; and, as soon as this change was discovered, the engines of the descending boat were stopped, allowing her to float according to the usage in such cases, for the purpose of enabling the other to pass across her bow or stern, as she might elect.

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Now, it could not be known, at least there is nothing in the *case to show that it [*110 was known to the master of the descending boat, which of the two courses open to her the other intended to adopt. If she determined to pass his bow, undoubtedly, reversing the engines and backing his boat would have been a very proper maneuver; but if she determined to cross his stern, the movement would have been improper, and might have been disastrous. Either a forward or backward movement under the circumstances would have embarrassed the operations of the other boat, as the master had a right to assume the one descending would adhere to the usage of the river, and leave him free to make choice of his course in passing upon that assumption.

Under these circumstances, we think it clear it would have been erroneous to instruct the jury, that the master of the Major Barbour was bound not only to stop her engines, but to back her, if, by so doing, the danger could have been avoided. For before the neglect to make that movement could be charged as a fault, it should have appeared that the master knew the colliding boat intended to pass her bow. In the absence of such knowledge, her proper position was that which the usage of the river prescribed, namely: to stop her engines and float, leaving the other the choice to pass across either her bow or stern. This was his plain duty, not only from the law of the river, but due, under the circumstances, to the other boat, as affording her the most favorable opportunity to extricate herself from the danger in which she had become involved by her own fault in carelessly leaving her proper track.

II. As to the question of damages.

The jury were instructed, if they found for the plaintiffs, to give damages that would remunerate them for the loss necessarily incurred in raising the boat, and repairing her; and also, for the use of the boat during the time necessary to make the repairs, and fit her for business.

By the use of the boat, we understand what she would produce to the plaintiffs by the hiring or chartering of her to run upon the river, in the business in which she had been usually engaged.

The general rule in regulating damages in cases of collision is to allow the injured party an indemnity to the extent of the loss sustained. This general rule is obvious enough; but there is a good deal of difficulty in stating the grounds upon which to arrive, in all cases, at the proper measure of that indemnity.

The expenses of raising the boat, and of repairs may, of course, be readily ascertained, and in respect to the repairs, no deduction is to be made, as in insurance cases, for the new materials in place of the old. The difficulty lies in estimating the damage sustained by the loss of the service of the vessel while she is undergoing the repairs.

*That an allowance short of some [*111 compensation for this loss would fail to be an indemnity for the injury, is apparent.

This question was directly before the Court of Admiralty in England, in the case of *The Gazelle*, decided by Dr. Lushington, in 1844. (2 W. Robinson, 279.) That was a case of collision, and in deciding it, the court observed,

"that the party who had suffered the injury is clearly entitled to an adequate compensation for any loss he may sustain for the detention of the vessel during the period which is necessary for the completion of the repairs, and furnishing the new articles."

In fixing the amount of the damages to be paid for the detention, the court allowed the gross freight, deducting so much as would, in ordinary cases, be disbursed on account of the ship's expenses in earning it.

A case is referred to, decided in the common law courts, in which the gross freight was allowed without any deduction for expenses, which was disapproved as inequitable and exceeding an adequate compensation, and the qualification we have stated laid down.

This rule may afford a very fair indemnity in cases where the repairs are completed within the period usually occupied in the voyage in which the freight is to be earned. But, if a longer period is required, it obviously falls short of an adequate allowance. Neither will it apply where the vessel is not engaged in earning freight at the time. The principle, however, governing the court in adopting the freight which the vessel was in the act of earning, as a just measure of compensation in the case, is one of general application. It looks to the capacity of the vessel to earn freight, for the benefit of the owner, and consequent loss sustained while deprived of herservice. In other words, to the amount she would earn him on hire.

It is true, in that case, the ship was engaged in earning freight at the time of the collision; and the loss, therefore, more fixed and certain than in the case where she is not at the time under a charter-party, and where her earnings must in some measure depend upon the contingency of obtaining for her employment. If, however, we look to the demand in the market for vessels of the description that has been disabled, and to the price there, which the owner could obtain or might have obtained for her hire as the measure of compensation, all this uncertainty disappears. If there is no demand for the employment, and of course, no hire to be obtained, no compensation for the detention during the repairs will be allowed, as no loss would be sustained.

But, if it can be shown that the vessel might have been chartered during the period of the repairs, it is impossible to deny that the owner has not lost, in consequence of the damage, the amount which she might have thus earned.

112*] *The market price, therefore, of the hire of the vessel applied as a test of the value of the service will be, if not as certain as in the case where she is under a charter-party, at least, so certain that, for all practical purposes in the administration of justice, no substantial distinction can be made. It can be ascertained as readily and with as much precision as the price of any given commodity in the market; and affords as clear a rule for estimating the damage sustained on account of the loss of her service, as exists in the case of damage to any other description of personal property, of which the party has been deprived.

In the case of *The Gazelle*, for aught that appears, the allowance of the freight afforded a full indemnity for the detention of the vessel while undergoing the repairs. This would be

so, as already stated, if they were made within the period she would have been engaged in earning it. If it were otherwise, it is certain that the indemnity allowed fell short of the rule laid down under which it was made; which was, that the party was entitled to an adequate compensation for any loss he might sustain for the detention of the vessel during the period which was necessary for the completion of the repairs and furnishing the new articles.

The allowance of the freight she was earning at the time was but a mode of arriving at the loss in the particular case under the general rule thus broadly stated; and afforded, doubtless, full indemnity.

We are of opinion, therefore, that the rule of damages laid down by the court below was the correct one, and is properly applicable in all similar cases. There was no question made in respect to the freight of the vessel, and hence the general principle stated was applicable, irrespective of this element, as influencing the result.

There were some other questions raised in the case, of a technical character, and urged on the argument. But we deem it sufficient to say, that they are so obviously untenable, that it is not important to notice them specially.

We are of opinion, therefore, the judgment of the court below was right and should be affirmed.

Mr. Justice Catron dissented, with whom *Mr. Chief Justice Taney* and *Mr. Justice Daniel* concurred.

Mr. Justice Catron:

This action is one of owners against owners, of respective steamboats. It is an action on the case, in which no vindictive damages can be inflicted on the defendants, as they committed no actual trespass; and therefore, in assessing damages against them, moderation must be observed.

*In the next place, the collision occurred on the Ohio River, and the rules of law applicable to the controversy must accommodate themselves to that navigation.

The injured boat was sunk and the plaintiffs declared for a total loss; but it came out in evidence that she was raised and repaired, and again commenced running the river. On this state of facts the jury was charged: 1st. That damages should be given for raising the boat: 2d. For repairing her: and 3d. Also damages in addition, "for her use, during the time necessary to make the repairs and fit her for business."

The expression "for her use," must mean either the clear profits of her probable earnings; or, how much she could have been hired for to others during the time of her detention. Both propositions come to the same result, to wit: how much clear gains the owners of the *Major Barbour* could have probably made by their boat, had she not been injured, during the time she was detained in consequence of being injured. This probable gain, the jury was instructed to estimate as a positive loss, and to charge the defendants with it.

The suit is merely for loss of the boat, and has no reference to the cargo. It does not appear that she had either cargo or passengers; nor does the evidence show in what trade she was engaged.

In cases of marine torts, no damages can be allowed for loss of a market; nor for the probable profits of a voyage, the rule being too uncertain in its nature to entitle it to judicial sanction. Such has been the settled doctrine of this court for more than thirty years.

In the case of *The Amiable Nancy*, 3 Wheat., 500, when discussing the propriety of allowing for probable loss of profits on a voyage that was broken up by illegal conduct of the respondents' agents, this court declared the general and settled rule to be, that the value of the property lost, at the time of the loss; and in case of injury, the diminution in value, by reason of the injury, with interest on such valuation, afforded the true measure of assessing damages. "This rule," says the court, "may not secure a complete indemnity for all possible injuries; but it has certainty and general applicability to recommend it, and in almost all cases, will give a fair and just recompense." And in the suit of *Smith v. Condry*, 1 How., 85, it is declared, that in cases of collision "the actual damage sustained by the party, at the time and place of the injury, is the measure of damages." In that case there was detention as well as here, but it never occurred to anyone that loss of time could be added as an item of damages. In other words, that damages might arise after 114*) *the injury and be consequent to it; and which might double the amount actually allowed.

The decision found in 8 Wheat. was made in 1818, and I had supposed for many years past, the rule was established, that consequential damages for loss of time, and which damages might continue to accrue for months after the injury was inflicted, could not be recovered; and that there was no distinction in principle, between the loss of the voyage, and loss of time, consequent on the injury.

The profits claimed and allowed by the Circuit Court, depended on remote, uncertain, and complicated contingencies, to a greater extent than was the case in any one instance, in cases coming before this court where a claim to damages was rejected for uncertainty.

Here, full damages are allowed for raising the boat, and for her repairs. To these allowances no objection is made; it only extends to the additional item for loss of time. That the investigation of this additional charge will greatly increase the stringency, tediousness, and charges of litigation, in collision cases, is manifest; nor should this consideration be overlooked. The expense and harassment of these trials have been great when the old rule was applied; and the contest, if the rule is extended, must generally double the expense and vexation of a full and fair trial. Nor will it be possible, as it seems to me, for a jury, or for a court (where the proceeding is by libel) to settle contingent profits, on grounds more certain than probable conjecture. The supposition that the amount of damages can be easily fixed, by proof of what the injured boat could have been hired for on a charter-party during her detention, will turn out to be a barren theory, as no general practice of chartering steamboats is known on the western rivers, nor can it ever exist; the nature of the vessels, and the contingencies of navigation being opposed to it. In most cases, the proof will be, that the boat

could not have found anyone to hire her; and then the contending parties will be thrown on the contingency, whether she could have earned something or nothing; little or much, in the hands of her owner, during the time she was necessarily detained; and this will involve another element of contention of great magnitude, to wit: whether she was repaired in reasonable time. Forasmuch as no necessity will be imposed on the owner to bestow the repairs, as is now the case, he will rarely, if ever, do so; and having the colliding boat and her owners in his power, gross oppression will generally follow, in applying this new and severe measure of damages to western river navigation.

In a majority of cases of collision on the western waters, partial *injury, repair, [*115 ing, and detention of the injured boat occur. Contests before the courts have been numerous where the precise question of compensation here claimed was involved, and yet in an experience of twenty five years, I have never known it raised until now. The bar, the bench, and those engaged in navigation, have acquiesced in the rule, that full damages for the injury at the time and place when it occurred, with legal interest on the amount, was the proper measure; nor do I think it should be disturbed; and that therefore the judgment of the Circuit Court should be reversed, because the jury were improperly instructed in this particular.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Ohio, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of said Circuit Court in this cause be, and the same is hereby affirmed, with costs and damages at the rate of six per centum per annum.

Aff'g 4 McLean, 589.

Cited—17 How., 175; 8 Wall., 386, 387; 1 Otto, 206; 15 Otto, 36, 632; 1 Ben., 227; 2 Ben., 126, 225; 7 Ben., 126, 128, 132; 3 Biss., 27; 4 Biss., 72; 5 Biss., 310; 4 Blatchf., 440-442; 14 Blatchf., 439; 1 Brown, 303, 249, 330-335; 6 McLean, 248; 2 Hughes, 95; 1 McCrary, 291; 2 Woods, 62; 3 Cliff., 336.

DAVID D. MITCHELL, *Plaintiff in Error*,
v.

MANUEL X. HARMONY.

When seizure of property of citizen who is trading in enemy's country is justifiable—orders of superior officer will not justify unlawful seizure—U. S. courts have jurisdiction between proper parties, of trespass committed in foreign country—damages on writ of error.

In some of the States it is the practice for the court to express its opinion upon facts, in a charge to the jury. In these States, it is not improper for the Circuit Court of the United States to follow the same practice.

During the war between the United States and Mexico, where a trader went into the adjoining Mexican provinces which were in possession of the military authorities of the United States, for the purpose of carrying on a trade with the inhabitants which was sanctioned by the executive branch of the government, and also by the commanding military officer, it was improper for an officer of the

United States to seize the property upon the ground of trading with the enemy.

Private property may be taken by a military commander to prevent it from falling into the hands of the enemy, or for the purpose of converting it to the use of the public; but the danger must be immediate and impending, or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for.

The fact that they appeared to the officer must furnish the rule for the application of these principles.

But the officer cannot take possession of private property for the purpose of insuring the success of a distant expedition upon which he is about to march.

Whether or not the owner of the goods resumed the possession of them at any time after their seizure, was a fact for the jury. In this case, they found that he did not resume the possession and in this they were sustained by legal evidence.

The officer who made the seizure cannot justify his trespass by showing the orders of his superior officer. An order to commit a trespass can afford no justification to the person by whom it was executed.

The trespass was committed out of the limits of the United States. But an action for it may be maintained in the Circuit Court for any district in which the defendant may be found upon process against him, where the citizenship of the respective parties gives jurisdiction to a court of the United States.

116* *Under the 18th rule of this court, the mode of calculating interest, when a judgment of the Circuit Court is affirmed, is to compute it at the rate of six per cent. per annum, from the day when judgment was signed in the Circuit Court until paid. (See report of the clerk and order of court at the end of this case.)

THIS case was brought up by writ of error from the Circuit Court of the United States for the Southern District of New York.

Mitchell was an officer of the army, and was seized in an action of trespass by Harmony for seizing his property in the Mexican State of Chihuahua.

By an Act passed on the 3d March, 1845 (5 Stat. at Large, 750), Congress allowed a drawback on foreign merchandise exported in the original packages to Chihuahua and Santa Fé, in Mexico. Harmony was a trader engaged in this business, and on the 27th of May, 1846, had transported to Independence in Missouri, a large amount of goods imported under this law, and in conformity with the regulations of the Treasury Department. On the 27th of May he left Independence with several other traders, before the passage of the Act of Congress of 13th May, recognizing the existence of war with Mexico, was known there.

The whole history of Colonel Doniphan's expedition was given in the record, being collected from official documents and the depositions of persons who were present. A brief narrative is given in the opinion of the court of all the facts which bore upon the present case.

The declaration was in the usual form and contained three counts, all of them charging the same trespass, namely: that the defendant, on the 10th of February, 1847, at Chihuahua, in the Republic of Mexico, seized, took, drove and carried away, and converted to his own use, the horses, mules, wagons, goods, chattels and merchandise, &c., of the plaintiff, and compelled the workmen and servants of the plaintiff having charge, to abandon his service and devote themselves to the defendant's service. The property so alleged to have been

taken is averred to be of the value of \$90,000, and the damages \$100,000.

Besides the general plea of not guilty to the whole action, the defendant, Mitchell, pleaded several special pleas.

1st. That war existed at the time between the United States and Mexico; that he was a lieutenant-colonel, &c., forming a part of the military force of the United States, employed in that war, and under the command of Colonel A. W. Doniphan; and he justifies the taking, &c., under and in virtue of the order, to that effect, of his superior and commanding officer, Colonel Doniphan; that the order was a lawful one, which he was bound to obey, and that he was no otherwise instrumental in the alleged trespass.

*2d. Alleging the same preliminary [*117 matter, avers that the plaintiff, Harmony, was a citizen of the United States, and with a full knowledge of the war, had gone with his wagons, merchandise, &c., into Mexico, with design to trade with the people of Mexico, and to afford aid to the same in said war; that said Doniphan, as he had a right to do, commanded the defendant to seize, take, &c., the said wagons, &c., and that he did, in obedience to said order, take, &c., doing nothing more than was necessary to the execution of that order.

3d. With the same preliminary matter as in the second plea, justifies the taking by his own (Colonel Mitchell's) authority as an officer.

The three special pleas above stated are to the first count of the declaration.

To the second count the defendant pleaded of like effect with the above; and three like pleas were pleaded to the third count.

To the three first and three last pleas, that is, the pleas to the first and third counts, issues were joined to the country.

To the special pleas to the second count, the plaintiff replied as follows, to wit: to the first, that the said Doniphan did not command the said horses, wagons, &c., to be stopped, taken, &c.; nor were the same taken in contemplation of any proceeding in due course of law for any alleged forfeiture thereof, but to apply the same to the use of the United States without compensation to the plaintiff, of which the defendant had notice.

To the second, that the plaintiff did not carry his goods, &c., out of the United States, for any purpose of trading with the enemy, or elsewhere than in places subdued by the arms of the United States, and by license and permission; and that said Doniphan did not command the defendant to take the same for or on account of any supposed unlawful design of the plaintiff to trade with the enemy, &c., but to apply the same to the use of the United States, without compensation to the plaintiff.

To the third, that he did not, after notice of the war, carry his goods into Mexico, "except to and into such place and places as had been, and was, or were captured, subdued and held in subjection by the forces of the United States," &c., and by the permission of the commanding officer of said forces; nor with design to carry on any friendly intercourse or trade with the citizens of Mexico hostile to the United States; and that the defendant did not, in the performance of his duty as lieutenant-colonel, seize, take, &c., said property, by

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reason of any supposed unlawful design of the plaintiff to trade with the enemy, &c.; but the same was taken by the defendant of his own wrong, &c.

118*] *On all these pleas and replications, issues were joined to the country.

When the testimony was closed, the judge charged the jury. The whole of the charge is set forth in the dissenting opinion of *Mr. Justice Daniel*, and therefore need not be recited here. The bill of exceptions brought the whole charge up to this court. The jury found a verdict for the plaintiff for \$90,806.44: for which and the costs, amounting to \$5,048.94, the court gave judgment for Harmony.

The cause was argued in this court by *Mr. Crittenden* (Attorney-General) for the plaintiff in error, and *Messrs. Cutting and Vinton* for the defendant in error. *Mr. Moore* also filed a printed brief.

Mr. Crittenden, for the plaintiff in error, contended that the charge was incorrect throughout, and founded upon misconception of the facts and the law, and that the judgment ought therefore to be reversed.

The principal points, as stated in the charge, and decided by the judge, are as follows:

1st. "One ground on which the defense is placed, is, that the plaintiff was engaged in an unlawful trade with the enemy; and that, being engaged in an unlawful trade, his goods were liable to confiscation, and any person, particularly an officer of the army, could seize the same."

After thus stating the point, the judge tells the jury, "this ground has, as I understand the evidence, altogether failed."

The true point of the defense is here misconceived and misstated. It is not that the plaintiff was "engaged in unlawful trade with the public enemy," but that he had the "design" to engage in such trade, and thereby afford aid to the enemy, and that this authorized the means of prevention used by defendant. The pleadings show that the issue is expressly made on the "design," and not on any actual unlawful trade. The mind of the jury was thus misled from the true issue by the judge's misapprehension. If he had observed that the true issue and point of defense rested on the "design" of the plaintiff, could he have said that Harmony's repeated solicitations and manifest wishes to precede the army, and finally his secret preparations, attempted to be concealed by falsehood, to separate himself from that army in the midst of the enemy's country, were no evidence of a "design" to trade with that enemy, under the protection of his Spanish passport? Or could he have said that such a "design" would not, in point of law, have justified the seizure of his wagons, goods, &c., 119*] and their detention, till the "danger was passed? I believe that the learned and honorable judge would have answered both these questions in the negative. The unlawfulness of trade with the enemy, and the right, under circumstances like those of the present case, to detain goods, designed for the enemy, and which might be "useful" to him, are doctrines supposed to be established by authority and reason. (2 Wildman's International Law, 8; 1 Kent's Com., 66; Grotius, book 3, ch. 1, pp. 1-11, and particularly p. 5.)

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The charge of the judge, therefore, on this first point, was inapplicable to the defense specifically made by plea, and, to say the least, was misleading.

2d. The judge tells the jury: "Another ground taken by the defendant, and relied upon, depends upon another principle of public law, viz.: the taking possession of the goods at a time and place when it was necessary for the purpose of preventing them from falling into the hands of the enemy."

If this is understood to imply that, to justify the taking of goods only where it is certain that they will otherwise fall into the hands of the enemy, then it seems to me that the principle of law is too strictly laid down. The principle, if there be use or reason in it, must extend to cases wherever a reasonable apprehension may be entertained that goods may fall into the enemy's hands.

But take the law to be as stated by the judge. He proceeds to say: "Taking the whole of the evidence together, and giving full effect to every part of it, we think this branch of the defense has also failed. No case of peril or danger has been proved which would lay a foundation for taking possession of the goods of the plaintiff." &c.

He adds, "the peril must be immediate and urgent," &c.; "In this case there was no immediate or impending danger." &c.

With respect, I must say that this part of the charge is not a comment on the evidence; it is a peremptory decision, a positive conclusion of facts from the evidence, which ought to have been left to the jury; and the law and the fact are so blended that no jury could well distinguish the one from the other.

The judge tells the jury that no "immediate and urgent peril" was proved in this case. It seems to me that the depositions of Doniphan and Clark, before referred to, do prove such a peril, in the strongest manner, and in the most eminent degree; and that the judge, mistaking the evidence, misled the jury as to the fact.

The charge is furthermore erroneous in requiring that the peril should be "immediate," "impending," "urgent." The principle of public law which the judge lays down does not require *it. But the radical error [*120] is, that the charge throws the burden upon the defendant of proving in court all the circumstances that conduce to make up the required peril, and that it makes the court or jury, judges of those circumstances, as of a *res integra*, without allowing any effect to the decision of the defendant, or his commander, by whose authority the goods of the plaintiff are alleged to have been received.

The law made it the business of the commander to decide, in the first instance, whether the peril was such, and the condition of his army and of the enemy such, as required their seizure and detention, and his decision must be entitled to some respect. Unless the integrity of his judgment can be impeached, that decision stands as proof and protection for him, against any suit or legal proceeding against him. He, no more than a judge on the bench, can be sued for a mere mistake of judgment, if mistake he has made. This is as true in respect to military, as it is in respect to civil of-

ficers, and as true in respect to the exercise of military, as of civil authority. (*Crowell et al. v. McFaddon*, 8 Cranch, 94; 9 Cranch, 355; *Martin v. Mott*, 12 Wheat., 19-83; 9 Peters, 134; *Wilkes v. Dinwiddie*, 7 How., 128, 129; *Luther v. Borden*, 1d., 45, et seq.)

These authorities fully, I think, establish the doctrine for which I contend, and the incorrectness of the instructions given to the jury in this respect.

8d. The next and third point of the charge is this: "The next ground of defense, and which constitutes the principal question in the case, and upon which it must probably ultimately turn, is the taking of the goods by the public authorities for public use."

In respect to this the judge admits the "right of a military officer, in a case of extreme necessity of the government of the army, to take private property for the public service." But then the judge further tells the jury, "in my judgment, all the evidence taken together does not make out an immediate peril or urgent necessity existing at the time of the seizure, which would justify the officer in taking private property and impressing it into the public service; the evidence does not bring the case within the principle of extreme necessity," &c.

Against this particular charge the plaintiff in error relies upon and urges all the exceptions and objections made to the preceding charges, and upon the authorities cited above. The seizure, as it is called, was in this case made by a military officer: he must decide it in the first instance whether an "extreme necessity" (if that be required), "for the safety of the army," made it proper to make the seizure. If the law made it his duty to decide it, and he gave an honest, though mistaken, judgment [121*] on the subject, will the same law hold him personally responsible for it?

Let the reason of the case, and the authorities last cited, answer the question. Yet, by the charge, the military question decided by the general in the field, and in the midst of danger, is to be rejudged in court *de novo*. This cannot be either justice or law. To make the military officer in such a case liable, it must be shown that his decision was corrupt, malicious, or, at least, without any reasonable ground.

If this view of the subject be in any degree right, the charge must be erroneous.

4th. The judge says, "as to the remaining grounds of defense, the liability of the defendant for taking the goods and appropriating them to the public service, accrued at the time of the seizure. If it was an unlawful taking, the liability immediately attached; and the question was, whether that liability had been discharged or released by any subsequent act of the plaintiff. Colonel Mitchell, who executed the order, was not alone responsible; Colonel Doniphan, who gave the order, was also liable; they were jointly and severally responsible. Then, was any act done by the plaintiff which waived the liability, or by which he resumed the ownership and possession of the goods?" On this question the judge doubts "if there be any evidence showing an intent, on the part of the plaintiff, to resume ownership over the goods, &c., or any act done by

him that would, when properly viewed, lead to that result."

In reviewing this last charge, it is to be remembered that Harmony was never deprived of the ownership, or even the possession, of his property, otherwise than constructively, by force of the order of the 10th February, 1847, which required him to accompany the army, and which order he obeyed. He retained ownership and possession, but was constrained to use those rights in a particular manner, and he did so use them. There is more and better ground to "doubt" whether he was ever deprived of ownership or possession, than to "doubt" whether he ever "resumed" that ownership and possession. He certainly, and by all the evidence, did have uncontrolled possession, and exercised uncontrolled ownership of the goods, from their arrival at the City of Chihuahua. There is no room for any doubt as to this fact. It is in effect admitted; and the attempt is made to qualify it, by alleging that Harmony took possession of said goods, and made sales of them, under agreement and arrangement with Colonel Doniphan. Now, if this was so, by what series of implications, by what accumulation of constructions construed, can the defendant, Mitchell, be made responsible, under the arrangement, for the whole value *of [*122 the goods, merely because of the trespass, if trespass it was, committed by him on the evening preceding the 10th of February, 1847? It might as reasonably be pretended by Harmony, if he had retailed his goods in Chihuahua, and any of the purchasers had failed to pay the price, that Mitchell was responsible for that price, because it all came from his old trespass. Yet the plain import of this charge is to make Mitchell liable for all the goods, notwithstanding that said Harmony had made them the subject of a subsequent contract with Doniphan, under which, as Harmony has attempted to prove, these same goods were lost by the inattention and negligence of Doniphan.

There seems, therefore, that there was no legal ground to make Mitchell liable to the extent to which he is made so by this charge, and that it is therefore erroneous.

But, as it appears to me, the great error of this part of the judge's charge is in his telling the jury, in effect, that the order of Colonel Doniphan afforded no legal defense or protection to Colonel Mitchell. The judge said that "Colonel Mitchell, who executed the order, was not alone responsible; Colonel Doniphan, who gave the order, was also liable; they were jointly and severally responsible," &c.

On the part of Mitchell, it is most respectfully, but earnestly contended, that this instruction to the jury is not warranted by law, but is directly contrary to law.

The order was such a one as Mitchell was bound by law to obey; and it would be contradictory in the law to bind him to obey, and then to punish him for obeying.

In addition to the cases and authorities cited on the 2d point, and which are relied on as particularly applicable to this, the court is referred to the Act of Congress of the 10th of April, 1806, "for establishing rules and articles for the government of the armies of the United States," and particularly the 9th article of the 1st section, which makes disobedience to the

"lawful command of his superior officer" punishable, at the discretion of a court-martial, with death. (2 Stat. at Large, 381.)

If the judge, by his charge, meant to say that, in his opinion, there was no evidence—no competent evidence—before the jury, to maintain the two grounds of defense first alluded to by him, then the questions he decided were questions of law, just as much as questions arising on demurrers to evidence, and were proper to be decided by the judge, and not by the jury.

Considering it, then, as a question of law, like that arising on a demurrer to evidence for some material defect, it becomes necessary to examine the evidence, to ascertain whether the question of law has been correctly determined. [23*] To that examination *the plaintiff in error confidently appeals, to show that the charge in this particular is plainly erroneous.

The points made by the counsel for the defendant in error were the following:

First. In respect to any justification of the seizure and use of the property, based upon an alleged unlawful trading with the enemy.

1. The evidence tendered to prove, and the jury found, that the plaintiff below was not engaged in illegal trading, or, in the language of the pleadings and authorities, "in affording aid or assistance to the enemy;" that neither the defendant nor Colonel Doniphan arrested his property as being forfeited, nor had grounds for so doing; but that this was merely an afterthought, other grounds having been alleged; and that the plaintiff, for all the trading he pursued or contemplated, had the sanction and license of Colonel Doniphan and of the defendant himself, and their superior officers, up to the President; and was acting to "aid and assist" the United States, and the policy of our government, attaching himself to its interests, trading under its protection, facilitating its supplies, and uniting himself with its fate; and simply declining (as he well might) to devote his property gratuitously to what an inferior agent supposed was the public service.

2. The law involved in the charge on this point was correctly stated. The plaintiff, a citizen of the United States, acting under such sanction and permission as he had, could rightfully and legally trade with the Mexicans.

(a.) In a territory and with inhabitants reduced to subjection. (*The United States v. Rice*, 4 Wheat. Rep., 246; 2 Gall. Rep., 501; *Pleming v. Page*, 9 How. Rep., 603, and authorities there cited.)

(b.) Under such license to trade as was given; which was within the competency of the officers who granted it, and a common course in prosecuting a campaign under a variety of circumstances; "so to modify the relations of a state of war as to permit commercial intercourse." (*The William Penn*, 3 Wash. C. C. R., 434; *The George*, 1 Mason Rep., 24; *The Julia*, 8 Cranch Rep., 181; *Scholefield v. Richelberger*, 7 Pet. R., 593.)

The Secretary of War was the proper organ of government. (*The United States v. Eliason*, 16 Pet., 302.)

3. The defendant could not arrest for examination, and then proceed with the property in pursuit of other objects, without deciding to seize as forfeited, or to restore. No delay

for examination was necessary; nor can delays be tolerated which may operate oppressively. (*The Anna Maria*, 2 Wheat. Rep., 327; *Maley v. Shattuck*, 8 Cranch, 458.)

*4. Defendant cannot be permitted [*124] to treat the property as arrested for the cause alleged, or, for the purpose of trial and condemnation, as forfeited, or as in fact forfeited, when the conduct of all throughout has been so inconsistent with that idea; when he did not, in fact, arrest it for that cause and purpose. He cannot deprive the plaintiff of the rights to which he is entitled on such a trial, nor dispose of the property as if condemned. The cause alleged for the seizure is important and issuable. If an officer even have legal process in his hands, and do not act under it, it is no justification. If he legally arrest property for probable cause of forfeiture, he cannot damage it, or convert it to his use with impunity. See cases above cited. *Lucas v. Nockells*, 4 Bing. Rep., 729; *The Eleanor*, 2 Wheat., 345; *Del Col v. Arnold*, 8 Dall. Rep., 833.

Second. In respect to the justification set up on the trial, but not in the pleadings, of taking the property, lest it should fall into the hands of the enemy.

1. The evidence tended to prove, and the jury found, the facts to be as understood and referred to by the judge; that El Paso and its neighborhood, including the presidio or fort of San Elisario, at which the property was at the time of seizure, were in the possession of the arms of this government; that there was no public force of the enemy at the time in its neighborhood which put the goods in danger of being captured; that the plaintiff's property stood in the same condition as that of any other trader in the country; that there was no immediate or urgent peril of its falling into the enemy's hands, and, at the most, only a contingent and remote peril; that there was no impending danger—no enemy present or advancing; and that the plaintiff was able and willing to defend himself against marauding parties.

2. The rules of law stated were correct; the peril must be great, immediate, and urgent, such as an enemy near or advancing; not remote, and the attack uncertain and contingent. A mere general exposure of the property to capture, from a hostile public force, not near nor advancing, but at rest 200 miles distant, or from irregular marauding parties, to which all property is exposed during war, and particularly so on a frontier, cannot be sufficient to justify the seizure. *Mayor, &c., of New York v. Lord*, 17 Wend., 235; 18 Id., 126; and cases referred to; so "to prevent the spreading of a fire, the ravages of a pestilence, the advance of a hostile army, or any other great public calamity," per Chancellor Walworth, *Ibid.*, p. 129. A jettison during an impending peril, *Ibid.*, p. 130.

3. The person or property of a citizen can not be seized and carried away by an inferior officer, and the latter be justified by "a [*125] mere order of his official superior, not stating any cause, and being in fact without cause. Such an order during war is different from one during peace, only as it affords a justification against the public enemy, or against one acting, at the time, with or in the garb of an enemy.

4. The pleadings do not sufficiently set up the present defense to admit of it. Two of the pleas to each count are confined to the cause of illegal trading, and do not even allege a forfeiture for that cause. (See *Gelston v. Hoyt*, 3 Wheat., 246; *Hall v. Warren*, 2 McLean's Rep., 332.)

The other one (the first one of each set) is radically defective. It neither avers any forfeiture or cause of arrest, nor sufficiently states the facts and circumstances to show the authority and jurisdiction of Colonel Doniphan.

(a.) Such facts are necessary to be averred in order that issue may be taken upon them; and that the plaintiff may not have his property taken for one pretense, and be exposed to the hazard of a trial upon various different pretenses, of which he had no notice. (See Precedents, 3 Chitty's Plead., 1081-1094, &c.)

(b.) The stopping, seizing, taking, driving and carrying away of the personal property of a citizen, damaging and converting it, cannot be justified by a mere order of a military officer during war. (*Gelston v. Hoyt*, 3 Wheat., 246, originally 13 Johns., 561; *Murray v. The Charming Betsy*, 2 Cranch Rep., 64.) [Express orders of the President to capture in a quasi war. No justification of an arrest and bringing in for trial. Officer excused, under the circumstances, only from vindictive damages.]

(c.) It results that, if the existence of a military necessity be requisite to make the command lawful, that fact should have been pleaded, and must be established. If, under any conceivable circumstances of danger, Colonel Doniphan's or the defendant's own judgment of the existence of such a necessity would have an effect to make the seizure justifiable (and without such a judgment it clearly cannot be justified, even if it can with it), then the circumstances of danger, and the fact of such judgment having been given, and the order and action based only upon that cause, should have been distinctly pleaded (so that the defendant might be held to prove them, and the plaintiff be prepared to controvert them); and all these should have been clearly established, which they were not. Under whatever color the acts may have been committed, the truth, good faith, and sufficiency of the cause alleged are the subjects of investigation as questions of fact without regard to the official station. (*Wilson v. Mackenzie*, 7 Hill Rep., 95, citing *Sutton v. Johnstone*; 1 Term Rep., 544, and 1 McArthur on Courts Martial, 268, 4th Ed., and 436, 126*) Appendix, No. 24; **Perceval v. Hickey*, 18 Johns., 257; and see cases cited under the 8d and 4th subdivisions of the 1st point.)

Third. In respect to the remaining ground set up on the trial, but not in the pleadings, viz.: that the taking the property, its damage or conversion, was for public use, and was justified, without other authority, by necessity.

1. The evidence tended to prove, and the jury found, that there was no such necessity; that there was no immediate, existing, impending and urgent occasion for the seizure; but that the property was taken on the frontier (by an inferior officer, not instructed by the government, nor even by any general officer, and in the contingency that happened of General Wool not being in Chihuahua), for the pur-

pose of strengthening an invading force against Chihuahua, and of attacking a fortification more than 200 miles distant, in the interior of the enemy's country, and even for this it was not urgently necessary. The finding of the jury, if it admitted that the property was taken for and applied to the public use, declared that it was so taken and so used, without the requisite authority to justify it. It appeared there had been an application to Congress to declare or recognize the necessity, which had not been successful.

2. The limitations of the charge, as to the character of the necessity requisite to justify such a seizure, were just, and did not prejudice the defendant. "An immediate, existing, impending, and urgent necessity" as explained and exemplified in the charge, was at least indispensable. (See authorities under 2d subdivision of the 2d point.)

3. A forced service beyond the realm has always been condemned. The war could not legally be presumed to be urged for purposes of conquest, nor for the capture or acquisition of Chihuahua, even by ordinary means. The use of extraordinary means for an invasion and capture of a city and by an inferior officer acting without orders, was in every respect unauthorized and illegal. (*Fleming v. Page*, 9 How. Rep., 603; 1 Rolle Abr., 116, l. 10, ad. 30: 2 Inst., 47; 1 Bl. Com., 139; *Lyon v. Jerome*, 26 Wend., 485, 491, 492, 494.)

4. Private property cannot be taken for public use without compensation and against the consent of the owner. The officer who so takes it is subject to an action for its value. The duty of the government to compensate for property taken and applied to the public service is well established; but compensation cannot be given without legislative sanction; and no discretionary power existing in any executive officer (much less an inferior one acting without orders) to compel the citizen to furnish property or funds, or to suffer from its being taken, can be tolerated under our system of government. The Legislature *cannot [*127 be put under such an obligation or duty, to indemnify the sufferer, nor the citizen be turned over to Congress, by anyone, compulsorily, for such redress. The actor against the citizen must be responsible until compensation be given. He may also be liable to an extent which the government may not sanction, by reason of his resorting to an unjustifiable course, or taking too much, or of a wrong kind, or wasting or using it. The indemnity which the government may or ought to afford him, is no defense to a suit. The defendant, therefore, is responsible to the plaintiff even if the supposed necessity had clearly existed, and the charge on this point is wholly in favor of the defendant, and not exceptionable. (Art. 4 and 5 of Amendments to Constitution; *VanHorne's Lessee v. Dorrance*, 2 Dall. Rep., 311; Compensation Act of 9th April, 1816, sec. 6, 3 U. S. Stat. at Large, 262; *Gelston v. Hoyt*, 3 Wheat., 246; 18 Johns., 139, 561; Ship American Eagle and cargo, seized by order of the President, as fitted out for illegal purposes: verdict, \$107,000; American State Papers, Claims, p. 601; Report of Committee, No. 427; also p. 475, No. 811; Appropriation Act, 9 April, 1818, 3 U. S. Stat. at Large, 418; Act for relief

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of Gelston's Ex'r, 7 July, 1838, c. 200, 6 U. S. Stat. at Large, 728; Case of Major Austin and Lieut. Wells, seizing disaffected persons, under orders of Gen. Pike, American State Papers, Claims, p. 545; Reports of Committee, 15th Cong., 1st Sess., Nos. 379, 431; Act for their relief, April 20, 1818, c. 75, 6 U. S. Stat. at Large, 210; Case of General Swartwout, impressing boats in an emergency, by order of General Wilkinson, American State Papers, Claims, p. 649; Report of Committee, No. 44, and p. 731; Report, No. 526; Act for his relief, 3d March, 1821, c. 55, 6 U. S. Stat. at Large, 261; Case of teamster in Canada, seizing rum by order of Col. Clark, American State Papers, Claims, p. 523; Report of Committee, 14 Cong., 2d Sess., No. 350; other cases of impressments, &c., 6 U. S. Stat. at Large, 146, 152, 171, 240, c. 26, 162, 173, 125, 98; Report, No. 294, p. 462; *Bloodgood v. Mohawk & H. R. Co.*, 18 Wend. Rep., 16, 17, 31, 42.)

5. The pleadings and the proofs were subject to the same objection under this point, as stated in the last subdivision to the third point.

6. The cause of action being transitory, and not merely against the peace, but affecting property, there is no objection to impleading the defendant wherever he can be found. (*McKenna v. Flak*, 1 How. Rep., 248; 18 Johns., 257; 7 Hill Rep., 95, before cited.)

Fourth. The directions as to the time when the liability attached, and as to the transactions [128*] with Colonel Doniphan, not *being sufficient to discharge the defendant, were correct. The evidence tended to prove, and the jury found, that there had been no intent to resume ownership, nor any release of liability. There was nothing in placing the goods subject to the order of Colonel Doniphan, when the plaintiff could no longer attend to or watch them, that amounted in itself to any release or resumption of ownership inconsistent with the liability of the defendant. Plaintiff was not bound to trade with the enemy, nor to accept the property in such a different and hostile place, under such different circumstances, damaged, scattered, destroyed, and impossible to be saved; and he did not so accept it. Whatever he could save he had a right to save, without impairing his right of action, or deducting anything more than he could realize. *Conard v. Pacific Ins. Co.*, 6 Peters, 274, and cases there referred to.

Fifth. The discussion by counsel and opinion by the court, after the testimony was closed, before the counsel was summed up in form, were without objection or exception; it was convenient and appropriate in such a case of voluminous written testimony and peculiar circumstances; it involved the necessity of commenting upon facts, before a formal summing up by counsel; but this also was without objection or exception. The comments of the court are to be treated as if made by way of hypothesis and for purposes of illustration; they took nothing from the jury. It was left to the jury to say whether their views of the evidence accorded with the judge's review of them, addressed to the jury for their consideration; they cannot be the ground of exception or review. (*Carver v. Ador*, 4 Peters Rep., 1, 23, 80, &c.)

There was, in fact, no exception. These and various other matters are out of place in the bill of exceptions. (Rule 38 of January HOWARD 18.

U. S., BOOK 14.

Term, 1832; *Zeller v. Eckert*, 4 How. Rep., 297; *United States v. Morgan*, 11 How. Rep., 158.)

Mr. Chief Justice Taney delivered the opinion of the court:

This is an action of trespass brought by the defendant in error, against the plaintiff in error, to recover the value of certain property taken by him, in the Province of Chihuahua during the late war with Mexico.

It appears that the plaintiff, who is a merchant of New York, and who was born in Spain, but is a naturalized citizen of the United States, had planned a trading expedition to Santa Fé, New Mexico and Chihuahua, in the Republic of Mexico, before hostilities commenced; and had set out from Fort Independence, in Missouri, before he had any knowledge of the declaration of war. As soon as the war commenced, an expedition was *pre- [*129] pared under the command of General Kearney, to invade New Mexico; and a detachment of troops was set forward to stop the plaintiff and other traders until General Kearney came up, and to prevent them from proceeding in advance of the army.

The trading expedition in which the plaintiff and the other traders were engaged, was, at the time they set out, authorized by the laws of the United States. And when General Kearney arrived, they were permitted to follow in the rear and to trade freely in all such places as might be subdued and occupied by the American arms. The plaintiff and other traders availed themselves of this permission and followed the army to Santa Fé.

Subsequently General Kearney proceeded to California, and the command in New Mexico devolved on Colonel Doniphan, who was joined, by Colonel Mitchell, who served under him, and against whom this action was brought.

It is unnecessary to follow the movements of the troops or the traders particularly, because, up to the period at which the trespass is alleged to have been committed at San Elisario, in the Province of Chihuahua, it is conceded that no control was exercised over the property of the plaintiff, that was not perfectly justifiable in a state of war, and no act done by him that had subjected it to seizure or confiscation by the military authorities.

When Colonel Doniphan commenced his march for Chihuahua, the plaintiff and the other traders continued to follow in the rear and trade with the inhabitants, as opportunity offered. But after they had entered that province and were about to proceed in an expedition against the city of that name, distant about 300 miles, the plaintiff determined to proceed no farther, and to leave the army. And when this determination was made known to the commander at San Elisario he gave orders to Colonel Mitchell, the defendant, to compel him to remain with and accompany the troops. Colonel Mitchell executed the order, and the plaintiff was forced, against his will, to accompany the American forces with his wagons, mules and goods, in that hazardous expedition.

Shortly before the battle of Sacramento, which was fought on the march to the Town of Chihuahua, Colonel Doniphan, at the request of the plaintiff, gave him permission to leave

the army and go to the *hacienda* of a Mexican by the name of Parna, about eight miles distant, with his property. But the plaintiff did not avail himself of this permission; and apprehended, upon more reflection, that his property would be in more danger there than with the army; and that a voluntary acceptance on his [130*] part, and *resuming the possession at his own risk, would deprive him of any remedy for its loss if it should be taken by the Mexican authorities. He remained, therefore, with the troops until they entered the town. His wagons and mules were used in the public service in the battle of Sacramento, and on the march afterwards. And while the town remained in possession of the American forces, he endeavored, but without success, to dispose of his goods. When the place was evacuated they were therefore unavoidably left behind, as nearly all of his mules had been lost in the march and the battle. He himself accompanied the army, fearing that his person would not be safe if he remained behind, as he was particularly obnoxious, it seems, to the Mexicans, because he was a native of Spain and came with a hostile, invading army.

When the Mexican authorities regained possession of the place, the goods of the plaintiff were seized and confiscated, and were totally lost to him. And this action was brought against Colonel Mitchell, the defendant, in the court below, to recover the damages which the plaintiff alleged he had sustained by the arrest and seizure of his property at San Elisario, and taking it from his control and legal possession.

This brief outline is sufficient to show how this case has arisen. The expedition of Colonel Doniphan, and all its incidents, are already historically known, and need not be repeated here.

At the trial in the Circuit Court the verdict and judgment were in favor of the plaintiff; and this writ of error has been brought upon the ground that the instructions to the jury by the Circuit Court, under which the verdict was found, were erroneous.

Some of the objections taken in the argument here, on behalf of the defendant, have arisen from a misconception of the instructions given to the jury. It is supposed that these directions embraced questions of fact as well as of law, and that the court took upon itself the decision of questions arising on the testimony, which it was the exclusive province of the jury to determine. But this is an erroneous construction of the exception taken at the trial. The passages in relation to questions of fact are nothing more than the inferences which in the opinion of the court were fairly deducible from the testimony; and were stated to the jury not to control their decision, but submitted for their consideration in order to assist them in forming their judgment. This mode of charging the jury has always prevailed in the State of New York, and has been followed in the Circuit Court ever since the adoption of the Constitution.

The practice in this respect differs in different states. In some of them the court neither sums up the evidence in a charge to the jury, nor expresses an opinion upon a question of [131*] fact. Its *charge is strictly confined to questions of law, leaving the evidence to be dis-

cussed by counsel, and the facts to be decided by the jury without commentary or opinion by the court.

But in most of the states the practice is otherwise; and they have adopted the usages of the English courts of justice, where the jury always sums up the evidence and points out the conclusions, which in his opinion ought to be drawn from it; submitting them, however, to the consideration and judgment of the jury.

It is not necessary to inquire which of these modes of proceeding most conduces to the purposes of justice. It is sufficient to say that either of them may be adopted under the laws of Congress. And as it is desirable that the practice in the courts of the United States should conform, as nearly as practicable, to that of the state in which they are sitting, that mode of proceeding is perhaps to be preferred, which, from long-established usage and practice, has become the law of the courts of the state. The right of a court of the United States to express its opinion upon the facts in a charge to the jury was affirmed by this court in the case of *M'Lanahan v. The Universal Insurance Co.*, 1 Pet., 182, and *Games v. Stiles*, 14 Pet., 322. Nor can it be objected to upon the ground that the reasoning and opinion of the court upon the evidence may have an undue and improper influence on the minds and judgment of the jury. For an objection of that kind questions their intelligence and independence; qualities which cannot be brought into doubt without taking from that tribunal the confidence and respect which so justly belong to it, in questions of fact.

It was in pursuance of this practice, that the proceedings set forth in the exceptions took place. When the testimony was closed and the questions of law have been raised and argued by counsel, the court stated to them the view it proposed to take of the evidence in the charge about to be given. And it is evident, from the statement in the exception, that this was done for the purpose of giving the counsel for the respective parties an opportunity of going before the jury, to combat the inferences drawn from the testimony by the court, if they supposed them to be erroneous or open to doubt.

It appears from the record that the counsel on both sides declined going before the jury, evidently acquiescing in the opinions expressed by the court, and believing that they could not be successfully disputed. And the judge thereupon charged the jury that, if they agreed with him in his view of the facts, that they would find for the plaintiff, otherwise for the defendant; and upon this charge the jury found for the plaintiff, and assessed the damages stated in the proceedings. It is manifest, therefore, that *the Circuit Court did not, in its [*132] instructions, trench upon the province of the jury, and that the jury could not have been misled as to the nature and extent of their own duties and powers. The decision of the facts was fully and plainly submitted to them. And their verdict for the plaintiff, upon the charge given to them, affirms the correctness of the views taken by the court; and the opinions upon the evidence as therein stated must now be regarded as facts found by the jury; and as such are not open to controversy in this court.

HOWARD J.

This statement of the manner in which the case was disposed of in the Circuit Court was necessary to disengage it from objections which do not belong to it, and to show what questions were decided by the court below, and are brought up by this writ of error. We proceed to examine them.

It is admitted that the plaintiff, against his will, was compelled by the defendant to accompany the troops with the property in question, when they marched from San Elisario to Chihuahua; and that he was informed that force would be used if he would refuse. This was unquestionably a taking of the property, by force, from the possession and control of the plaintiff; and a trespass on the part of the defendant, unless he can show legal grounds of justification.

He justified the seizure on several grounds.

1. That the plaintiff was engaged in trading with the enemy.

2. That he was compelled to remain with the American forces, and to move with them, to prevent the property from falling into the hands of the enemy.

3. That the property was taken for public use.

4. That if the defendant was liable for the original taking, he was released from damages for its subsequent loss, by the act of the plaintiff, who had resumed the possession and control of it before the loss happened.

5. That the defendant acted in obedience to the order of his commanding officer, and therefore is not liable.

The first objection was overruled by the court, and we think correctly.

There is no dispute about the facts which relate to this part of the case, nor any contradiction in the testimony. The plaintiff entered the hostile country openly for the purpose of trading, in company with other traders, and under the protection of the American flag. The inhabitants with whom he traded had submitted to the American arms, and the country was in possession of the military authorities of the United States. The trade in which he was engaged was not only sanctioned by the commander of the American troops, but, as appears by the record, was permitted by the Executive [133*] Department of the government, *whose policy it was to conciliate, by kindness and commercial intercourse, the Mexican provinces bordering on the United States, and by that means weaken the power of the hostile government of Mexico, with which we were at war. It was one of the means resorted to to bring the war to a successful conclusion.

It is certainly true, as a general rule, that no citizen can lawfully trade with a public enemy; and if found to be engaged in such illicit traffic his goods are liable to seizure and confiscation. But the rule has no application to a case of this kind; nor can an officer of the United States seize the property of an American citizen, for an act which the constituted authorities, acting within the scope of their lawful powers, have authorized to be done.

Indeed, this ground of justification has not been pressed in the argument. The defense has been placed, rather on rumors which reached the commanding officer and suspicions which he appears to have entertained of a secret de-

sign in the plaintiff to leave the American forces and carry on an illicit trade with the enemy, injurious to the interests of the United States. And if such a design had been shown, and that he was preparing to leave the American troops for that purpose, the seizure and detention of his property, to prevent its execution, would have been fully justified. But there is no evidence in the record tending to show that these rumors and suspicions had any foundation. And certainly mere suspicions of an illegal intention will not authorize a military officer to seize and detain the property of an American citizen. The fact that such an intention existed must be shown; and of that there is no evidence.

The 2d and 3d objections will be considered together, as they depend on the same principles. Upon these two grounds of defense the Circuit Court instructed the jury, that the defendant might lawfully take possession of the goods of the plaintiff, to prevent them from falling into the hands of the public enemy; but in order to justify the seizure the danger must be immediate and impending, and not remote or contingent. And that he might also take them for public use and impress them into the public service, in case of an immediate and pressing danger or urgent necessity existing at the time, but not otherwise.

In the argument of these two points, the circumstances under which the goods of the plaintiff were taken have been much discussed, and the evidence examined for the purpose of showing the nature and character of the danger which actually existed at the time or was apprehended by the commander of the American forces. But this question is not before us. It is a question of fact upon which the jury have passed, and their verdict has decided that a danger or necessity, such as the court described *did not [*134] exist when the property of the plaintiff was taken by the defendant. And the only subject for inquiry in this court is, whether the law was correctly stated in the instruction of the court; and whether anything short of an immediate and impending danger from the public enemy, or an urgent necessity for the public service, can justify the taking of private property by a military commander to prevent it from falling into the hands of the enemy, or for the purpose of converting it to the use of the public.

The instruction is objected to on the ground that it restricts the power of the officer within narrower limits than the law will justify. And that when the troops are employed in an expedition into the enemy's country, where the dangers that meet them cannot always be foreseen, and where they are cut off from aid from their own government, the commanding officer must necessarily be intrusted with some discretionary power as to the measures he should adopt; and if he acts honestly, and to the best of his judgment, the law will protect him. But it must be remembered that the question here is not as to the discretion he may exercise in his military operations or in relation to those who are under his command. His distance from home, and the duties in which he is engaged, cannot enlarge his power over the property of a citizen, nor give to him, in that respect, any authority which he would not, un-

der similar circumstances, possess at home. And where the owner has done nothing to forfeit his rights, every public officer is bound to respect them, whether he finds the property in a foreign or hostile country, or in his own.

There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands* of the public enemy; and also where a military officer, charged with particular duty, may impress private property into the public service or take it for public use. Unquestionably, in such cases, the government is bound to make full compensation to the owner; but the officer is not a trespasser.

But we are clearly of opinion, that in all of these cases the danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. It is impossible to define the particular circumstances of danger or necessity in which this power may be lawfully exercised. Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified.

135*] *In deciding upon this necessity, however, the state of the facts, as they appeared to the officer at the time he acted, must govern the decision; for he must necessarily act upon the information of others as well as his own observation. And if, with such information as he had a right to rely upon, there is reasonable ground for believing that the peril is immediate and menacing, or the necessity urgent, he is justified in acting upon it; and the discovery afterwards that it was false or erroneous, will not make him a trespasser. But it is not sufficient to show that he exercised an honest judgment, and took the property to promote the public service; he must show by proof the nature and character of the emergency, such as he had reasonable grounds to believe it to be, and it is then for a jury to say, whether it was so pressing as not to admit of delay; and the occasion such, according to the information upon which he acted, that private rights must for the time give way to the common and public good.

But it is not alleged that Colonel Doniphan was deceived by false intelligence as to the movements or strength of the enemy at the time the property was taken. His camp at San Elisario was not threatened. He was well informed upon the state of affairs in his rear, as well as of the dangers before him. And the property was seized, not to defend his position, nor to place his troops in a safer one, nor to anticipate the attack of an approaching enemy, but to insure the success of a distant and hazardous expedition, upon which he was about to march.

The movement upon Chihuahua was undoubtedly undertaken from high and patriotic motives. It was boldly planned and gallantly executed, and contributed to the successful issue of the war. But it is not for the court to say what protection or indemnity is due from the public to an officer who, in his zeal for the honor and interest of his country, and in the excitement of military operations, has trespassed on private rights. That question belongs to the Political Department of the government. Our

duty is to determine under what circumstances private property may be taken from the owner by a military officer in a time of war. And the question here is, whether the law permits it to be taken to insure the success of any enterprise against a public enemy which the commanding officer may deem it advisable to undertake. And we think it very clear that the law does not permit it.

The case mentioned by Lord Mansfield, in delivering his opinion in *Mostyn v. Fabrigas*, 1 Cowp., 180, illustrates the principle of which we are speaking. Captain Gambier, of the British navy, by the order of Admiral Boscawen, pulled down the houses of some sutlers on the coast of Nova Scotia, who *were [*136 supplying the sailors with spirituous liquors, the health of the sailors being injured by frequenting them. The motive was evidently a laudable one, and the act done for the public service. Yet it was an invasion of the rights of private property, and without the authority of law, and the officer who executed the order was held liable to an action, and the sutlers recovered damages against him to the value of the property destroyed.

This case shows how carefully the rights of private property are guarded by the laws in England; and they are certainly not less valued nor less securely guarded under the Constitution and laws of the United States.

We think, therefore, that the instructions of the Circuit Court on the 2d and 3d points were right.

The 4th ground of objection is equally untenable. The liability of the defendant attached the moment the goods were seized, and the jury have found that the plaintiff did not afterwards resume the ownership and possession.

Indeed, we do not see any evidence in the record from which the jury could have found otherwise. From the moment they were taken possession of at San Elisario, they were under the control of Colonel Doniphan, and held subject to his order. They were no longer in the possession or control of the plaintiff; and the loss which happened, was the immediate and necessary consequence of the coercion which compelled him to accompany the troops.

It is true, the plaintiff remained with his goods and took care of them, as far as he could, during the march. But whatever he did in that respect was by the orders or permission of the military authorities. He had no independent control over them.

Neither can his efforts to save them from loss, after they arrived at the town of Chihuahua, by sale or otherwise, be construed into a resumption of possession, so as to discharge the defendant from liability. He had been brought there with the property against his will; and his goods were subjected to the danger in which they were placed by the act of the defendant. And the defendant cannot discharge himself from the immediate and necessary consequences of his wrongful act, by abandoning all care and control of the property after it reached Chihuahua, and leaving the plaintiff to his own efforts to save it. He could not discharge himself without restoring the possession in a place of safety; or in a place where the plaintiff was willing to accept it. And the plaintiff con-

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stantly refused to take the risk upon himself, after they arrived at Chihuahua, as well as on the march, and warned Colonel Doniphan that he would not.

Neither can the permission given to the plaintiff to leave the troops and go to the *Hacienda* of Parna, affect his rights. He was then in the midst of the enemy's country, and to leave the American forces at that point might have subjected his person and property to greater dangers than he incurred by remaining with them. The plaintiff was not bound to take upon himself any of the perils which were the immediate consequences of the original wrong committed by the defendant in seizing his property and compelling him to proceed with it and accompany the troops.

The 5th point may be disposed of in a few words. If the power exercised by Colonel Doniphan had been within the limits of a discretion confided to him by law, his order would have justified the defendant even if the commander had abused his power, or acted from improper motives. But we have already said that the law did not confide to him a discretionary power over private property. Urgent necessity would alone give him the right; and the verdict finds that this necessity did not exist. Consequently the order given was an order to do an illegal act; to commit a trespass upon the property of another; and can afford no justification to the person by whom it was executed. The case of *Captain Gambier*, to which we have just referred, is directly in point upon this question. And upon principle, independent of the weight of judicial decision, it can never be maintained that a military officer can justify himself for doing an unlawful act, by producing the order of his superior. The order may palliate, but it cannot justify.

But in this case the defendant does not stand in the situation of an officer who merely obeys the command of his superior. For it appears that he advised the order, and volunteered to execute it, when, according to military usage, that duty more properly belonged to an officer of inferior grade.

We do not understand that any objection is taken to the jurisdiction of the Circuit Court over the matters in controversy. The trespass, it is true, was committed out of the limits of the United States. But an action might have been maintained for it in the Circuit Court for any district in which the defendant might be found, upon process against him, where the citizenship of the respective parties gave jurisdiction to a court of the United States. The subject was before this court in the case of *McKenna v. Pisk*, reported in 1 How., 241, where the decisions upon the question are referred to, and the jurisdiction in cases of this description maintained.

Upon the whole, therefore, it is the opinion of this court, that there is no error in the instructions given by the Circuit Court, and that the judgment must be affirmed, with costs.

138*] *Mr. Justice Daniel* dissented:

In this case I find myself constrained to disagree with the opinion of the court just pronounced. This disagreement is not so much the result of any view taken by me of the testimony in this case, in conflict with that adopted

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by my brethren; for, with respect to the character of the testimony, were that the subject regularly before us, there perhaps would exist little or no difference of opinion. With some modifications, perhaps unimportant, I might have agreed also to the legal propositions laid down by the court, so far as I have been able to extract them from the charge of the judge. My disagreement with the majority, relates to a great principle lying at the foundation of all legal inquiries into matters of fact; lying, indeed, at the foundation of civil society itself: the preservation, in its fullest scope and integrity, unaffected, and even unapproached by improper influences, direct or indirect, of the venerable, the sacred, the unappreciable trial by jury. In the remark just made, or in any criticism which may be attempted as to the charge of the judge at circuit, in this case, I would have it understood that there is no officer to whose learning, or to whose integrity of purpose, I would with greater confidence intrust either the rights of the citizen, or the exposition of the law, than I would to the judge whose opinion is before us; but in this instance, it seems to me, that in accordance with a practice which, although it has obtained in some of the courts, is regarded as irregular and mischievous, he has stepped beyond the true limits of the judicial province. Duty demands of me, therefore, however ineffectual the effort, that I should oppose my feeble resistance to the aggression.

I object to the charge of the judge in this case, as I would to every similar charge of a court presiding over a jury trial at common law, because it is not confined to a statement of the points of law raised by the pleadings, and to the competency or relevancy of the testimony offered by either party in reference to those points; but extends to the weight and efficiency of the evidence, all admissible, and in fact admitted, and declares to the jury minutely and emphatically, what that testimony does or does not prove. And now let us examine the language of the charge. It is as follows:

"One ground on which the defense is placed is, that the plaintiff was engaged in an unlawful trade with the public enemy; and that, being engaged in an unlawful trade, his goods were liable to confiscation; and any person, particularly an officer of the army, could seize the same.

This ground, as I understand the evidence, has altogether failed. He was not only not so engaged, but was engaged in trading with that portion of the territory reduced to subjection by our arms, and where his trading with the inhabitants was permitted and encouraged. The army was directed to hold out encouragement to the traders. There is no foundation, therefore, for this branch of the defense. Another ground taken by the defendant, and relied upon, depends upon another principle of public law, viz.: the taking possession of the goods at a time and place when it was necessary for the purpose of preventing them from falling into the hands of the enemy. This has been urged as particularly applicable to the plaintiff's goods, some of which consisted of articles which might be used as munitions of war, wagons for transportations, &c.

Taking the whole of the evidence together, and giving full effect to every part of it,

we think this branch of the defense has also failed.

No case of peril or danger has been proved which would lay a foundation for taking possession of the goods of the plaintiff at San Elisario, on that ground, either as it respects the state of the country, or the force of the public enemy. On the contrary, it was in the possession of the arms of this government. There was no enemy, no public force at the time in the neighborhood, which put the goods in the danger of being captured. The plaintiff's goods, therefore, stood in the same condition as the goods of any other trader in the country. The testimony does not make out a case of seizure of property justified by the peril of its falling into the enemy's hands. The peril must be immediate and urgent, not contingent or remote; otherwise every citizen's property, particularly on the frontiers, would be liable to be seized or destroyed, as it must always be more or less exposed to capture by the public enemy. The principle, itself, if properly applied, of the right to take property to prevent it from falling into the hands of the enemy, is undisputed. But in this case there was no immediate or impending danger, no enemy advancing to put the goods in peril. They were more exposed to marauding parties than to any public force, the danger from which the plaintiff considered himself able to take care of. The next ground of defense, and which constitutes the principal question in the case, and upon which it must probably ultimately turn, is the taking of the goods by the public authorities for public use. I admit the principle of public law; but this rests likewise upon the law of necessity. I have no doubt of the right of a military officer, in a case of extreme necessity, for the safety of the government or of the army, to take private property for the public service.

An army upon its march, in danger from the public enemy, would have a right to seize [140*] the property of the citizen, and use *it to fortify itself against assault while the danger existed and was impending, and the officer ordering the seizure would not be liable as a trespasser; the owner must look to the Government for indemnity. The safety of the country is paramount, and the rights of the individual must yield in case of extreme necessity. No doubt, upon the testimony, if the enemy had been in force, in the neighborhood of the United States troops, with the disparity which existed at Sacramento, and the same danger for the safety of the troops existed at San Elisario that threatened them there, the commanding officer might, for the safety of this army, seize and use, while the danger continued, the wagons and teams of the plaintiff that could be immediately brought into the service, to meet and overcome the impending danger. An immediate, existing, and overwhelming necessity would justify the seizure for the safety of the army.

Looking, however, at the testimony, it seems to me quite clear that these goods were seized, not on account of any impending danger at the time, or for the purpose of being used against an immediate assault of the enemy, by which the command might be endangered, but that they were seized and taken into the public service for the purpose of co-operating with the

army in their expedition into the enemy's country, to Chihuahua. The mules, wagons, and goods were taken into the public service for the purpose of strengthening the army, and aiding in the accomplishment of the ulterior object of the expedition, which was the taking of Chihuahua; it was not to repel a threatened assault, or to protect the army from an impending peril; in my judgment, all the evidence taken together does not make out an immediate peril or urgent necessity existing at the time of seizure which would justify the officer in taking private property and impressing it into the public service; the evidence does not bring the case within the principle of extreme necessity; it does not make out such a case, or one coming within the principle; there is not only no evidence of an impending peril to be resisted by the public force, but the goods were taken for a different purpose, viz.: for the purpose of co-operating with the army against Chihuahua; the army had to march over two hundred miles before it reached or found the enemy; the danger, if any, lay in the pursuit, not in remaining at San Elisario or returning to Santa Fé; there had been a sudden insurrection against the authority of the government in that neighborhood, but it was immediately suppressed.

As to the remaining grounds of defense, the liability of the defendant for taking the goods and appropriating them to the public service accrued at the time of the seizure; if it was an unlawful taking, the liability immediately attached, and the question was whether [*141] that liability had been discharged or released by any subsequent act of the plaintiff; Colonel Mitchell, who executed the order, was not alone responsible, Colonel Doniphan, who gave the order, was also liable; they were jointly and severally responsible; then, was any act done by the plaintiff which waived the liability, or by which he resumed the ownership and possession of the goods? Certainly the abandonment of the goods to Colonel Doniphan cannot be regarded as an act of resumption of ownership; on the contrary, it was consistent with the assertion of his liability; there had been a negotiation between them; Colonel Doniphan advised him to sell the goods at Chihuahua and look to the government for indemnity, and, in pursuance of this, measures were taken for their protection and safe-keeping. I doubt if there be any evidence showing an intent on the part of the plaintiff to resume ownership over the goods as his private property after they had been seized by the army, or any act done by him that would, when properly viewed, lead to that result."

The bill of exceptions concludes as follows:

"After the judge expressed his views of the case as above stated, the counsel on both sides declined going to the jury.

The presiding judge accordingly charged the jury that the law was as had been stated by him, and that if they agreed with him in his view of the facts, that they would find for the plaintiff, otherwise for the defendant.

The counsel for the defendant did then and there except to each of the four propositions mentioned in the charge above stated.

The jury, without leaving their seats, returned a verdict for the plaintiff for \$90,806.44.

And because none of the said exceptions, so

offered and made to the opinions and decisions of the said associate justice, do appear upon the record of the said trial; therefore, on the prayer of the said defendant, by his said counsel, the said associate justice hath to the bill of exceptions set his seal, April Term, one thousand eight hundred and fifty.

S. NELSON. [SEAL.]

The record, above cited, informs us that after the judge had expressed his views of the case as above stated, the counsel on both sides declined going to the jury. And surely, after such an expression, no other result could well have been anticipated. In the first place, the counsel for the plaintiff could not have made to the jury so authoritative an argument in behalf of his client; and in the next place the counsel for the defendant must have been a rash man could he have attempted to throw his individual weight (whatever might have been his ability) in opposition to this authoritative declaration and influence of the court. Nay, [142*] "it may be insisted, that if the court, in passing upon the weight of the evidence, was acting within its legitimate sphere, the counsel would have been justly obnoxious to the imputation of indecorum, if not of contempt, in assailing before the jury the judge's decision; for the respective provinces of the court, the counsel, and the jury, are separate, distinct and well defined, and neither should be subject to invasion by the other.

But after the counsel had been thus silenced, and the weight of the evidence fully and minutely pronounced upon by the court, it is insisted, that the alleged irregularity was entirely cured, by a declaration from the court to the jury, "that if they agreed with him in his view of the facts, they should find for the plaintiff, otherwise they might find for the defendant." But the natural and obvious inquiry here is, what the judge's view of the facts had to do with this matter. It was the jury who were to find the facts for the judge, and not the judge who was to find the facts for the jury; and if the verdict is either formally, or in effect, the verdict of the judge, it is neither according to truth nor common sense, the verdict of the jury; and these triers of fact had better be dispensed with, as an useless, and indeed an expensive and cumbersome formula in courts of law, than be preserved as false *indicia* of what they in reality do not show. Moreover, this determination of facts by the court does not place the parties upon fair and equal grounds of contest before the minds of the jury; it is placing the weight of the court, which must always be powerfully felt, on the side of one of the parties, and causing the scale necessarily to preponderate by throwing the sword, which, under such circumstances, can hardly be called the sword of justice, into one of the scales in which the rights of the parties are hanging.

The practice of passing upon the weight of the evidence and of pronouncing from the bench what that evidence does or does not prove, accords neither with the nature and objects of jury trials, as indicated by its very name, nor as affirmed by the fathers of the law who have defined this institution and proclaimed it to be the ark of safety for life, liberty and property. Thus it is called the trial *per pais*, or by the country, to distinguish it as a determination of

the rights of the subject or citizen by his fellow subjects or citizens, from a determination thereon by the action of mere officials or creatures of the government. And with respect to the peculiar intent and effects of this tribunal of the people we read thus: *Justice Blackstone*, speaking of this institution, says: "The trial by jury has ever been, and, I trust ever will be, looked upon as the glory of the English law. And if it has so great an advantage over others in regulating civil property, how much must that advantage be heightened when *it is ap- [*143 plied to criminal cases! It is the most transcendent privilege which any subject can enjoy or wish for, that he cannot be affected, either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals." Again he says: "Great as this eulogium may seem, it is no more than this admirable constitution, when traced to its principles, will be found in sober reason to deserve. The impartial administration of justice, which secures both our persons and our property, is the great end of civil society. But if that be entirely intrusted to the magistracy, a select body of men, and those generally selected by the prince, or such as enjoy the highest offices in the state, their decisions, in spite of their own natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity. It is wisely ordered, therefore, that the principles and axioms of law, which are general propositions flowing from abstracted reason, and not accommodated to times or men, should be deposited in the breasts of the judges, to be occasionally applied to such facts as come properly ascertained before them. For here partiality can have little scope: The law is well known, and is the same for all ranks and degrees; it follows as a regular conclusion from the premises of facts pre-established. But in settling and adjusting a question of fact, when entrusted to any single magistrate, partiality and injustice have an ample field to range in, either by boldly asserting that to be proved which is not so, or by more artfully suppressing some circumstances, stretching and warping others, and distinguishing away the remainder." And again: "Every new tribunal erected for the decision of facts without the intervention of a jury (whether composed of justices of the peace, commissioners of the revenue, or judges of a court of conscience, or any other standing magistracy) is a step towards establishing aristocracy, the most oppressive of absolute governments. It is, therefore, upon the whole, a duty which every man owes to his country, his friends, his posterity, and himself, to maintain, to the utmost of his power, this valuable constitution in all its rights; to restore it to its ancient dignity if at all impaired by the different value of property, or otherwise deviated from its first institution; and above all to guard it against the introduction of new and arbitrary methods of trial, which, under a variety of plausible pretenses, may in time imperceptibly undermine this best preservative of English liberty."

With regard to the legitimate and proper mode of operation, and effect of the trial by jury, the language of Lord Coke should ever be kept in mind, as furnishing the true and

only true standard by which to measure this valuable institution. After giving his derivation of the terms "verdict" and "judgment," [144*] "this great common lawyer proceeds, "*Et sicut ad questionem juris non respondent juratores sed iudices; sic ad questionem facti, non respondent iudices sed juratores.*" For jurors are to try the fact, and the judges ought to judge according to the law that ariseth upon the fact, for *ex facto jus oritur*. The manner of stating the above propositions by this great lawyer and commentator is worthy of particular attention, as defining and illustrating with clearness and precision, the powers and duties of the court and the jury. He has not simply said, *ad questionem juris respondent iudices*, nor in like manner *ad questionem facti, respondent juratores*, but he has placed them in a striking opposition and contrast, and drawn a well-defined limit around the functions of both the court and the jury, and informed them, in terms too unequivocal for misapprehension, that the limit, thus prescribed, neither has the power to transcend; has declared to each what it shall not do. Thus, literally translated, his annunciation is "And as with respect to the questions of law, the jury must not respond, but only the judges; so, or in like manner, or under like restriction, the judges must not respond to questions of fact, but only the jury." There can be no escape from the force of the positions thus laid down by Lord Coke, by the argument that the jury are not absolutely bound by the opinion pronounced by the court upon the weight of the evidence. The proper inquiry here is, not as to the absolute and binding authority of the court's opinion upon the weight of evidence, but that inquiry is, what are the legitimate and appropriate functions of the court and the jury; whether the former, in pronouncing upon the weight of the evidence, can, within any rational sense, be responding only to questions of law, or whether it is not controlling the free action of the jury by the indirect exertion of a power which all are obliged to concede that it does not legitimately possess; the power of responding to the facts of the case. This is one of the mischievous consequences against which we are assured by Justice Blackstone, that the trial by jury was designed to guard, when he remarks that, "in settling and adjusting a question of fact when intrusted to any single magistrate, partiality and injustice have an ample field to range in, either by boldly asserting that to be proved which is not so, or by more artfully suppressing some circumstances, stretching and warping others, and distinguishing away the remainder." And if this power of interpretation or of weighing the evidence cannot safely be deposited within the regular commission of the judge, much less should an attempt to wield that power be tolerated, when confessedly beyond his commission. The objection here urged to the interposition of the court as to the weight of evidence, is by [145*] "no means weakened by the excuse or explanation that such declaration by the court is not binding, but is given in the way of advice to the jury; the essence of the objection is perceived in the control and influence which an interposition by court is almost certain to produce upon the otherwise free and unembarrassed action of the jury, and the restraint it

imposes upon the views and efforts of the advocate, who, in a great majority of instances, will hardly venture to throw himself openly into a conflict with the court. And again the maxim which declares that *ad questionem facti non respondent iudices*, would seem to forbid this advice altogether, or to render it officious or irregular at least. The court can exercise a legitimate and effectual control over the verdict of juries by the award of new trials, and should be restricted to this regular exertion of its acknowledged power. Let us test this interposition by the court, by comparing it with a similar irregularity on the part of the jury. "*Ad questionem juris non respondent juratores sed iudices.*" says the maxim. Now, suppose the jury sworn in a cause should declare to the court what evidence was competent or relevant to the issues they were to try, and what, in their view, should be the law governing the contest between the parties. Would not such a proceeding be regarded as extremely irregular and wholly unjustifiable? And why would it be so regarded? Simply because in so acting, the jury would transcend the province assigned them by their duty; because they would not be conforming to the maxim *ad questionem legis non respondent juratores sed iudices*. And yet, perhaps, there would be greater color for this proceeding than can be found to excuse the interference by the court in questions of fact; for it is undeniable that from the earliest periods of the practice of jury trials, the jury, of right, could find a general verdict, thereby constituting themselves judges both of law and fact.

In accordance with the maxim quoted from Lord Coke, may be cited other authorities of great weight. Thus, in the case of *Rez v. Poole*, to be found in Cases in the King's Bench, in the time of Lord Hardwicke, it is said by Hardwicke, Ch. J., that "it is of the greatest consequence to the law of England, and to the subject, that the powers of the judge and the jury be kept distinct; that the judge determine the law, and the jury the fact; and if ever they come to be confounded, it will prove the confusion and destruction of the law of England." So likewise in Foster, p. 256, it is said, that "the construction of the law, upon the facts found by the jury, is in all cases undoubtedly, the proper province of the court." It has been said, that the course pursued by the judge in this case is in conformity with the practice of the courts of England, and in the majority of the [146] States of this Union. For the establishment of the position assumed, either with regard to the English courts, or with respect to the tribunals of the several States, no authorities have been cited; but, even if this position should be conceded, it is not the less clear that the rule it is invoked to sustain is a flagrant departure from the great principle so emphatically asserted by the fathers of the law, and should not the less be viewed and shunned as an abuse, rather than an example worthy of imitation. In what number of states of this confederacy such a practice (such an abuse, as I would term it), may prevail has not been shown; certain it is, that in many of the Southern States it does not obtain, and would not be tolerated. It has also been said, that the right of the judge to instruct the jury upon the weight of testimony has been ruled as the established doctrine of this

court. If this be so, it is a revelation which the friends of jury trial, in its full integrity and independence, will grieve to learn, and will be disposed to regard as a demolition by this court of that sacred ark of civil liberty, for which, by the greatest services it may render, it can hardly ever be able to atone. It is true that, in the case of *Carver v. Jackson*, 4 Pet., 80, there is an expression of *Mr. Justice Story*, in delivering the opinion of the court, broad enough to cover this irregular exercise of power by the court in its widest extent. But, upon examination, it will be seen that this expression had no real connection with the points regularly before the court; and, as a mere *dictum*, was entirely without authority. In the introductory part of his opinion, *Mr. Justice Story*, meaning merely to express his disapprobation of a practice of bringing up for review the entire charge of the court below, without stating specific points or grounds of exception, as extremely inconvenient, takes occasion to use the following remark, namely: that, "with the charge of the court to the jury upon mere matters of fact, and with its commentaries upon the weight of evidence, this court has nothing to do." But it is remarkable that this judge goes on to say, with respect to these commentaries, that they are of no binding legal effect; thus, in reality, pronouncing their condemnation in the same breath which sanctions their admission to affect, if it can be done without legal or binding obligation, the minds of the jurors. Surely it may be assumed as a postulate, that a court of justice, in adjudicating upon the rights of the citizen or of the State, should do, and can have power to do, nothing which is irregular or vain or useless. Its duty and its office is to do the law, and nothing but the law. The anomalous and contradictory doctrine above noticed has, I think, been condemned by a more recent and a far more correct decision of this court; a decision 147*] directly in point upon this subject—I allude to the case of *Hanson v. Eustace*, 2 How., 706. In that case, the late *Justice Baldwin*, under the rule which admits of secondary evidence when the primary evidence is not within the power of a party, or is withheld improperly by his adversary, went so far beyond the just application of the rule as to say to the jury what the secondary or presumptive evidence did actually prove; but still accompanied his declaration with the salvo, "that if they agreed with him in opinion." This is his language: "Should your opinion agree with ours on this point, you will presume that there was a deed from Robert Phillips, or his heirs, competent to vest the title to the sixth street lot in the firm of Robert & Isaac Phillips; that it so remained at the time of the assignment, and that it was by such conveyance as would enable them to enjoy the property against Robert Phillips and his heirs." And this court reversed the decision of the Circuit Court, upon the ground that the judge's charge declared to the jury what their conclusions, from the secondary evidence, ought specifically to be. This decision I regard as in strict conformity with the doctrines promulgated by the fathers of the law; the doctrine which alone can prevent the inestimable trial by jury from becoming a mere mockery and a deception to those who have been taught to revere and rely upon it as the best safeguard of these

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rights. Transforming this institution from what it was intended to be, and once was in reality—a trial by the country—into a mere formula, to be molded at the discretion of the court. I think that the judgment of the Circuit Court should be reversed.

DAVID D. MITCHELL, Plaintiff
in Error,

v.

MANUEL X. HARMONY.
the clerk of this court having filed the following report, namely:

*Supreme Court of the United States. No. 178.
December Term, 1851.*

DAVID D. MITCHELL, Plaintiff
in Error,

v.

MANUEL X. HARMONY.
the Southern District of New York.

In calculating the interest on the judgment of affirmance in the above-entitled cause, the clerk respectfully presents, at the instance of the respective counsel, the following different modes for the consideration of the court:

1. Interest, at the rate of six per cent., on the judgment of the Circuit Court, from the 9th November, 1850, the day the judgment was signed, to this date.

*2. Interest, from the 1st April, 1850, [*148 the first day of the term at which the judgment was rendered to this date.

3. Interest, at the rate of 7 per cent., from 9th November, 1850, to 26th February, 1851 (the date of the writ of error), and then at 6 per cent. on the aggregate, to this date.

4. Interest, at the rate of 7 per cent., from 1st April, 1850, to 26th February, 1851, and then at six per cent. on the aggregate, to this date.

The clerk feels bound to confine his calculations to the 18th rule of the court, irrespective of the Act of Congress of 23d August, 1842.

WM. THOMAS CARROLL,
C. S. C. U. S.

14th May, 1852.

Calculation No. 1.

\$95,855.38 Judgment of Circuit Court, U. S., for New York, signed 9th November, 1850.

8,706.85 Interest, at 6 per cent. per annum, from 9th November, 1850, to 14th May, 1852—one year, six months, and five days.

\$104,562.23

Calculation No. 2.

\$95,855.38 Judgment of Circuit Court, U. S., for New York, rendered 1st April, 1850.

12,204.57 Interest, at 6 per cent. per annum, from 1st April, 1850, to 14th May, 1852—two years, one month, and fourteen days.

\$108,059.95†

Calculation No. 3.

\$95,855.38 Judgment of Circuit Court, U. S., for New York, signed 9th November, 1850.

1,994.35 Interest, at 7 per cent. per annum, from 9th November, 1850, to 26th February, 1851—

three months and seventeen days.
 97,849.78
 7,139.51 Interest on this amount at 6 per cent. per annum, from 26th February, 1851, to 14th May, 1852—one year, two months, and eighteen days.
 \$104,989.24

Calculation No. 4.

\$95,855.88 Judgment of Circuit Court, U. S., for New York, rendered 1st April, 1850.
 6,076.15 Interest, at 7 per cent. per annum, from 1st April, 1850, to 26th February, 1851—ten months and twenty-six days.
 \$101,931.58
 7,440.99 Interest on this amount, at 6 per cent. per annum, from 26th February, 1851, to 14th May, 1852—one year, two months, and eighteen days.
 \$109,372.52

149*] *And Mr. Vinton having filed the following exceptions, namely:

The Defendant in Error, M. X. Harmony, excepts to the report of the clerk, touching the computation of interest on the above-named judgment of the Circuit Court, U. S., for the Southern District of New York, in this, namely:

1st. That, by the Act of Congress of the 23d of August, 1842, the said defendant in error is entitled to the same rate of interest on said judgment (being 7 per cent.) as he would be entitled to if said judgment had been rendered in a state court of the State of New York; whereas, the said computation allows 6 per cent. only on said judgment. (See 5 Statutes at Large, 518.)

2d. That the said interest ought to be computed, on said judgment, from the first Monday in April, 1850, instead of from the 9th of November of that year. (See printed record, pages 19 and 20.) S. F. VINTON,

For Defendant in Error.

May 14, 1852.

And the said Defendant in Error, also, at the same time, moves the court to open up the judgment of affirmance (rendered in this court at its present term) of said judgment of said Circuit Court, touching the damages allowed in said judgment of affirmance; and in lieu of 6 per cent. per annum, therein given on said judgment below, to allow 7 per cent. per annum therein, to be computed from the — day of —, 1850, in conformity to said Act of Congress of the 23d of August, 1842.

S. F. VINTON,

For Defendant in Error.

It is thereupon now here ordered by the court, that the said report and exceptions be set down for argument next Monday, the 17th instant.

The court declined to hear any argument on the motion of Mr. Vinton and the exceptions filed by him to the clerk's report, and took the same under advisement.

On consideration of the motion made by Mr. Attorney-General Crittenden, on the 13th instant; of the report by the clerk, filed the 14th instant; of the exceptions to said report, by Mr. Vinton, filed the same instant; and of the motion filed by Mr. Vinton, the 15th instant, it is the opinion of the court, that the

first calculation by the clerk in his report is the proper mode of calculating the damages given under the rule of court. Wherefore, it is now here ordered by the court, that the judgment entered in this case, on the 12th instant, do stand as the judgment of this court.

*ORDER.

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This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of New York, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs and damages at the rate of six per centum per annum.

Aff'g 1 Blatchf., 549.

Cited—14 How., 332; 13 Wall., 628; 1 Otto, 716; 4 Otto, 101, 234; 5 Otto, 238; 8 Otto, 304; 10 Otto, 169, 171; 1 Abb. U. S., 558; 6 Blatchf., 534; 17 Blatchf., 54; 1 Dill., 355, 357; 2 Sprague, 220; 1 Flippin, 101; 16 Bank. Reg., 222; 4 Cliff., 411, 412.

JOHN S. BUCKINGHAM AND MARK BUCKINGHAM, Appellants,

v.

NATHANIEL C. McLEAN, Assignee in Bankruptcy of JOHN MAHARD, JR.

Practice—Waiver of notice—What appeal in equity brings up.

Where a defendant in error or an appellee wishes to have a case dismissed because no citation has been served upon him, his counsel should give notice of the motion when his appearance is entered, or at the same term; and also that his appearance is entered for that purpose. A general appearance is a waiver of the want of notice.

An appeal in equity brings up all the matters which were decided in the Circuit Court to the prejudice of the appellant; including a prior decree of that court from which an appeal was then taken, but which appeal was dismissed under the rules of this court.

BEFORE this case was reached upon the docket, a motion was made to dismiss it upon the ground that the appellee had not been served with a citation, and also upon another ground, which is stated in the following opinion of the court as pronounced by Mr. Justice McLean.

Mr. Justice McLean:

This is an appeal from the Circuit Court of the Ohio District, and a motion is made to dismiss it on two grounds:

1. Because no citation has been issued.

2. "Because the appeal is from the decree of 1848 and interlocutory decrees, whereas all the matters contested by the appellants were finally adjudicated and decreed at the November Term, 1846, from which decree an appeal was taken, which was dismissed by this court, and no appeal has been since taken."

At November Term, 1846, a decree was en-

NOTE.—Appearance cures defects in service of process, and its non-service, except want of jurisdiction of subject matter. See note to Knox v. Summers, 3 Cranch, 496.

Effect of appearance by counsel or attorney in an action. Unauthorized appearance. What is an appearance. See note to Shelton v. Timm, 6 How., 164.

tered against the appellants. In January Term, 1847, an appeal was prayed by them from that decree, which was granted, and bond was given. But the appellants failing to file the record and docket the cause in this court, as required by the rules, it was, on motion of the appellee's counsel docketed and dismissed at December Term, 1847. At the same term a motion was made to re-instate the cause upon the docket, which motion was overruled.

151*] *Afterward, at October Term, 1849, the appellants prayed an appeal from the final decree made at the November Term, 1848, which was granted, and that is the appeal which is now pending.

It seems that no notice of this appeal has been served on the appellee, and on that ground the motion to dismiss is made. A general appearance was entered by the counsel for the appellee at December Term, 1850, but the motion to dismiss was not filed until February, 1852. In the case of *McDonough v. Millaudon*, 3 How., 707, a motion was made to dismiss the cause on the ground that the clerk of the Supreme Court of Louisiana issued the writ of error, and signed the citation; and the court said, "this case has been here for two terms; a writ of *certiorari* has been sent down, at the instance of the defendant in error, in whose behalf the motion is made, to complete the record; he now moves to dismiss for the first time, and we think he comes too late."

The object of a citation on a writ of error, or an appeal is to give notice of the removal of the cause, and such notice may be waived by entering a general appearance by counsel. Where an appearance is entered, the objection that notice has not been given is a mere technicality, and the party availing himself of it, should, at the first term he appears, give notice of the motion to dismiss, and that his appearance is entered for that purpose. A delay to give this notice may throw the other party off his guard, until the limitation of the writ of error or the appeal may have expired. In this case we think the motion is made too late.

The record appeal was regularly taken and perfected. By this appeal all the questions are brought before us, which were decided to the prejudice of the appellants. From the nature of the controversy until the final decree was entered, as between all the parties, the case could not, properly, be brought before this court. The motion to dismiss is overruled.

When the case was called in its regular order, it was argued, and the following is a report of it:

JOHN S. BUCKINGHAM AND MARK BUCKINGHAM, Appellants,

v.

NATHANIEL C. McLEAN, Assignee in Bankruptcy of JOHN MAHARD, JR.

Practice—Waiver of notices—Giving power of attorney to confess judgment is a security within meaning of Bankrupt Act—when an act of bankruptcy—Usury—Exchange.

Where a bill in chancery was filed by the assignee of a bankrupt, claiming certain shares of bank stock, the same being also claimed by the Bank and

by other persons who were all made defendants and the answer of the Bank set forth apparently valid titles to the stock, which were not impeached by the complainant in the subsequent proceedings in the cause, nor impeached by the other defendants, the Circuit Court decreed correctly in confirming the title of the Bank.

*A power of attorney to confess a judgment [*152 is a security within the second section of the Bankrupt Act, 5 Stat. at Large, 442.

And this security is void if given by the debtor in contemplation of bankruptcy. But by these terms is meant an act of bankruptcy on an application by himself to be decreed a bankrupt, and not a mere state of insolvency.

In this case there is evidence enough to show that the debtor contemplated a legal bankruptcy when the power of attorney was given.

It is not usury in a bank which has power by its charter to deal in exchange, to charge the market rates of exchange upon time bills.

THIS was an appeal from the Circuit Court of the United States for the District of Ohio, sitting as a court of equity.

On the 27th of May, 1842, John Mahard, Jr., filed his petition in bankruptcy, and on the 20th of July, 1842, was declared a bankrupt.

Nathaniel C. McLean was appointed his assignee in bankruptcy.

John Mahard had been transacting business at Cincinnati with his brother, William Mahard, under the firm of J. & W. Mahard, and at New Orleans, under the firm of Mahard & Brother.

On the 12th of August, 1842, William Mahard filed his petition in bankruptcy.

On the 5th of January, 1843, McLean filed his bill in the Circuit Court against a great number of persons, who had outstanding liens on the property of John Mahard, Jr., at the time of his filing his petition in bankruptcy. They were,

The President, Directors and Company of the Lafayette Bank of Cincinnati; the President, Directors and Company of the Northern Bank of Kentucky; Andrew Johnson, John S. Buckingham; Mark Buckingham; the Ohio Life Insurance and Trust Company; the President, Directors and Company of the Bank of the United States, incorporated by the State of Pennsylvania; the President, Directors and Company of the Commercial Bank of Cincinnati; the President, Directors and Company of the Franklin Bank of Cincinnati, James Dundas, Mordecai D. Lewis, Samuel W. Jones, Robert L. Pitfield, and Robert Howell, assignees, &c.; John Mahard, Sen., John McLaughlin, George Milne, and James Keith, partners, doing business in the firm name of George Milne & Co.; Charles B. Dyer, Frederick Trow, John C. Avery, late sheriff, and John H. Gerard, present sheriff of Hamilton County.

The assignee, McLean, enjoined proceedings in the State Courts where the parties were prosecuting their several liens, and brought all matters connected with the bankrupts into the Circuit Court of the United States.

In the progress of the cause, a number of collateral matters were brought into the case; but the facts upon which the questions arose before this court are stated in the opinion, to which the reader is referred.

*It was argued by Mr. Read for the [*153 Buckinghams, and by Messrs. Chase and Rock-

well for the Lafayette Bank, the Franklin Bank of Cincinnati, and the Northern Bank of Kentucky. The interest of these banks was drawn in question by the third point raised by *Mr. Read*, who contended that the notes, bills and mortgages held by them, were void on account of usury.

Mr. Read made the following points, viz.:

1st. The forty-nine shares of stock should have been decreed to the Buckinghams, and not to the Bahk.

2d. That the judgment, execution, and levy of the Buckinghams were valid; the fruits of the sale should have been decreed to them, and not to the assignee as general assets.

3d. That the notes, bills, and mortgages of the said Banks were void, having been discounted at higher rates of interest than were permitted by their charters, and the mortgages were given to secure such discounts or notes substituted therefor.

1. As to the forty-nine shares of bank stock.

In her answer, the Lafayette Bank contends that she held this stock of John Mahard as collateral security to pay the amount of \$15,000, secured by mortgage on real estate, and also on general lien under her charter as security for general debts.

The Bank, before the master, claimed the right to apply the stock to pay unsecured debts under her charter lien.

On the 18th of April, 1842, on the same piece of paper on which the stock had been assigned to the Bank, was an assignment to Buckingham in these words:

"The forty-nine shares of the stock are transferred to John S. Buckingham for value received."

Point. A party having a lien or other interest in property, standing by and permitting it to be sold without notice or assenting to its sale, loses all right in said property.

2. That if general creditors have an interest in such property, and the first lien holder parts with his lien by consenting to its transfer, and such transfer is void by operation of law, the lien of the first holder does not reattach, but the property stands as general assets for the benefit of all creditors.

2d. As to the \$1,800 made on Buckingham's execution.

It may be laid out of view that the Mahards did any act in creating liens or a *cognovit*, in contemplation of bankruptcy, as all the parties in their answers deny it.

On the 7th of April, 1842, John Mahard executed a power of attorney to confess judgment in favor of John S. Buckingham for \$14,000, which was done the next day in the Supreme Court of the State of Ohio. Execution issued 20th of April, 1842; levy made upon real estate and certain personal property; which latter sold for \$1,800.

154*] *John Mahard petitioned to be declared a bankrupt, 27th May, 1842.

Cognovit and judgment within two months prior to petition; held, therefore, void under the second section of the Bankrupt Act.

Point 1st. The second section of the Bankrupt Act does not embrace in its terms, or by necessary implication, powers of attorney to *bona fide* creditors to confess judgment. (Bankrupt Act, 19th August, 1841.)

2d. The power of attorney gives no lien or preference, but the judgments, by operation of law, and not the Act of the bankruptcy.

(*In the matter of Allen*, 5 Law Rep., 362; *Wakeman v. Hoyt*, 5 Law Rep., 309; *Downer et al. v. Brackett et al.*, 5 Law Rep., 394; 1 Bac. Abr., 628; *Foote, ex parte*, 5 Law Rep., 55.)

3d. As to the invalidity of notes, bills, and mortgages of the banks, it is conceded that these banks could deal in exchange at fair and usual rates; but their charters did not authorize them to discount, by way of loan, at higher rates of interest than six per cent. in advance. If a bank or moneyed corporation exceeds its powers in exacting interest on discounts and loans at higher rates than permitted by their charter, all notes thus discounted and loans made are void, and all mortgages and pledges to secure payment are void also. (*Bank of Chillicothe v. Paddleford et al.*, 8 Ohio R., 257; *Creed v. Commercial Bank*, 11 Ohio R., 493; *Miami Exporting Co. v. Clark*, 18 Ohio R., 18.)

Banks may charge fair rate of exchange. (*Andrews v. Pond*, 13 Peters, 65.)

Difference between sale and a discount. Sale at any price, discount only at legal rates. A loan, if seller bound to pay if obligee does not. (Comyn on Usury, Add., 287, 5 Law Lib.; *Rea v. Ridge*, 4 Price, 50; 2 Eng. Ex. Rep., 80; Byles on Bills, 72; *Lee, ex parte*, 1 Peere Wms., 782; *Eden on Bankruptcy*, 145; 7 Wend., 578; *Ketchum v. Barber*, 4 Hill, 244; *Rapelye v. Anderson*, 4 Hill, 476; *Rice v. Mather*, 8 Wend., 62; *Yankey v. Lockheart*, 4 J. J. Marshall, 276; *Knights v. Putnam*, 3 Pick., 184, 187; 12 Pick., 565; 4 Mass., 156; *Powell v. Waters*, 17 Johns., 176; 15 Johns., 44; 7 Wend., 569; 4 Hill, 476; 2 Johns. Cases, 60; 8 Johns. Cases, 66; 3 McCord, 365; 2 Cowen, 675; 7 Peters, 103, 109; 8 Cranch, 180; 1 Peters, 87; 4 Peters, 305; 2 Strange, 1248; 7 Wend., 633, 642; 8 Cowen, 669.)

Lex loci, or place of performance to fix rate. (Story on Bills, sec. 148.)

Excessive exchange or commission on collection, or discounting depreciated paper, whereby higher rates than legal interest is obtained, *will be deemed usurious. (*Hew*, [*155 son, *ex parte*, 1 Madd., 112; 7 Wend., 581-582; 13 Johns., 47; 1 Leigh, N. P., 482; 4 Hill, 219, 229; Comyn on Usury, 184.)

Exchange charged on bill payable in a place where the money will be as valuable as at place of discount; a shift or device to exact over six per cent., charge of attorneys' fees, &c. (*Miami Ex. Co. v. Clark*, 18 Ohio R., 1; Chitty on Bills, 89, a note; *State v. Taylor*, 10 Ohio R., 381; *Shelton v. Gull*, 11 Ohio R., 418; *Spaulding v. Bank of Muskingum*, 12 Ohio R., 544; *Creed v. Com. Bank*, 11 Ohio, 495.)

Discounter must show the charge to be well founded; expense of collecting compensated by way of exchange; the usage of banks cannot control the law. (8 Bac. Abr., 424; *Bank United States v. Davis*, 2 Hill, 452; 13 Johns., 47; 16 Johns., 875; 9 Mass., 49; 3 Bos. & Pull., 154.)

True differences only are to be charged. (*Merritt v. Benton*, 10 Wend., 116; 2 Hill, 640; 2 Hill, 452; 7 Wend., 581.)

No such thing as time exchange. (McCulloch, "Exchange"; Story on Bills, p. 481.)

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Discounted in depreciated paper, to be paid in silver, usurious. (*United States Bank v. Orens*, 2 Peters, 527; *United States Bank v. Waggener*, 9 Peters, 378; 1 Peters, 44; 2 Har- ris & Gill, 13; 1 J. J. Marshall, 47; 2 Hill, 499; 1 Hall, 519.)

Unreasonable charge for commission, or im- probable difference of exchange. (*Hine v. Hardy*, 1 Johns. Ch., 6; *Dunham v. Dey*, 13 Johns., 47; 7 Wend., 581-582; 16 Johns., 375.)

Risk of making place of payment only to be charged as exchange. (4 Hill, 221; 4 Hill, 250; 2 Paige, 272, 275.)

Bank's charge according to length of time an artifice. (4 Hill, 440; 10 Ohio R., 381.)

Mortgages in Ohio but a security. (*Lessee of Perkins v. Dibble*, 10 Ohio R., 439; *Moore v. Burnet*, 11 Ohio R., 341; 4 Kent's Com., 195, 5th ed.; 21 Wend., 485; 26 Wend., 555.)

Usury defeats a mortgage. (8 Pow. on Mort., 396, note.)

Substituted securities void, taint of usury follows. (Chit. on Bills, 89; *Walker v. Bank of Washington*, 3 How., 72.)

All the discounts of these banks were on time bills; sight bills at par; exchange from 1¼ to 3¼ per cent.

Messrs. Chase and Rockwell made the following points:

1. The mortgage to the Lafayette Bank was made more than two months before the filing of the bankrupt petition, and was not made in contemplation of bankruptcy, in violation of the provisions of the Bankrupt Act.

Answer of Lafayette Bank, p. 48: "And these respondents, further answering, deny that [156*] said mortgage was executed by *said John in contemplation of bankruptcy, or that he was known or considered to be in a state of insolvency; but these respondents had good reason to believe, and did believe, that said John was solvent, and fully able to pay all his debts, and therefore they agreed to give, and did give him time to enable him the more readily to pay the said debts then due to these respondents. Respondents insist that said John Mahard, Jr., did not contemplate bankruptcy at the time of the execution of said mortgage, but that he executed and delivered the same in good faith, to secure a *bona fide* debt then due to these respondents as aforesaid.

"And these respondents further answering, state, that said mortgage was executed, delivered, and recorded more than sixty days before the filing of said petition by said John Mahard, Jr., for the benefit of said Act, and that the transaction between said Mahard and these respondents was in good faith; and if the said John Mahard (which they deny) had it in contemplation, at the time of executing said mortgage, to take the benefit of said Act, these respondents had no notice of such intention, either express or implied, and their mortgage is not affected by any subsequent proceedings in bankruptcy," &c.

The cases decided by the English courts under the statute of 1 Jac., c. 15, if applicable to the United States Bankrupt Act, do not sustain the doctrine that a conveyance made by an insolvent person is to be considered as a conveyance in contemplation of bankruptcy.

The 2d section of that statute provided that every person using the trade of merchandise

who should "make, or cause to be made, any fraudulent conveyance of his lands, tenements, goods or chattels, to the intent, or whereby his creditors shall or may be defeated or delayed, for the recovery of their just and true debts, shall be accounted and adjudged a bankrupt."

Gibbs, *Ch. J.*, in *Fidgeon v. Sharpe*, 5 Taunt., 541, said: "With respect to this doctrine of contemplation in cases of bankruptcy, we have nothing either in the common or statute law to show what it is. The cases in which this doctrine was introduced made it depend upon the *quo animo*."

In *Morgan v. Brundrett*, 5 Barn. & Adol., 297, Patteson, *J.*, says: "The recent cases have gone too great a length. They seem to have proceeded on the principle, that if a party be insolvent at the time he makes payment or a delivery, and afterwards he become bankrupt, he must be deemed to have contemplated bankruptcy at the time when he made such payment; but I think that is incorrect; for a man may be insolvent and yet not contemplate bankruptcy."

And Parke, *J.*, says: "The meaning of those words" (in "contemplation of [*157 bankruptcy]), "I take to be that the payment or delivery must be with intent to defeat the general distribution of effects which takes place under a commission of bankruptcy. It is not sufficient that it should be made (as may be inferred from some of the late cases) in contemplation of insolvency. These cases I think have gone too far."

Gibbs, *Ch. J.*, in *Fidgeon v. Sharpe*, 5 Taunt., 545, lays down the correct rule. (See it quoted, 8 Met., 385; see, also, *Hartshorn v. Slodden*, 2 Bos. & Pull., 582; *Gibbins v. Philipps*, 7 Barn. & Cress., 529; *Atkinson v. Brindall*, 2 Bing. N. R., 225; 2 Scott, 369; *Belcher v. Prittie*, 10 Bing., 408.)

The statute of Jac. 1 has been modified by recent enactments.

By the 12th sec. of 2 & 3 Vict., ch. 11, it is provided that "all conveyances by any bankrupt *bona fide* executed, before the issuing any fiat of bankruptcy, shall be valid, notwithstanding any prior act of bankruptcy by him committed, provided the person to whom such bankrupt so conveyed had not at the time of such conveyance notice of such act."

And the 1st sec. of the 2 & 3 Vict. ch. 29, after reciting 6 Geo. IV., ch. 16, sec. 81, and 2 & 3 Vict., ch. 11, sec. 12, enacts, "That all contracts, dealings, and transactions, by and with any bankrupt, really and *bona fide* made and entered into before the date and issuing of the fiat against him, and all executions and attachments against the lands and tenements, or goods and chattels of such bankrupt, *bona fide* executed or levied before the date, &c., of the fiat, shall be deemed to be valid, notwithstanding any act of bankruptcy; provided also, that nothing herein contained shall be deemed to give validity to any payment, &c., of any bankrupt, being a fraudulent preference of any creditor."

The following American cases give the construction of the United States Bankrupt Act upon this point:

In the matter of *Rowell*, Mr Justice Prentiss, of the United States District Court of Vermont,

21 Vt. R., 625, says: "What constitutes such a preference is a question concerning which there are conflicting authorities; but the prevailing *dictum* seems to be, that a payment, when it consists of a part only of the debtor's property, must be made in contemplation of bankruptcy, and must be voluntary. Both must concur. If it be in contemplation of bankruptcy, but not voluntary, or be voluntary and not in contemplation of bankruptcy, something more must appear than mere insolvency; enough to show, if not a determination to become a bankrupt, at least that bankruptcy was in view as a consequence of the insolvency; and to be voluntary, the payment must originate with the debtor, the first step being taken by him and not by the creditor."

158*] *Gassett et al. v. Morse et al.*, United States District Court of Vermont, 21 Vt. R., 627, where in relation to the proviso as to conveyances made more than two months before, &c., Prentiss, J., (p. 633) says: "It cannot reasonably be taken to have any other effect than merely to give validity to a transaction *bona fide* entered into more than two months before the filing of the bill, so far as it concerns the party dealing with the bankrupt. It cannot be understood as giving any protection to the bankrupt himself, either on the question of bankruptcy, or on the question of his right to a discharge. If the transaction be fraudulent on his part, why should he not be deemed a bankrupt or denied a discharge, as the case may be, though the rights of the party under the transaction, who may be an innocent party, should remain unaffected?"

In the matter of *Pearce*, 6 Law Rep., 261, Judge Prentiss held "that it is not a necessary and legal inference that a conveyance was made in contemplation of bankruptcy, merely because the debtor was insolvent at the time; but it must appear that the conveyance was made by the debtor in anticipation of failing in his business, of committing an act of bankruptcy, or of being declared bankrupt at his own instance, and intending to defeat the general distribution of his effects."

In *Ashby v. Steere*, 2 Wood. & Minot's Rep., 347, Judge Woodbury examined all the cases on the subject, and says (p. 357) that "if a preference is made by the debtor without contemplating a subsequent resort to the law, the sale and preference are not void at all. Nor if made with such contemplation, though culpable in the debtor, is it invalid as to the creditor, unless he took the property with notice of what was contemplated, and thus designedly co-operated against the Act, and did it within the short period of two months prior to the debtor's application for the benefit of the Act."

Again (pp. 357, 358): "The law wisely considers it better that a preference of this kind, which is good at common law, and when the creditor does not know of the design of the debtor to go into bankruptcy, and does not co-operate to defeat the policy of that law, should not be disturbed as to the public, after two months as before named, than that such assets should go into a common fund for all creditors."

In *Jones v. Howland*, 8 Met. R., 377, per Hubbard, J., opinion of court, p. 387: "The instruction requested by the counsel for the de-

fendants was substantially correct. With some slight modification, it may be stated as follows: That if, on the 8th day of March, Stowell feared or believed himself to be insolvent, but did not contemplate stoppage or failure, and intended to keep on, making his payments and transacting his business, hoping that his [*159] affairs might be afterwards retrieved; and in that state of mind made the sale or payment of that day without intending to give a preference to the defendants, and as a measure connected with his going on in his business, and not as a measure preparatory to, or connected with, a stoppage in business, then the sale or payment on that day was not a sale or payment made in contemplation of bankruptcy within the meaning of the Act."

And see *Wilkinson's Appeal*, 4 Barr, Penn. Rep., 284, 288, 289, where the court say (referring to the cases of *Wakeman v. Hoyt*, 5 Law Rep., 306, and *Arnold et al. v. Maynard*, by Story, J., 5 Law Rep., 296): "These last two decisions do not sustain the position that the confession of a judgment by a person, even deeply indebted and insolvent, constitutes of itself a fraud on the Bankrupt Act, and is an act of bankruptcy, &c."

"We apprehend that to take the cause out of the saving clause, it is incumbent upon those who attempt to defeat its operation to show by satisfactory evidence that the act or dealings were not *bona fide*." (*Id.*, p. 290.)

"This view of the case appears to be in conformity with the decisions of this court on the subject. Thus, in *Haldeman v. Michael*, 6 Watts & Serg., 128, it was ruled that a bond with warrant of attorney to confess judgment, which was given two months and twenty days before the petition to have the debtor declared a bankrupt was presented by his creditor, and on which a *fi. fa.* was issued on the same day the bond and warrant were given, was good and valid, and did not constitute an act of bankruptcy. Judge Hays says that the slightest solicitation on the part of a creditor will protect the transaction. 'Unless it clearly appears that the act originated with the debtor, and that he took the first step to make the transfer, it will not be deemed a fraudulent preference. And it is incumbent on the party who seeks to defeat the transaction to show that it was voluntary.'" (*Id.*, p. 291.)

The case of *McAllister v. Richards*, 6 Barr, 133, does not vary this rule, and refers to the above case in 4 Barr, as containing the correct rule on the subject.

II. The debt of \$15,000, secured by mortgage to the Lafayette Bank, was not an usurious or prohibited loan of money under the charter of the bank.

1. The interest charged upon this sum of \$15,000 was only at the rate of 6 per cent. per annum, with no additional charge of any kind.

The amended bill charges that this loan was "at and for a rate of interest greater than at the rate of six per cent. per annum in advance."

*This the answer positively denies. [*160] The respondents, in their answer, say: "These respondents loaned to the said J. & W. Mahard the sum of \$15,000, at Cincinnati, at or about the date of said mortgage, to enable them to take up a portion of the drafts on which they

were liable, as already stated. These respondents have already stated that the first and only draft of said J. & W. Mahard not paid at maturity, to the knowledge of these respondents, was protested on the 18th November, 1841, but was arranged and taken up to the satisfaction of these respondents; all other drafts of said J. & W. Mahard were taken up by them as they became due at New Orleans, whether with the proceeds of the loan made by these respondents, as aforesaid, or not, these respondents have no positive knowledge; when the said drafts were paid, these respondents regarded the debt evidenced thereby as paid, and fully discharged and extinguished."

The answer further states, that when these notes for \$15,000 were discounted, they "had then ninety-two days to run, and were to be received without reduction for one year, then one third to be paid, and so on, until final payment in three years; that the proceeds of said notes, reserving the sum of two hundred and thirty dollars, the interest for ninety-two days, were placed to the credit of said J. & W. Mahard."

The interest on \$15,000 for ninety-two days, computing 365 days to the year, is just \$230.78, so that the Bank received seventy-eight cents less than the legal interest.

It is claimed that these notes were discounted in order to enable the Mahards to take up their drafts when they became due, and the transaction would be affected by any taint of usury which might be claimed to attach to the drafts.

These notes were in no sense a renewal of the drafts; they were not substituted for the drafts. The avails were passed to the credit of the Mahards. The drafts were all supposed to continue outstanding, and at their maturity were taken up at New Orleans, but whether with proceeds of these notes or not is not certain.

There was no pledge or legal appropriation of the avails of those notes to meet the drafts. Only one of the drafts was due when the notes were discounted.

2. In the discounting of the drafts there was no usury.

The charge made on the drafts, as shown in the answer to the amended bill, was interest at 6 per cent. on each. The exchange on the first was one per cent., and the other three one and one half per cent. The drafts were all at four months, on New Orleans.

The answer expressly states: "The exchange 161*] charged in each *case was the customary and regular rate at the time of the discounting of the bills; and these respondents expressly deny that any illegal interest was taken or charged on said bills, or any of them."

It is the universal settled rule of law that a charge for exchange, unless used as a cover for usury, is legal and not usurious.

The case of *Andrews v. Pond et al.*, 13 Pet., 65, contains a full statement and illustration of the rule on this subject.

The party in this case paid ten per cent. damages on a protested bill, drawn on Alabama, in New York, and ten per cent. interest and exchange on a new bill to be given, besides the expenses on the protested bill. The amount due on the first bill, 21st February, 1837, was \$6,000. The amount of the new

bill, including damages, interest, exchange, and expenses of protest, due on the 18th May, 1837, less than three months, was \$7,287.78.

Per case, Taney, *Ch. J.*, (p. 76): "The transaction, taken altogether, was indeed a ruinous one on the part of the defendant. A debt of \$6,000, payable at Mobile, on the 21st of February, was converted into a debt of \$7,287.78, payable at the same place on the 25th of April, following: being an increase of \$1,287.78 in the short space of eighty-one days. Yet, if the defendants brought it upon themselves by their failure to take up the first bill at maturity, and the transaction was not intended to cover usurious interest, they must meet the consequence of their own improvidence. The sum of \$6,525.25 was undoubtedly due from them to H. Andrews & Co., on the day the bill in question was drawn. They were entitled to demand that sum in New York, or a bill that was equivalent to it at the market price of exchange; and, if ten per cent. discount was the usual price at which others purchased bills of this description in the market of New York, they had a right to take the bill at that rate in satisfaction of their debt."

Again (p. 77): "There is no rule of law fixing the rate which may be lawfully charged for exchange. It does not altogether depend upon the cost of transporting specie from one place to another, although the price of exchange is, no doubt, influenced by it. But it is also materially affected by the state of trade, by the urgency of the demand for remittances, and by the quantity brought into the market for sale; and sometimes material changes take place in a single day, although no alteration has happened in the expenses of transporting specie. The court, therefore, can lay down no rule on the subject."

The fact that bills on time are sold or discounted at a higher rate of exchange than sight bills, does not prove the transaction to *be usurious. (*Picher, Assignee, &c.*, [*162 v. *The Banks*, 7 B. Monroe, 548; see, also, 11 Ohio R., 417; 18 Pet., 65.)

When there is a suspension of specie payment by the banks, the fact of a charge of a higher rate for time than for sight drafts does not even tend to show that there was any attempt to cover an usurious loan.

The rate of exchange, when the payment is to be made in specie at the place of payment, is, in the main, the expense, risk, &c., of the transportation of specie.

The rate charged on sight drafts, even if payable in specie, is not always the same as that on drafts on time. In one case, the rate has reference to the present known value of the funds at the place of payment; in the other, to the rate at the maturing of the paper.

When the banks have suspended specie payment, the ordinary certainty in such transactions ceases, and there is a marked difference between sight and time drafts.

The party buying or discounting drafts at a future time, acts in reference to the possible and uncertain state of things which may exist when his money is returned to him in a depreciated currency at a distant place. The soundness of the banks in whose paper the notes may be paid, the discount on the paper of those banks, the uncertainty attending commercial

affairs, and the apprehension of future depreciating of bank paper, all form part of the consideration as to the rate of exchange.

The question is one not affecting the character of the draft or note offered for sale or discount, but the value of the funds at the place of payment where the same is paid.

When the draft is drawn at a place, where, from the suspension of banks, bank paper is the currency, upon a place where they have not suspended, and debts are paid in specie, the effect of this state of things is apparent.

A draft drawn on London at New York, when the banks of New York suspended specie payment, would be sold at a premium, which would represent, not only the real state of exchanges between the two countries, but the difference in the value between gold and silver and the market value of the depreciated currency.

And *vice versa*, a draft sold at London on New York, would be in the same manner at a heavy discount. If such draft was drawn on time, however abundant money might be in London, and however low the rate of interest, or however unquestionable the character of the paper offered, the rate of exchange charged would be much higher than on a sight draft, on account of the uncertainty of the value of the depreciated currency in which the debt was to be paid.

163*] *For these reasons it might well be that at the same time that drafts on New Orleans at Cincinnati were at a discount, similar drafts at New Orleans on Cincinnati might be at a similar discount. Because men would prefer to have their money returned to them, at the maturity of the paper, in the paper of the banks known to them and at home, in preference to that of banks unknown to them and at a distance. This would not apply to specie, the value of which is known and uniform.

8. If usurious interest were taken by the bank, by the general principle of equity, a party seeking relief must pay the principal and legal interest, and, by the settled law of Ohio, the contract is void only for the excess of interest.

Lord Thurlow, in *Scott v. Nesbit*, 2 Bro., 641; 2 Cox, 188, said: "I take it to be a universal rule that if it be necessary for you to come into this court to displace a judgment at law, you must do it on the equitable terms of paying the principal money due with lawful interest."

"It is the fundamental doctrine of the court, that in case of usury, equity suffers the party to the illicit contract to have relief; but whoever brings a bill in case of usury, must submit to pay principal and interest due." (Per Lord Hardwicke, 1 Vesey, 820.)

Lord Eldon, 3 Ves. & Bea., 14, says: "At law you must make out the charge of usury, and at equity you cannot come for relief, without offering to pay what is really due," &c.

Chancellor Kent, 5 Johns. Ch. R., 148, after citing the foregoing cases, says: "The equity cases speak one uniform language, and I do not know of a case in which relief has been afforded to a plaintiff, seeking relief against usury, by bill, upon any other terms." (1 Johns. Ch. R., 867; 8 Ves. & Bea., 14; 2 Ves., Jr., 188; 16 Ves., 124, n. 1; 2 Ves., Jr., 489; 2 Bro. C. R., 641; 1 Story, Eq. Jur., secs. 801, 802.)

Mr. Justice Curtis delivered the opinion of the court:

Nathaniel C. McLean, as the assignee of John Mahard, Jr., a bankrupt, filed his bill in the Circuit Court of the United States for the District of Ohio, for the purpose of relieving property of the bankrupt from incumbrances thereon, alleged to have been created in fraud of the Bankrupt Act. A final decree having been entered in the cause, John S. Buckingham and Mark Buckingham, parties defendant to the bill, have prosecuted this appeal.

They allege that the decree of the Circuit Court was erroneous in three particulars.

The first is, that the title of John S. Buckingham to forty-nine shares of the stock of the Lafayette Bank has been declared *to [*164] be subject to an incumbrance thereon in favor of the bank, whereas John S. Buckingham had the better title thereto.

The amended bill states "that said Mahard, before and at the time of filing his petition to be declared bankrupt, was the owner of forty-nine shares, of one hundred dollars each, of the capital stock of the Lafayette Bank of Cincinnati; that the said Lafayette Bank and John S. Buckingham set up some claim to said forty-nine shares of stock, of the particular nature of which your petitioner is ignorant. And your petitioner charges, that neither said Lafayette Bank, nor John S. Buckingham, have any valid legal claim to said shares of stock, but that petitioner, assignee, &c., is justly entitled thereto."

The answer of the Bank responds to this allegation in the bill, "that said John Mahard was the owner of forty-nine shares of the capital stock of the Bank of these respondents, on each of which the sum of one hundred dollars had been paid; that he became the owner of said shares, so far as these respondents are advised, on the 18th day of September, 1841, and afterwards transferred the same to the cashier of said Bank, as collateral security for the debt of J. & W. Mahard to these respondents, and these respondents now claim to have the control of said shares in virtue of said transfer, and also in virtue of their lien upon the capital stock of said Bank, owned by debtors to the same, which lien is created and confirmed by the charter granted to these respondents by the Legislature of the State of Ohio."

John S. Buckingham and Mark Buckingham both demurred to this amendment of the bill. Their demurrer was overruled; but no answer to this particular allegation was filed by either of them; and the record contains no evidence, introduced by any party, touching the title to this stock. In this state of the record, it is most manifest, only one decree could be made. The Bank, in response to the allegations of the bill, having disclosed two titles to this stock, either of which was sufficient, if valid, and the assignee having shown nothing to impeach either title, his claim could not be allowed; and John S. Buckingham, being entirely silent respecting the charge in the bill, that he makes some claim to this stock, does, in effect, make none in this cause, and cannot complain of a decree for not awarding to him what he does not appear to have claimed.

The second objection made by the appellants to the decree is, that it declares their title to

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certain moneys, made by the levy of an execution, in their favor, on personal property of the bankrupts, to be invalid, as against the assignee.

On the 7th of April, 1842, a power of attorney to William M. Corry, Esq., to confess a ¹⁶⁵ judgment against the mercantile firm "of the bankrupts, in favor of John S. Buckingham, for the sum of fourteen thousand eight hundred dollars, was executed by John Mahard, Jr., for himself and his copartner, William Mahard, who was at the time in New Orleans. By virtue of this power a judgment for that sum was confessed on the 8th of April. On the 20th of April, William Mahard, by an instrument under seal which recited the substance of this power, and that it was given with his concurrence, confirmed and ratified it as his act. On the 22d of May, 1842, execution was taken out and levied on personal property of the judgment debtors. On the 27th of May, 1842, John Mahard, Jr., filed his petition and was subsequently decreed a bankrupt thereon. The judgment, though confessed in favor of John S. Buckingham alone, was founded on a debt due to both the appellants, who were *bona fide* creditors of J. & W. Mahard.

The question is, whether these proceedings came within the second section of the Bankrupt Act, 5 Stat. at Large, 442. This section provides: "That all future payments, securities, conveyances or transfers of property, or agreements, made, or given by any bankrupt, in contemplation of bankruptcy, and for the purpose of giving any creditor, indorser, surety, or other person any preference or priority over the general creditors of such bankrupt, shall be deemed utterly void, and a fraud upon this act."

By the law of Ohio, a judgment creates a lien on the real estate of the judgment debtor; and the levy of an execution creates one on his personal estate levied on. A power of attorney to confess a judgment, whenever a judgment is taken under it, does in fact operate to create a security upon the debtor's real estate; and when an execution issues on that judgment, to create a lien on the personal estate levied on. It is true these liens arise by operation of law, from the judgment, and execution, and its levy, which are the acts of officers of the law, and not of the debtor. But the power of attorney is designed to, and does, produce those acts, which depend upon it for their validity, and therefore through those acts does create the security. The operation of law is always necessary to give effect to any form of security, which indeed is but the legal consequence of the act of the party; and the lien created by a judgment is none the less the legal consequence of the act of the party, because it is necessary that after the power is executed, a judgment should be rendered. When it is rendered, the creditor has a security, by operation of law, through the act of the debtor, and therefore such a security may be correctly said, in the language of this section, to be made or given by the debtor.

If it were not so, one of the acts of bankruptcy, described in the first section of this statute, would make a valid title to the creditor. ¹⁶⁶ *It is an act of bankruptcy, for the debtor willingly to procure his goods or lands to be attached, distrained, sequestered, or taken

on execution. It cannot be supposed that what was in itself an act of bankruptcy, and done for the purpose of giving a preference over the general creditors, was intended to be left valid, and effectual to defeat one of the two great objects of the law, which were to grant a discharge to honest debtors who should conform to its provisions, and to distribute their property ratably among all their creditors.

But if a judgment, confessed by the debtor through a power of attorney, be not a security given by him, there is nothing in this act which defeats a preference thus created, and the provisions of this second section become practically inoperative in respect to all property of the debtor which may be bound by a judgment, or even by the levy of an execution; since a speedy and well-known mode of preferring a creditor, by confessing a judgment, is left open to all debtors who may desire to give preferences, even in contemplation of bankruptcy. This consequence, while it would not justify a forced construction of the words used in the Act, does certainly require that the utmost meaning and effect, fairly attributable to them, should be laid hold of to prevent so great a mischief.

The language employed in the English Bankrupt Acts shows that, under that system, a judgment is treated as a security. The 21 James I., c. 19, sec. 9, uses the language "that, if any person have a security for his debt by judgment, statute," &c. The Revising Act, 6 Geo. IV., c. 16, sec. 108, provides that, "no creditor, having security for his debt, &c., shall receive more than a ratable part of such debt, except in respect to any execution or extent, served and levied by seizure upon, or any mortgage or lien upon, any part of the property of such bankrupt, before the bankruptcy." Thus classing judgments with mortgages, under the word "securities." And the Irish Bankrupt Act, 11 & 12 Geo. III., c. 8, sec. 5, enacted, that "nothing herein contained shall extend to any security by judgment, obtained before the bankrupt became a trader." Mr. Eden (Eden on Bankruptcy, 285) remarks, concerning the difference in phraseology between the 21 James I., and 6 Geo. IV., that the general term, security, employed by the latter, would necessarily include all the particulars enumerated in the old statute; that is, security necessarily includes judgments. In many of the states, a bond and warrant of attorney to enter up judgment is a usual mode of taking security for a debt, and judgments thus entered are treated as securities, and an equitable jurisdiction exercised over them by courts of law. In some states, they operate only as a lien on the lands of the debtor, in others, on his personal estate also ^{(Brown v. Clarke, 4 How., 4); and} [*167] wherever, by the local law, a judgment or an execution operates to make a lien on property, we are of opinion, it is to be deemed a security; and when rendered upon confession, under a power given by the debtor for that purpose, it is a security made or given by him within the meaning of the Bankrupt Act, and is void, if accompanied by the facts made necessary by that Act to render securities void. These facts are, that the security was given "in contemplation of bankruptcy, and for the purpose of giving any creditor, indorser, surety, or other per-

son, a preference or priority over the general creditors of such bankrupt."

The inquiry, whether this security was given in contemplation of bankruptcy, involves the question what is meant by those words. It is understood that, while the bankrupt law was in operation, different interpretations were placed upon them in different circuits. By some judges, they were held to mean contemplation of insolvency—of a simple inability to pay, as debts should become payable—whereby his business would be broken up; this was considered to be a state of bankruptcy, the contemplation of which was sufficient. By other judges, it was held, that the debtor must contemplate an act of bankruptcy, or a voluntary application for the bankrupt law. (*In re Pearce*, 6 Law, 261; *In re Rowell*, 6 Law, 298; *Jones v. Howland*, 8 Met. R., 377; *Taylor v. Whitehouse*, 5 Humph., 340.)

It is somewhat remarkable that this question should be presented for the first time for the decision of this court after the law has been so long repealed, and nearly all proceedings under it terminated. Perhaps the explanation may be found in the fact that when securities have been given within two months before the presentation of a petition by or against the debtor, the evidence would usually bring the case within either interpretation of the law. However this may be, it is now presented for decision; and we are of opinion that, to render the security void, the debtor must have contemplated an act of bankruptcy, or an application by himself to be decreed a bankrupt.

Under the common law, conveyances by a debtor, to *bona fide* creditors, are valid, though the debtor has become insolvent and failed, and makes the conveyance for the sole purpose of giving a preference over his other creditors. This common law right, it was the object of the second section of the Act to restrain; but, at the same time, in so guarded a way as not to interfere with transactions consistent with the reasonable accomplishment of the objects of the Act. To give to these words, contemplation of bankruptcy, a broad scope, and somewhat loose meaning, would not be in furtherance of the general purpose with which they were introduced.

168*] "The word "bankruptcy" occurs many times in this Act. It is entitled "An Act to establish a uniform system of bankruptcy." And the word is manifestly used in other parts of the law to describe a particular legal status, to be ascertained and declared by a judicial decree. It cannot be easily admitted that this very precise and definite term is used in this clause to signify something quite different. It is certainly true in point of fact, that, even a merchant may contemplate insolvency and the breaking up of his business, and yet not contemplate bankruptcy. He may confidently believe that his personal character, and the state of his affairs, and the disposition of his creditors, are such, that when they shall have examined into his condition they will extend the times of payment of their debts, and enable him to resume his business. A person, not a merchant, banker, &c., and consequently not liable to be proceeded against and made a bankrupt, though insolvent, may have come to a determination that he will not petition. The

contemplation of one of these states, not being in fact the contemplation of the other, to say that both were included in a term which describes only one of them, would be a departure from sound principles of interpretation. Moreover, the provisos in this section tend to show what was the real meaning of this first enacting clause. The object of these provisos was, to protect *bona fide* dealings with the bankrupt, more than two months before the filing of the petition by or against him, provided the other party was ignorant of such an intent, on the part of the bankrupt, as made the security invalid under the first enacting clause. And the language is, "provided that the other party to any such dealings or transactions had no notice of a prior act of bankruptcy, or of the intention of the bankrupt to take the benefit of this Act." These facts, of one of which a *bona fide* creditor must have notice, to render his security void, if taken more than two months before the filing of the petition, can hardly be supposed to be different from the facts which must exist to render the security void under the first clause; or in other words, if it be enough for the debtor to contemplate a state of insolvency, it could hardly be required that the creditor should have notice of an act of bankruptcy, or an intention to take the benefit of the act. It would seem that notice to the creditor of what is sufficient to avoid the security, must deprive him of its benefits, and consequently, if he must have notice of something more than insolvency, something more than insolvency is required to render the security invalid; and that we may safely take this description of the facts which a creditor must have notice of to avoid the security, as descriptive, also, of what the bankrupt must contemplate to render it void.

*In construing a similar clause in the [*169 English bankrupt law, there have been conflicting decisions. It has been held that contemplation of a state of insolvency was sufficient. (*Pulling v. Tucker*, 4 B. & Ald., 382; *Poland v. Glyn*, 2 Dow. & Ry., 310.) But both the earlier and later decisions were otherwise; and in our judgment, they contain the sounder rule. (*Fidgeon v. Sharpe*, 5 Taunt., 545; *Hartshorn v. Slodden*, 2 Bes. & Pull., 582; *Gibbins v. Philipps*, 7 B. & C., 529; *Belcher v. Prittie*, 10 Bing., 408; *Morgan v. Brundrett*, 5 Barn. & Ad., 297; and see the opinion of Pattenon, J., in the last case.)

Considering, then, that it is necessary to show that the debtor contemplated an act of bankruptcy, or a decree adjudging him a bankrupt on his own petition, at what time in this case must he have had this in contemplation? He gave the power of attorney on the 7th of April; the judgment was confessed and entered up on the next day; the execution was taken out and levied, and the lien created thereby, on the 22d of May; and five days afterwards, being less than two months after the execution of the power, the debtor presented the petition under which he was decreed a bankrupt. The only act done by the debtor was the execution and delivery of the power of attorney. It was a security by him made or given, only by reason of that instrument. What followed were acts of the creditor and of officers of the law, with which the debtor is no

more connected than with the delivery by a creditor of a deed to the office of the register, to be recorded, or the act of the register in recording it. It would seem that, if the intent of the debtor is to give a legal quality to a transaction, it must be an intent accompanying an act done by himself, and not an intent or purpose arising in his mind afterwards, while third persons are acting; and that, consequently, we must inquire whether the debtor contemplated bankruptcy when he executed the power. It is true, this construction would put it in the power of creditors, by taking a bond and warrant of attorney, while the debtor was solvent and did not contemplate bankruptcy, to enter up a judgment and issue execution, and by a levy acquire a valid lien, down to the very moment when the title of the assignee began. But this was undoubtedly so under the statute of James, which, like ours, contained no provision to meet this mischief; and it became so great that, by the 108th section of the Revising Act of 6 Geo. IV., it was enacted, that "no creditor, though for a valuable consideration, who shall sue out execution on any judgment obtained by default, confession, or *nil dicit*, shall avail himself of such execution, to the prejudice of other fair creditors, but shall be paid ratably with such creditors."

If the Bankrupt Act of 1841 had continued 170*] to exist, a *similar addition to its provisions would doubtless have become necessary.

It remains to inquire whether the debtor in this case, in point of fact, contemplated bankruptcy, and designed to give a preference to the appellants, when he executed the power on the 7th of April.

It has been stated at the bar that by some accident, much of the evidence bearing on this question was lost, and is not inserted in the record. We have no doubt of the fact; but this question must be decided here upon what remains; and we think there is sufficient now on the record to show that bankruptcy was in contemplation when the power was given. The petition to be decreed a bankrupt was filed only fifty days after the date of the power. No material change in the state of the debtor's affairs appears to have occurred between the 7th of April and the 27th of May. The only property which came into the hands of the assignee, uncovered by valid liens of particular creditors, was the \$1,300 made by this execution out of property already incumbered by a mortgage to another creditor, for the sum of upwards of \$1,400 dated on the 18th of March preceding, and which has been adjudged by the Circuit Court to be void, under the second section of the Bankrupt Act, and no appeal taken.

The bankrupt was a member of a mercantile firm, doing business in Cincinnati and New Orleans, and the commercial paper of this firm, to a very large amount, had been protested for non-payment, and was known to the bankrupt to have been so, before this power was given. Holding an execution for \$14,800, the appellants were able to make upon it only \$1,300. Both the mercantile firm and the individual bankrupt were in a state of deep, and so far as appears, irretrievable insolvency, and there is no reason to doubt the bankrupt knew these

facts. Though a competent witness for the appellants on the question of his own intent, and able to give decisive evidence, if believed, he has not been examined, nor is there any evidence in the record to control the strong presumption that the purpose he executed on the 22d of May, by filing his petition, existed in his mind, fifty days before, when his circumstances were the same, and the inducements to take advantage of the Act were as great, as at the time he actually attempted to do so.

It is true the appellants say in their answers they did not know or believe, when the power was given, and do not now believe, the debtor then contemplated bankruptcy. But their answer, though responsive, in this particular, to the bill, is entitled to little weight concerning the state of mind of the debtor, no reasons being given for their belief and none of the facts explained *from which an opposite inference is to be drawn (9 Cranch, 160); and their own state of mind is not material, because the petition was filed within two months after the date of the power.

It has been suggested that the execution of the power of attorney by Mahard was in itself an act of bankruptcy, because he thereby procured his goods to be taken on execution. But the Act requires that this should be done willingly, or fraudulently. The Buckinghams being *bona fide* creditors there is no ground upon which this act can be deemed fraudulent unless it was done in contemplation of bankruptcy and with intent to give a preference, and this would bring us back to the inquiry whether such contemplation and intent existed; and it is explicitly denied by the answers of the Buckinghams that the power was executed by Mahard willingly, it having been done under strong pressure by them, and only at last because a suit was threatened if he did not comply. There is no evidence to control these statements in their answers, so that we cannot say that *per se* the giving of the power was an act of bankruptcy. (1 Deacon's B. L., 446; *Thompson v. Freenan*, 1 T. R., 155; *Hunt v. Mortimer*, 10 B. & C., 44; *Morgan v. Brundrett*, 5 B. & Ad., 297.)

We have therefore found it necessary to go into the inquiry whether the bankrupt did in fact contemplate bankruptcy when the power was given, and intend to give a preference thereby; and being of opinion that he did, there is no error in the decree of the Circuit Court in this particular.

The third objection made to the decree of the court below is, that it established the validity of sundry mortgages on the property of the bankrupts, held by certain bankrupt corporations. It is alleged by the appellants that these mortgages were void, on account of usury; that though, by the statute law of Ohio, a usurious contract is valid, for the principle sum lent, with lawful interest thereon, yet, if a banking corporation make a usurious contract, it is utterly void, because such a banking corporation has no lawful authority to make such a contract, exceeds its powers by attempting to do so, and consequently neither party is bound thereby.

We have not thought it necessary to examine this position, because we are of opinion that

usury, in either of these mortgages, is not proved.

The power of these banking corporations to deal in exchange is not controverted. There is no usury on the face of any one of these transactions. It is incumbent on the party who charges usury to prove it; and where it is alleged to consist in taking excessive rates of exchange, or in resorting to the form of a bill of exchange in order to keep out of sight a usurious compensation for the simple loan of money, these [172*] facts must be proved. **(Andrews v. Pond et al., 13 Pet., 65; Creed v. The Commercial Bank, 11 Ohio R., 489.)* The answer of each bank denies such intent, and avers that the exchange charged in each case was the customary and regular rate at the time of the discount of each bill. There is not evidence to prove the contrary. Indeed, it was agreed by the counsel on both sides, during the argument, that the rates charged were the usual and customary prices of exchange between Cincinnati, where the bills were drawn, and New Orleans, where they were payable, at the times they were discounted. The counsel for the appellants urged that the rates were higher than were charged on sight bills. But these were time bills, and it is no proof of usury that the banks did not take the market rates on sight bills which they did not discount, if they took only the market rates on those they did discount. It was also insisted that the banks did not buy these bills, but were the first takers for loans of money made to the drawers. But we are unable to perceive how the fact that the banks were the first takers can be of any importance in this case, nor do we deem it material that the bills were discounted for the drawers.

The reason why the addition of the current rate of exchange to the legal rate of interest does not constitute usury is, that the former is a just and lawful compensation for receiving payment at a place where the money is expected to be less valuable than at the place where it is advanced and lent. And this reason exists when the lender discounts the drawer's bill as well as when he buys a bill in the market of the payee. In neither case is it usury to take the regular and customary compensation for the loss in value by change in place of payment. It is argued that no usage or custom can make an unlawful contract valid. This must be admitted. But the contract is not unlawful, unless more than six per cent. has been reserved or taken for interest; if more has been reserved or taken, not for the loan and forbearance, but for a change in the place of payment, then the contract is lawful; and in determining whether the excess over six per cent. has been reserved for interest, or as a just compensation for changing the place of payment, the custom, or the market value of this change, is evidence of the real intent of the parties, and so evidence of the validity of the contract.

Our opinion is that usury was not made out in either of these mortgages and that there was no error in the decree of the court below declaring their validity.

The decree of the Circuit Court is affirmed, with costs.

ORDER.

This cause came on to be heard on the tran-

script of the record from the Circuit Court of the United States for the District of Ohio, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

Cited—20 How., 207, 210; 5 Wall., 412; 12 Wall., 126; 21 Wall., 386; 1 Bank. Reg., 81, 82, 90, 146; 2 Bank. Reg., 116, 123, 148, 150, 155, 156; 3 Bank. Reg., 74, 98, 99; 4 Bank. Reg., 115; 5 Bank. Reg., 330; 6 Bank. Reg., 149, 289; 9 Bank. Reg., 476; 16 Bank. Reg., 416, 509; Deady, 443, 563; 6 Blatchf., 179; 7 Blatchf., 264; 1 Curt., 234; 1 Dill., 194; 2 Ben., 202, 208, 221; 3 Ben., 526; 1 Low., 210, 294, 317; 2 Low., 287, 288; 2 Flippin; 135; 5 Sawy., 386; 1 Biss., 444; 1 Holmes, 64.

SMITH HOGAN, ARTHUR S. HOGAN,
AND REUBEN Y. REYNOLDS, *Plaintiffs*
in Error, v.

AARON ROSS, who sues for the use of
ROBERT PATTERSON.

Pleading—judgment for plaintiff on second count, where all pleas were applicable to first, which was stricken out on trial.

Where a declaration contained two counts, one of which set out an injunction bond with the condition thereto annexed, and averred a breach, and the second count was merely for the debt in the penalty; and the pleas were all applicable to the first count, which was upon trial stricken out by the plaintiff, and the court gave judgment upon the second count for the want of a plea, this judgment was proper, and must be affirmed.

THIS case was brought up by writ of error from the District Court of the United States for the Northern District of Mississippi.

The question was one of pleading and arose in this way:

At June Term, 1840, of the District Court of the United States for the Northern District of Mississippi, Aaron Ross, a citizen of Pennsylvania, recovered a judgment against George Wightman and Smith Hogan, for \$3,177.05, with interest from the 11th day of December, 1839.

Ross issued an execution upon this judgment.

On the 30th of September, 1842, when this execution was in the hands of the marshal, Smith Hogan obtained an injunction prohibiting further proceedings under the execution. The signers of the injunction bond were Smith Hogan, Arthur S. Hogan, and Reuben Y. Reynolds.

In November, 1843, in the Circuit Court of the United States, the following entry was made upon the docket:

SMITH HOGAN }
v. } 401. Dismissed by order of
AARON ROSS, } complainant's solicitors.

In May, 1845, Ross brought an action upon the injunction bond, the penalty of which, being double the amount of the judgment, was \$6,354.10. The declaration set out the bond and averred, as a breach of the condition, that Hogan had not prosecuted his writ of injunction to effect, but the same was dissolved and the bill of the said Smith, by said court, dismissed. To this declaration, three pleas [174

were filed in June, 1845, to the second and third of which the plaintiff demurred, and afterwards the defendant demurred to the plaintiff's declaration. All the demurrers were sustained: and the court gave leave to the plaintiff to amend his declaration.

In December, 1846, the plaintiff filed his amended declaration. This was the commencement of the system of pleading which came before this court for review.

The amended declaration consisted of two counts.

The first, after setting out in *hæc verba* the condition of the injunction bond, sets out the breach of the condition, specially, in this, that the said Smith Hogan did not prosecute his said writ of injunction to effect, &c., but afterwards, &c., dismissed the same. It then avers that, by means of the wrongful suing out of said injunction, plaintiff has sustained damage to the amount of \$4,000. It proceeds to aver, that, since the dismissal of the injunction, &c., neither of said obligors, nor any other person, hath paid to plaintiff the damages, &c., nor any part of the judgment enjoined by said writ of injunction.

The second count is upon the obligatory part of the bond alone, without any reference to the condition, and the only breach assigned is the general one, the non-payment of the money mentioned in the bond.

The defendants put in the five following pleas:

1. And the said defendants, by leave of the court first had, by attorney, come and defend the wrong and injury, when, &c., and say *actio non*, because they say that they have prosecuted their said injunction with effect, and this they pray may be inquired of by the country, &c.; and the plaintiff likewise.

TOPP & MILLER.

2. And for further plea in this behalf, the said defendants say *actio non*, &c., because they say that the said plaintiff was not damaged or in any manner injured by the wrongful suing out of said injunction by the said Smith Hogan, and this they are ready to verify; wherefore they pray judgment, &c.

Replication and issue in short by consent.

TOPP & MILLER.

3. And for further plea in this behalf the said defendants say *actio non*, because they say they have fully, well, and truly performed all and singular the conditions in said bond specified, and this they are ready to verify; wherefore they pray judgment, &c.

Replication and issue in short by consent.

TOPP & MILLER.

4. And for further plea in this behalf the said defendants say *actio non*, because they say they have fully, well, and truly performed all and [175*] singular the conditions in said bond specified, in this, to wit: that on the — day of —, 184 —, at the district aforesaid, the said plaintiff sued out of the office of the clerk of said District Court a writ of *feri facias*, founded on the judgment in the bond and declaration mentioned, which on the day and year aforesaid went into the hands of the marshal of said district, to be executed and returned according to law. And the said defendants aver that said marshal, by virtue of said execution, did levy and make, of the property, goods, and

HOWARD 13.

chattels of said defendant, Smith Hogan, a large sum of money, to wit: the sum of four thousand dollars, and this they are ready to verify; wherefore they pray judgment, &c.

5. And for further plea in this behalf the said defendants say *actio non*, because they say, that the judgment upon which the execution issued, and to enjoin which the supposed injunction bond upon which this suit is founded was executed, was fully paid off, satisfied and discharged, and before the issuance of the execution enjoined, to wit: on the 1st day of June, A. D. 1842, at, to wit: in the district aforesaid, and this they are ready to verify; wherefore they pray judgment, &c.

DAVIS & GOODWIN,
Attorneys for Plaintiff.

Replication and issue.

TOPP & MILLER.

To the fourth plea there was the following special replication:

Replication to 4th plea.

UNITED STATES OF AMERICA,

District Court, Northern District of Mississippi.

AARON ROSS, use, &c.,

v.

SMITH HOGAN et al.

And said plaintiff, by attorney, comes, and &c., and says, as to the plea of said defendants by them fourthly above pleaded, *precludi non*, &c., because, he says, that although the writ of *feri facias*, founded upon the judgment of the plaintiff in said plea mentioned, was levied upon two negroes as the property of Smith Hogan, one of the defendants therein, yet said plaintiff says that the said two negroes were levied upon by the marshal of said northern district, at the same time, by virtue of sundry writs of *feri facias*, founded on judgments recovered in said District Court against said defendant, Smith Hogan, to wit: one *in favor of Stephen [*176 Davis, for \$1,194.20; two in favor of James A. Henden, one for \$1,194.20, and the other for \$3,582.60, and one in favor of Fellows, Wordworth & Co., for the sum of \$2,172.46, numbered 23, 24, 25, and 26: and the said two negroes being afterwards sold by said marshal, by virtue of said several writs of *feri facias*, together with the writs of *feri facias* founded upon the judgment of said plaintiff; yet said plaintiff avers that the sum of money, to wit: the sum of \$1,178, raised by the sale of said negroes by virtue of the writs aforesaid was by the order of said District Court, to wit: at the June Term, 1844, thereof, applied and appropriated to the payment and satisfaction of said other writs of *feri facias* above mentioned; and said plaintiff avers that no portion of said sum of money raised as aforesaid was appropriated or applied to the payment or satisfaction of said writ of *feri facias* founded upon the judgment of plaintiff in said plea mentioned; wherefore said plaintiff says he has not had any satisfaction of his said judgment, mentioned in said plea, and this he is ready to verify, &c.; wherefore he prays judgment, &c. TOPP & MILLER.

For plaintiff.

To the second and third pleas the plaintiff demurred, as follows:

And the said plaintiff, as to the said pleas of

the said defendants by them second and third above pleaded in this behalf, says, he is not bound by the law of the land to reply to the same; and for causes of demurrer to said second plea the plaintiff states and sets forth the following, to wit:

1st. Said second plea tenders an issue to an immaterial matter, and not directly put in issue by the declaration.

2d. The said second plea is not responsive to the averments in the declaration mentioned; the plaintiff does not complain that said defendants failed to prosecute their said injunction with effect; the *gravamen* in the declaration of the plaintiff is this, that the defendant, Smith Hogan, wrongfully obtained and sued out the injunction by which the plaintiff was hindered and delayed in the collection of his said judgment.

3d. And the said plea is in other respects informal and insufficient, &c.

EVANS, and TOPP & MILLER,

For plaintiff.

And for cause of demurrer to the said third plea, plaintiff shows the following causes:

1st. Said plea only alleges general performance of the conditions of the bond, when special breaches are assigned in the declaration.

177*] 2d. And is otherwise informal and insufficient.

EVANS, and TOPP & MILLER,

For plaintiff.

To the special replication to the fourth plea, the defendant put in the following rejoinder:

And the said defendants, as to the replications of the said plaintiff to the fourth and sixth pleas of the said defendants, say that the said plaintiff ought not, by reason of anything by them in said replications alleged, to have or maintain their aforesaid action thereof against them, because they — that the other writs of *fiery facias* founded on judgments recorded in said District Court against the defendant, as described and set forth in said replication, were younger in point of time than the judgment and execution founded thereon in the plea mentioned. And the said defendants in fact say, that the said plaintiff, by virtue of the execution founded upon the judgment against one George Wightman and Smith Hogan, being the execution in the declaration and fourth and sixth pleas mentioned, and which judgment was rendered and recorded in said District Court, at the June Term thereof, 1840, the said marshal did make and levy of the proper goods and chattels of the defendant, Smith Hogan, the said sum of four thousand dollars in said plea mentioned. And the said defendants in fact further say, that the judgment upon which the execution issued, as mentioned and set forth in said replications to the fourth and sixth pleas of the said defendants, were not rendered and recorded in said court until the times as hereinafter mentioned, to wit: the judgment in favor of James A. Henden, at the June Term, 1842, of said District Court; the judgment in favor of Stephen Davis, at the June Term, 1842; the judgment in favor of Fellows, Wordworth & Co., at the June Term, 1842, of said District Court; and so the said defendants in fact say, that the said plaintiff hath obtained payment and satisfaction of his said execution in the said replications men-

tioned, and this the said defendants are ready to verify; wherefore they pray judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against these defendants.

DAVIS & GOODWIN,

Attorneys for defendants.

The plaintiff demurred to this rejoinder, and the defendants joined in demurrer.

On the 11th of December, 1846, the demurrer to the rejoinder was sustained, and the court ordered that the defendants have leave to answer over, which they declined to do; and thereupon the cause was continued by consent of parties till the next term of the court.

*In June, 1847, the cause was con- [*178
tinued again.

In December, 1847, it came on for trial. A jury being impaneled, the plaintiff, by his attorney, read to the jury the pleadings, a certificate of the clerk of the Circuit Court, showing that the bill in the case of *Hogan v. Ross* was dismissed by order of complainant's solicitors, and there rested his case. The defendants then put in a demurrer to the evidence.

On the 10th of December, 1847, the following proceedings took place:

Friday, December the 10th, 1847.

This day came the parties by their attorneys, and it appearing to the satisfaction of the court that defendants have filed no plea to the second count in plaintiff's declaration, but have therein wholly made default: It is therefore considered by the court, that plaintiff recover of defendants the sum of six thousand three hundred and fifty-four dollars and ten cents debt, in the said second count in the declaration mentioned, and also the costs in this cause expended. And the plaintiff, by attorney, comes and remits the sum of twenty-six hundred sixty-two dollars and seventy-eight cents, being part of the judgment above mentioned.

Defendants' motion in arrest of judgment, filed and entered December 10th, 1847, as follows, to wit:

AARON ROSS, use of, &c.,

v.

SMITH HOGAN and others.

} 401.

The defendants move the court to arrest the judgment in this case:

1. Because the court cannot pronounce a final judgment upon the second count in the declaration.

2. For other causes.

DAVIS & GOODWIN.

Also, afterwards, to wit: on the 11th day of December, being a day of the December Term of said court last aforesaid, the further proceedings were had in the foregoing cause, to wit:

AARON ROSS, use of Robert Patterson,

v.

SMITH HOGAN, ARTHUR S. HOGAN,
AND REUBEN Y. REYNOLDS.

Saturday, December the 11th, 1847.

This day came the parties, by their attorneys, and then came on to be heard defendants' demurrer to plaintiff's testimony; in which said demurrer the plaintiff was ordered to join, but refused to join, and thereupon dismissed the first count in his declaration *set forth; [*179

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whereupon the defendants demanded judgment on the demurrer to the evidence for want of joinder thereto, which is refused by the court.

And also, afterwards, to wit: on the day and at the term last above stated, the further proceedings were had in the aforesaid cause, to wit:

AARON ROSS, who sues for the use of
Robert Patterson,

v.

SMITH HOGAN, ARTHUR S. HOGAN,
AND REUBEN Y. REYNOLDS.

401.

Saturday, December the 11th, 1847.

This day again came the parties, by their attorneys, and thereupon came on to be heard defendants' motion to arrest the judgment rendered in this cause on yesterday; and, after argument, it is considered by the court that said motion be overruled.

A writ of error brought all these proceedings up to this court.

It was argued by *Mr. Reuben Davis* for the plaintiffs in error, and *Mr. Coxe* for the defendant in error.

Mr. Davis: This was an action of debt founded upon an injunction bond. The declaration contained two counts. The first count sets out the bond and condition, and assigns breaches; the second is only upon the penal part of the bond. The defendants below filed but one plea, which undertakes to answer the whole declaration, and is an answer to the whole.

The case having been put to the jury, the plaintiff introduced his proof and closed. Thereupon the defendants demurred to the testimony, and tendered an issue to the court. The plaintiff refused to join in the issue upon the demurrer, and the court refused to compel him to do so, or allow the defendants to sign judgment. Thus stood the case, when the plaintiff's counsel asked the court for judgment final by default upon the second count, upon the ground that it had not been replied to. This was allowed by the court; still leaving the demurrer to the testimony undisposed of.

The court certainly erred in allowing judgment upon the second count. The plea undertakes to answer the whole declaration; and if it does not do so, the objection should have been by demurrer. The plaintiff could not sign judgment. (6 Johns., 63; 18 Johns., 28; 20 Johns., 471; 1 Saunders, 28, note 3, Chitty, 510.)

I confess that when a plea undertakes to answer only a part of the declaration, and afterwards answers more, judgment in *that case may be signed for so much as the plea in its commencement does not undertake to answer. (6 Johns., 63; 18 Johns., 28; 20 Johns., 471; 1 Saunders, 28, note 3; 2 Chitty, 510.)

It was a manifest error to allow plaintiff to take judgment, even if the plea had not extended to the second count of the declaration final. (4 Phillips, Evidence, 169; 1 Saunders, Pleading and Evidence, 819.)

The only remaining question is, what the judgment of the court shall be. There can be

no question that the court will feel it to be their duty to reverse the judgment below. This being done, I insist that it will be the duty of the court to render upon the demurrer such judgment as the court below should have rendered in the case. There can be no necessity for reversing the judgment, and returning to the court below, as there is nothing to be settled by that court.

Mr. Coxe, after stating the nature of the amended declaration, proceeded to comment upon the rest of the pleadings.

The defendants appear and plead several pleas:

1. *Actio non*, because they have prosecuted their injunction with effect, and pray an issue to the country.

2. General *non damnificatus* with a verification.

3. General performance of condition with a verification.

4. Full performance of all and singular the conditions of said bond, in this, viz.: that plaintiff sued out a writ of *fiat facias* on the judgment in the bond and declaration mentioned, which went into the hands of the marshal; and that the said marshal did, by virtue of the same, levy and make of the property of said Smith Hogan \$4,000; no time specified.

5. That prior to the issuing of the execution enjoined, viz.: in June, 1842, the judgment upon which it issued was fully paid.

It will be observed that over is not prayed of either the bond or the condition, and consequently none was given. The five pleas put in, informal and defective as they are in many respects, while they profess to answer the entire declaration, are substantially only an answer to the first count, leaving the second unnoticed. The pleadings on both sides, after the narr., are unskillfully drawn: a replication is filed to the 4th plea, to which there is a rejoinder and a demurrer to that rejoinder, a demurrer to the 2d and 3d pleas, issue joined on the first. The demurrer to the rejoinder was argued and sustained; leave given to defendants to answer over, which was declined; whereupon judgment on that was given for plaintiff.

The cause came on to be tried on the issue joined on the first plea; after the plaintiff had produced his evidence, defendants *de- [*181] murred to the evidence, which demurrer was argued; and afterwards the court rendered judgment for plaintiff on the second count in the declaration for want of a plea; a motion was made in arrest of judgment, which was overruled. The demurrer to the evidence came on to be heard, the plaintiff refusing to join therein and dismissing the first count in his declaration, and judgment was entered for plaintiff on the 2d count.

It cannot be doubted that there was much irregularity in the conduct of the case; but it all originated in the bad pleading of defendants, and it is apparent that the final judgment is in accordance with the law and justice of the case.

The rule of pleading is clearly laid down by *Mr. Sergeant Williams*, 1 Saund., 28, n. 3, and the authorities there cited. Every plea must answer the whole declaration or count. If a plea, as in this case, begin with an answer to

the whole declaration, but in truth the matter pleaded is only an answer to part, the whole plea is bad. In such case plaintiff may take judgment for the part unanswered as by *nil dicit*. (4 Rep., 62 a; 1 Chit. Rep., 132, note a; *Id.*, 526, n.)

It must be apparent on the whole pleadings that defendants had no defense to the action, and merely made defense for delay, and that plaintiff is entitled to judgment on the merits.

Mr. Justice Daniel delivered the opinion of the court:

This was an action of debt instituted by the defendant in error, who was plaintiff in the court below against the plaintiffs in error, as the obligors in an injunction bond. To the original declaration three pleas were filed at the June Term of the court, 1845; to the second and third of these pleas the plaintiff demurred; and at the December Term, 1845, the defendants demurred to the plaintiff's declaration. The demurrers to the two pleas above mentioned were sustained by the court, and afterwards, viz.: on the 10th December, 1846, the court decided in favor of the demurrer to the declaration; giving at the same time leave to amend. The plaintiff, under this leave, filed his amended declaration, presenting the case which was acted upon in the court below. The amended declaration consists of two counts; the first sets out the injunction bond with the condition thereto annexed, and alleges a breach of that condition as the special ground of the action. The second count is for the penalty of the bond, as having been forfeited by failure of payment. The defendants filed five pleas to the amended declaration; upon the first of these pleas an issue of fact was joined, and the four following were by the court adjudged bad upon demurrer. At the December Term of the court, 1847, the cause coming on for trial [182*] upon the issue joined *upon the first plea, after the testimony on the part of the plaintiff was closed, the defendants tendered a demurrer to the evidence offered by the plaintiff, but in this the plaintiff refused to join, and dismissed or struck out the first count in his declaration; whereupon the defendants moved the court for judgment on the demurrer to evidence, for want of a joinder thereon, but this motion the court refused to grant, and afterward entered up the following judgment: "It appearing to the satisfaction of the court that the defendants have filed no plea to the second count in the plaintiff's declaration, but have therein made default; it is therefore considered by the court that the plaintiff recover of the defendants the sum of six thousand three hundred and fifty-four dollars and ten cents debt in the second count in the declaration mentioned, and the costs in this cause expended."

If in our examination of the decision of the Circuit Court, it were deemed necessary to pass upon the legal effect of the pleas tendered by the defendants below, and overruled by the court, we could have no hesitation in pronouncing each of those pleas bad upon demurrer. It is a settled rule in pleading, that wherever a plea in its commencement professes

to respond to the entire declaration or count, and is in substance and reality in answer to part only of such declaration or count, the plea is bad, and the defect may be availed of, upon demurrer. If a plea profess in the commencement to answer only part of the declaration or count, and is in truth and substance a response to such part alone, the plaintiff should not demur, because the residue of the count or declaration is unanswered, but should take judgment for that residue by *nil dicit*, as by demurring he would operate a discontinuance of the entire cause. The authorities upon these canons of pleading will be found collected from the earliest decisions by Sergeant Williams in note 8 to the case of *The Earl of Manchester v. Vale*, 1 Saunders, 28. The same rules are expressly affirmed in *Tippet v. May*, 1 Bosanquet & Puller, 411; *Everard v. Patterson*, 6 Taunton, 625; *Wileox v. Newman*, 1 Chitty Reports, 132, and *Hallet v. Holmes*, 18 Johnson, 28. In the case before us every plea tendered by the defendants embraces within its commencement the entire cause of action, averring that the plaintiff should not have or maintain his action; yet each of them, in its body and substance, is limited to the condition of the injunction bond and to some stipulation in that condition to which each plea specifically refers. The pleas demurred to, therefore, could not but be properly overruled; and with respect to that upon which issue was joined, it being immaterial and inconclusive as to the entire declaration, and defective in the same sense with the others, had the issue been found against the plaintiff, he would *still have been entitled to [*183 judgment *non obstante veredicto*. But upon this record there remains no subject for the application of the rules of pleading above adverted to. The first count in the declaration having been dismissed or stricken out, everything which was pertinent strictly to that count, or which constituted a defense to the case made thereby, falls with the count against which such defense was interposed. The case then remains solely on the second count in the declaration, and it cannot be pretended that to this count, consisting purely of a money claim, connected with no condition, any pleas have been interposed upon this record to this count; therefore the case must be considered as one of plain default entirely unanswered by the defendant below, and as having been properly so treated by the Circuit Court.

The judgment of the Circuit Court is therefore affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Mississippi, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and the same is hereby affirmed, with costs and damages at the rate of six per centum per annum.

Cited—7 Wall., 91.

THOMAS J. COFFEE, *Plaintiff in Error*,

v.

THE PLANTERS' BANK OF TENNESSEE.

In Mississippi, in suit on joint promise on negotiable paper, judgment may be taken against one, though defendants plead jointly—judgment on common money counts in such action, supported.

By the eleventh section of the Judiciary Act, 1 Stat. at Large, 78, no action can be brought in the federal courts upon a promissory note or other chose in action, by an assignee, unless the action could have been maintained, if there had been no assignment. But an indorsee may sue his own immediate indorser.

Hence, where an action was brought by an indorsee upon checks which had been indorsed from one person to another in the same state, and some of the counts of the declaration traced the title through these indorsements, no recovery could have been had upon those counts.

But the declaration also contained the common money counts: and, upon the trial, these were the only counts which remained, all the rest having been stricken out. The suit against the maker, and also against all the indorsers, except one, had been discontinued.

The statute of the state where the trial took place authorized a suit upon such an instrument as if it were a joint and several contract.

The dismissal of the suit against all the indorsers except one, and the striking out of all the counts against him except the common money counts, freed the judgment against him from all objection; and, therefore, when brought up for review upon a writ of error, it must be affirmed.

THIS case was brought up by writ of error from the Circuit Court of the United States for the Southern District of Mississippi.

184*] *The facts are stated in the opinion of the court.

It was argued by *Mr. Coxe* for the plaintiff in error, and *Mr. Badger* for the defendants in error.

Mr. Coxe: This was an action in the Circuit Court of the United States by the Planters' Bank against plaintiff in error and six others, as the drawers and indorsers of several checks, bills, promissory notes, &c. The plaintiff is averred to be a corporation, created by the laws of Tennessee, &c.; and each and every of the defendants is averred to be a citizen of the State of Mississippi, and these averments were necessary to give jurisdiction to the court. The declaration contains numerous special counts, in all of which, however, the instrument which is the subject of it is averred to have been made in the State of Mississippi, between parties, citizens of that State, and which, after several indorsements, finally came to the hands of plaintiff. In no one instance, however, was the defendant the immediate indorser to plaintiff. It is supposed that in such a case the Circuit Court had no jurisdiction. (*Young v. Bryan*, 6 Wheat., 146; *Sullivan v. Fulton Steamboat Company*, 6 Wheat., 450; *Mollan v. Torrance*, 9 Wheat., 587; *Evans v. Gee*, 11 Peters, 80.)

The only ground upon which jurisdiction in this case can be sustained is supposed to be presented in the last count in the declaration. This is the common money count.

This action is, as has been stated, brought originally against seven defendants. Every count in the declaration was a joint contract. Three of the defendants were served with the

first process; five upon the second or *alias* summons. It does not appear ever to have been served on the Mississippi and Alabama Railroad Company. Moss, Packett, Coffee, and Sheldon plead *non assumpsit* jointly; Crozier pleads separately. The death of Washington and Shelton is suggested, and the suit abated as regards them. This is the proper course when defendants are jointly responsible, but not when their liabilities are several and distinct. The plaintiffs then discontinued the action as to all the defendants, except Coffee, plaintiff in error, and forthwith proceeded to have a jury impaneled to try the issue joined. Verdict and judgment for plaintiffs against Coffee.

The record then presents this case: All the defendants are averred to be jointly responsible on a joint contract. Plaintiff in error, with two of his associates, pleads a joint plea. Upon this issue is joined. It is insisted that under these circumstances a discontinuance of the action against one is a discontinuance as against all.

*The issue being upon a joint plea, [*185 averring that the parties did not, as is alleged in the declaration, jointly promise, the verdict and judgment against Coffee singly, as having made a several promise, is a departure from the issue, and void.

When the narr. consisted of two counts against two individuals, and demurrer because one of the defendants was not named in the last count, plaintiff cannot enter a *vol. pros.* on that count, and proceed on the other. So if one pleads infancy, plaintiff cannot enter a *vol. pros.* as to him, and proceed against the other. (Tidd's Pr., 630.) In *assumpsit* or other action upon contract, plaintiff cannot enter a *vol. pros.* as to one, unless it be for some matter operating in his personal discharge, without releasing the others. (Tidd, 632.)

In the case at bar, the declaration avers a joint contract between the plaintiffs and seven defendants. Three of the defendants being served with process, appear and plead jointly that they did not promise as is alleged against them. The death of some of the defendants is suggested, and consequently all the others are to be considered as living. At this stage of the case the plaintiff discontinued his action against all the defendants except one, and proceeds to take a verdict and judgment against him.

It is admitted upon authority that if one alone is sued upon a joint contract, he must avail himself of the non-joinder of his co-contractor by a plea in abatement. If, however, the plaintiff in his declaration shows the contract to be joint, no plea in abatement is required, if it also appear that the party who ought to have been joined is living. (1 Chitty, Pl., 29; 1 Saunders, 291.) This doctrine is distinctly laid down in *Scott v. Goarwin*, 1 Bos. & Pull., 73; 2 Saund., 422, Wms. Note; *United States v. Linn*, 1 How., 104; *United States v. Girault*, 11 How., 22.)

Such omission, apparent on plaintiffs' pleadings, may either be moved in arrest of judgment or in error.

Mr. Badger, for defendants in error:

It is contended, for the defendants in error, that there is no error in the judgment. The

jurisdiction of the court below is evident upon the undisputed averments of the declaration.

There was nothing irregular; nothing erroneous in permitting the discontinuance as to the other parties: on the contrary, the regularity and legality of the proceeding have been sanctioned by cases in this court.

In the case of *McAfee v. Doremus*, 5 How., 58, McAfee had been sued in the Circuit Court of Mississippi as indorser of a bill of exchange, jointly, with four persons as the drawers [*186*] of the bill. McAfee appeared, and pleaded severally the general issue, and three of the four drawers having been served with process, the action was discontinued as to the four, carried on against McAfee alone, and upon a judgment rendered against him, a writ of error was brought in this court. Here the judgment was unanimously affirmed, the court saying that there was "no objection, in principle or in practice, to the discontinuance of the writ against the drawers of the bill."

In *The Bank of the United States v. Moss*, 6 How., 32, there was, on appearance by all the defendants, a joint plea, and afterwards the action was discontinued as to one of the parties, and a verdict and judgment taken against the others. To this, there was no objection taken below or here, and no writ of error was brought upon the judgment.

Mr. Justice Daniel delivered the opinion of the court:

The questions of law to be decided in this cause, arise upon the following facts: The defendant in error (the plaintiff in the court below), described in the pleadings to be a corporation created by the laws of the State of Tennessee, the stockholders of which are citizens of Tennessee, declared in *assumpsit*, in the court below against the Mississippi and Alabama Railroad Company, averred to be a corporation created by the laws of Mississippi, and also against William H. Shelton, Robert G. Crozier, Henry K. Moss, Samuel M. Puckett, Thomas G. Coffee (the plaintiff in error), and William H. Washington, averring the said individuals to be all citizens of the State of Mississippi. The declaration contained twenty-four counts; twenty-three of which set out respectively checks drawn by the Mississippi and Alabama Railroad Company, for different sums of money, payable to some of the individual defendants in the court below, and indorsed by the payee and successively by the other defendants, so as at last to become payable to the plaintiff below, the defendant in error, as the last indorsee.

The last or twenty-fourth count in the declaration was upon an *indebitatus assumpsit*, for one hundred and fifty thousand dollars, for money lent and advanced, for the like sum for money laid out and expended, and for the like sum for money had and received, laying the damages at three hundred thousand dollars.

The defendants below, Moss, Puckett, Shelton, and Coffee, the plaintiff in error, appeared to the suit and pleaded jointly the general issue. Crozier also appeared and pleaded *non assumpsit*. The Mississippi and Alabama Railroad Company did not appear. Afterwards, upon a suggestion of the death of Washington and Shel-

ton, the suit was abated as to these parties, and upon the motion of the plaintiff below, the defendant in error, the suit was ordered [*187] to be discontinued as to all the defendants below except the plaintiff in error; and a jury being impaneled upon the issue joined as to him, found a verdict against him in damages for the sum of \$149,924.97 for which sum together with costs of suit, a judgment was entered by the Circuit Court. No exception appears to have been taken to the forms of proceeding, nor to any ruling by the court upon the trial, and the questions for consideration here are raised upon facts as above set forth.

On behalf of the plaintiff in error it is insisted, that upon none of the twenty-three counts, each of which sets forth a deduction of title by intermediate indorsements from the payee, can this action be maintained, because it appears, on the face of those counts, that the drafts or checks constituting the claim were drawn by a corporation situated within the State of Mississippi, and the members of which corporation were citizens and inhabitants of that State, in favor of payees who, being also citizens of that State, could not sue upon those drafts in the courts of the United States, and could not, by indorsement, confer upon others a right denied by the law to themselves.

By the 11th section of the Act of Congress establishing the Judicial Courts of the United States, it is declared, that no District or Circuit Court of the United States shall have cognizance of any suit to recover the contents of any promissory note or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange. This provision has been expounded by this court as early as 1779 in the case of *Turner's Administrator v. The Bank of North America*, 4 Dall., 8. It has received a further interpretation in the case of *Montalet v. Murray*, 4 Cranch, 46; of *Young v. Bryan*, 6 Wheat., 146; of *Mollan v. Torrance*, 9 Wheat., 537; and of *Evans v. Gee*, 11 Pet., 80. These several decisions have settled the construction of the 11th section of the Judiciary Act, and the principle they have affirmed is unquestionably fatal to a right of recovery under the first twenty-three counts, for they deny jurisdiction in the courts of the United States over cases of intermediate deduction of title from the payee, where such payee and the maker of the instrument are citizens of the same state, with the exception of foreign bills of exchange; and in the case before us every special count is framed upon a title thus deduced; and is not within the exception made by the statute. But whilst the authorities cited have laid down the above doctrine with reference to intermediate deductions of title from the payee of a note or check, they have ruled with equal clearness that as between the *immediate indorsee and indorser, be- [*188] ing citizens and inhabitants of different states, the jurisdiction of the federal courts attaches, as upon a distinct contract between these parties, independently of the residence of the original and remote parties to the instrument. Upon the doctrine thus ruled, the following question recurs for our decision upon this record, viz.:

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whether the plaintiff below, the defendant in error, as a corporation created by and situated within the State of Tennessee, and the members of which corporation were citizens of that State, as immediate indorsee of the plaintiff in error, a citizen and inhabitant of the State of Mississippi, had the right to a recovery against him, as the immediate indorser of the notes or checks on which the action was founded. As to the general principle relative to the jurisdiction of the federal courts, and as to the right of recovery or of action as between the immediate indorsee and indorser, we have already stated that principle as having been conclusively settled; if then there can be an objection to its application or controlling effect in the case before us, it must exist as to the manner of that application in the proceedings in this cause, and not to the rule itself. Such objection, it has been attempted, on the part of the plaintiff in error, to maintain. Thus it is disclosed upon the record, that after the general issue pleaded by all the defendants except the Mississippi and Alabama Railroad, who were in default, the action was by order of the Circuit Court, on the motion of the plaintiff, discontinued as to all the defendants except the now plaintiff in error, the last indorser, and as to him also, upon all the counts except the general *indebitatus assumpsit*, upon which the case was tried and verdict and judgment obtained. It has been insisted, that the proceeding just mentioned, under the order of the Circuit Court, was erroneous; that the liability of the defendants was a joint liability, as set forth in the declaration, and could not be severed upon motion, and that the discontinuance as to one of the defendants was a discontinuance as to them all. It may here be remarked, in the first place, that however the liability of the defendants below may have been presented by the declaration, it is certain that the responsibility of the indorser to his immediate indorsee, is strictly a several responsibility, and that so far as the jurisdiction of the federal court is concerned, there is no right in the indorsee to look beyond that responsibility into transactions between citizens of the same state. The courts of the United States, therefore, could not, upon the face of the pleadings, take cognizance of questions beyond the several responsibility arising out of the transaction between the indorsee and his immediate indorser. We deem it unnecessary, however, to examine critically, 189*] in connection with *the proceedings had in this cause, the doctrine of joint and several obligations as settled by the common law and the rules of pleading founded thereon, and are the less disposed to listen to objections drawn from that source at this stage of the case, as not an exception has been taken upon the record to any of the proceedings in the Circuit Court, which are therefore entitled to every presumption in their favor, whether of fact or law, which is not excluded by absolute authority. But the proceedings in this case should not be tested by the rules of the common law in relation to joint and several obligations; but should be judged of by the regulations of a local polity which has been adopted by the courts of the United States, and in conformity with which the pleadings in this case have been controlled and modeled.

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By the statute of Mississippi (*vide* Howard & Hutchinson's edition, c. 44, p. 578, s. 9) it is declared that, "Every joint bond, covenant, bill, or promissory note, shall be deemed and construed to have the same effect in law as a joint and several bond, covenant, bill, or promissory note, and it shall be lawful to sue out process and proceed to judgment against any one of the obligors, covenantors or drawers of such bond, covenant, bill or promissory note, in the same manner as if the same were joint and several." In the same collection, c. 45, p. 594, sec. 28, it is laid down, that "it shall hereafter be lawful for the holder or holders of any covenant, bond, bill or promissory note, signed by two or more persons, to sue any number of the covenantors, obligors or drawers thereof in one and the same action."

By these statutory provisions the rules prescribed under the common law with respect to suits upon joint and several promises have been essentially changed, and the same license which concedes to a party the power of instituting his suit against one or more, or all the parties to an undertaking, carries with it by necessary implication the right to prosecute or discontinue it in the same sense and to the same extent and degree. In accordance with this conclusion is the interpretation given to the statutes of Mississippi by the Supreme Court of that State, as will be seen in the cases of *Peyton & Halliday v. Scott*, 2 How., Miss. Rep., 870; *Lynch et al. v. Commissioners of the Sinking Fund*, 4 Id., 377; *Dennison v. Lewis*, 6 Id., 517; *Prevot v. Caruthers et al.*, 7 Id., 804; and that interpretation by the State Court of these statutes, has been repeatedly sanctioned as a rule of proceeding in the Circuit Court of the United States for the District of Mississippi, by the decisions of this court, as will be seen by the cases of *McAfee v. Doremus*, 5 How., 53; of *The Bank of the United States v. Moss et al.*, 6 How., 81; and of *The United States v. Girault et al.*, 11 *How., *190 22. It follows, then, from the foregoing authorities, as an inevitable conclusion, that whether the undertakings set out in the special counts or in the general *indebitatus assumpsit* be taken as joint or as joint and several, it would have constituted no valid objection to the proceedings in the Circuit Court by which the cause was discontinued, as to all the defendants save the last or immediate indorser, even had such an objection been directly and expressly presented and reserved by the pleadings. That discontinuance deprived him of no right, imposed upon him no burden or responsibility he was not already bound to sustain—it merely left him in the exact position in which his undertaking with the plaintiff below could be regularly and properly adjudicated.

Upon full consideration, therefore, we think that the judgment of the Circuit Court should be, and the same is hereby affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of said Circuit Court in this cause be, and the

same is hereby affirmed, with costs and damages at the rate of six per centum per annum.

Cited—1 Curt., 147; 1 Abb. U. S., 308.

ALEXANDER H. WEEMS, *Plaintiff in Error,*
v.

ANN GEORGE, CONELLY GEORGE, ROSE ANN GEORGE, Wife of JOHN STREN; MARY ANN GEORGE, Wife of THOMAS CONN; NANCY GEORGE, Wife of JAMES GILMOUR; MARGARET GEORGE, Wife of WILLIAM MILLER; JOHN STEEN, THOMAS CONN, JAMES GILMOUR, AND WILLIAM MILLER.

Writ of error to U. S. Circuit Court for Louisiana—Whole case submitted to judge without jury—Admission or rejection of evidence, cannot be assigned for error.

Where there was a sale of an undivided moiety of a tract of land, and the purchaser undertook to extinguish certain liens upon it, which he failed to do; and in consequence of such failure the liens were enforced, and had to be paid by the heirs of the original owner, a suit by these heirs against the purchaser to recover damages for the non-fulfillment of his contract to extinguish the liens, was not within the prohibition of the 11th section of the Judiciary Act, 1 Stat. at Large, 78. The heirs, being aliens, had a right to sue in the Circuit Court.

In a trial in Louisiana, where the judge tried the whole case without the intervention of a jury, a bill of exceptions to the admission of testimony by the judge, cannot be sustained in this court.

The extinguishment of the liens by the heirs of the original owner, was effected by process of law and attended with costs. It was proper that these 1914 costs also, as well as *the amount of the liens, should be recovered by the heirs from the defaulting party who had failed to fulfill his contract. The article, 1929 of the Code of Louisiana, does not include this case, but it is included within article 1924.

THIS case was brought up by writ of error from the Circuit Court of the United States for the Eastern District of Louisiana.

The plaintiff in error, and Alexander George, being joint owners of certain real property, made a partition of it between them on the 14th of January, 1847, by a written act of partition, and the plaintiff in error undertook, and promised to pay, certain promissory notes, made by Alexander George in favor of John McClain Durand, and which were secured by mortgage on the property described in the act of partition, among which were two notes, one for the sum of \$1,305.38, payable on the 1st of January, 1848, with interest at six per cent. per annum from maturity; and one for the sum of \$1,250.22, payable on the 1st of January, 1849, with interest at six per cent. per annum from maturity. When the note for \$1,305.38 fell due the plaintiff in error paid \$600 on account upon it, leaving the remainder unpaid; and, when the other note fell due, he failed to pay it also. After default was made in the payment of the last note, the holder of the two notes instituted suit against the defendants in error, the heirs and legal representatives of Alexander George, who was then dead, and recovered the amount due on them, viz.:

\$1,955.60, and costs of protest, with interest at six per cent. per annum on \$705.38, from 4th January, 1848, and on the remainder from 4th January, 1849, by judgment, and issued an execution or *fi. fa.*, under which certain slaves were seized, in the Parish of St. Tammany, and brought over to the City of New Orleans, where they were sold on the 18th of June, 1849, and the sum of \$2,435.88, out of the proceeds of the sale, were applied to the payment of the debt and of the costs made.

On the 1st of December, 1849, Ann George, &c., the defendants in error, filed their petition against Weems in the Circuit Court of the United States for the Eastern District of Louisiana, claiming to be re-indorsed this sum of \$2,435.88, with interest and costs. (Another claim was made for the value of a negro slave who died, but as a *remittitur* was entered before final judgment, it is not necessary to notice this further.)

The defendant put in two pleas to the jurisdiction: 1st, that the plaintiffs were not aliens, and 2d, that they derived their right from George; and as he and Weems were both citizens of Louisiana, the plaintiffs were prohibited, by the 11th section of the Judiciary Act, from bringing suit in the United States court. These pleas were overruled.

After sundry other proceedings, the defendant filed the following answer:

*Now comes the defendant in the [*192 above-entitled suit, and denies all and singular the allegations in the plaintiffs' petition contained; he denies specially that the plaintiffs are the heirs of said Alexander George, or that they have, or ever had any interest in the succession of said Alexander George. He denies that plaintiffs ever authorized the institution of this suit, and avers that they have no interest in the pretended causes of action set forth in said petition. He avers, also, that he is in no manner liable to the plaintiffs herein. Your respondent further says, that if at any time he has refused or failed to pay any of the notes mentioned in said petition, it was because one Rickerman had brought suit against the succession of said Alexander George, claiming a lien and privilege upon said island for work, labor, &c., in constructing a levee thereon, which lien and privilege neither said Durand nor the curator of said succession would discharge, and your respondent is in no way liable for the consequences of such refusal. Wherefore defendant prays to be hence dismissed with his costs, and for general relief, &c.

CHAS. M. EMERSON,
J. S. WHITTAKER,

Defendant's attorneys.

On the 4th of April, 1850, the cause came on for trial before the judge, without a jury, when the following final judgment was given, viz.:

This cause this day came on to be heard: Halsey and Bonford, Esqs., appearing for the plaintiffs, and Emerson, Esq., for the defendant. When, after argument of counsel, the court being satisfied that the law and the evidence are in favor of the plaintiffs, Ann George *et al.*, doth order, adjudge and decree, that the said plaintiffs do have and recover judgment against the defendant, Alexander W. Weems, for the sum of two thousand four hundred and

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thirty-five dollars and eighty-eight cents, with interest on nineteen hundred and fifty-five dollars and sixty cents of said sum, from 13th June, 1849, at the rate of six per centum per annum, until paid, and costs of suit to be taxed.

Judgment rendered 4th April, 1850.

Judgment signed 22d April, 1850.

THEODORE H. McCALEB, [SEAL.]

United States Judge.

In the course of the trial, the following bill of exceptions was taken:

Be it remembered, that on the trial of this cause, the plaintiffs offered in evidence a certificate marked D, of one N. B. Harmer, clerk of the eighth Judicial District Court for the Parish of St. Tammany, for the purpose of proving that certain claims against the succession of Alexander George were satisfied and 193*) *paid by the heirs of said George. To the introduction of this document the defendant objected, on the ground that it was not competent nor within the official duties and acts of the clerk to certify to the existence of facts from the inspection of, and from documents and papers on file in the suit; and that the facts and the papers showing them should have been copied, and the certificate given as to the verity of the copy. The court overruled the objection and admitted the evidence.

Be it remembered, also, that on the trial of said cause the plaintiffs offered one J. M. Durand as a witness to prove that he had brought suit against the defendant in this suit, the said Alexander W. Weems, to recover the amount of the notes set forth in this suit, and that said Weems had taken a suspensive appeal from an order of seizure and sale, to the Supreme Court of the State of Louisiana. The defendant objected to these facts being stated by the witness, on the ground that it was not competent to prove the contents, or any part of the contents of written documents, or of judicial records by parol, without first proving the destruction of the said documents or records. But the court overruled the objection and permitted the witness to testify to the facts above mentioned.

THEODORE H. McCALEB,

United States Judge.

The defendants brought the case up to this court by writ of error.

It was argued by *Mr. Miles Taylor* for the plaintiff in error, and *Mr. Lawrence* for the defendants in error.

Mr. Taylor, for the plaintiff in error:

Upon the trial of the cause, the defendants in error, in the court below, offered in evidence a certificate of the clerk of the eighth Judicial District Court for the Parish of St. Tammany, for the purpose of proving that certain claims against the succession of Alexander George were satisfied and paid by the heirs of the said George. To the introduction of this certificate the plaintiff in error objected, on the ground that it was not competent for, nor within the official duties or power of the clerk, to certify to the existence of facts from the inspection of documents and papers on file in a suit, and that such facts, if they existed, could only be shown by duly certified copies of the documents and papers on file, showing such facts; and the objection was overruled by the court, and the certificate admitted.

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And the defendants in error further offered one J. M. Durand as a witness to prove that he had brought suit against the plaintiff in error, to recover the amount of the notes sued on in this case, and that he, the plaintiff in error, [*194] had taken a suspensive appeal therein to the Supreme Court of Louisiana. To the introduction of this testimony the plaintiff in error objected, on the ground that one could not be permitted to prove the contents or any part of the contents, of judicial records by parol, without first proving the destruction of the said records; and the objection was overruled, and the testimony admitted. To the decisions of the court overruling these objections, and admitting the certificate of the clerk, and the testimony of the witness Durand, the plaintiff excepted; and his bill of exceptions was duly allowed and signed by the court, as will be seen at p. 8 of the transcript.

And this ruling of the court was erroneous, and an error apparent on the face of the record.

As to the certificate of the clerk:

1st. If it relates to facts shown by papers or documents on file in his office, he cannot certify the substance of such papers; he must give a transcript of them. (*Smoot v. Russell*, 1 Mart., La. Rep., N. S., 522; 1 Phill. Ev., 817.)

2d. If it related to facts within his knowledge, it was inadmissible; because the statement was not made under oath, &c. (*Ellicott v. Pearl*, 10 Pet., 412.)

As to the testimony of the witness Durand:

1st. It was not the best evidence the nature of the case admitted of.

2d. Judicial records can only be proved by copies duly certified to be true copies from the originals. (1 Phillips, Evidence, 383; *Hagan v. Lucas*, 10 Pet., 400.)

Mr. Lawrence, for defendants in error:

The plaintiff in error pleaded to the jurisdiction (p. 3), on the ground that the petitioners are not aliens, as alleged; and especially, that the said Alexander George was, in his lifetime, and at the date of the notes, &c., a citizen of Louisiana; and that Durand and wife (the vendors to George) were also citizens of Louisiana.

The first bill of exceptions states that the plaintiffs below offered in evidence a certificate of the clerk of the Parish Court, for the purpose of proving that certain claims against the succession of Alexander George were paid by the heirs of said George, which was objected to on the ground that the clerk was not authorized to certify as to facts from inspection of records.

The second bill of exceptions states, that the plaintiffs below offered Durand as a witness, to prove that he had brought suit against Weems on the notes set forth in the petition. The defendant objected, on the ground that it was not competent to prove the contents of judicial records by parol, first without proving their loss or destruction.

*1st. The plea to the jurisdiction. [*195]

The plaintiffs below were aliens. The action was not brought upon the promissory notes, but upon the agreement in the act of partition. They were not assignees of a chose in action, in the sense of the 11th section of the Judiciary Act. The plaintiffs below were the heirs of George, and not his assignees. (*Chappedelaine v. Dechenaux*, 4 Cranch, 306; *Sers et al. v. Pilot*, 6 Cranch, 332.)

2d. As to the 1st bill of exceptions: The evidence offered is not shown to be material. The object of it was to prove that the plaintiffs below had paid claims against the estate of Alexander George, in order to show that they had taken possession of the succession of Alexander George, and were discharging their duties in that capacity.

3d. As to the 2d bill of exceptions: The evidence of Durand was offered, not for the purpose of proving the contents of a judicial record, but simply to establish the fact that a suit was brought; that fact being only used as proof of a demand from Weems before the commencement of an action against the defendants in error. A demand by suit was not necessary.

4th. The objection, that the judgment for principal, interest, costs of protest on the notes, and for the further sum of \$389.08, was erroneous, is not well taken; and the art. 1929 of the Civil Code, which is cited, is not applicable. The previous articles, from 1924, are applicable to this case. (See, also, *The United States v. King*, 7 How., 854; *Field v. The United States*, 9 Pet., 202.)

Mr. Justice Grier delivered the opinion of the court:

The defendants in error brought this suit in the Circuit Court of the United States for the Eastern District of Louisiana, against Weems, the plaintiff in error, by petition, according to practice in the courts of that State. They aver, in their petition, that they are aliens, and subjects of the Queen of Great Britain, with the exception of two, who were citizens of the State of Illinois; and that they are the heirs of Alexander George, deceased. That said George, in his lifetime, was owner of a certain island, the undivided moiety of which he had sold to Weems. That in the act of partition between them, Weems agreed to pay two certain notes, given by George for the purchase money, and which were secured by mortgage on the land—one for \$1,805.82, payable on the 1st of January, 1848, and the other for \$1,250.22, on the 1st of January, 1849. That Weems paid the sum of \$600 on the notes, but neglected or refused to pay the balance. That Alexander George having died, and the defendants in error having been [196*] admitted to the succession as "his heirs, an execution was issued on the mortgage for the balance of the notes, on which certain slaves held by them, as such heirs, were seized and sold; and the sum of \$2,435 88 raised in satisfaction of the balance of said notes, with interest and costs of suit.

The defendant below filed two pleas to the jurisdiction: 1st, That the plaintiffs were not aliens, as set forth in their bill; and, second, that the claim of the plaintiffs is under Alexander George, who was a citizen of Louisiana.

These pleas were overruled—the first, it is to be presumed, because it was not true in fact; and the second, because it was not good in law. For the plaintiffs' petition does not set forth a claim as assignees of the negotiable paper or notes mentioned therein, but for damage and loss incurred by them, from the neglect and refusal of Weems to pay certain liens which he had contracted to pay in the act of partition between himself and George.

As the argument submitted by the counsel

for plaintiff in error does not insist that there was error in overruling these pleas to the jurisdiction, they need not be further noticed.

The case was afterwards heard on the merits before the court, without the intervention of a jury; and a paper, called a bill of exceptions to the admission of certain testimony, is found on the record, on which the plaintiff in error seems mainly to rely for the reversal of judgment. It might be thought, perhaps, hypercritical to object to the form of this paper, as it comes from a state where common law forms are little known in practice; but it may be remarked, that this document certifies only that certain testimony was offered and received by the court after objection by the defendants' counsel, and does not state that any exception was taken to such ruling of the court, or that the judge who signed it was asked to seal, or did seal a bill of exceptions. But, waiving this objection, the first exception is to receiving in evidence a certain paper, marked D. That paper is not copied in, or annexed to, the bill. It is said to be a certificate from the clerk of the eighth Judicial District for the Parish of St. Tammany, offered to prove that certain claims against the succession of Alexander George were paid by his heirs. The objection to it was undoubtedly a good and valid objection, if the contents of the paper were what the objection assumes them to be. But as the paper itself is not set forth in the bill, this court cannot know whether the objection was overruled because the paper was not what it was assumed to be, or because the objection was not well taken, if it was.

The second exception was to the admission of parol testimony, that a suit had been brought against the defendant, *Weems. The [197*] objection, that the contents of a record cannot be proved by parol, is certainly a good and legal one, if such were the offer or such the evidence given by the witness.

But the bill does not state any of the preceding evidence in the case, nor the purpose or bearing of the testimony offered. It may have been merely offered to show demand of the payment of a note; a fact *in pais*, which may be proved in parol, like any other mode of demand, notwithstanding it was made by presenting a writ.

But there remains an objection to these bills of exception which is conclusive against them, even if they had been drawn in all proper and legal form. It has been frequently decided by this court, that notwithstanding there is no distinction between suits at law and equity in the courts of Louisiana, in those of the United States this distinction must be preserved. When the case is submitted to the judge, to find the facts without the intervention of a jury, he acts as a referee, by consent of the parties, and no bill of exceptions will lie to his reception or rejection of testimony, nor to his judgment on the law. In such cases, when a party feels aggrieved by the decision of the court, a case should be made up, stating the facts as found by the court, in the nature of a special verdict, and the judgment of the court thereon. If testimony has been received after objection, or overruled, as incompetent or irrelevant, it should be stated, so that this court may judge whether it was competent, relevant, or materi-

al, in a just decision of the case. (See *Craig v. Missouri*, 4 Pet., 427.)

In *Field v. The United States*, 9 Pet., 202, Marshall, Ch. J., in delivering the opinion of the court, says: "As the case was not tried by a jury, the exception to the admission of evidence was not properly the subject of a bill of exceptions. But if the District Court improperly admitted the evidence, the only effect would be, that this court would reject that evidence, and proceed to decide the cause as if it were not on the record. It would not, however, of itself, constitute any ground for the reversal of the judgment." And again, in *The United States v. King*, 7 How., 858, 854, it is decided, that "no exception can be taken where there is no jury, and where the question of law is decided in delivering the final decision of the court." And, "when the court decides the fact without the intervention of a jury, the admission of illegal testimony, even if material, is not of itself a ground for reversing the judgment, nor is it properly the subject of a bill of exceptions."

It is alleged, also, that there is error on the face of this record, because the court allowed the whole amount levied from the property of the plaintiffs below, being the amount of the 198*) notes *and costs; because, by art. 1929 of the Code of Louisiana, "the damages due for delay in the performance of an obligation are called interest. The creditor is entitled to these damages without proving any loss, and whatever loss he may have suffered he can recover no more." But we are of opinion that this objection is founded on a mistake of the nature of the action, which is not brought on the notes mentioned in the petition, but for damages suffered by the plaintiffs below, on account of the non-performance by the defendant of his stipulations contained in his act of partition. This case, therefore, comes within the art. 1924 of the Code, which says: "The obligations of contracts extending to whatsoever is incident to such contracts, the party who violates them is liable, as one of the incidents of his obligations, to the payment of the damages which the other party has sustained by his default."

The judgment of the Circuit Court is affirmed with costs.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs and damages at the rate of six per centum per annum.

Cited—1 Wall., 103.

SAMPSON B. LORD AND GEORGE W. JENNESS, *Plaintiffs in Error*,

v.

JOHN GODDARD.

Action for falsely representing credit of another—Intention to defraud and deceive, must be proved in order to charge debts

HOWARD 13.

Where an action was brought against certain persons for giving a commercial letter of recommendation with intention to defraud and deceive, whereby the party to whom the letter was addressed gave credit and sustained a loss, the question for the jury ought to have been whether or not there was fraud and an intention to deceive, in giving the letter.

If there was no such intention, if the parties honestly stated their own opinion, believing at the time that they stated the truth, they are not liable in this form of action, although the representation turned out to be entirely untrue.

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of New Hampshire.

Goddard was the plaintiff below, and Lord and Jenness the defendants.

The declaration in two counts alleged that the plaintiffs in error, October 28, 1847, intending to deceive and defraud the defendant *in error, wrongfully and deceitfully [*199 made and signed a letter of recommendation in favor of E. K. West and A. W. Daby, addressed to the defendant in error, in which they represented they had full confidence in West & Daby, dealers in coal, lumber, &c., that they were men well worthy of credit, and good for what they wished to purchase, and that West was visiting Bangor for the purpose of purchasing lumber for the New York market, and did thereby falsely, fraudulently, and deceitfully cause and procure the defendant in error to sell, and that he, confiding in the statements, on the 9th of November, 1847, did sell to West & Daby certain timber on credit, &c. Whereas, in fact, West & Daby were not worthy of credit, and that the plaintiffs in error well knew the same, and that West & Daby have not paid, &c.

The plaintiffs in error pleaded severally, not guilty, on which issue was joined.

The defendant in error offered, in support of his declaration, the letter addressed to him, as follows, viz.:

"To JOHN GODDARD, Esq., Bangor, Me.

Sir—We, the undersigned, have full confidence in Messrs. E. K. West and A. W. Daby, dealers in coal, lumber, lime, &c. They are men well worthy of credit, and good for what they wish to purchase. The bearer of this, Mr. E. K. West, is visiting your city for the express purpose of purchasing lumber for the New York market.

Yours respectfully,

S. B. LORD,
GEORGE W. JENNESS.

Portsmouth, N. H., October 28th, 1847."

In July, 1850, the cause came on for trial, when the jury, under the instructions of the court, found a verdict for the plaintiff for \$2,300.

The bill of exceptions was very comprehensive. It began with reciting the writ, the declaration, and other pleadings, then recapitulated the evidence of two persons with all the interrogatories and cross-interrogatories, and also the evidence of seven persons taken upon the stand. It is not necessary to recite any of this, as the point stated in the instructions of the court was the only matter brought into discussion.

The evidence being closed, the counsel for the defendants then prayed the honorable court to instruct the jury, that, in order to maintain

the plaintiff's declaration, it must be proved that the representations made were false, and that the defendants made them knowing they were false, and intending to defraud the plaintiff; and that, if the defendants made the representations on such information as they believed to be **200*** true, whether that information was true or false, this action cannot be maintained. The defendants further requested the honorable court to charge the jury, that if the plaintiff had not proved, to the satisfaction of the jury, either that the defendants gave the recommendation in this case knowing that it was false, and intending to defraud the plaintiff, or that they gave it without any information of the credit or means of West & Daby; or if the jury believe that the defendants gave such information respecting said West & Daby as said defendants believed to be true and sufficient, whether that information was true or false, and whether it was sufficient or not, the defendants were entitled to a verdict.

But the honorable court declined to do this, and did not charge the jury in the terms and manner, and to the extent prayed; but the honorable court did instruct the jury upon the subject matter so prayed for as follows: that, as a general rule, one ground upon which to maintain the plaintiff's declaration is, it must be proved that the representations made were false, and that the defendants made them knowing they were false, and intending to defraud the plaintiff; and that if the defendants made the representations on such information as they believed to be true, whether that information was true or false, the action cannot be maintained; but a party, if stating positively that a person is entitled to credit, should do it from his own knowledge, or from full and proper inquiries; and then he is not liable if the debtor is insolvent, unless the jury see circumstances in the case of real fraud. But if a party state this positively as to the credit of an individual, and does it ignorantly, not knowing the credit of the person recommended, and without making full and proper inquiries, and the statements turn out to be false, the jury may infer that those so recommending did wrong, and deceived, because they must know that third persons are likely to rely on their stating what they personally know, or had duly inquired about, or what they had good reason to suppose their information as to it was sufficient and true. If the defendants in this case did not make the recommendation upon such authority or information as you may think, under the instructions they ought to have acted upon, you will charge them.

Whereupon the counsel for the defendants did then and there except to the aforesaid refusal, and the instructions and charge of the honorable court.

Upon this exception the case came up to this court.

It was argued by *Mr. Norris* for the plaintiffs in error, and *Mr. Washburn* for the defendant in error.

201* *Mr. Norris*, for the plaintiffs in error:

I. Both counts in the declaration allege, not only that the plaintiffs in error, intending to deceive and defraud the defendant in error, wrongfully and deceitfully made the representa-

tions alleged, and did thereby falsely, fraudulently, and deceitfully cause him to sell the lumber to West & Daby on a credit; but they allege, also, that the plaintiffs in error well knew the representation to be false.

In making these averments the pleader but complied with the ordinary rules of pleading. It was necessary that the declaration should allege in some form, substantially, that they had knowledge of the falsity of their representations, or an actual intent to defraud under circumstances that made knowledge immaterial.

It is essential, in order to support an action of this character, that such knowledge should be proved, and found by the jury, or at least that an actual intent to defraud should be shown.

That knowledge of the falsity must be averred and proved, where the actual intent to defraud does not exist, is very clear. (*Pasley v. Freeman*, 3 D. & E., 59, 60, 62, 63, &c.; *Haycraft v. Creasey*, 2 East, 92; *Ashlin v. White*, Holt, N. P. R., 387; *Ames v. Milward*, 8 Taunt., 637; *Foster v. Charles*, 6 Bing., 396; 7 Bing., 105; *Freeman v. Baker*, 5 Barn. & Adolph., 797; *Moen v. Heyworth*, 10 Mees. & Welsby, 147; *Clifford v. Brooke*, 18 Vesey, 133.)

The case of *Collins v. Evans*, in error, 5 Ad. & Ellis, N. S., 820, 827, although not upon a representation, fully sustains the principle.

The American cases are equally explicit. (*Russell v. Clarke's Executors*, 4 Cranch, 92, 94; *Tryon v. Whitmarsh*, 1 Met., 1; *Stone v. Denny*, 4 Met., 159, 161; *Fooks v. Waples*, 1 Harring. Del. Rep., 131; *Young v. Hall*, 4 Ga. R., 95; *Boyd's Executors v. Brown*, 6 Barr's Penn. R., 316.)

Perhaps this declaration might be supported by evidence of an actual intent to defraud, without proving knowledge of the falsity of the representations.

But there must be fraud. (*Lord v. Colley*, 6 N. H. Rep., 99, 102; *Taylor v. Ashton*, 11 Mees. & Wels., 401; *Stafford's Administrator v. Newson*, 9 Ired. N. Car. Rep., 507; *Munroe v. Gardner*, 3 Brevard; S. Car. Rep., 31; *Allen v. Addington*, 7 Wend., 9; *Addington v. Allen*, 11 Wend., 374, 382, 388, 402, 408.)

All these cases are express to the point, that a mere false representation is insufficient.

In case for a false warranty, the *scienter* need not be alleged and proved. (2 East, 446; 1 How. Miss. Rep., 288.) But this is *be. [*202 cause the *gravamen* of the action is the undertaking of the defendant, and not his fraud. (2 East, 451, 452.) In the present case the plaintiffs in error are not parties to a contract, and the *gravamen* is fraud.

II. The evidence has no tendency to prove the *scienter*, or an intent to defraud anyone.

The representation by the plaintiffs in error, that they had full confidence in West & Daby, and that they were well worthy of credit, and good for what they wished to purchase, has no tendency to prove the fact to be otherwise. And the proof of the fact that it was otherwise, if proved, has no tendency to show such knowledge, or to show fraud.

But this is all the evidence to charge them. There is nothing having even a remote tendency to show that they had any suspicion that the representation was not strictly true.

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There is evidence to show that they made the representation fairly.

Suppose they made it incautiously, without any such inquiry as would have been made by more careful and suspicious men? It is clear that this cannot charge them. (*Young v. Cornell*, 8 Johns., 23; 11 Mees. & Wels., 415.)

The case put by Pothier, and cited with approbation by *Chief Justice Kent*, in *Upton v. Paul*, 6 Johns., 184, goes even beyond this case. "If," says Pothier, "you had only recommended Peter to his creditor as honest and able to pay, this was but advice, and not any obligation; and if Peter was at the time insolvent, you are not bound to indemnify the creditor for the sum which he loaned to Peter, by means of your advice, which he has lost, *Nemo ex consilio obligatur*. This rule is the same if the advice was given rashly and indiscreetly, without being duly informed of the circumstances of Peter, provided it was sincerely given. *Librum est cuique apud se explorare an expediat sibi consilium*. But if the recommendation was made in bad faith, and with knowledge that Peter was insolvent, in this case you are bound to indemnify the creditor."

III. The representation in this case is, in its very nature, but the expression of an opinion, and for this reason the action cannot be maintained without showing affirmatively knowledge of its falsity. If the plaintiffs in error had made a positive assertion, as of their own knowledge, it would have been but the assertion of a strong opinion, without evidence to show knowledge of its falsity. (*Haycraft v. Creaney*, 2 East, 92, which is the leading case upon this point, is explicit; see, also, *Page v. Bent*, 2 Met., 374; 6 N. H. Rep., 102, 103.)

IV. There was nothing to leave to the jury, there being no evidence to prove knowledge or fraud by the plaintiffs in error.

203*] *V. The charge to the jury does not require them to inquire whether the plaintiffs in error had any knowledge that the representation was false, or any fraudulent purpose. But it authorizes them to find a verdict for the plaintiff in that action, notwithstanding they had no such knowledge or suspicion, and acted in entire good faith.

It leaves to the jury, in effect, the question, whether, in their opinion, the plaintiffs in error acted without sufficient caution; with directions, in that case, to charge them. Nothing, it is believed, having the character of authority, sustains such a position.

If there had been evidence to be weighed by the jury, tending to show that the plaintiffs in error acted in bad faith (which there was not), the jury were not instructed to consider it, and did not consider it. The allegation in the original writ that they well knew the falsity of what they represented, was neither proved nor found by the verdict.

Nothing has been tried except the question whether the jury were of opinion that the plaintiffs in error were imprudent.

VI. There are cases where a representation has been held to be fraudulent, although the party had no knowledge at the time of its falsity, and no actual intent to defraud was shown. (*Hazard v. Irwin*, 18 Pick., 96; *Stone Denny*, 4 Met., 151; *Hammett's Executor v. Emerson*, 27 Maine, 308; *Snyder v. Findley*,

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U. S., Book 14.

1 Coxe, N. J., 48, 78; *Barnett v. Stanton*, 2 Alabama, 181; *Buford v. Caldwell*, 3 Miss., 477; *Warner v. Daniels*, 1 Wood. & M., 91, 107; *Mason v. Crosby*, 1 Id., 843, 353; *Smith v. Babcock*, 2 Id., 246.)

It is understood that the defendant in error relies upon this class of cases.

With the exception of the case in Coxe (which raised a question respecting the payment of a note), the cases just cited were founded upon representations by vendors of property, or by their agents.

How far the principle of some of these cases may be regarded as brought in question by *Omrod v. Huth*, 14 Mees. & Wels., 651 (in which, cotton being sold by the sample, upon representation that the bulk corresponded with the sample, it was held, that an action on the case by the purchaser, for a false and fraudulent representation, was not maintainable without showing that such representation was false to the knowledge of the seller, or that he acted fraudulently or against good faith in making it), we need not stop to inquire. (See, also, *Atwood v. Small*, 6 Clark & Fennelly, 233, 333, 447; *Early v. Garret*, 9 Barn. & Cress., 928.)

It is sufficient that, taking the cases above cited as they stand, to the full extent, they do not apply to this case.

*1. They are cases where the party [*204 had some interest to make the representation. Here the cause of action is not connected with any sale by the plaintiffs in error, or with anything by which the assertion can have the character of a false warranty. The action has no foundation in a contract between the parties.

In *Humphreys v. Pratt*, 5 Bligh., N. S., 154, which might seem at first to have some tendency to sustain this action, the learned counsel for the defendants in error contended for no more than "a principle of law that he who affirms that which he does not know to be true, or that which he knows to be false, to another's prejudice, and his own gain, is a wrong-doer," and expressly admitted that, "if the party making the representation has no interest, the action may not lie, unless it is done maliciously," pp. 162, 163. The reasons of the judgment are not stated in the report, but the grounds upon which the case is to be sustained, as stated by *Mr. Chief Justice Tindal*, 5 Ad. & Ellis, N. S., 829, are very far from sustaining the reporter's abstract; which has no support from the report of the same case, 2 Dow. & Clark, 288; *Adamson v. Jarvis*, 4 Bing., 66, may lead to the belief that the considerations suggested by *Chief Justice Tindal* were in truth the grounds of Lord Winford's opinion in *Humphreys v. Pratt*.

In *Taylor v. Ashton*, 11 Mees. & Wels., 415, *Mr. Baron Parke* says: "it is insisted that even that" [gross negligence] "accompanied with a damage to the plaintiff, in consequence of that gross negligence, would be sufficient to give him a right of action. From this proposition we entirely dissent, because we are of opinion that, independent of any contract between the parties, no one can be made responsible for a representation of this kind, unless it be fraudulently made."

2. In those cases the party asserted the fact as of his own knowledge, either in terms, or in a manner which implied that he had such actual

knowledge, and this is relied on as a ground for the opinion that he was liable. (4 Met., 151, 156.) In the present case the representation begins by merely stating the confidence of the parties who made it, and it is not stronger than that in *Tryon v. Whitmarsh*, 1 Met., 1.

8. From the nature of most of those cases, the party might naturally have had actual knowledge of what he asserted, and he was bound to know it before he made a positive assertion, from which he was to derive a benefit, and which entered into the contract constituting part of the *res gesta*. It was because he might well have had the knowledge that he professed to have, that the representation was held fraudulent. (3 Miss., 477.) In this case, as the plaintiffs in error lived in Portsmouth, and West & Daby in New York, there was no reason to suppose actual knowledge.

205*] *4. The difference between the case at bar and the cases referred to, is further shown by what has been already suggested. Without evidence to show that the representation was known to be false, actual knowledge of the matter stated is not to be inferred by the party to whom it is made. The representation is but the expression of an opinion, and is to be so understood.

In *Pusley v. Freeman*, 3 D. & E., 56, Grose, J., held the representation to be matter of judgment and opinion. Buller, J., said, "My brother Grose considers this assertion as mere matter of opinion only, but I differ from him in that respect." We naturally inquire why. And the reason immediately follows: "For it is stated in this record that the defendant knew that the fact was false." (3 D. & E., 57.)

This distinction is adverted to and recognized in *Hazard v. Irwin*, 18 Pick., 95, 105, and in numerous cases before cited. In *Kidney v. Stoddard*, 7 Met., 252, the defendant had knowledge of the falsity, and was not entitled, therefore, to say that he had merely expressed an opinion. So in *Cropton v. Cozart*, 18 Smedes & Marshall, 383, the representation, which had the form of an assertion made as of personal knowledge, was held not to have the character of opinion. But the decision is directly upon the ground that the defendants had knowledge of the falsity of the representation.

VII. The plaintiffs in error had in fact information that led them to the belief of the truth of the representation which they made. They had as much knowledge as they assumed to have—good ground for the confidence they expressed. This is shown by the letter to one of them from his son in New York. It is submitted that here is a most perfect defense. The representation was not made "under circumstances which manifested a recklessness of truth," but upon all the information which the defendant in error could reasonably have supposed to be in the possession of those who made it. (*Collins v. Evans*, in error, 5 Ad. & Ellis, 830, 826, 827; *Williams v. Wood*, 14 Wend., 126, 130; 2 Ala. R., 187.)

VIII. If there was any ground upon which the cash could rightfully be submitted to the jury, it was for them to inquire whether the plaintiffs in error did or did not believe what they represented, or whether they made the assertion with the express intention of enabling West & Daby to obtain credit; whether they

were able to pay or not, the plaintiffs in error being parties to an actual fraudulent intent. (The preliminary question for the court, would be, whether there was any evidence whatever to support the action on either ground.) But the charge submits no question of that character to the jury. If it had, the result must have been different.

*Unless the representation of a matter [***206** as true, which was in fact false, the assertion having been made in good faith, without knowledge of its falsity, and being one in which the party neither had, nor appeared to have any interest, is sufficient to charge him in damages, as for a fraud, the defendant in error has no cause of action. This is the extent of the proof. But it is believed that no authority can be found to sustain such a proposition. The case of *Evans v. Collins*, 5 Ad. & Ellis, N. S., 804, which comes nearest to the enunciation of such a principle, is followed immediately by its antidote, in the shape of a reversal of the judgment, by the unanimous opinion of the judges in the Exchequer Chamber, on the very ground that knowledge of the falsity of the representation was essential to the maintenance of the action (5 A. & E., N. S., 620.) And in *Barley v. Walsford*, 9 Ad. & Ellis, N. S., 208, Lord Denman, who delivered the opinion in *Evans v. Collins*, not only recognizes the reversal as settling the law, but admits the reasonableness of the doctrine. The Court of Queen's Bench had been misled by supposing that the case of *Humphreys v. Pratt*, in the House of Lords, was an authority for the principle laid down in *Evans v. Collins*.

It may be said of the cases which distinctly assert, or distinctly recognize the principles contended for by the plaintiffs in error, that their name is legion, for they are many.

To those already cited may be added, *Eyre v. Dunsford*, 1 East, 327; *Tapp v. Lee*, 3 B. & Pull., 367, 371; *Hamer v. Alexander*, 5 B. & Pull., 241, 245; *Wood v. Waine*, 1 Esp. R., 442; *Scott v. Lara*, Peake's R., 226; *Hutchinson v. Ball*, 1 Taunt., 558, 564; *Corbett v. Brown*, 3 Bing., 38; *Polhill v. Walter*, 3 Barn. & Adolph., 114; *Cornfoot v. Fowke*, 6 Mees. & Wels., 358; *Rawlings v. Bell*, 2 Man. Gran. & Scott, 951, 960; *Carr, Ex parte*, 3 Ves. & Bea., 110; *McDonald v. Trafton*, 15 Maine, 227; *Holbrook v. Burt*, 22 Pick., 554; *Loddell v. Baker*, 1 Met., 93; 3 Met., 472; *Benton v. Pratt*, 2 Wend., 385; *Gallager v. Brunell*, 6 Cowen, 846, 352; *Weeks v. Burton*, 7 Vt., 67, 70; *Evans v. Culhoun*, Id., 79; *West v. Emery*, 17 Vt., 583, 5-6; *McCraken v. West*, 17 Ohio, 24; *Perkins v. Serritt*, Little's Sel. Cas., 218; *Chisholm v. Gadsden*, 1 Strohart, 220; *Foster v. Seasey*, 2 Wood. & M., 217.

If the plaintiffs in error had given a guaranty, there is no evidence in the case upon which they could have been held responsible. It will be more than passing strange, if they are to be held *ex delicto*, for the payment of the debt, in the shape of damages, without evidence of express fraud, intentional wrong, actual bad faith.

Mr. Washburn**, for defendant in [207** error:

I. The record shows—

1. That the defendant in error lived in Bangor, Maine, and the plaintiffs in error, in

Portsmouth, N. H. The distance between these places is about two hundred miles.

2. That the defendant was acquainted with the plaintiffs, and would be likely to repose confidence in their representations; and that this was understood by the plaintiffs themselves. The letter from the latter, in which the representation complained of was made, was addressed to the defendant by name.

3. That West & Daby, wishing to purchase lumber, were directed by plaintiffs to defendant, with the following positive and unqualified representation: "They" (West & Daby) "are men well worthy of credit, and good for what they wish to purchase."

4. That upon this representation, West & Daby were able to purchase, and did purchase, of the defendant, a quantity of lumber, amounting in value to about \$2,000.

5. That the representation was wholly untrue. That West & Daby were neither worthy of credit, nor good for what they wished to purchase.

6. That Lord had means to know the facts. That if he did not know of the insolvency of West & Daby, he was probably entirely ignorant of their situation, unless he may be supposed to have derived information respecting it from the letter of his son, who was, as the record says, proved to be unworthy of belief, and that Jenness' position was no better than Lord's.

II. If the evidence shows, or the verdict necessarily implies, as I respectfully submit is the case, all that has been stated, the following propositions and deductions are fully warranted.

The plaintiffs made an unequivocal and unqualified representation, which the defendant might well rely upon as true, and known to be true by the plaintiffs. Relying upon it he sold his lumber to West & Daby, and lost the value of it. The wrongful conduct of plaintiffs occasioned that loss, and they should be held responsible for it.

A positive declaration like this carries with it the other declaration (implied) that the party making it knew what the pecuniary circumstances and credit of the persons recommended were; and, particularly, when he believes that another party will act upon the strength of it. It is as if the plaintiff had said to defendant, "We know all about the pecuniary circumstances and credit of West & Daby; they are well worthy of credit, and good for what they wish to purchase."

The plaintiffs did not undertake to assert a mere opinion, but they stated a fact as of their own knowledge. That statement was grossly untrue.

208*] *It is as false and fraudulent to state positively as true, as a fact, what one knows nothing about, as what one knows to be false. The same injury would be done in the former case as in the latter.

"To state what is not known to be true is just as criminal, in the eye of the law, as to state what is known to be false," under circumstances like those in this case. (*Buford v. Caldwell*, 3 Miss. R., 477.)

"It is perfectly immaterial, so far as regards the question of law, whether Findley knew or did not know the falsity of the facts which he

represented." (*Snyder v. Findley*, 1 Coxe, N. J. R., 48, 78; 1 Doug. R., 654.) But were the plaintiffs ignorant? They were, or worse. They had no reason for believing what they asserted. The evidence throws the strongest suspicion upon their act. Jenness stands with Lord. Lord had the means of knowing the condition of West & Daby. The letter from his son, whose character he must have known, cannot relieve him. The son had "failed in business, and was unworthy of belief." Who would think to ask for a letter of recommendation from such a man as Lord, Junior, but one of like character and condition? What would speak more suggestively and suspiciously of West & Daby than the letter from young Lord? *Nocturn a sociis*. It is submitted that the circumstances of the letter from the son, of the letter to the defendant, written by the daughter-in-law, who knew West in York, as she says, of the character of the son, have a tendency to raise the presumption that the plaintiffs were not entirely ignorant or innocent; that they must have known or suspected enough to dissuade them from the use of the strong language employed in the letter to defendant, if they had meant fairly by him. Did the plaintiffs make "full and proper inquiries?" or did they "make the recommendation upon such information as they ought to have acted upon?" Is the verdict of the jury negatively answering these questions (unless they found positive knowledge on the part of the defendants), unwarranted by the evidence?

But the plaintiffs are concluded by the terms of their letter; they cannot be permitted to say that they did not know of the insolvency of West & Daby; or to allege that their representation was not false and fraudulent.

When, to repeat, one makes a positive representation to another, who, he presumes, may act thereon, and who, he knows, has no other means of information, he cannot be permitted, after the injury is done, and done solely by reason of his act, to allege that he was ignorant, and knew nothing of what he had said, and affirmed in the most explicit language to be true, and true of his own knowledge; for [209] if he does not know the truth of what he says, he has no right to use terms of positive affirmation; the use of which, in such case, would be evidence of recklessness, tantamount to fraud.

Nor can he be permitted to say that he believed what he affirmed; for if he had nothing but belief or opinion in reference to the matter, he should have so expressed himself, and not employed language, the import of which was so unequivocal and decisive as to lead the party addressed to understand that he wrote from intimate acquaintance and actual knowledge. Herein this case differs from many of the cases cited by plaintiffs. Goddard could not have supposed that the language of the plaintiffs was adopted simply to express an opinion founded on such a miserable basis as they now allege. Are not men to be held responsible for such reckless and wanton disregard of the rights of others as is shown in this case, even when considered in the most favorable aspect for the plaintiffs?

Where the legitimate consequence of a positive assertion, false in fact, is to cause an injury to an innocent party, every principle of morality

and every rule of law, forbids its being made with impunity. The form of the statement implies a falsehood—implies knowledge and belief founded on knowledge. The falsehood in such case is willful, and willful falsehood imports fraud. It would be a reproach to the law if it did not furnish a remedy in a case like this.

The cases relied upon by the plaintiffs are dissimilar to this. It is believed that not one of them is applicable to the state of facts appearing upon this record. But it is believed that some of the cases cited, under the head VI., fully sustain the positions of the defendant.

Under the charge of the judge, the jury must have found, and were authorized by the evidence to find, all the facts as to knowledge, intent, belief, &c., necessary to support the action. The law, as applicable to the facts, was correctly given to the jury.

For the facts bearing upon the questions before the court, I would refer to the record at large, rather than to the abstract made by the plaintiffs.

Mr. Justice Catron delivered the opinion of the court:

Goddard sued Lord & Jenness in the Circuit Court of New Hampshire, alleging that the defendants by letter recommended West & Daby as men well worthy of credit, and good for what they wished to purchase; that they were dealers in coal, lumber, lime, &c., and that West, one of the firm, was visiting Bangor, Maine, for the purpose of purchasing lumber for the New York market.

210* The letter, set forth in the declaration, was dated at Portsmouth, New Hampshire, and directed to Goddard, at Bangor, Maine. West & Daby resided in New York.

On the faith of this letter Goddard credited West & Daby for a cargo of lumber worth nearly two thousand dollars, giving them four months' time: for which lumber West & Daby never paid, having been insolvent when the letter of recommendation was given, and so continued afterwards. It is clear that they were mere insolvent adventurers, without property, and entitled to no credit or confidence.

The declaration alleges that the letter was given by Lord & Jenness with an intention to deceive and defraud Goddard; and that they did procure credit for West & Daby falsely and fraudulently. On the plea of the general issue the parties went to trial, when it appeared that Lord had a son residing in New York, who, on the 28th of October, 1847, gave a letter of introduction to West, dated at New York, and directed to Lord, the father, at Portsmouth, N. H. The letter recommended the firm of West & Daby, as fully worthy of credit, and requested that Lord, the defendant, should recommend West & Daby to others. West delivered this letter, and on the same day got the one on which the suit is founded. It was written by the wife of the younger Lord, who was in Portsmouth, at the instance of West; he being known to her, but not known to Lord or Jenness the defendants. They seem to have acted on the information contained in the younger Lord's letter and on the representations of his wife.

On this state of facts, the court charged the jury: 1. That, as a general rule, it must be

proved that the representations made were false; and that the defendants made them, knowing they were false, and intended to defraud the plaintiff; and if the defendants made the representations, believing them to be true, they were not liable. "But a party, if stating positively that a person is entitled to credit, should do it from his own knowledge, or from full and proper inquiries; and then he is not liable if the debtor is insolvent, unless the jury see circumstances in the case of real fraud. But if a party state this positively as to the credit of an individual, and does it ignorantly, not knowing the credit of the person recommended, and without making full and proper inquiries, and the statements turn out to be false, the jury may infer that those so recommending did wrong, and deceived, because they must know that third persons are likely to rely on their stating what they personally know, or had duly inquired about, or what they had good reason to suppose their information as to it was sufficient and true. If the defendants in this case did not make the recommendation upon such *authority or information as you may [*211 think under the instructions they ought to have acted upon, you will charge them."

The jury found for the plaintiff on this charge, and the only question is whether it was proper.

The gist of the action is fraud in the defendants, and damage to the plaintiff. Fraud means an intention to deceive. If there was no such intention; if the party honestly stated his own opinion, believing at the time that he stated the truth, he is not liable in this form of action, although the representation turned out to be entirely untrue. Since the decision in *Haycraft v. Creasy*, 2 East, made in 1801, the question has been settled to this effect in England.

The Supreme Court of New York held likewise in *Young v. Covell*, 8 Johns., 23.

That court declared it to be well settled that this action could not be sustained without proving actual fraud in the defendant, or an intention to deceive the plaintiff by false representations. The simple fact of making representations, which turn out not to be true, unconnected with a fraudulent design, is not sufficient.

This decision was made forty years ago, and stands uncontradicted, so far as we know, in the American courts.

Taking the foregoing instruction together, we understand it to mean this: That if the jury believed due inquiry as to the credit of West & Daby had not been made by Lord & Jenness, and that they had signed the letter ignorantly, and regardless of the fact, whether the persons recommended were or were not entitled to credit, then the jury should charge the defendants: the real test of conduct, according to the charge, obviously being, whether Lord & Jenness ought to have accorded confidence to the younger Lord's letter, and to its sanction by his wife; and whether this information was of such a character as to justify them in writing the letter to Goddard, without further inquiry.

That this instruction, taken in its proper sense, was evasive of the true rule, and calculated to mislead the jury, is manifest, and therefore the judgment must be reversed, and the cause sent down for another trial.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of New Hampshire, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, *that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to award a *venire facias de novo*.

Cited—2 Curt., 263; 16 Bank. Reg., 375.

JAMES S. MORSELL, Special Bail of WILLIAM SMITH, Plaintiff in Error,
v.
HENRY A. HALL.

Omission to join in demurrer to plea waives plea—Judgment is conclusive of debt in sci. fa. against bail—omission to enter judgment, however cured—motion to enter exoneretur, no defense to sci. fa.—refusal cannot be assigned as error.

In Maryland, it is correct to take a cognizance of bail before two justices of the peace.

Where a *scire facias* was issued against special bail, who pleaded two pleas, to the first of which the plaintiff took issue, and demurred to the second; and the cause went to trial upon that state of the pleadings, without a joinder in demurrer; and the court gave a general judgment for the plaintiff, this was not error.

The refusal or omission to join in demurrer was a waiver of the plea demurred to.

In this case, if the plea had been before the court, it was bad; because being a plea that the note was paid before the original judgment, it called upon the party to prove a second time what had been once settled by a judgment. The omission of the court to render a judgment upon the plea could not be assigned as error.

A judgment of a court upon a motion to enter an *exoneretur* of bail is not the proper subject of a writ of error.

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of Maryland.

The facts were these:

In 1843, Henry A. Hall, a citizen of Maryland, brought a suit in the Circuit Court of the United States for Maryland, against William Smith, a citizen of the State of Mississippi. James S. Morsell was one of two persons who became, jointly and severally, special bail; and the recognizance of bail was taken before two justices of the peace for Calvert County.

In April, 1847, Hall obtained a judgment, in consequence of an opinion given by this court at the preceding term, which is reported in 5 How., 96.

In May, 1847, he sued out a writ of *capias ad satisfaciendum* against Smith, which was returned "*non est*."

In November, 1847, he issued a *scire facias* against Morsell.

In April, 1848, Morsell appeared and filed two pleas, viz.: 1. *Nul tiel record*. This plea was based upon the fact that the recognizance of bail was taken before two justices of the peace. In the argument before this court this objection was not urged; but as the opinion of the Circuit Court was thus established, it is proper that a record of it should be made.

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The opinion was short, and may be inserted, viz.:

"This mode of taking bail conforms to the long-established practice of this court. An Act of Assembly of Maryland passed *in [*213 1715, c. 28, sec. 2, authorized this mode of taking bail in suits in the then Provincial Court, which, like this court, had jurisdiction co-extensive with the State. This court adopted the practice, and has always since acted upon it.

"The written rule, No. 62, adopted in 1802, was not intended to alter the previous practice of this court, and has never been so construed. It is merely intended to confer the power upon other state officers also, so as to increase the facilities of giving bail where the defendant resided at a distance from the place of holding the court; for upon searching the records we find recognizances of bail taken soon after the adoption of the rule of 1802, before two justices of the peace of the State, in the same manner with the recognizance now before the court. A precedent has been produced as far back as 1812, and a more careful search would probably show precedents still earlier. The same practice has continued without interruption ever since; and, indeed, any other rule would be oppressive to citizens of the State who reside at a distance from the place of holding the court, especially as they would most commonly be obliged to bring their bail with them. In the case before us the recognizance of bail having been taken and sanctioned according to the established rules and practice of this court, the judgment upon the plea of *nul tiel record* must be for the plaintiff.

2. That the promissory note filed as the cause of bail in the action against Smith, was paid before the judgment was obtained against Smith.

To the first of these pleas Hall took issue, and the judgment of the court was as is above recorded.

To the second plea he demurred; and instead of joining in demurrer, Morsell took no notice of it, but the judgment of the court was for the plaintiff generally. A motion was made to enter an *exoneretur* on the bailpiece, which was overruled.

A writ of error brought the case up to this court.

It was argued by *Messrs. Stewart and Johnson* for the plaintiff in error, and *Mr. Dulany* for the defendant in error.

The counsel for the plaintiff in error did not press the objection founded upon the plea of *nul tiel record*, as before remarked; but contended that the judgment below should be reversed because the court did not decide upon the demurrer. (*Harris v. Wall*, 7 How., 693; *Wheelwright v. Jutting*, 7 Taunt., 304; *Thompson v. Macirone*, 4 Dowl. & Ry., 619.)

2. That if it be assumed that the court did decide upon the demurrer in favor of the plaintiff below, that such decision was erroneous, because the debt, in reference to which the recognizance of bail was entered into, [*214 is shown to have been discharged before the institution of the original suit. (*Jackson v. Hassel*, Doug., 330; 6 D. & E., 363; *Tetherington v. Golding*, 7 D. & E., 80; 2 Tidd's Practice, 992, 993; *Clark v. Bradshaw*, 1 East, 86; 4 Halst., 97.)

Mr. Dulany: The ground taken by the plaintiff in error in his second plea is, that, in the affidavit made by the defendant in error, in his original suit against William Smith, he filed, as cause of bail in said suit, a promissory note for the sum of \$2,678.90, which had been paid (he does not say by whom) before the judgment against Smith in that suit was obtained.

In support of the demurrer to this plea, it would seem sufficient to remark, that the plea relies upon a matter of defense which, if it had been established, as it might have been if true, in the principal action by Hall against William Smith, would have been an effectual bar to the recovery of the verdict and judgment in that case.

It is a maxim of law that there can be no averment in pleading against the validity of a record, therefore no matter of defense can be alleged which existed anterior to the recovery of the judgment. (1 Chitty's Pleading, Am. ed., 1844, p. 486, and margin; *Cardesa v. Humes*, 5 Serg. & Rawle, 65; *McFarland v. Irwin*, 8 Johns., 77; *Moore v. Bowmaker*, 2 Marsh., 392; 6 Taunt., 379.)

Now, the payment of the note, which is the ground of defense apparently relied upon in the above plea, was anterior (as is expressly averred in the plea itself) to the rendition of the judgment against Smith, and upon that judgment the *scire facias* in this case was issued against the plaintiff in error as special bail of Smith. The plea must, therefore, be held bad, and the judgment of the court below sustained, else there is great error in the above stated legal maxim and in the authorities by which it is supported.

Mr. Chief Justice Taney delivered the opinion of the court:

This is a *scire facias* brought by Hall against Morsell, as the special bail of William Smith, in a suit in the Circuit Court of the United States for the District of Maryland, in which Hall recovered a judgment, and proceeded by proper process to charge the bail.

Morsell appeared to the *scire facias*, and pleaded: 1st. *Nul tiel record*; and 2d. That the promissory note, filed as the cause of bail in the action against Smith, was paid before the judgment was obtained against Smith. The plaintiff, in the court below, took issue on the first plea, and demurred to the second; **215*** but the defendant did not join in the demurrer. The court gave judgment for the plaintiff, upon which this writ of error is brought.

The plaintiff in error alleges, that according to the record, the case was decided on the first plea only, and that the demurrer was not disposed of by the judgment—and they assign as error, 1st. That no judgment was given on the second plea; and 2d, if the court consider it to be overruled by the general judgment for the plaintiff below, that then the judgment is erroneous, because the plea was a good defense.

As relates to the first objection, the refusal or omission of the plaintiff in error to join in demurrer was a waiver of the plea, and there was no issue in law upon the second plea upon which the Circuit Court was required to give judgment. (*Townsend v. Jemison*, 7 How., 719, 720.)

And as concerns the second objection, if the plea was before the court and not waived, it was no defense. For the right of the defendant in error being established by the judgment in his favor, he was not bound to prove it over again in the *scire facias* against the bail. (1 Chit. Pl., Am. ed. of 1847, 469, 486, and margin.)

And consequently the omission to enter a formal judgment upon it could not, under the Act of Congress of 1789, c. 20, s. 32, be assigned as error. The omission would be a mere imperfection in form, not affecting the right of the cause or the matter in law as they appear on the record. (*Roach v. Hulings*, 16 Pet., 319; 4 How., 164; *Stockton et al. v. Bishop*, and *Parks v. Turner & Renshaw*, decided at the present term.)

The record, as transmitted to this court, shows that a motion was made, before the judgment on the *scire facias* to enter an *exoneretur* of the bail upon ground similar to that taken in the second plea; and that affidavits were filed in support of, and also in opposition to the motion. And it has been urged, in the argument here, that the Circuit Court erred in not granting this motion.

A motion to enter an *exoneretur* of the bail is no defense to a *scire facias* even if sufficient grounds were shown to support the motion (which we do not mean to say was the case in the present instance). It is a collateral proceeding, not forming a legal defense to the *scire facias*, but addressing itself to the equitable discretion of the court, and founded upon its rules and practice. (Chit. Pl., Am. ed., 1847, 469.) No writ of error will therefore lie upon the decision of a motion of that kind; because a writ of error can bring up nothing but questions of law. It does not bring up questions of equity arising out of the rules and practice of the courts. And the proceedings upon the motion to *discharge the bail form no ***216** part of the legal record in the proceedings on the *scire facias* and ought not to have been inserted in the record transmitted to this court.

There is no foundation, therefore, for any of the errors assigned in this case, and the judgment of the Circuit Court must be affirmed, with costs.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Maryland, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs and damages at the rate of six per centum per annum.

Cited—11 Wall., 676; 14 Wall., 22.

THE UNITED STATES, Appellants, v.

WILLIAM AND ALEXANDER McCULLAGH AND JAMES CORNAHAN, Trustees of the Heirs of ALEXANDER McCULLAGH and DAVID MCCALEB.

District Court no jurisdiction to try title derived from British grant.

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The Act of June 17, 1844 (5 Stat. at Large, 676), reviving the Act of 1844, gives jurisdiction to the District Courts in cases only where the title set up to lands, under grants from former governments, is equitable and inchoate, and where there is no grant purporting to convey a legal title.

Grants from the British government, as well as those of France and Spain, are equally within this restriction.

THIS was an appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

The opinion of the court sets out the facts of the case so far as to raise the question of jurisdiction.

It was argued by *Messrs. Lawrence and Crittenden* (Attorney-General for the United States, and by *Messrs. Janin and Taylor* for the appellees.

Mr. Chief Justice Taney delivered the opinion of the court:

This case arises on a petition filed by the appellees in the District Court for the Eastern District of Louisiana, praying that their title to a certain tract of land containing one thousand acres, situated on the Mississippi River, to the westward of Baton Rouge, may be declared valid and confirmed. They claim title under Alexander McCullagh, Sen., who obtained a grant from the British authorities while they [217*] were in possession of the country *and before it was ceded to Spain. The grant was made on certain conditions therein specified, which it is not necessary to state, as the court is of opinion that the District Court had no jurisdiction in the questions upon which the validity or invalidity of the title claimed by the appellees against the United States depends.

The proceeding is under the Act of June 17th, 1844, and this court have always held that under that Act the District Court has jurisdiction in those cases only where the title set up by the petitioner is equitable and inchoate; and where there is no grant purporting to convey a legal title as contradistinguished from an equitable one. It is true that the cases heretofore decided have arisen under titles derived from the French or Spanish authorities while they respectively held the territory and exercised dominion over it. And this is the first case that has come before the court in which the title sought to be confirmed is derived from the government of Great Britain. But as respects the jurisdiction of the District Court, claims of this description are placed by the Act of 1844, on the same footing with those which are derived from France or Spain. The jurisdiction conferred in either case is that of a court of equity only; and the titles which the court is authorized to confirm, are inchoate and imperfect ones, which, upon principles of equity, the government of the United States are bound to confirm and make perfect.

In this case, all of the questions upon which the title of the appellees depend, are strictly legal questions, to be decided in a court of law, in a suit at law. They are not, therefore, within the equity jurisdiction given by the Acts of 1824 and 1844. There are no equitable considerations involved in the controversy; and the validity or invalidity of this claim can be tried and determined in any court having competent jurisdiction to try and decide a disputed title to

land between individual claimants. There was no necessity, therefore, for any special jurisdiction to try them, and on that account they were not embraced in the Acts of Congress above mentioned.

It appears, in this case, that the District Judge had an interest in the land in question, and the cause was certified to the Circuit Court for the Eastern District of Louisiana, under the Act of March 3, 1821, and the decree affirming this title was passed by the Circuit Court.

This decree must be reversed, and a mandate issued to the Circuit Court to dismiss the petition without prejudice to the rights of the United States or the appellees.

ORDER.

This cause came on to be heard on the transcript of the *record, from the Circuit [*218 Court of the United States for the Eastern District of Louisiana, and was argued by counsel: on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby reversed; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to dismiss the petition of the claimants without prejudice to the rights of either the United States or the appellees.

HENRY MILLER, *Plaintiff in Error*,

v.

DAVID AUSTEN, WILLIAM S. WILMERDING, AND DAVID AUSTEN, JR.,
Defendants.

Instrument declared negotiable.

A statute of Ohio declares all promissory notes, drawn for a sum certain, payable to any person or order, or to any person or his assignees, negotiable by indorsement.

The following paper, namely:

MISSISSIPPI UNION BANK,
"No. 959. JACKSON, MISS., February 8, 1840. }
I hereby certify that Hugh Short has deposited in this bank, payable twelve months from 1st May, 1839, with five per cent. interest till due, fifteen hundred dollars, for the use of Henry Miller, and payable only to his order, upon the return of this certificate. \$1,500. Wm. P. Grayson, Cashier"—
was negotiable by indorsement under the statute, and the indorsee had a right to maintain an action against an indorser.

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of Ohio.

On the 8th of February, 1840, the Mississippi Union Bank issued the following certificate:

MISSISSIPPI UNION BANK. }
JACKSON, MISS., Feb. 8th, 1840. }
I hereby certify, that Hugh Short has deposited in this bank, payable 12 months from 1st May, 1839, with 5 per cent. interest till due, fifteen hundred dollars, for the use of Henry Miller, and payable only to his order, upon the return of this certificate.
\$1,500. WM. P. GRAYSON, Cashier.
On which are the following indorsements:
Pay to George Lockwood or order.
HENRY MILLER, Cincinnati, Ohio.

Pay Austen, Wilmerding & Co., or order, without recourse. GEORGE LOCKWOOD.

On the 4th of May, 1840, L. V. Dixon, justice of the peace and *ex officio* notary public, presented the paper declared on at the counter of the Mississippi Union Bank, at Jackson, and 219*] demanded *of the teller payment in specie, or its equivalent, which that officer, after consultation with the other officers of the bank, refused; but offered to pay in the notes of the bank, which the notary would not accept. The defendant, Miller, was duly notified as indorser, by a written and printed notice, directed to him at Cincinnati, and deposited in the postoffice in time for the first mail of the next day.

In July, 1847, Austen, Wilmerding & Co., brought an action against Miller in the Circuit Court of Ohio. The suit was brought against Miller as indorser, and the declaration contained three counts.

1st. Alleging it to be a promissory note of the Union Bank, payable to the order of Henry Miller, and by him indorsed to George Lockwood, who indorsed it to plaintiffs below.

2d. Alleging it to be a draft drawn by Henry Miller, on the Mississippi Union Bank, at Jackson, requesting the said bank to pay to George Lockwood, and by him indorsed to the plaintiffs below, and charging a due presentment for payment, and notice of non payment.

3d. On a common count for money lent and advanced, paid, laid out and expended, money had and received, and on an account stated.

The plea was *non assumpsit*.

In October, 1850, the cause came on for trial, when the jury found a verdict for the plaintiff for \$2,468.86.

Upon the trial, the plaintiff offered the note in evidence, together with the protest, &c. Objection was taken, but the court overruled it and admitted the evidence. This was the subject of the first bill of exception.

The second exception was to the refusal of the court to grant certain prayers asked for by the defendant, of which it is only necessary to notice the following:

1st. That the paper offered in evidence is not a negotiable instrument under the laws of Ohio, and cannot be sued on by the plaintiffs in the cause.

6th. That said paper offered in evidence is not a promissory note, nor is it a bill of exchange, but is a mere certificate, acknowledging the receipt and deposit of paper or obligations of some kind, which are payable twelve months after 1st May, 1839, bearing interest at the rate of five per cent. till due.

Upon these exceptions the case came up to this court, and was argued by *Mr. Fox* for the plaintiff in error, and by *Messrs. Chase and Rockwell* for the defendants in error.

Only those parts of the arguments will be noted, which bear upon the point decided by the court.

220*] *Mr. Fox*: We maintain this is not a promissory note, as described in the declaration, so as to pass by indorsement, as a mercantile instrument. That it is not so considered in a mercantile sense, nor is it a promissory note under the statute of Ohio.

Under the statute of Ohio (Swan's Stat., 587),

"all bonds, promissory notes, bills of exchange, foreign and inland, drawn for any sum or sums of money certain, and made payable to any person or order, or to any person or bearer, or to any person or assigns, shall be negotiable by indorsement thereon; . . . but nothing in this section shall be construed to make negotiable any such bond, note or bill of exchange, drawn to any person or persons alone, and not drawn payable to order, bearer or assigns." A check and certificate of deposit are not mentioned in this statute as being negotiable.

Under this statute, the Supreme Court of Ohio has decided that this identical paper is not a promissory note, negotiable under the laws of Ohio, as will be seen by reference to the *Western Law Journal*, Vol. IV., p. 527.

Suit was brought by these plaintiffs against Miller, on the same certificate, and was decided by *Judge Hitchcock*, May Term, 1847. The case is reported very shortly, but the point decided is fully shown. We claim that this, being a decision upon a local statute, the statute must, by this court, be construed in the same way as the same is construed by the Supreme Court of Ohio. Whether it is such a note as is negotiable in Ohio, depends upon the statutes of Ohio; and the courts of that State having given a judicial construction to the statute, this court will adhere to the construction, because the very essence of the contract of indorsement depends upon the laws of Ohio, where it was made. (6 Cranch, 225; 10 Wheat., 50; 18 Pet., 379; 11 Wheat., 367; 6 Pet., 297.)

We suppose, therefore, that we may safely rely upon the decision of the Supreme Court of Ohio, on this identical paper, between the same parties, as decisive of this question.

But independently of that decision, we maintain this is not such a promissory note as is or can be negotiable under the well-settled rules of law.

In the first place, there can be no such thing as a negotiable promissory note, unless there is an express promise to pay a certain amount. An implied promise will not answer. (Story on Promissory Notes, sec. 14.)

Where there is "no more than a simple acknowledgment of the debt, with such a promise to pay as the law will imply," it is not a promissory note. (*Patterson v. Poindexter*, 6 Watts & Serg., 231.) In that case this question is very fully examined by *the Supreme [*221 Court of Pennsylvania, on a certificate of deposit, exactly like the one now before the court, and which was held not to be a promissory note, after two arguments. The court referred to *Horne v. Redfearn*, 6 Scott, 267, as conclusive on the subject.

In *Fisher v. Leslie*, 1 Esp. Rep., 426, it was held that a slip of paper "10 U eight guineas," is not a promissory note; the court held the paper was the mere acknowledgment of the debt, but was neither a promissory note nor a receipt.

An instrument acknowledging the receipt of £200 in drafts, for the payment of money, and promising to pay the money specified in the drafts, is not a promissory note. (*Williamson v. Bennett*, 2 Camp., 417.)

In the next place, it is not a promissory note, because it is payable upon a contingency and not at all events. It is payable only upon the

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order of Henry Miller, and upon the return of the certificate.

A promissory note must not depend upon any contingency whatever. (Story on Prom. Notes, 22; *Williamson et al. v. Bennett et al.*, 2 Camp., 417; *Roberts v. Peake*, 1 Burrow, 333.)

This point was also decided in the case, already alluded to, of *Patterson v. Poindexter*, 6 Watts & Sergeant, 232, where the court say the promise is a contingent one, depending upon the return of the certificate.

We call the attention of the court particularly to this case, because it was precisely like the present. The certificate was issued by the same bank, and the language is precisely the same, as are also the indorsements. It is the only well-considered case in the books, on this subject, and it decides that the paper is neither a promissory note, nor a bill of exchange, nor a check upon a bank, but is only what it purports to be, a mere certificate of deposit, which is neither a bill, note, or check.

Again, if this is a promissory note and negotiable, can the consideration be inquired into? If it can, in the hands of an assignee it ceases to be a negotiable promissory note. And we claim that the consideration of this note may be inquired into; that it may be shown for instance, that the statement that Hugh Short had deposited the amount named, is not in fact true. That portion of the note is like the statement of a bill of lading, acknowledging the receipt of goods, and may, like all statements of receipt, be explained or contradicted.

And we maintain that in a suit against the Mississippi Union Bank, the bank might show that instead of money being deposited, worthless bank notes were deposited; and an offer to return the same notes would discharge the obligation.

Again, to whom (if this is a promissory note) 222*) is it payable? *It acknowledges the receipt from Hugh Short, payable in twelve months with interest, of \$1,500, for the use of Henry Miller, and payable only to his order. The amount received is from Short. It is payable, by the first part of the note, in twelve months, to Short, and not to Miller. The subsequent words "for the use of Henry Miller," do not alter the legal effect of the note. It is still a receipt of money from Short. It is payable to him in legal contemplation, notwithstanding the words "for the use of Henry Miller." These words do not vary the legal obligation. Supposing it had been a note promising to pay \$1,500 to Hugh Short or order, for the use of Henry Miller, could it be pretended that anyone, besides Short or his indorsee, could have recovered on the note at law. Under such circumstances, Miller would have had an equitable interest, but not the legal interest; and he or his assignee could not have recovered in a suit at law.

In order to sustain this suit as on a promissory note, the promise has to be implied, for there is no express promise to pay. Supposing that an implied promise to pay is sufficient (which we think it is not), to whom is this implied promise to be raised on this particular instrument?

As before remarked, if the promise had been express, to pay to Short, for the use of Miller, the legal title would have been in Short. Now,

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if in the absence of an express promise, we substitute an implied promise, must it not have the same effect? The plaintiffs below claimed the word "payable" was equivalent to an express promise to pay. Supposing it is so, for the sake of argument, how does the case stand? The certificate certifies that Hugh Short has deposited in the bank, payable in twelve months from 1st May, 1889, with 5 per cent. interest till due, \$1,500. From this statement the promise to be implied, from the word "payable," would be to Hugh Short. The subsequent statement, "for the use of Henry Miller," would no more in this case than in the case of an express promise, change the nature of the legal obligation. The words "for the use of Henry Miller" would in each case be of no further efficacy than to point out the equitable owner of the paper.

But it is claimed that the additional words used, "and payable only to his order, upon the return of this certificate," change the whole legal character of the instrument, and make what before was payable to Hugh Short, now payable to Henry Miller, or order. We contend that such is not the fair construction of the instrument, but that it must be construed in the same way as though an express promise had been made to pay to Hugh Short, and if that express promise had been inserted, the paper would read thus:

"I certify that Hugh Short has deposited in this bank \$1,500, which is promised to be paid 12 months from 1st May, 1889, with 5 per cent. interest till due, to the order of said Short (for the use of Henry Miller), upon the return of this certificate."

In other words, we contend that the words "for the use of Henry Miller" only indicate the equitable rights of the parties, and do not in any way affect the legal character of the paper. And to test this matter more fully, let us suppose that Hugh Short was owing Henry Miller \$1,500, and that supposing that Henry Miller would be willing to accept his pay in this certificate of deposit, he obtains it in the form of the paper now in suit. Suppose, further, that on his offering it to Mr. Miller, the latter refused to accept it, in whose name could the amount have been recovered of the bank, in a court of law? Miller could not have recovered, because he had refused to become the holder or owner of the paper. Is it not clear, then, that in such a state of case, Short could have received the amount? But if the construction is as contended for by counsel, Short could not have recovered, because the implied promise was not to him. We, however, contend that the promise, if expressed, would have been to Short; and if implied, it is also to him, and the other words, "for the use of Henry Miller," is only to designate the equitable course, which the legal owner or depositor, intends the money shall take, and that the words "payable to his order" relate back to the original depositor, Short, and not Miller, just in the same way and manner as if there had been an express promise to pay. Short would then be the promisee, and would be a trustee for Miller, if the latter saw proper to receive the certificate.

So that we think it clear that this was not a promissory note; that it was not a promissory note to Henry Miller, but was an obligation of

an equitable character, and he might have used the name of Hugh Short, in order to recover at law. That his indorsement of the certificate was no more than a mere authority to receive the money, and did not subject him to the payment of the sum mentioned in the certificate in case of default by the bank. (Story on Prom. Notes, secs. 128, 129.)

Messrs. Chase and Rockwell:

The first exception only remains for consideration, namely: that the paper declared on is not a negotiable promissory note under the laws of Ohio.

There is nothing peculiar in the legislation of Ohio in relation to promissory notes. The statute "making certain instruments of writing negotiable," provides that "all promissory notes drawn for any sum or sums of money certain, [224*] and made *payable to any person or order, or to any person or bearer, or to any person or assigns, shall be negotiable by indorsement thereon," &c. (Swan's Stat.) This legislation does not at all affect the general principles so firmly established by repeated decisions in respect to negotiable paper.

"A bill or note is not confined to any set form of words. A promise to deliver or to be accountable, or to be responsible for so much money, is a good bill or note." (3 Keat's Com., 75; Chitty on Bills, 40, and notes.)

"No particular words are necessary; the form may be varied at the pleasure of the individual, so, always, that it amounts to a written promise for the payment of money absolutely and at all events, and interferes with no statute regulation. Thus: an order or promise to deliver a certain sum of money to A, or to be accountable or responsible to A, for a certain sum of money, or that A shall receive it from the maker, is a good promissory note; so a receipt for money to be returned when called for, or an acknowledgment, due to A a certain sum of money payable on demand; or a promise to pay or cause to be paid to A a certain sum of money; or an instrument acknowledging the receipt of money of A, promising to pay it on demand with interest; or acknowledging the receipt of money to be repaid in one month; or acknowledging to have borrowed a certain sum of money, in promise of payment thereof." (Story on Prom. Notes, 15, sec. 12.)

A promise implied by law, founded upon a mere acknowledged indebtedment, will not be sufficient. Thus, where A wrote upon a slip of paper "I O U eight guineas," it was held to be a mere due-bill, and not a promissory note. But if the promise were "Due to A B, £20, payable to him or order," it would be a promissory note, for it contains more than the law would imply, and becomes negotiable. (Story on Prom. Notes, 17, sec. 14; *Curtis v. Rickards*, 1 Mann. & Grang., 46; *Russell v. Whipple*, 2 Cowen, 536.)

The decisions in Ohio are in strict accordance with these principles.

In *Moore v. Gano*, 12 Ohio R., 302, the following instrument was held a promissory note:

BRIDGEPORT, 12th month, 30th, 1836.

Received of John Moore, five thousand one hundred and ten dollars, which we promise to replace to the said Moore on demand, with interest from date.

GANO, THOMS & TALBOTT.

In *McCoy v. Gilmore*, 7 Ohio, Pt. 1, 368, it was held that "no special form of words is necessary to constitute a promissory note. *It is enough if the intent appear, and [*225 the sum can be made certain by calculation."

In *Ring v. Foster*, 6 Ohio, 379, a contract by which A agreed to pay to B one hundred and forty dollars, "provided B delivers the crop of tobacco raised by him and C, then B is to have one fourth of the above sum in hand, and in addition three dollars per hundred weight for that part yet to be delivered, payable one fourth in hand, and the balance in one hundred and twenty days," was held to be a promissory note.

These cases show the doctrine in Ohio on this subject; and that it is quite as liberal in favor of commerce as that of England, or her co-states.

The plaintiff in error relies upon a brief note of a decision said to have been made by the Supreme Court of Ohio in Hamilton County. The case is not reported, but merely the point supposed to have been decided; and this not by an authorized reporter, in any book of reports, but as an item of intelligence for a law journal. Those conversant with the stirrup practice of the Supreme Court on the Circuit in Ohio, would not claim the weight of authority for this paragraph in the Law Journal.

There is, however, it must be admitted, a decision, not of an Ohio court, but of a Pennsylvania court, both respectable and respected, which sustains the doctrine insisted on by the plaintiff in error. In the case of *Patterson v. Poindexter*, 6 Watts & Serg., 227, it was held that a certain certificate of deposit, in all respects like that now in controversy, was not a negotiable note. The opinion of the court maintains three propositions:

1st. That the words "payable to order" do not import a promise to pay; which is in direct opposition to the whole current of English and American authority.

2d. That a promise to pay on "return of the certificate," is a contingent and conditional promise, and therefore the note by which such promise is made is not a promissory note; and this, although the court is immediately after, forced to admit that "true it is that such a contingency is no more than is implied in every promissory note."

3d. That the words "payable twelve months from 18th May, 1839, with five per cent. interest till due," constitutes a special agreement for interest, which is inconsistent with the character of a promissory note; and this, also, is in direct opposition to the current of authority.

Upon these three propositions the court rested their conclusion that the paper in question was not a negotiable promissory note.

The only authority cited in support of this conclusion was *Horne v. Redfearn*, 6 Scott's Cases, 267.

*This was a decision under the [*226 Stamp Act. Suit was brought on the following letter:

December 25, 1839.

SIR: I have received the sum of £20, which I borrowed of you, and have to be accountable for the same with legal interest.

I am, &c.,

PETER REDFEARN.

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It was stamped as a special agreement, and was sued on as such. It was objected that it was a promissory note, and not being stamped as such, could not be given in evidence. But Chief Justice Tindal said: "I think this case may be decided by referring to the provisions of the Stamp Act, without referring to the cases which have been cited." He then proceeded to hold that the instrument, being stamped as a special agreement, and not as a promissory note, fell within the exemption of the Act, 55 Geo. III., ch. 184, from the promissory note stamp "of all other instruments bearing in any degree the form or style of promissory notes, but which shall in law be deemed special agreements, except those hereby expressly directed to be deemed promissory notes." The Chief Justice added, "It would be a very harsh construction of the Act to hold the document to be a promissory note, after the commissioners on stamps have impressed it with an agreement stamp, upon payment of the usual penalty."

This brief statement clearly shows that the case of *Horne v. Redfearn* went entirely upon a construction of the Stamp Act; and it is remarkable enough, that by this very Act, simple certificates of deposit, issued by banks, without any words, such as "payable," and the like, importing a promise to pay, are declared to be promissory notes. So that there cannot be a doubt that in England the paper now in controversy would be held to be a promissory note, whether the question was decided upon general principles or statutory provisions.

The Pennsylvania decision, then, is without the support of any English case, as it is without the support of any general principle of law applicable to promissory notes.

We shall proceed to show that it is in direct conflict with American authorities.

In the case of *Kilgore v. Bulkley*, 14 Conn., 363, the Supreme Court of Connecticut held the following certificate of deposit to be a promissory note:

§10,608.75. CHELSEA BANK, July 6, 1839.

I do hereby certify that David E. Wheeler, Robert S. Taylor, and Noah Bulkley, have deposited in this bank the sum of ten thousand six hundred and eight dollars seventy-five cents, payable on the first day of December next, to their order, on the return of this certificate.

D. E. WHEELER, President.

227*] *And the following writing, indorsed upon the paper, was held to be an indorsement by which the parties made themselves liable as indorsers of a negotiable note:

"For value received, we hereby assign to S. F. Macracken, Joseph S. Lake and Daniel Kilgore, Commissioners of the Ohio Canal Fund, or their successors, the amount of the within certificate."

The case of *The Bank of Orleans v. Merrill*, 2 Hill, N. Y., 295, is also in direct conflict with the case of *Patterson v. Poindexter*. In that case the action being brought on a certificate of deposit, the court said, "the instrument in question is in effect a negotiable promissory note."

Thus, then, stands the case. The paper in controversy has all the requisites which an unbroken current of decisions has pronounced es-

sential to a promissory note. It is a promise to pay a sum of money certain, at a fixed time, for value received. It was regarded by the maker, by the defendant, and by the plaintiffs, as a negotiable promissory note. By the maker, for it was in the language of the Ohio statute, "drawn payable to order;" by the defendant, for he issued it payable to the order of his indorsee, and he added to his signature the place of his residence, obviously that, in the event of non-payment, it might be known where to direct notice; by the plaintiffs, for they caused it to be presented for payment, and protested as negotiable paper. Two American courts, of distinguished ability, have expressly held similar instruments to be negotiable paper. One American court has held otherwise.

This statement would seem to be decisive. We do not think it worth while to comment on the positions of the counsel for the plaintiffs in error, that the paper in question is not a promissory note, because subject to the condition of the return of the certificate: and that, if it is a note at all, it is a note to Hugh Short, and not to Henry Miller. The first is refuted by the remark of the court which suggested it, that it is a condition which is implied by law in every promissory note; and the section is refuted by the language of the instrument, and the act of the defendant himself.

We will only add two or three cases, which illustrate somewhat strikingly the disposition to which the Supreme Court of New York referred, when they said, "the great commercial advantages growing out of negotiable instruments, have induced the courts to adopt a most liberal rule in construing them." The first case is that of *Walker v. Roberts*, 1 Carr. & Marsh., 590 (41 Eng. Com. Law, 321). The following document was held to be a promissory note:

*February, 1831. William Walker [*228 lent to James Roberts £19, 19s. 11d.; to pay five per cent. for the same £19, 19s. 11d.; to pay on demand to the said William Walker, giving James Roberts six months' notice of the same. James Roberts, Mary Roberts.

The other case is that of *Henschel v. Mahler*, 3 Hill's N. Y., 132. The action was upon the following instrument:

"For francs 8,755.60, payable on the 31st of December, 1839. On the 31st of October, of this year, pay to the order of ourselves, 8,755 francs 60 centimes, payable in Paris, the 31st of December, of this year."

It was held a valuable negotiable bill of exchange, notwithstanding the ambiguity: the words "on the 31st of October, in this year" being rejected as repugnant, and the bill held payable "on the 31st of December."

We refer the court, also, to 1 Greenl., 535; 2 Cow., 536; 10 Wend., 675; and, in deciding the last of which cases, Nelson, J., said, "the instrument is a promissory note within the statute, as it contains every quality essential to such paper. The acknowledgment of indebtedness on its face implies a promise to pay the plaintiffs," and the payment, by its terms, was to be in money, absolutely. The instrument on which this last action was brought was as follows: "Due Kimball & Kiniston three hundred and twenty-five dollars, payable on demand."

Mr. Justice Catron delivered the opinion of the court:

The only question this case presents that we deem worthy of notice is, whether the paper sued on is a negotiable instrument; it is as follows:

"No. 959. Mississippi Union Bank, Jackson, Miss., Feb. 8, 1840. I hereby certify, that Hugh Short has deposited in this bank, payable twelve months from 1st May, 1839, with 5 per cent, interest till due, fifteen hundred dollars, for the use of Henry Miller, and payable only to his order upon the return of this certificate. \$1,500. Wm. P. Grayson, Cashier."

The suit was by the last indorsee against his immediate indorser, and brought in Ohio. The statute of that State declares all promissory notes, drawn for a sum certain, payable to any person or order, or to any person or his assigns, negotiable by indorsement.

The established doctrine is, that a promise to deliver, or to be accountable for so much money, is a good bill or note. Here the sum is certain, and the promise direct. Every reason ^{220*} exists why the indorser of this paper should be held responsible to his indorsee, that can prevail in cases where the paper indorsed is in the ordinary form of a promissory note; and as such note the state courts generally, have treated certificates of deposit payable to order; and the principles adopted by the state courts, in coming to this conclusion, are fully sustained by the writers of treatises on bills and notes.

Being of opinion that the Circuit Court properly held the paper indorsed, negotiable, it is ordered that the judgment be affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Ohio, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs and damages at the rate of six per centum per annum.

*Att'g 5 McLean, 153.
Cited—19 How., 604.*

ALANSON SALTMARSH, *Plaintiff in Error,*
v.

JAMES W. TUTHILL.

Witness—competency—party to bill.

In a suit by the indorsee against the indorser of a bill, where the defense was usury, the drawer and drawee were incompetent witnesses, when offered to prove certain facts, which, when taken in conjunction with certain other facts, to be proved by other witnesses, would invalidate the instrument. Being incompetent witnesses to establish the whole defense, they are also incompetent to establish a part.

THIS case was brought up by writ of error from the District Court of the United States for the Middle District of Alabama.

The only question was one of evidence, which is fully explained in the opinion of the court.

It was argued by *Messrs. J. A. Campbell*

and *Seward* for the plaintiff in error, and *Mr. Pryor* for the defendant in error.

Mr. Justice Catron delivered the opinion of the court:

Hill drew a thirty days' bill, dated at Mobile, on William Bower & Co., for four thousand dollars, payable to Coleman. It was indorsed by Coleman to Saltmarsh, and by him to James W. Tuthill, who sued Saltmarsh. The parties went to trial on the general issue, and the defense relied on was usury. By the laws of Alabama, a party to any security [^{*230} for the payment of money, who takes more than after the rate of eight per cent. per annum for the money advanced, is prohibited from recovering any interest, and can have judgment only for the original sum loaned. And this abatement, was the matter in controversy. To prove the usury, Hill, the drawer, and William Bower, one of the drawees, were introduced on behalf of the defendant; and objected to by the plaintiff as incompetent, on the ground that a party to negotiable paper who, by the sanction of his name, gave it credit and currency, could not afterwards, upon his own testimony, invalidate the instrument, by showing that the consideration on which it was executed was illegal. The witnesses were rejected.

Both Hill and Bower were offered to prove facts which, when taken in connection with additional facts, that might be proved by others, would invalidate the instrument in part, by abating the interest. The proof was offered, and only material to establish the defense of usury, this being the sole defense. It must be admitted, that if the party to the bill had been introduced to establish the whole defense, then he was incompetent; and to hold, that he could prove a defense in part, without which piece of evidence no successful defense could be made, would be a mere evasion of the rule, which excludes such witnesses from giving evidence to impeach the consideration.

No other question is presented to us, nor does any other exist in the record, worthy of notice.

It is therefore ordered that the judgment of the Circuit Court be affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Middle District of Alabama, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and the same is hereby affirmed, with costs and damages at the rate of six per centum per annum.

Cited—1 Wall., 173.

CYRIL C. TYLER AND HIS WIFE, SARAH
P. TYLER, *Appellants,*
v.

GEORGE N. BLACK.

Conveyance of land set aside for fraud—representation of purchaser.

NOTE.—Inadequacy of price to impeach or set aside sale. See note to *Erwin v. Parham*, 12 How., 197.

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Where a person desired to purchase land from a party who was ignorant that he had any title to it, or where the land was situated; and the purchaser made fraudulent representations as to the quantity and quality of the land, and also, as to a lien which he professed to have for taxes which he had paid; and finally bought the land for a grossly inadequate price, the sale will be set aside.

THIS was an appeal from the Circuit Court of the United States for the District of Maine, sitting as a court of equity.

The facts are all stated in the opinion of the court.

It was argued by *Mr. Fessenden* for the appellants, and *Mr. Rowe* for the appellee.

The points made by the counsel for the appellants were the following, viz.:

The complainants claim to have their deed to Black, dated November 30, 1846, canceled, and a reconveyance of said estate, on the following grounds:

1. For fraud and fraudulent representations.
2. For inadequacy of price, as, of itself, furnishing evidence of fraud.
3. For the two preceding grounds united.

General Considerations. The acts and declarations of Black, to show he had formed a design to commit frauds in making this purchase, as opportunity should offer.

All such acts and declarations of Black made to other persons, about the time of the transaction, are competent evidence for complainants, for that purpose. (*Bradley v. Chase*, 22 Maine Rep., 511; *Warner v. Daniels*, 1 Wood. & M., 90; *Wood v. The United States*, 16 Pet., 342; S. C., 14 Pet., 430.)

Complainants rely on the testimony of the Vermont witnesses, viz.: Edward F. Putnam, Albert G. Soule, E. P. Soule, and Phebe Hendricks, to prove such acts and declarations of Black.

First Proposition. The bill, answer, and evidence, establish complainants' proposition of fraud, on the part of Black, in several particulars, either of which is sufficient to entitle them to a decree in their favor.

1. As to complainants' title and the evidence of it, and Black's misrepresentations concerning it.
2. Black's misrepresentations as to the number of acres.
3. Black's misrepresentations as to incumbrances on the land, and particularly of his lien thereon for taxes, alleged to have been paid by himself.
4. Black's misrepresentations of the value of the land.

(Each one of these points was examined according to the evidence.)

Second Proposition. The doctrine is well stated in Story's Commentaries on Equity Jur., sec. 245 and 246. After stating the general proposition that mere inadequacy is not a sufficient ground for relief, he says (sec. 246): "232*" "Still, however, there may *be such unconscionableness or inadequacy in a bargain, as to demonstrate some gross imposition, or undue influence; and in such cases, courts of equity ought to interfere upon the satisfactory ground of fraud. But then, such unconscionableness or such inadequacy, should be made out as would, to use an expressive phrase, shock the conscience, and amount, in itself, to conclusive and decisive evidence of fraud. And where there are other ingredients in the case of a suspicious nature, or peculiar relation between the parties, gross inadequacy of price must necessarily furnish the most vehement presumption of fraud."

The same doctrine is stated in Fonb. Eq., B. 1, ch. 2, sec. 9, note a.

"Where the deed is executed, or if the parties have not been on equal footing, or, if there has been any concealment, or misrepresentation, or imposition, courts of equity uniformly set aside such deed or contract." (Sug. Vend., 6th Amer. ed., p. 317, and note 2.)

"Where the circumstances of the case are such as have afforded an opportunity, either from the situation or condition of the parties, or the nature of the property, for either of them to take a fraudulent advantage of the other, and the consideration is grossly inadequate, this court considers that circumstance to be evidence of fraud, and will not only refuse a specific performance at the instance of the former, but will, at the suit of the latter, rescind the transaction." (Jer. Eq. Jur., 488, and notes.)

"A conveyance, obtained for an inadequate consideration, from one not conscious of his right, by a person who has notice of such right, will be set aside, although no actual fraud or imposition be used." (Sug. Vend., 6th Amer. ed., 320.)

"Although it may be impossible, by any general proposition, to define what is to be understood by gross inadequacy of consideration, as it must, in a great measure, depend upon the circumstances of each individual case in which the question may arise; yet, if it be so gross and palpable, as of itself to afford evidence of actual fraud, the court will set aside a sale." (Jer. Eq. Jur., 433, note 7; *Osgood v. Franklin*, 2 Johns. Ch., 1, and cases cited.)

In *Turner v. Harcey*, 1 Jacob's Ch. R., 169, which was a case where the vendors were ignorant of a fact or circumstance considerably increasing the value, the court says: "If a word, a single word, be dropped which tends to mislead the vendor, the principle that the purchaser is not bound to give the vendor information as to the value of the property, will not be allowed to operate."

Again: in *Hill on Trustees*, 152, it is said, "Mere inadequacy, of itself, is not enough to set aside a contract; but where the inadequacy is so gross that it is impossible to state it to a man of common sense, without producing an exclamation as to the inequality of it, the court will infer, from that fact alone, that there must have been such imposition, or oppression in the transaction, as to amount to a case of fraud, from which it would not suffer any benefit or advantage to be derived. Other circumstances of fraud will aid the court."

To apply these principles to the case at bar. The inadequacy of price, in this case, is such as of itself to afford evidence of fraud. In 1799 Parsons conveyed to Putnam for 50 cents an acre. Black paid Tyler and wife 84 cents an acre.

Black, in his answer, says that it was worth from 50 cents to \$2 per acre, November 30, 1846. Now, 50 cents to \$2 averages \$1.25 per

acre; so that Black purchased for 8½ cents an acre what he admits was worth \$1.25 an acre. He bought for \$50 what he admits was worth \$757.50.

Third Proposition. The bill may be sustained on the ground of fraud and fraudulent representation, and for inadequacy of price, united.

On these principles the court will find a rule for their guidance in *Seymour v. Delancey*, 6 Johns. Ch. R., 232. Chancellor Kent, in that case, found it convenient to take the average value, as established by the witnesses on the one side and the other.

On this principle the land was worth about \$4.45 an acre, or \$2,688.36, in November, 1846, date of deed of Tyler and wife to Black.

The denials of the answer are thus overcome, and the bill is maintained.

The counsel for the defendant in error made the following points, viz.:

The court has no jurisdiction. The value of the matter in controversy is one of the points at issue in the case. The proofs fail to show the land to be worth \$2,000. It is not worth over 50 cents per acre, as shown by respondent's witnesses.

(The arguments upon this point upon both sides depend so entirely upon references to the testimony, that they cannot be reported.)

Point 2. There was no inadequacy of price. The inadequacy, to be evidence of fraud, must be so gross as to shock the conscience. (1 Story's Eq. Jur., secs. 244, 245, 246; 1 Sugd. Vend., [*422, 423.] 318, 319, and cases there cited.) Here is no satisfactory proof of such inadequacy as would even amount to damage. (1 Story's Eq. Jur., sec. 203.) The consideration, on Black's part, was the \$100 paid, the amount due for taxes and interest, and his claim for trouble and expenses, in discovering [234*] and notifying the heirs. There is no sufficient proof now (as before shown) that all which Black takes by his deed is worth more than that. At the time of the contract it was doubtful how much he would take by his deed, or whether he would take anything.

It was not then fully ascertained whether Dr. Putnam died seised of any portion of this lot; and it was not known of how much, if any. It was not even known that Parsons had sold him any land, or if any, how much. The extent of Mrs. Tyler's rights, as heir at law, was not clearly ascertained. The value of the land was unknown. Defendant had no information but that derived from Mrs. Sheldon, and Tilden, and from the Putnams.

Where neither of the parties knows the value of the estate, no inadequacy of consideration can operate, even to prevent a decree for specific performance in favor of the purchaser. (*Anon.*, cited in 1 Bro. C. C., 158, and 6 Ves., Jr., 24; 1 Sugd. Vend., [*441, 442] 318.)

Point 3. There was no fraudulent concealment.

A purchaser is under no obligation to give any information, unless there be some relation of confidence between the parties. (2 Kent's Com., 5th ed., 490, by Lord Thurlow, in *Flax v. Macereth*, 2 Bro. C. C., 420; *Laidlaw v. Organ*, 2 Wheat., 178; 1 Story's Eq. Jur., sec. 207.)

The parties to this contract were strangers to each other. The complainants are persons of

intelligence, and in "comfortable circumstances."

Black offered to communicate everything for a reasonable compensation; and the offer was made at the commencement of the conversation, and repeated afterwards. In fact there was no concealment.

Before the execution of the deed the complainants were informed of every fact, known to the defendant, in relation to the land and their title thereto.

It is too late for complainants to take advantage of any concealment during the negotiations, they having executed the deed after all the facts were fully disclosed. (*Hovenden on Frands*, 106, cites *Fleetwood v. Green*, 15 Ves., 594; *Burroughs v. Oakley*, 3 Swanst., 168; 1 Sugd. Vend., 392, secs. 27, 28, and cases cited; 1 Story's Eq. Jur., sec. 203, a.)

Point 4. There was no misrepresentation.

The testimony of E. F. Putnam and others, as to the representations made to them at Fairfield, is irrelevant and inadmissible. The interrogatories, which called it out, were objected to. If admissible, it is discredited by the evident bias and strong feeling of the witnesses; by their mutual contradictions, in relation to Black's denial of knowledge of the [*235] quantity of land, and his statements in relation to the number of acres, the price of land sold, the place searched for papers, &c.; and by their statement that Black said Mrs. Tyler was dead, which contradicts the case as settled by bill and answer.

Black did not represent that he had a tax title, or a lien on the land. The charge is inconsistent in its several parts, and with complainants' proof. The claim which he set up, was the claim which the answer shows that he had an equitable one on the owners of the land, and not a legal charge on the land itself. He made no representation as to the number of acres.

This charge is not made the subject of a particular interrogatory, but is covered by interrogatories 7 and 16; and is denied in the answer.

Black stated that he "did not know how many acres belonged to said Aaron Putnam;" he could not have known. The statement of the number of acres, if made, was a mere matter of opinion, so understood by all parties, and there is no evidence that it was insincere.

A misrepresentation must be of something more than a mere matter of opinion. (1 Story's Eq. Jur., 179; *Hepburn v. Dunlop*, 1 Wheat., 179.)

The representation, if made, was not material. The land in itself is worthless; the only value is the timber. The number of acres gives no idea of the quantity of that. About the timber there were no representations made and no inquiries. It was no inducement to the sale. The bill contains no averment that it was an inducement (see p. 627); no denial of its truth; no interrogatory in relation to it; no averment that the complainants believed it. It was not regarded as evidence of the value of the land sold by either party, for Tyler afterwards inquired again as to the character and value, and Black declared he knew nothing about it. The only inducement specifically charged is the doubt as to Mrs. Tyler's title.

HOWARD 12.

The only unfairness in relation to the value of the land charged against Black is the withholding information. He said that Tilden's part of the lot was purchased at a shilling per acre, and not at twelve and a half cents, as charged. Tilden paid a shilling. Black so stated at Fairfield; the Soules interpolated the word "York"; Stanwood borrows the story and reduces the York shilling to federal currency.

600 acres at 12½ cents, — \$62.50, incumbered by tax claims for about \$300. The story is incredible, and inconsistent with the propositions made by Black. What Black did say was not thus incredible or inconsistent, for Stan-236*] wood believed him, and *thought a doubtful title to half the land worth more than he asked for his information.

Black's representations of his inducements to purchase are not shown to be false; and if they were, that would furnish no grounds for rescinding the contract.

A purchaser is under no legal obligation to make a true disclosure of his motives. (*Ver-non v. Keys*, 12 East, 682, 687, 688.)

Point 5. The misrepresentation must be of something, in regard to which the party places known trust and confidence in the other. If the party had no right to place reliance upon it, and it was his own folly to give credence to it, it will not avoid the contract. (1 Story's Eq. Jur., secs. 197, 199.)

Before any of the representations complained of were made, Black assured Dr. Tyler that he would give no information whatever, unless paid therefor; and repeatedly made the same assurance to him, in substance, in reply to his pressing questions. If, after that, Dr. Tyler relied upon anything, wrung from the defendant by his importunate inquiries, it was a folly, from the consequences of which a court of equity will not relieve him.

Point 6. Before they executed the deed, the complainants knew where the land is situated, and where the evidence of their title is recorded, and could have ascertained whether the representations made by Black were true.

If Black made all the representations charged in the bill, they then knew that some of them were untrue, and were put on their guard as to the rest.

Misrepresentation of a matter, where a party was capable of seeing whether it was right or not, is no ground for relief. (*Ainslie v. Medley*, 9 Ves., 13; 1 Madd. Ch., 253; *Bayley v. Merrell*, Cro Jac., 386; 3 Bulstr., 95; 1 Story's Eq. Jur., sec. 149; 2 Kent's Com., 485, 486, note d.)

The deceit must be such as ordinary prudence would not protect the party against. (1 Story's Eq. Jur., sec. 200, a.)

Point 7. Black's claim on account of taxes paid, &c., is valid *in foro conscientia*. Complainants will not be entitled in equity to the relief prayed for, until provision is made for that claim.

They have never offered to pay him if he would rescind the contract; nor even requested him to rescind. The bill contains no such offer. The parties cannot be placed *in statu quo*.

Mr. Justice Wayne delivered the opinion of the court:
HOWARD 13.

This is an appeal from the Circuit Court of the United States for the District of Maine, sitting as a court of equity.

The complainants, Tyler and wife, filed their bill to set aside a sale of land made by them to Black, upon the ground of fraud, concealment, and fraudulent representations made to them by *Black; and also upon the ground [*237 of inadequacy of price as furnishing evidence of fraud.

Towards the latter end of the last century, the State of Massachusetts established a lottery, for the sale of some lands in Maine; and one Zenos Parsons drew a prize of 1,920 acres, being lot number one in township No. 33.

On the 25th of March, 1799, Parsons conveyed to Aaron Putnam, of Charlestown, Massachusetts, for the consideration of \$600, 1212 acres of the said land, being an undivided interest. Putnam had three children, two sons, and a daughter. The daughter married Tyler, and they were the complainants and appellants in the present cause. One of the sons died without issue, and the other son left two children, viz.: Edward and Elizabeth, who married Soule, who resided in Fairfield, Vermont.

At the time of the death of Aaron Putnam, his daughter was a minor, and resided in Massachusetts. When the transaction occurred which gave rise to the present suit, she was residing with her husband, Tyler, at Hopkinton, in New Hampshire. Black resided near the land in Maine, and had acted as the agent of the owner of the remaining undivided interest for upwards of twenty years.

In November, 1846, Black went to Fairfield, in Vermont, and offered to purchase the share of Edward and Elizabeth, who were ignorant of their title to the land; but they refused to sell. Black there learned that Tyler and his wife were the owners of one half of the 1212 acres which had been conveyed by Parsons to Putnam, and immediately proceeded to Hopkinton to see them. At this time Black's position was this: he resided at the town of Ellsworth, which communicated, by a navigable stream, with the land in question; he had been connected, since 1833, with his father, John Black, in the business of agency for the proprietors of nearly all the lots in the townships in which the land in question was situated; and in the seasons of 1844-5 and 1845-6 there had been lumbering operations upon lands in the neighborhood.

The interview between Black and Tyler is thus described by Joseph Stanwood in his deposition:

Second. To the second interrogatory he saith: "I was present at the public house when Mr. Black came here and took the deed, as before stated; my father-in-law and I were then keeping a public house; Mr. Black came in and inquired for Doctor Tyler; what sort of a man was he, and what were his circumstances as to property; I told him he was a physician, doing a tolerable good share of business; had his house and other buildings clear of debt, as I supposed."

*Third. To the third interrogatory he [*238 saith: "I was not present at the commencement of the interview betwixt Tyler and Black; I left the room soon after Tyler came in; after

they had been together perhaps an hour, Tyler came out and told, in substance, that Black and he had been talking about some land in Maine; I went into the room with them; Black said there was a tract of land in Maine, and he could find no person that had any claim to it, unless it belonged to the heirs of Doctor Putnam; Black said he would give Tyler fifty dollars for a deed of the land from Tyler and his wife; or, if they would give him fifty dollars, he would tell them all he knew about the land; they came to no agreement at that time, but separated late at night; the next morning Black said he had concluded to make Tyler another offer for the land; he would give him one hundred dollars for a deed; I went to Doctor Tyler, told what Black had offered, and he came in and concluded to take it."

Fourth. To the fourth interrogatory he saith: "The inquiries in the first part of this interrogatory were not made, if made at all, in my presence, but I inferred from their conversation that these questions had been settled before I came into the room; Black represented that the land was situated in a township, and gave the number of the township, but refused to name the county; when the deed was made, he directed me to insert a different number from that he had represented in the previous conversation; he either represented that the township in which the land was situated was thirty-one, and directed me to insert thirty-three in the deed, or represented thirty-three as the number of the township, and had thirty-one inserted in the deed, but which I cannot now recollect."

Fifth. To the fifth interrogatory he saith: "That Black said the land was holden, if held at all, by virtue of a lottery ticket, the form of which he attempted to describe; it was made of pasteboard or thick paper, as I understood; he said he had lately seen one in the hands of a Mr. Webster, I think, but I am not certain about the name; Black said he had made many inquiries about the title to this land; he had been to Springfield, Mass., and other places, for this purpose, but could find no record of the title anywhere; and he did not suppose there was any deed of this land on record, but that the whole claim to it depended upon the lottery ticket, and that alone."

Sixth. To the sixth interrogatory he saith: "When Tyler inquired how many acres Doctor Putnam owned, Black answered, about five hundred."

Seventh. To the seventh interrogatory he saith: "Black said he had a claim on this land 239* for the taxes he had paid on *it; he said he had paid taxes on this land twenty-eight or twenty-nine years; think he said twenty-nine years; the amount I do not recollect, if he stated it; he said Tyler must pay him the amount of these taxes, and twenty-five per cent. interest, at all events, before he could avail himself of any title to this land, and this he required in addition to the fifty dollars mentioned in my answer to the third interrogatory; he said he would have the land sold for taxes, and get a good title."

Eighth. To the eighth interrogatory he saith: "I do not recollect that Black represented what was the value of this particular piece of land, but he said a part of the same tract had

been sold for twelve and a half cents per acre, and was still undivided; so that if Tyler should ever be able to find and get possession of the land, he would find himself an owner in common with others, and it would become necessary for him to get a division before he could do anything with the land; he said a road had been, or would be, laid out through this township, which would much increase the taxes; he assigned as a reason why he wished to purchase the land, that another person had appeared and claimed a large part of it, and he thought it was best for him to be looking out for the remainder; and he had traced it back to Doctor Putnam, and had not found that he had parted with his title; till this claim was made to a part of the land, he had supposed he was in quiet possession, and that the claimants were all dead."

Ninth. To the ninth interrogatory he saith: "Black's first offer was fifty dollars, and he did not vary from this till the morning, when he offered one hundred dollars; whether he professed to be liberal or not I do not recollect, but said it was all he would give till the morning."

Tenth. To the tenth interrogatory he saith: "Black said he could have had the land sold for taxes, and obtained a title that way; I asked him why he had not done so; he said he was afraid other speculators would come in and trouble him, or get the land; I think he mentioned Norcross."

Eleventh. To the eleventh interrogatory he saith: "I made the deed for Tyler and his wife to sign; when I commenced writing the deed, Black took from his pocket a memorandum, and dictated to me a description of the land, and caused me to use words different from those I should have used; he then, for the first time, gave the name of the county in which the land is situated, and the number of the township, which was different from the number he had before given, as I have before stated in my answer to the fourth interrogatory; and he directed me to put in a much larger sum for the consideration in the deed than he gave Tyler, which I did."

*It appeared afterwards, in evidence, [*240 that the deed from Parsons to Putnam was on record in the office for registering deeds for land in Hancock County, kept in the town of Ellsworth; and it also appeared that Black had no lien upon the land for taxes paid by him.

In December, 1846, Edward Putnam wrote to Tyler, giving an account of Black's visit to him and his ineffectual efforts to purchase his share of the land.

In June, 1847, Tyler and wife filed their bill against Black in the Circuit Court of the United States for the District of Maine. It set out their title; averred their entire ignorance of it until informed by Black; charged that he had deceived them by false representations as to their title, and as to the character, quantity and value of the land, and also by setting up false pretensions to a lien upon it held by him on account of his having paid the taxes. The bill further charged that the land was heavily covered with timber, which could easily be carried to market, and was worth twenty thousand dollars; and that confiding in the fraudulent representations of Black, they had been induced

to sell it for the grossly inadequate consideration of one hundred dollars.

In October, 1849, Black filed his answer. He admitted the title of the complainants, his interview with them; their allegations to him of their ignorance respecting their title; his agency for lands in the neighborhood; but he denied ever having been upon that particular lot, or that he had caused an exploration of it to be made, or that he had any particular knowledge of it; denied that he had ever claimed to have a title or lien for taxes paid; averred that in 1844, or 1845, he accidentally learned that Tilden (whom he had supposed to be the owner of the whole lot, and for whom he had been the agent), was the owner of only an undivided part, and that thereupon he had examined the records of the registry of deeds for Hancock County, for the purpose of ascertaining in whom the title was vested, but could find nothing there relative to it. That he then examined a plan book, and there found the name of Zenos Parsons, Springfield, set down against this lot as the owner of it; that in the summer of 1846 he was informed by Tilden that said Parsons conveyed to one Dr. Putnam, of Charlestown, a part of this lot.

Both the bill and answer contained other particulars, which it is not necessary to mention. Much evidence was taken under commissions.

At September Term, 1849, the cause came up for hearing upon the bill, answer, pleadings, and evidence, when the Circuit Court dismissed the bill, and the complainants appealed to this court.

In the argument of the cause here it was insisted by the counsel for the defendant that this court had not jurisdiction, as it did not appear in the evidence that the value of the land in controversy was enough to justify the appeal. We think otherwise; one of the witnesses gives an exaggerated estimate, and others not enough to enable us to say what the value of the land is; but the exploration, made at the instance of the complainants, satisfies us that the land for its timber alone, if it had no other uses, is worth more than two thousand dollars.

If we look, too, at its value at the time when Black bargained for it, we think it must be admitted that the sum which he offered and which the complainants accepted upon his representations, was an inadequate price.

But the ground upon which we shall put this case is, that the defendant did not act fairly in the representations made by him to the complainants of the quantity and quality of the land, and in his statement to them that he had a claim upon the land for taxes, which was not true. The quantity of the land is larger than he said it was, and from his agency for the owner of a part of it for many years, and his knowledge how the title was acquired, he must have known what the grant called for. In representing it to be less, he could only have done so to diminish, in the view of the complainants, its value. The untruth in regard to his claim for taxes, without anything else, is sufficient for us to cancel the deed for a fraudulent misrepresentation.

Stanwood's testimony has been given in detail, because it corresponds with the averments in the bill, and is confirmed in all essential particulars by the admissions of the defendant in

his answer, especially in two, which we think decisive of the decree which ought to be made in this case. Those are the defendant's repeated misrepresentations, made at different times and to different persons, and to these complainants when he was bargaining with them for the land, as to the quantity, and his misstatements concerning the taxes paid upon it by his father and himself for many years, especially used by him to the complainant as an inducement for him to sell the land for the small sum which he offered for it.

It cannot be doubted that the defendant knew, when he went to Fairfield to buy this land, where he learned that the wife of this complainant was a daughter of Aaron Putnam, that he knew the latter's interest in the Parsons grant exceeded five hundred acres; indeed, that he positively knew it could not be short of twelve hundred acres. He stated, however, to Stanwood, that it did not exceed five hundred; to Louisa Stanwood the same. When he went to Fairfield to buy the land, he said, in reply to Edward Putnam's inquiry as to the number of acres, *that he did [*242] not know anything about the amount of the land, that he did not know the number of acres, and said there were four or five hundred acres. Soule, another witness, represents that when questioned concerning the quantity, he answered that he did not know, that there was probably two or three hundred acres, and that the value was merely nominal. Phebe Hendrick says, that Black said that the number of acres might be two hundred and fifty, but could not exceed three hundred acres. Mrs. Soule says the same. These statements are so inconsistent with the narrative given by Black in his answer of his and his father's agency for many years, for Tilden, who was the owner of a part of the Parsons grant, for which, as the agent of Tilden they had paid the taxes for more than twenty-seven years, that it must be concluded he concealed and misrepresented the quantity to the complainants to induce them to sell. He states that he had learned, as early as February, 1846, that Tilden's interest in the land did not exceed seven hundred and seven acres. That Tilden afterwards told him, that Parsons had conveyed to Putnam a part of the lot, but denies that he had, prior to November, 1846, when he went to have the deed of the complainants to him recorded, any knowledge that Aaron Putnam was the owner of one thousand two hundred acres of the Parsons lot or grant. Now, this last may very well be so; but whether he had that knowledge or not, he must have misrepresented as to the quantity of the land, when he so repeatedly undertook to speak of it as not being more than from three to five hundred acres. It is not the less a misrepresentation because he did not know how much Parsons had conveyed to Putnam. He undertook to speak of it as he did, as an inducement to the complainant to sell to him, and in that way misled him to do so.

The defendant's answer in respect to the averment in the bill of his statement to them of the payment of taxes upon this land is evasive, and directly at variance with the proofs in the cause. He states that his father had been the agent for the owners of land in the township for more than thirty years, and that he

had been his associate in such agencies since the year 1838, that it was a part of their agency to pay the taxes assessed on the land under their care; that the taxes on this township have, during all the time of their agency for Tilden, been paid by his father and himself as though the whole of said lottery lot had been the property of Tilden, and that he did not know until recently that Tilden did not own the whole of it. And in what he means to be a direct denial of the plaintiffs' bill in this particular, he denies that he ever claimed any title to the land by virtue of a tax sale and deed therefor, or that he had any lien on the same for taxes paid by himself, but that he told them **243*** that he might have "allowed the land to be sold for taxes, and that we, meaning his father and himself, had paid the taxes and ought to be re-imbursed in the sums so paid, with such interest as the law allowed in cases where land was sold for taxes, which he believed to be twenty-five per cent., and that Tyler replied that was right, and that whoever owned the land ought to pay them.

The proofs in the cause of the use which he made of this payment of taxes is, that he represented to the complainant when bargaining for the land that he had a claim upon the land for the taxes he had paid for twenty-eight or twenty nine years; that Tyler must pay him the amount of the taxes and twenty-five per cent. interest before he could avail himself of any title to the land, and this he required in addition to the fifty dollars which he asked, for the information he had concerning the land, for which he would tell them all he knew about the land. This is a part of Stanwood's evidence. Louisa Stanwood testifies, that the defendant said, that Tyler would have to pay the taxes at any rate before he could do anything with the land, and he could go home and have the land sold for taxes and get a good title, and Tyler would never be the wiser for it. To Putnam he said the taxes he had paid on the land were two hundred dollars or over; that he claimed a lien upon the land on account of it. Albert G. Soule says, that Black stated, having ascertained that Edward F. Putnam and his wife were heirs to a quantity of land in Maine, which came by their grandfather Dr. Putnam, that he had come to get a conveyance of it; "that he had paid the taxes on the land for twenty-seven years, and he wanted either that they should convey to him their interest or refund the amount which he had paid for taxes. Being asked what the amount was, he replied he did not know, but thought two hundred dollars. He was asked for his account; he answered he had it not with him. Another witness, Phebe Hendrick, says, that Black said he had paid the taxes for a long time, amounting to about two hundred dollars. Mrs. Soule repeats the same.

We have then, from these witnesses, a confirmation of what was said by Black to these complainants when he was bargaining with them for their share of this land. His object evidently was to induce them to take his small offer for the land in consideration of their obligation to repay him taxes, which there is no proof in the cause he ever paid.

In the two particulars stated, we think the entire proceedings of Black in this transaction

were inconsistent with fair dealing, and that what was said by him both as respects the quantity of the land and the taxes he had paid upon it amount to a fraudulent misrepresentation, entitling the complainant to the relief of having the deed of conveyance to Black canceled. We shall direct it to be done.

*We shall direct the deed from the [**244** complainants to the defendant to be canceled, and that the defendant reconvey to the complainants all the right, title and interest acquired of him from them in said land. And we further direct that an account shall be taken in the court below of such profits as the defendant may have made from said land, and that he shall account for the same to the complainants, subject to a deduction therefrom of the sum of \$100 paid by the defendant to the complainants as the consideration of their transfer to him of their interest in the land, if the said profits exceed the said \$100, and if no profits have been made, then that the complainants repay to the defendant the aforesaid \$100.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Maine, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions for further proceedings to be had therein in conformity to the opinion of this court.

JOHN CAMPBELL, WILLIAM ELLISON,
GEORGE STEECE, AND HIRAM CAMP-
BELL, *Plaintiffs in Error*,

v.

JOHN DOE, *ex dem.* THE TRUSTEES AND
TREASURER OF ORIGINAL SURVEYED TOWNSHIP, No. 1, IN RANGE No. 19, &c.

Decision of Secretary of Treasury on conflicting titles to lands, claimed as school lands and by private party, is final.

On the 20th of May, 1826, Congress passed an Act (4 Stat. at Large, 179) giving school lands to such townships, in the various land districts of the United States, as had not been before provided for, which were to be selected for such townships by the Secretary of the Treasury, out of any unappropriated public lands within the land district where the township was situated for which the selection was made.

The Secretary of the Treasury, through the Land Office, directed the registers to make selections and return lists thereof, to be submitted to him for his approbation.

Under this direction, the land in question was selected and reserved from sale.

Afterwards, the Register withdrew the selection, by authority of the Commissioner of the Land Office, and permitted a person to enter and take it up, this person knowing the circumstances under which it had been reserved from sale.

Finally, the Secretary of the Treasury selected the land in question, under the authority given to him by the Act of 1826.

This selection was good, and conferred a title, overruling the intermediate entry.

HOWARD 13.

245*] THIS case was brought up from the Supreme Court of the State of Ohio, by a writ of error issued under the 25th section of the Judiciary Act.

The facts are all stated in the opinion of the court.

It was argued by *Mr. Marsh* for the plaintiffs in error, and *Mr. Vinton* for the defendant in error.

Mr. Marsh, for the plaintiffs in error, contended that the entry of Hamilton was legal; that the reservation from sale had been withdrawn, and consequently the land was open; that, if the Secretary of the Treasury must be supposed to have sanctioned the first order, reserving the land for sale, so he must be supposed equally to have sanctioned the second order, authorizing the withdrawal of the reservation; that if Hamilton's entry was legal, the subsequent selection of the same land by the Secretary was void, because the Act of Congress only authorized him to select unappropriated land, and this was not so; that there was no fraud, or any mistake, on the part of the Register or of Hamilton.

Mr. Vinton, for the defendant in error, contended:

1st. That the selection of the land in controversy, as school land, by the Secretary of the Treasury, on the 9th of January, 1834, vested the legal title thereof in the State of Ohio. (See Act of the 20th of May, 1826, 4 Stat. at Large, 179, and Act of the 3d of March, 1833, 2 Stat. at Large, 235.)

2d. The prior sale to Hamilton and certificate of purchase cannot avail him, for several reasons:

1. Because the title thus vested in the State overreaches his certificate, and reaches back to the date of the original selection of the land for schools, and the report of it, as such, to the Commissioner of the General Land Office. (*Lessee of Hammond v. Warfield*, 2 Harr. & Johns., 158; 17 Ohio, 287, 288.)

It will be insisted that this consequence results from the fact, that the duty of making the selections conferred on the Secretary, as incident to its proper discharge, a discretion, to be exercised by him in a manner most beneficial to the objects of the grant, consistent with a due regard to the interests of the United States; and that, to exercise this discretion wisely and intelligibly, he must have at his command the means of ascertaining every fact necessary to a proper selection; such, for example, as the ascertainment of the quality of the land, which could only be done through subordinate agencies. And that, therefore, the selection of the land, under the circular of the 24th of May, 1826, and the report of it, by the **246*]** Register, to the General Land Office, by direction of the Secretary, for his decision thereon, being necessary and proper preliminary steps towards carrying the act into execution, had the effect in law to sever the land, thus selected and reported, from the mass of the public lands, until his decision was had; and, when approved by him, the whole proceeding was in law one act, and constituted the selection by the Secretary required by the Act of the 20th of May, 1826.

That the land was, from the commencement of the act of selection, severed from the mass

of public lands. (See *Wilcox v. Jackson*, 13 Pet., 513.)

2. Because, whether the title of the State overreaches the sale to Hamilton or not, his purchase was void, for the reason that the land was at the time withheld from sale, and could not be entered by him.

In support of this position, it will be insisted that the selection and report of the land to the General Land Office, being made by the direction of the Secretary, for his decision thereon, the question of its approval was in law pending before him, and under his consideration until his decision should be made; which pending consideration necessarily, for the time being, suspended the sale of the lands selected; and, whether this be so or not, the sale was expressly prohibited by the circular of the 30th of August, 1832, until the Register should be officially advised of the approval or rejection of the selection by the Secretary.

It will be claimed, also, that the power of reservation from sale in such case, is incident to the proper execution of the Act of May 20, 1826, making the grant of these school lands, and is also incident to the general supervisory power of the Secretary over the public lands given by the Act of the 25th of April, 1812, entitled "An Act for the establishment of a General Land Office in the Department of the Treasury," which Act was at that time in force. (2 Stat. at Large, 716.)

It will also be further insisted that, though the selection of these school lands was specially intrusted to the Secretary of the Treasury, by the law granting them, and required his express approval, yet the circulars of the 24th of May, 1826, and the 30th of August, 1832, issued by the Commissioner of the General Land Office, prescribing the mode of selection and withdrawing the selected lands from sale, will, in the absence of proof to the contrary, be presumed to have been issued under the direction and sanction of the Secretary. (*Wilcox v. Jackson's Lessee*, 13 Pet., 512.)

This, however, is not a conclusive presumption of law, but belongs to that class of presumptions which may be rebutted by **247** proof. (1 Greenleaf's Evidence, secs. 38 and 34, page 42.)

And where the facts of a case are agreed, this court will apply and has applied to those facts the presumptions of law belonging to this class. (*Doddridge v. Thompson*, 9 Wheat., 483; *Wilcox v. Jackson*, 13 Pet., 512, 513.)

3d. The sale to Hamilton was void because the letter of the Commissioner of the General Land Office of the date of the 19th of March, 1833, giving to the Register permission to withdraw the selection and make another in its stead, was written without authority from the Secretary of the Treasury. That it was so, is shown by the facts that the said Commissioner subsequently recommended the approval of said selection to the Secretary, who, on appeal to him, confirmed it with a full knowledge of the sale to Hamilton, of said letter of the 19th of March, 1833, and of all the correspondence relating to the said tract of land existing at that date; which facts rebut the presumption that might otherwise arise that said letter was written by authority. (1 Greenleaf's Ev., secs. 38 and 34.)

4th. Because, without the express permission of the Secretary, the Commissioner had no more authority to reject a selection duly made and reported, than he had to confirm it. (17 Ohio, 288.)

5th. Because, if said letter of the 19th of March, 1833, were written by authority of the Secretary, the Register did not comply with its directions, inasmuch as he withdrew the selection theretofore made, and made no other in its stead, and thus, as far as in him lay, defeated the grant altogether.

Mr. Justice McLean delivered the opinion of the court:

This action of ejectment is here on a writ of error to the Supreme Court of Ohio, under the 25th section of the Judiciary Act. The plaintiffs in error claim title to a quarter section of land under an entry made with the Register of the Land Office; the defendants claim the same as reserved for school purposes. As both parties claim under an Act of Congress, either is entitled to a writ of error to have the judgment against the right asserted revised in this court.

By the Act of the 20th of May, 1826, Congress gave school lands to such townships and fractional townships in the land districts of the United States as had not been provided for, to be selected within such townships by the Secretary of the Treasury, out of any unappropriated public lands within the land district in which the township was situated. Under that Act, fractional township No. 1, range No. 19, of the Chillicothe land district of Ohio, was entitled to 160 acres of land.

248*] *On the 24th of the same month the Treasury Department issued a circular, through the General Land Office, to the Registers of the different land districts, directing them to make selections of the lands granted and return a list to the General Land Office, for the approbation of the Secretary of the Treasury.

The Register of the Chillicothe land district caused to be selected the southeast quarter of section No. 15, township 2, range 18, the land now in controversy. A return of this selection was made to the General Land Office the 23d October, 1828. This return contained other tracts not made as required by the law, and consequently the list was returned to the Register for correction. The errors being corrected the list was again returned to the General Land Office. But afterwards, in 1832, a circular from the Land Office was directed to the Register, accompanied by a printed form and directions so that the returns of lands selected should be uniform. The tracts selected were required to be noted and reserved from sale. Where good land could not be procured in the township, the selection was authorized to be made in the nearest adjacent township which contained good land. The land above selected is not in township No. 1, range No. 19, nor in the next adjacent township; but in the nearest adjacent township in which good land could be procured.

In pursuance of the above instruction, the Register withheld the land from sale. On the 7th March, 1833, he informed the Commissioner that "some of the selections which he had reported were half quarter sections, and that others did not lie 'either in the township or in

the nearest adjacent township where good land exists," "which are not in accordance with the general rules laid down in the Commissioner's last circular;" and he says, "I have withheld from sale all the lands selected which were embraced in my two reports," and he inquires whether the fact of his having reported them takes them out of the general rule prescribed for his government; and whether he should consider all the selections heretofore made, and have them made in exact conformity to the instructions.

In answer to the above the Commissioner says, "on the subject of the school lands, selected by you in 1831, I have to state that, as there has been no action of the department on these selections, you are at liberty to withdraw them and select other lands in their stead, in conformity to my circular of the 30th August, 1833."

Under this letter, it seems, the Register permitted Hamilton to enter the land in controversy; but no other school land was selected in lieu of it. On this entry being made the school trustees *of the township ap- [***249** pealed to the Secretary of the Treasury, against the sale of the land, and claimed the original selection. And the same being laid before the Secretary, he sanctioned and confirmed the original selection. This was done the 9th January, 1834.

The decision of this case must depend upon the validity of Hamilton's entry. He had full notice that the quarter section had been selected for school purposes, and was reserved from sale. This information was given him by the Register on his first application to enter it. He then endeavored to purchase it from the trustees. The selection of that tract was made at first as the law required, though other tracts on the same list had not been so selected.

The entry by Hamilton may have been permitted by the Register, through inadvertence or mistake. This supposition is at least as probable, and indeed more so, than that he withdrew the selection and failed in his duty to select another tract in place of it. But, in whatever light this may be viewed, we are clear, that the Secretary of the Treasury had the power, under the Act of Congress, to make the selection; and his decision, declaring the entry of Hamilton invalid, was, under the circumstances, conclusive. This tract, selected by the Secretary under the Act of 1826, "is held by the same tenure, as provided in the second section of that Act, and upon the same terms for the support of schools, in such township, as section number sixteen is held." By the Act of the 8d March, 1803, it is declared that lands appropriated for schools, shall be vested in the Legislature of the State in trust, &c., and in the same Act, section number sixteen in each township was designated for school purposes. If, therefore, the quarter section in dispute was legally selected for school purposes, the legal title became vested in the Legislature of Ohio.

The general duties of the Commissioner of the General Land Office are required to be performed "under the direction of the head of the Treasury Department." And where a duty is especially enjoined on the Secretary of the Treasury, although he may perform it through

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the Commissioner of the General Land Office, who may well be presumed to act under his authority where the contrary does not appear; yet where the Secretary has interposed and decided the matter, as in the case under consideration, his decision must be considered as the only one under the law. So far, then, as the sanction of the Secretary was given to the appropriation of the land in dispute, to school purposes, it must be considered as a valid appropriation.

This view imposes no hardship on Hamilton, as he had notice of the tract selected, and his [250*] repeated attempts to purchase the same land cannot be favorably considered by the court. Under the circumstances, no right became vested in him, by reason of his entry of the land, which could be regarded or enforced by a court of equity.

The judgment of the State Court is therefore affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Ohio, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court in this cause be, and the same is hereby affirmed, with costs.

JOHN GLENN AND CHARLES M THRUSTON, *Appellants,*

v.

THE UNITED STATES.

Grantees under Spain of Louisiana lands, with conditions unperformed, cannot demand confirmation of title from U. S.—limitation of time to complete titles.

In 1766, when Delassus was commandant of the port of New Madrid, he exercised the powers of sub-delegate, and had authority, under the instructions of the Governor-General of Louisiana, to make conditional grants of land.

He made a grant to Clamorgan, who stipulated upon his part that he would introduce a colony from Canada, for the purpose of cultivating hemp and making cordage.

This obligation he entirely failed to perform.

By the laws and ordinances of the Spanish colonial government (which this court is bound, under the Act of 1844, to adopt, as one of their rules of decision), this condition had to be performed before Clamorgan could become possessed of a perfect title.

The difference between this case and that of *Arredondo* explained.

If the Spanish Governor would have refused to complete the title, this court, acting under the laws of Congress, must also decline to confirm it.

After the cession of the Province of Louisiana to the United States, Clamorgan could not legally have taken any steps to fulfill his condition. He was forbidden by law. By the treaty of cession, no particular time was allowed for grantees to complete their imperfect grants. It was left to the Political Department of the government, and Congress accordingly acted upon the subject.

The 2d day of March, 1804, was the time fixed by Congress, and the grant must now be judged of as it stood upon that day.

THIS was an appeal from the District Court of the United States for the State of Arkansas.

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Glenn and Thruston, the appellants, filed a petition in the District Court of Arkansas, on the 24th of January, 1846, in virtue of the Act of 1824, as revived by the Act of 1844, claiming confirmation of a concession of a large tract of country which lies partly in Arkansas and partly in Missouri, consisting of nearly half a million of acres of land and known as the Clamorgan grant.

*The circumstances of this grant are [*251 fully set forth in the opinion.

The District Court decided against the claim and the petitioners appealed to this court.

It was argued by *Messrs. Webster and Johnson* for the appellants, and *Mr. Crittenden* (Attorney-General) for the United States. The points made by the counsel respectively were the following.

For the appellants:

1st. Because if the concession was upon conditions they were conditions subsequent to the vesting of the estate in the grantee, and could only be taken advantage of by some proceeding for that purpose instituted by Spain, or by France, or by the United States claiming under Spain, and no such proceedings have been instituted. (3 Am. St. Papers, 270; 5 *Id.*, 704.)

2d. Because if the concession was upon conditions which should have been complied with in order to vest the estate as against Spain, whilst the conditions were practicable and might have been performed by the grantee, the estate vested without such performance because the province was ceded by Spain before the time for performance had expired, and because of the change of government, manners, &c., consequent on that cession. (*The United States v. Arredondo et al.*, 6 Pet., 706; *Soulard et al. v. The United States*, 4 Pet., 511; *Delassus v. The United States*, 9 Pet., 117; *The United States v. Percheman*, 7 Pet., 51; *Strother v. Lucas*, 12 Pet., 410; *The United States v. Forbes*, 15 Pet., 173; *The United States v. King*, 3 How., 773; *Chouteau v. Eckhart*, 2 How., 344; *The United States v. Lawton et al.*, 5 How., 10; *Hughes et al. v. Edwards et al.*, 9 Wheat., 489; 2 Black., 157; 2 Thomas' Coke, 18.)

3d. Because there was a sufficient survey of the grant; and,

4th. Because no such survey was necessary, the calls of the grant being sufficiently certain of themselves to separate the land granted from the rest of the royal domain.

5th. That the District Court had jurisdiction over the claim. (Act of 26 May, 1824, ch. 178, 4 Stat. at Large, 52; Act of 9 July, 1832, ch. 180, 4 Stat. at Large, 565; Act of 17 June, 1844, ch. 95, 5 Stat. at Large, 676.)

6th. That the decision of the District Court of Missouri was no bar to this suit.

Mr. Crittenden, for the United States:

I. That the claim is barred under both the Act of 1824 and 1832.

*II. That Delassus had no authority [*252 to make such a concession, and the burden of proof is on the claimants to show that he had such authority.

III. That the concession could not have been perfected into a complete title, from the political considerations mentioned.

IV. That the conditions of the concession were never performed during the sovereignty of Spain over the country, or since, and that

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Clamorgan must be considered as having abandoned the claim.

V. That the cession of Louisiana to the United States did not make the concession absolute, without the performance of the conditions.

VI. That the survey of 1806 was void for want of authority to make it.

VII. That the concession is void for uncertainty in the description of the land intended to be conceded.

That Clamorgan lost all claim to have the concession perfected into a complete title, even if it had been in all other respects unobjectionable, by his failure to comply with the requisitions of the 23d article of Morales' regulations of 1799, to make known his incomplete title within the six months limited by that article. Read the 23d article in connection with the four preceding articles. (2 White's *Recop.*, 240.)

Mr. Justice Catron delivered the opinion of the court:

In August, 1796, James Clamorgan petitioned Colonel Delassus, then acting as commandant of the post and dependency of New Madrid, for a grant of land fronting on the Mississippi River, for many miles, and running back to the western branches of White River, including a section of country equal in area to 536,904 arpents, as was afterwards ascertained by measurement. To obtain title and possession of this large quantity of land, Clamorgan represented that he was a merchant residing in St. Louis; that he had been strongly encouraged by the Governor-General of the Province of Louisiana to establish a manufactory of cordage, fit and proper for the use of His Spanish Majesty's vessels, and especially for the necessities of the Havana, to which place His Excellency desired the petitioner to export the cordage, under his, the Governor-General's, protection; of which facts the commandant was advised, so that he might exercise his power to favor an enterprise likely to become very important to the prosperity of the dependency, and very lucrative to all the inhabitants of Upper Louisiana. Furthermore, that the petitioner, Clamorgan, was then connected in correspondence and interest with a powerful house in Canada, which might procure for him a sufficient number of cultivators to teach in that region "the manner of cultivating hemp, and fabricating it into various kinds of cordage, in the most perfect manner, so as thereby to respond to the views of the General Government; which desired the prosecution of this enterprise by all proper and honest means that possibly could be used, in order to exempt His Majesty from drawing in future from foreigners this article so important for the equipment of his vessels.

Clamorgan further stated, that "it is with this hope, that the petitioner has actively made the most pressing demands to obtain from his correspondents in Montreal a considerable number of people proper for this culture, who must of necessity by inducement be attracted hither, although at this moment the political circumstances of Canada appear to oppose it; but in more favorable times hereafter this object may undoubtedly be obtained. Notwithstanding which, the petitioner is obliged to assure him-

self, in advance, from you, Monsieur, a title which may guarantee to him the proprietorship of a quantity of arable land, proportioned to his views, in order to form an extensive establishment, as soon as the time shall appear favorable to his enterprise, and as soon as his correspondents shall be able, without compromising their sense of duty, to cause to emigrate to this country the number of people necessary to give birth to this culture, so much desired by the government."

"Considering, Monsieur, this exposition of the petitioner, and the particular recommendations of His Excellency the Governor-General of the province, the petitioner hopes that you will be pleased to grant him the quantity of land which he desires to obtain, as well in order to favor him, the execution of all which may contribute to the future success of his project, as to furnish him the means of attracting hereafter from a foreign country an emigration of cultivators, which may not, perhaps, be obtained until after a considerable lapse of time, and upon promises of rewards, which the petitioner will be obliged to fulfill in their favor."

The land solicited is then described; and the petitioner proceeds to set forth the title he desires: "To the end that as soon as it may be in the power of the petitioner, he may be able to establish and select, in the tract of land so demanded, those portions which shall be best fitted to improve for the culture of hemp; because, inasmuch as a great tract of said lands is now drowned in swamps and unimprovable lowland, making it impossible to fix establishments in its whole extent; all to be done that the petitioner may enjoy the land, and dispose of it always as a property belonging to him, his heirs or assigns; and also may distribute them, or part of them, if he think fit, in favor of such person or persons as he may judge proper, to attain, as far as on him depends, the accomplishment of his project; and the petitioner will never cease to return thanks for your favors."

To this demand of Clamorgan, the commandant responded, and proceeded to grant as follows: "Since, by the exposition contained in this petition, the means of the petitioner are apparent to me, and his new connection with the house of Todd, which will be able to facilitate to him the accomplishment of the enterprise proposed, the profit whereof, if it succeed, will redound in part to the advantage of this remote country, miserable on account of its small actual population; and I giving particular attention to the recommendations which Señor the Baron de Carondelet, Governor-General of these provinces, has communicated to me, when he thought fit to appoint me commandant of this post and its dependencies, 'to seek by all means the mode of increasing the population, and of encouraging agriculture in all its branches, and particularly the cultivation of hemp,' it appearing to me that the propositions which the petitioner makes are conducive to the attainment of this last recommendation. In virtue of this, I concede to him, for him and his heirs, the tract of land which he solicits, in the place and with the same boundaries that he prays for, provided there is injury to no one; and so that the same may be established, he shall cause a survey to be made, not obliging

him to accomplish this immediately, as from the excessive extent of space, it would cause him great expense, if it were done before the arrival of the families, which he is bound to cause to come from Canada; but so that on their arrival, and being put in possession, it shall be his duty to secure his property, by means of exercising the power of survey, in order afterwards that he may make application to the Governor-General, to obtain his approval with the title in form of this his concession."

By various conveyances, the foregoing claim was vested in Glenn and Thruston, who filed their petition in the District Court of Arkansas, seeking to have it confirmed according to the Act of 1844. They set forth Clamorgan's application; the commandant's decree thereon, and the mesne conveyances.

The Attorney of the United States answered, and among other grounds of defense set up and alleged, that he was wholly uninformed as to the several statements and allegations contained in the petition; that he denied the said statements and allegations, and required full proof thereof; as well as of all other matters and things necessary or material, to establish the validity of the claim of said James Clamorgan.

On these issues the parties went to trial.

The petitioners established by proof that Clamorgan's application, and the Governor's decree thereon, were genuine; and *also proved a due execution of the several conveyances vesting title in Glenn and Thruston. No other evidence was introduced by either side. The District Court dismissed the petition: and from that decree an appeal was prosecuted to this court.

No controversy has been raised drawing in question the validity of the mesne conveyances; nor do we suppose there is any difficulty in locating the land demanded in Clamorgan's petition: *prima facie*, its locality is sufficiently described to authorize a survey thereof according to Spanish usages.

As regards the commandant's power to make the concession to Clamorgan there is more difficulty. In 1796, when Delassus was commandant at the post of New Madrid, he also acted as sub-delegate and exercised the faculty of granting concessions for, and ordering surveys of land. In the exercise of his functions he was directly subordinate to the Governor-General at New Orleans; and acted according to his instructions. Nor was he in any degree dependant on the Lieutenant-Governor of Upper Louisiana, residing at St. Louis; as appears by a letter of August 26, 1799, from Morales to Delassus, reciting the facts. The letter is found in document 12 of Senate Documents, 2d Session 21st Congress, p. 29, and filed as evidence by Judge Peck, preparatory to his trial before the Senate of the United States.

In a deposition of Delassus, forming part of the documents filed before the Board of Commissioners for Missouri, in 1833, and afterwards returned by them for the consideration of Congress, Delassus states the fact that he, as commandant at New Madrid, exercised the powers of sub-delegate. (Doc. No. 59, p. 17, H. Repts. 1st Session, 24th Congress.)

This commandant's powers were therefore co-extensive with those of the Lieutenant-Governor at St. Louis, in distributing the public

domain. Having acted under the Governor-General, to whose orders and instructions the commandant was bound to conform, it becomes necessary to ascertain what these instructions were in the present instance; and taking the facts stated in Clamorgan's memorial, and in Delassus' decree thereon, to be true (as we are compelled to do), it is sufficiently manifest, as we think, that the commandant did stipulate with Clamorgan, in accordance with the Governor-General's instructions. That the Governor-General had power thus to contract was held by this court, when the agreements of Maison Rouge, and Bastrop, were before it for adjudication; and having done the same through his deputy in this instance, the acts of that deputy cannot be called in question, on the assumption that he exceeded his powers.

In the document No. 59, above referred to, Delassus states *what his practice was, [*256] in giving out concessions. He kept no books in which the fact was recorded; all he did was to indorse his decree on the petition, and return it to the party demanding the land; and the party might hand it to the surveyor, or retain it, at his option. That he, Delassus, believed the surveyor made a note of the concession of record: but whether before or after the survey was made, he knew not, as that matter did not concern the deponent. That no time was limited within which the party was bound to survey.

Thus it appears that Clamorgan got the paper title relied on, in the ordinary form, and which he retained in his own hands until after Upper Louisiana was delivered to the United States in March, 1804. No possession was taken of the land, or any part of it, nor was it surveyed during the time Spain governed the country; nor has any claimant under Clamorgan ever had possession, so far as this record shows.

The surveys produced to us are private ones, and of no value in support of the claim. And this brings us to a consideration of the mere title paper, standing alone. On its true meaning this controversy depends.

1. The petition of Clamorgan, and Delassus' decree on it, must be construed together; there being a proposition to do certain acts on the one side, and an acceptance on the other, limited by several restrictions.

2. What is stated in either paper as to facts or intent, must be taken as true.

Such are the rules laid down in *Boisdoré's* case, 11 How., 87, and which apply here.

The country was vacant, and greatly needed population; which could only be drawn from abroad; and this population Clamorgan stipulated that he would supply, and establish a colony from Canada on the land. That he would introduce cultivators of hemp, and artisans skilled in the manufacture of cordage; and would grow hemp and make cordage, to an extent so large as to be of national consequence.

On the faith of these promises the grant was made. As already stated, no step was taken by Clamorgan to perform the contract; all that he did was a presentation of his petition, and the obtaining of Delassus' approval and decree on it. This paper he retained about thirteen years, when it was assigned to Pierre Choteau, May 2d, 1809, by a deed of conveyance for the

land claimed. In view of these facts, several legal considerations arise.

It was held in *Arredondo's* case, 6 Peters, 711, that, by consenting to be sued, the United States had submitted to judicial action, and considered the suit as of a purely judicial character, *which the courts were bound to decide as between man and man litigating the same subject matter; and that, in thus deciding, the courts were restricted within the limits, and governed by the rules Congress had prescribed. The principle rules applicable here, are, that in settling the question of validity of title, we are required, by the Act of 1824, to proceed in conformity with the principles of justice; according to the law of nations; the stipulations of the Treaty by which the country was acquired, and the proceedings under the same; the several Acts of Congress in relation thereto; and the laws and ordinances of the government from which the claim is alleged to have been derived.

When deciding according to the law of nations, and the stipulations of the Treaty, we are bound to hold, that such title as Clamorgan had by his concession, or first decree, stood secured to him as private property; and that the claim being assignable, the complainants represent Clamorgan. And this brings us to the question as to what right was acquired by the concession, according to the laws and ordinances of the Spanish Colonial Government, existing and in force, when the grant was made. By these, the commandant, Delassus, had authority to contract, and give concessions, and make orders of survey, by first decrees, either with or without conditions; as this court held in the case of *Soulard v. The United States*, 10 Pet., 144; provided the concession was founded on a consideration *prima facie* good, either past, when the concession was made, or to follow in future. Here, the consideration was to arise, by future performance, on the part of the grantee. But, it is insisted that forasmuch as a title vested in Clamorgan by the grant to him, even admitting that it was incumbered with conditions, still, as their performance was to happen subsequent to the vesting of the estate, the want of performance could only be taken advantage of by a proceeding instituted by government for that especial purpose; nor could want of performance be set up as a defense in this suit.

If the premises assumed were true, the conclusion would necessarily follow; and *Arredondo's* case is relied on in support of this position and as governing the present case. That proceeding was founded on a perfect title, having every sanction the Spanish government could confer. It was brought before the courts according to the 6th section of the Act of May 23, 1828, which embraced perfect titles, and was only applicable to suits in Florida.

The subsequent condition there relied on to annul the grant, was rendered immaterial, and perhaps impossible, by the grantor himself, as this court held; and the grantee discharged from its performance. But in *Clamorgan's* 258*) case, the conditions to occupy and cultivate were precedent conditions; they addressed themselves to the Governor-General, and their performance was required in advance.

Before any right existed in Clamorgan to apply for a complete title, or even to have a public survey, preparatory to such application, he was bound by his contract to establish his colony on the land; and furthermore, to set up his manufactory to make cordage, and to supply it with hemp grown on the land, unless these conditions were waived on the part of the Spanish government. And as we are called on by the complainants to adjudge the validity of this claim, and to order that a patent shall issue for the land, in the name of the United States, it necessarily follows, the same duty is imposed on us that would have devolved on the Governor-General, had the Spanish government continued in Louisiana.

By the Spanish regulations, Clamorgan was not recognized as owner of a legal title without the further act of the King's deputy, the Governor-General; or the Intendant-General, after the power to make perfect grants was conferred on him. Until this was done, the legal title remained in the crown; and the same rule has been applied in this country; no standing can be allowed to imperfect and unrecognized claims in the ordinary judicial tribunals, until confirmed either by Congress directly, or by a special tribunal constituted by Congress for that purpose.

For our opinion more at large on this subject, we refer to the case of *Menard v. Massey*, 8 How., 305, 306, 307.

As we are asked to decree the final title, and bound to do so, in like manner that the Spanish Governor-General or Intendant was bound, it follows we may refuse, for the same legal reasons that they could refuse. And the question presented is, whether we are bound to refuse, according to the face of the contract sued on, and in conformity to our previous decisions in other cases, depending on similar principles.

Very many applications made for perfect titles to the District Courts, under the Act of 1824, have been resisted, because subsequent conditions had not been complied with: First, such as mill grants in Florida, where the usual quantity of 16,000 acres was given by concession, with the condition that the mill should be built within a specified time: Second, where grants were made for the purpose of cultivation, and no cultivation followed, as in the case of *Wiggins*, 14 Pet., and of *Boisdoré*, 11 How.: Third, where, by the concession, parties were required by special regulations to levee and ditch on the river's front in Lower Louisiana. These were subsequent conditions, just as much as the introduction of a colony of hemp growers, and the manufacture of cordage, by Clamorgan; and yet, no one has ever successfully maintained that a party having such concession, could hold the land and obtain [*259] a perfect title, although he did not build the mill, nor occupy and cultivate, nor levee and ditch, founded on the assumption that performance was unnecessary. In all these cases it was held that performance was a condition precedent and the real equity, on which a favorable decree for a patent could be founded, under the Act of 1824.

If Clamorgan's concession carries with it conditions, similar in principle, it must abide by this settled rule of decision. This depends on the true meaning of his contract with the

Spanish authorities. He agreed to establish a colony by introducing a foreign population, and to grow hemp and manufacture cordage, to an amount so large as to make it a national object. By these promises he obtained a concession for more than half a million of arpents of land. A promise of performance was the sole ground on which the Spanish commandant made the concession; and actual performance was to be the consideration on which a complete title could issue.

So far from complying, Clamorgan never took a single step, after the agreement was made; and in 1809 sold out his claim on speculation, for the paltry sum of fifteen hundred dollars. Under these circumstances we are called on to decide in his favor, according to the principles of justice: this being the rule prescribed to us by the Act of 1824, and the Spanish regulations. To hold that an individual should have decreed to him, or to his assignees, a domain of land more than equal to seven hundred square miles, for no better reason than that he had the ingenuity to induce a Spanish commandant to grant the concession, founded on extravagant promises, not one of which was ever complied with, would shock all sense of justice. And such decision would be equally contrary to the policy pursued by Spain, which was, to make grants for the purpose of settlement and inhabitation, and not to the end of mere speculation. We so held in *Boisdoré's* case, 11 How., 96, and the principle applies even more strongly in this case than it did in that; as there, something was done towards compliance; and here, nothing has been attempted.

The remaining ground on which the complainants demand a confirmation is the following: "Because if the concession was upon conditions which should have been complied with in order to vest the estate as against Spain, whilst the conditions were practicable and might have been performed by the grantee, the estate vested without such performance, because the province was ceded by Spain before the time for performance had expired, and because of the change of government, manners, &c., consequent on that cession.

That Clamorgan could take no step after the change of government, is not open to controversy.

260*] *By the 14th section of the Act of March 28, 1804, which established the Territories of Orleans and Louisiana, Clamorgan was prevented from doing any further act in support of his title, had he been disposed so to do. He was positively prohibited from making settlements on the land, or making a survey of it, under the penalty of fine and imprisonment. But no advantage resulted from this provision to claimants whose concessions carried with them conditions that had not then been complied with.

The 1st section of the Act of 1824, in conformity to which we are now exercising jurisdiction, limits the courts, as to the validity of title and standing of the various claims, to the condition they held before the 10th of March, 1804.

By the 3d article of the Treaty of Cession by which Louisiana was acquired, it was stipulated

that the inhabitants of the ceded country should be admitted as soon as possible, and become citizens of the United States, and be maintained in the free enjoyment of their property in the mean time. But no time was provided by the Treaty within which conditions appertaining to imperfect grants of land might be performed; this was left to the justice and discretion of our government; and in a due exercise of that discretion, the Acts of 1804 and 1824 were passed; and to these Acts of Congress, the 2d section of the Act of 1824 commands us to conform.

The Treaty addressed itself to the Political Department; and up to the passing of the Act of 1824, that department alone had power to perfect titles, and administer equities to claimants. And when judicial cognizance was conferred on the courts of justice to determine questions of title between the government and individuals, the limits of that jurisdiction were prescribed, to wit: that no act done by the Spanish authorities, or by an individual claimant, after the 3d day of March, 1804, should have any effect on the title; but that its validity should be determined according to its condition at that date.

All claims lying within the territory acquired by the Treaty of 1803, which have been brought before the courts, according to the Acts of 1824 and 1844, have been compelled to abide by this test: great numbers have been rejected, because the conditions of occupation and cultivation had not been complied with before the Restraining Act of 1804 was passed, or before the 10th day of March, 1804. Nor have the claimants under Clamorgan more right to complain than others; his neglect extended through nearly eight years, during the existence of the Spanish government; whereas many similar claims have been rejected, where the neglect was not half so long.

If Clamorgan could come forward because of the prohibition, and be heard to excuse himself from performing the onerous conditions *his contract imposed, so could every [*261 other claimant who had neither taken possession, nor in any manner complied with his contract, do the same; and on this assumption, concessions issued by France or Spain would be without condition, and a simple grant of the land described in the paper. Its genuineness and proof of identity of the land, would settle the question of title.

No tribunal has ever accorded any credence to this claim; two boards of commissioners have pronounced it invalid; the first in 1811, and the second in 1835. The latter on the ground that the conditions of the grant had not been complied with. By this decision it fell into the mass of public lands, according to the 3d section of the Act of July 9, 1832, which declares that the lands contained in the second class (being those rejected) should be subject to sale as other public lands. By the Act of 17th June, 1844, another opportunity was afforded to apply to the District Court for a confirmation; that court agreed with the board of commissioners, and again declared the claim invalid, because the conditions had not been complied with, and dismissed the petition; and with this decree we concur.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Arkansas, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said District Court in this cause be, and the same is hereby affirmed.

Att'g Hemp., 394.
Cited—13 How., 237; 17 How., 556, 569, 570, 572; McAll., 321.

THE HEIRS OF DON CARLOS DE VILEMONT, *Appellants,*

v.

THE UNITED STATES,

Spanish grant of Louisiana lands—conditions unperformed—Excuses—Land cannot be located simply by survey—title not confirmed.

In 1795, Baron de Carondelet, the Governor-General of Louisiana, made a grant of land on the Mississippi River, upon condition that a road and clearing should be made within one year, and an establishment made upon the land within three years.

Neither of these conditions was complied with, nor was possession taken under the grant till after the cession of the country to the United States.

The excuses for these omissions, namely: that the grantee was commandant at the post of Arkansas, and that the Indians were hostile, are not satisfactory; because the grantee must have known these circumstances when he obtained the grant.

According to the principles established in the preceding case of *Glenn and Thruston v. The United States*, the Spanish authorities would not have confirmed this grant, neither can this court confirm it.

Moreover, in this case, the land claimed cannot be located by a survey.

THIS was an appeal from the District Court of the United States for the District of Arkansas.

262*] *It was a petition filed by the heirs of Don Carlos de Vilemont, under the Act of 1824, as revived by the Act of 1844, praying for the confirmation of a grant of land issued by the Baron de Carondelet in 1795.

The circumstances attending the grant are set forth in the opinion of the court.

The District Court decided against the claim and the petitioners appealed to this court.

In the District Court, Horace F. Walworth, Mary B. Miles, and James B. Miles, were made defendants with the United States.

It was argued in this court by *Mr. Taylor* for the appellants, and *Mr. Lawrence* and *Mr. Crittenden* (Attorney-General) for the appellees. A brief was also filed by *Mr. Pike* for Mr. Walworth.

Mr. Taylor, for the appellants, thus noticed the omission of Vilemont to comply with the conditions of the grant. (It will be seen, by referring to the opinion of the court, that this was an important point in the case.)

The confirmation of the claim is resisted in the answer of the District Attorney, on the ground that the conditions of the grant were not complied with. The conditions, as has already been stated, were those almost invariably inserted in orders of survey, that a road and settlement should be made within a given day.

The record contains the testimony of two aged inhabitants of Louisiana, who, as officers in the same regiment in which Vilemont served many years, were attached to the person of the Governor, and one of whom was employed in the Land Office in New Orleans, showing that these conditions were mere matters of form, and mechanically inserted with the orders of survey, without inquiring into the situation of the land. They add that they never were enforced, and that no land was ever forfeited under the Spanish government on account of a non-compliance with these conditions. This testimony is emphatically confirmed by Judge Simon, for many years a practicing lawyer in Louisiana, and during six years a judge of the Supreme Court of that State, before whose eyes probably thousands of such claims have passed.

In this instance the land was asked for to establish a stock farm. What necessity was there to cultivate it, if such was the purpose of the grant? And how much of the two leagues front and one in depth should have been cultivated and established? The land was twenty-five leagues below the mouth of the Arkansas, and more than that distance from any white settlement. *What use would there [*263 have been for a road, and where would it have been?

But if these conditions, in such a case, were more than an idle formality, Vilemont would have been relieved from a compliance with them. In 1795, when the grant was made, and until 1802, Vilemont was the civil and military commandant of the post of Arkansas. During all this period he never left his post, not even to visit New Orleans. His presence there was constantly required by the threatening aspect of the Indian tribes by whom he was surrounded, while the garrison of the fort never exceeded forty men. Eight letters from Governor Carondelet to Vilemont (which will be found on pp. 72-76 of the printed and Vilemont's official correspondence with the Governor of Louisiana, until his appointment to a higher office, in 1802), furnish a striking proof of the arduous service in which he was engaged, and of ceaseless feuds among the Indians, and attacks upon the whites, and leave no doubt that even a temporary absence from the command would not have been tolerated by the Governor. Can it be pretended that, under these circumstances, the government seriously, and under pain of forfeiture, expected him to make a road within one year, and a settlement within three years, upon this rude and remote spot? The government kept him until 1802 at the post of Arkansas; the government then removed him to a new scene of service, and this, if any case, falls under the rule established in *The United States v. Arredondo et al.*, 6 Pet., 745. "It is an acknowledged fact that if a grant is made on a condition subsequent, and its performance becomes impossible by the act of the grantor, the grant becomes single."

The other reason why a settlement could not be required of Vilemont is, that hostile Indians made it impossible. Vilemont was not bound, though he might have attempted, to form a settlement by agents. Indeed, already, in 1795 or 1796, he sent Bogy there with that object.

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but Bogy was driven off by the Indians. Nor did the danger from the Indians cease until a number of years after the change of government.

Mr. Crittenden, for the United States, made the following points:

I. That the appeal ought to be dismissed for want of being duly prosecuted.

II. That the appellants' ancestor was never put in possession of the lands, and the conditions on which the concession was made were not performed during the time therein limited, or during the sovereignty of Spain over the country, or subsequently.

264*] *There is no evidence whatever that the Surveyor-General, or a deputy approved by him, ever put Vilemont into possession of the lands as required by the terms of the concession. No survey was ever made, and no plat and certificate were ever reported to the Governor, and no title in form could therefore have been issued to Vilemont at any time during the continuance of the Spanish power.

The petition of de Vilemont sets fourth his desire to establish a plantation and stock farm, in order to supply the post, of which he was commandant, with cattle. This is the inducement he presents to de Carondelet to make the concession. It was accordingly made to him under the express condition that he shall make the regular road and clearing within the peremptory¹ term of one year, the concession to be null, if, at the precise expiration of three years, the land should not be established.

From the date of the grant, in 1795, until the delivery of Louisiana to the United States, in 1803, he had completely failed to comply with the conditions above mentioned, and thereby forfeited all right to require a title in form. He had done nothing whatever. This, therefore, is not such a concession as might have been perfected into a complete title had not the sovereignty of the country been transferred to the United States.

But to examine the evidence on the point of non performance of the conditions presented in the record:

The appellants themselves state, in their petition, that de Vilemont "endeavored, soon after the date of said concession, to procure persons to make a settlement, but could not succeed" on account of the danger arising from hostile Indians. It further states, "that in the year 1803 he again attempted a settlement, but that, from the year 1807," he, or persons employed by him or his family, had been in actual possession of part of the land.

The above is the petitioners' own statement. In 1813, in de Vilemont's lifetime, when he presented his claim to the recorder of land titles, he did not submit a particle of proof to show that he had done anything with respect to establishing the stock farm, making the road, or settling the land. Joseph Bogy, his father-in-law, then testified that he, de Vilemont, proposed to witness to settle on the tract, but that he declined on account of the supposed danger from the Indians, which continued until 1803. Francis de Vaugene also then testified that the Indians continued so hostile as to

make it unsafe to settle at Isle Chicot till the year 1803.

*It will thus be seen that de Vile. [*265 mont made no pretense then, or offered no proof to show, that he had fulfilled any of the conditions, but he sets up an excuse merely for not having done so. The recorder, under the column titled "possession, inhabitation, or cultivation," states, "danger from the Indians prevented settlement," and gives his opinion that the claim ought not to be confirmed, the conditions not having been complied with.

Mr. Crittenden then examined the evidence.

But it is said that de Vilemont could not leave his post to attend to the performance of the conditions, that he was prevented from performance by danger from the Indians, and that the conditions were merely formal.

The answers to the first of these excuses are obvious. de Vilemont styles himself, in the petition to Baron de Carondelet, the commandant of the post of Arkansas, and asks for the land at the place it is given, the inducement being, that he might furnish cattle to the post. It would be strange if, under these circumstances, his not being allowed to leave the post should excuse the performance of the conditions. As to being prevented from establishing the stock farm, and performing the other conditions, by danger from the Indians, he knew that the Indians were in the country at the time he made the application; and if he sought for a concession, the conditions of which he could not comply with, it can afford no exemption from their performance. As to the allegation that the conditions were merely formal, it is negated by the third article of O'Reilly's regulation, where the non-performance of the conditions as to roads, settlements, &c., is thus spoken of: "And in default of fulfilling these conditions, their land shall revert to the king's domain, and be granted anew." (2 White's *Recop.*, 228.) These regulations were approved by the king. See letter of Marquis de Grimaldi to Unzaga, 24th August, 1770, *Id.*, 460; see, also, the third, fourth, fifth, and sixth articles of regulations of Morales, *Id.*, 235.

III. That the evidence in the case shows that de Vilemont had abandoned his claim to the land.

IV. That the concession is void, because no land was severed from the public domain by survey giving it a certain location, previous to the Treaty of Cession, and the description is so vague, indefinite, and uncertain, that no location can be given to the lands. (*United States v. Miranda*, 16 Pet., 156; *United States v. Boisdoré*, 11 How., 63.)

V. That the decree as to floats is void, the individuals holding the lands in respect of which floats are decreed, not having been made parties in the case.

**Mr. Justice Catron* delivered the [*266 opinion of the court:

The heirs of Don Carlos de Vilemont filed their petition in the District Court of Arkansas, to have a confirmation of a grant for two leagues of land front, by one league in depth, lying on the right descending bank of the Mississippi, at a place called the Island del Chicot, distant twenty-five leagues below the mouth of

¹—The Spanish word is printed *percutorio*; it should have been *peremptorio*. All the translators agree in translating *peremptorio*.

the Arkansas River; the cypress swamp of the island being called for as the upper boundary of said tract.

The Governor-General granted the land on the express conditions "that a road and regular clearing be made in the peremptory space of one year; and this concession to be null, if, at the expiration of three years' time, the said land shall not be established; and during which time it cannot be alienated; under which conditions the plat and certificate of survey shall be made out and remitted to me in order to provide the interested with the corresponding title in form." The concession was made June 17, 1795. No possession was taken of the land by De Vilemont, nor any survey made or demanded, during the existence of the Spanish government. The petition alleges that possession was first taken in 1807; and as an excuse for the delay, it is stated, that the grantee was commandant at the post of Arkansas up to the end of the year 1802, and confined to his official duties there; and, 2d, that so hostile were the Indians in the neighborhood of the land, that no settlement could be made on it. The proof shows that De Vilemont first took possession in 1822 or 1823. The 2d regulation of O'Reilly of 1770, required that roads should be made and kept in repair, in case of grants fronting on the Mississippi River; and that grantees should be bound within the term of three years to clear the whole front of their lands to the depth of two arpents; and, in default of fulfilling these conditions, the land claimed should revert to the king's domain; nor should proprietors alienate until after three years' possession was held, and until the conditions were entirely fulfilled. In this instance the time was restricted to one year, for making the improvements required by the regulations, and three years were allowed for making an establishment on the premises. In this case where a front of six miles was granted, a clearing to the whole extent was of course not contemplated; yet to a reasonable extent it certainly was; but it was undoubtedly necessary that an establishment should be made within three years—such being the requirement of the concession, in concurrence with the regulations.

The Act of March 26, 1804, prohibited any subsequent entry on the land; and declared void all future acts done to the end of obtaining a perfect title even by an actual settler, if the settlement was not made before the 20th of 267*] December, 1803; *De Vilemont's title must therefore abide by its condition when the Act of 1804 was passed. For further views on this subject we refer to our opinion expressed on Clamorgan's title, at the present term, in the case of *Glenn and Thruston v. The United States*.

We are asked to decree a title, and to award a patent, on the same grounds that the Governor-General of Louisiana, or the Intendant, would have been bound to do, had application for a perfect title been made during the existence of the Spanish colonial government. The only consideration on which such title could have been founded, was inhabitation and cultivation, either by De Vilemont himself, or his tenants; and having done nothing of the kind, he had no right to a title; nor can an excuse be heard that hostility from Indians prevented

a compliance with the conditions imposed, as Vilemont took his concession subject to this risk; and the alleged excuse that he was commandant of the post of Arkansas, and bound to be constantly there in the performance of his official duties, is still more idle, as he held this office when the concession was made, and knew what his duties were.

The petition was dismissed by the District Court, because the land claimed could not be located by survey. The concession is for two leagues front, by one in depth, with parallel boundaries, situate at Chicot Island; the cypress swamp on the island being the upper boundary. Chicot Island is represented in the concession as being twenty-five leagues below the mouth of the Arkansas River. The land now claimed by the petition is represented to lie five leagues below the mouth of that river, at a place known as Chicot Point; being a peninsula included in a sudden bend, and surrounded on three sides by the Mississippi River.

It is difficult to conceive that Chicot Point, lying in fact nearly twenty-five leagues below the mouth of the Arkansas, is the Chicot Island to which the concession refers; but admitting that the Point was meant (which we believe to be the fact), still, no cypress swamp is found there to locate the upper boundary; nor is it possible to make a decree fixing any one side line, or any one place of beginning, for a specific tract of land.

Our opinion is, that on either of the grounds stated, the petition should be dismissed, and the decree below affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District *of [268 Arkansas, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said District Court in this cause be, and the same is hereby affirmed.

*Att'g Hemp., 389.
Cited—17 How., 556, 569, 570; 18 How., 475; 23 How., 317.*

WILLIAM NEVES and JAMES C. NEVES,
Appellants,

v.

WILLIAM H. SCOTT and THOMAS N. BEALL, Administrators of WILLIAM F. SCOTT, Deceased, and GEORGE W. ROWELL and LAWRENCE G. ROWELL, Executors of RICHARD ROWELL, Deceased.

Decision by State Court on general principles of equity law, not binding on this court.

The courts of the United States, under the Constitution and laws, have equity jurisdiction. Unless the general principles of equity have been modified by the laws or usages of a particular state, those general principles will be carried out everywhere in the same manner, and equity jurisprudence be the same, when administered by the courts of the United States, in all the States.

Hence, the decision of a state court, in a case which involved only the general principles of

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equity, and was not controlled by local law or usage, is not binding as authority upon this court.

In the case of *Neves et al. v. Scott et al.*, reported in 9 *Howard*, 196, this court decided two points—one, that volunteers could, in that case, claim the interference of chancery to enforce the marriage articles in question; and the other, that the articles constituted an executed trust.

The Supreme Court of Georgia does not agree with this court upon the first point. Nevertheless, this court does not change its decision.

Moreover, the second point upon which this court rested the case does not appear to have been brought before the Supreme Court of Georgia; and, of course, it expressed no opinion upon the point.

THIS was an appeal from the Circuit Court of the United States for the District of Georgia.

It was argued at December Term, 1849, and is reported in 9 *How.*, 196. It being suggested afterwards, that at the time when the case was argued and decided, Richard Rowell, the principal defendant, was dead, the judgment was stricken out and the cause argued again.

It was argued by *Mr. Johnson* for the appellants, and *Mr. Cone* for the appellees.

Mr. Cone, for the appellees, made the following points:

1st. The marriage contract is executory; it conveys no titles, and creates no trusts, nor does it impair or abridge the rights of the husband during the continuance of the coverture. (2 *Story's Eq. Jur.*, secs. 1, 379, 380, 381, 382, 383; *Clancy on Rights*, 269; *Hill on Trustees*, 420.)

3d. *Roper on Husband and Wife*, 156, 161; 269*) *Scarborough v. Bowman*, 1 *Beav.*, 34; *Stanton v. Hall*, 2 *R. & M.*, 180; *Harkins v. Cotton*, 2 *Porter's*, 463; *Cook v. Kinny*, 12 *Ala.*, 42; *Stewart v. Stewart*, 7 *Johns. Ch.*, 229; 7 *Smedes & Marshall's*, 798; *Lee v. Perdue*, 3 *Brown's Chancery*, 358.

The fact that the parties to the contract considered it as final, and contemplated no further settlement, cannot alter its legal character or change its legal effect. (*Hester, Executor v. Young*, 2 *Ga.*, 45, 46; *Barker v. Giles*, *Rice, Eq. R.*, 516; *Lee v. Perdue*, 3 *Brown's Chancery*, 381; *Hill on Trustees*, 84; *Antrobus v. Smith*, 12 *Ves.*, 39; 6 *Humph.* 127.)

2d. The complainants are not within the marriage consideration, and do not claim through any person, that is, they claim not as heirs, but as purchasers under the articles; they are, therefore, volunteers. (*Osgood v. Strode*, 2 *P. Williams*, 255; *Goodwin v. Goodwin*, 1 *Ves.*, 228; *Tudor v. Anson*, 2 *Ves.*, 582; *Marston v. Gowan*, 3 *Bro. Ch.*, 170; *Strode v. Russel*, 2 *Vern.*, 621; *Bias v. Bias*, 2 *Ves.*, 184; *Atherley on Mar. Set.*, 66, 73, 74, 75; *Story's Eq. Jur.*, sec. 986; *Kittery v. Atwood*, 1 *Vern.*, 298, 471; 2 *P. Williams*, 172; 1 *P. Williams*, 483; *Batson v. Batson*, 12 *Sim.*, 281; *Goring v. Nash*, 3 *Atk.*, 186; *Holt v. Holt*, 2 *P. Williams*, 243; *Johnson v. Legard*, *Turner & Russell*, 261, 293; *Colgate v. Mulgrave*, 2 *Keen*, 98; *Salton v. Chetwynd*, 3 *Meriv.*, 249; 6 *Maule & Selw.*, 60.)

3d. Courts of equity will not interpose in favor of volunteers, either upon a contract, covenant, or settlement. (2 *Story's Eq.*, secs. 798, 973, 996, 997; 1 *Turner & Russell*, 296; *Coleman v. Sarel*, 2 *Ves.*, Jr., 50; *Hill on Trustees*, 88; *Atherley on Mar. Set.*, 72, 73, 74, 76; 2 *Story's Eq. Jur.*, 372, 433, 706, 787; *Jeffreys v. Jeffreys*, 1 *Craig & Phil.*, 138, 141; *Ellison v. Ellison*, 6 *Ves.*, 656; *Colman v. Sarel*, 3 *Brown's Ch.*, 12; *Edwards v. Jones*, 1 *Mylne & Craig*, 226; *Dillon v. Coffin*, 4 *Mylne & Craig*, 647; *Halloway v. Headington*, 8 *Sim.*, 324, 571; *Meek v. Hallowell*, 1 *Hare*, 464, 475; *Wycherly v. Wycherly*, 2 *Eden*, 177; 2 *Keen*, 81, 123, 134.)

4th. But if there were any doubt in relation to the soundness of the foregoing positions, the law of Georgia upon these points has been settled by a decision of the Supreme Court of that State, made upon the contract now under consideration, and being a contract made in Georgia, and to be executed in Georgia, its character, interpretation, force, and effect, must be governed by the laws of that State.

(*Carroll v. Renich*, 7 *Smedes & Marshall*, 798; 12 *Wheat.*, 153, 167; 5 *Pet.*, 151; 6 *Pet.*, 172; 8 *Pet.*, 301; 8 *How.*, 170; 1 *Gall. Circuit Court*, 160, 371.)

In the case of *Merritt et al. v. Scott & Beall*, 6 *Ga.*, *563, the questions now pre- [*270] sented to this court upon this contract came before the Supreme Court of that State. That court established the following positions:

1st. That marriage articles, like those now under consideration, will be specifically executed upon the application of any person within the scope of the consideration of such marriage, or claiming under such person.

2d. That in no case whatever will courts of equity interpose in favor of mere volunteers, whether it be a voluntary contract, or a covenant, or a settlement, however meritorious may be the consideration, and although they stand in the relation of a wife or child.

3d. That where a bill is brought by a person who is within the scope of the marriage consideration, or claiming under them there, courts of equity will decree a specific execution throughout, as well in favor of mere volunteers as plaintiffs in the suit.

4th. That no persons are within the marriage consideration but the husband and wife of their issues; that all others are volunteers.

5th. That the complainants in that case (who occupied the exact position that the complainants do in this case in relation to the contract) were not entitled to the aid of a court of equity to enforce the covenant in their favor.

6th. That although the contract under consideration made no provision for the issue of the marriage, yet that did not aid the case of the complainants; that they were still volunteers, and as such, not entitled to the aid of a court of equity.

7th. That the decree rendered in the case of Catherine Neves against Richard Rowell was not such a partial execution of the marriage contract as would inure to the benefit of complainants, nor could said decree be invoked in their favor; and that they were not entitled to the discovery and relief that they sought.

Mr. Justice Curtis delivered the opinion of the court:

This case came on to be heard at the December Term, 1849, and was argued by counsel. The decision of the court is reported in 9 *How.*, 196, under the name of *William Neves and James C. Neves, appellants, v. William F. Scott and Richard Rowell*. At the present term, it

was suggested to the court, that at the time when the cause was argued and decided, Richard Rowell, the principal party defendant in interest, was dead; and thereupon proceedings took place which made his representatives parties, and the decree heretofore entered was stricken out, the cause brought forward, and again heard at the present term. It has been elaborately and ably argued upon the 271*] grounds *on which it was rested at the former hearing, and upon one additional ground, which will first be adverted to.

It appears that a short time before the former argument, the Supreme Court of Georgia, where the marriage articles in question were made, and the parties thereto domiciled, in a suit between other persons claiming a separate interest under these articles, had made a decision, involving an equitable title like that passed on by this court. This decision was not made known to us at the former hearing; and the respondent's counsel now maintains, that it is binding on this court, as an authoritative exposition of the local law of Georgia, by the highest tribunal of that State.

To appreciate this position, it is necessary to ascertain what questions have been decided by the Supreme Court of Georgia, and are for decision by this court.

By reference to the case in 9 How., 196, it will be found that there were two questions presented to this court, either of which being decided in favor of the complainant, would dispose of the cause.

The first was, whether the trusts manifested by this particular instrument, were what a court of equity deems executed trusts: that is, trusts actually defined and declared and in the view of a court of equity created; or whether a court of equity would treat the instrument as only exhibiting an incomplete intention to create some trusts at a then future period; and the second being, whether the complainants, as collateral heirs of one of the settlers, can have the aid of a court of equity, to enforce the delivery of the property to them; or are precluded from that relief, by the fact that they are not issue of the marriage; in other terms, whether by the rules of equity law the complainants are volunteers, or within the consideration of the articles. No question has arisen, concerning any statute law of Georgia; nor was it then, nor is it now suggested, that any word, or phrase, or provision of the articles, should bear any peculiar, or technical meaning, by reason of any local law, or custom. Indeed, the actual intentions of the parties are so plain, that no doubt has been suggested concerning them; and the only inquiry in either court has been, how far, and in favor of what parties, a court of equity will lend its aid to carry those intentions into effect. And, accordingly, the Supreme Court of Georgia, as well as this court, has resorted to the decisions of the High Court of Chancery in England, and to approved writers on equity jurisprudence, as affording the proper guides to a correct decision. If, according to sound principles of the law of equity, a trust existed, or the complainants have an equitable right to the specific performance of an agreement to create a trust, then the relief is to be granted, otherwise it is to be refused.

*Such being the nature of the ques- [*272 tions, we do not consider this court bound by the decision of the Supreme Court of Georgia. The Constitution provides, that the judicial power of the United States shall extend to all cases in equity arising between citizens of different states. Congress has duly conferred this power upon all Circuit Courts, and among others upon that of the District of Georgia, in which this bill was filed, and the same power is granted by the Constitution to this court as an appellate tribunal.

Wherever a case in equity may arise and be determined under the judicial power of the United States, the same principles of equity must be applied to it, and it is for the courts of the United States, and for this court in the last resort, to decide what those principles are, and to apply such of them, to each particular case, as they may find justly applicable thereto. These principles may make part of the law of a state, or they may have been modified by its legislation, or usages, or they may never have existed in its jurisprudence. Instances of each kind may now be found in the several States. But in all the States, the equity law, recognized by the Constitution and by Acts of Congress, and modified by the latter, is administered by the courts of the United States, and upon appeal by this court.

Such has long been the settled doctrine of this court, repeatedly and steadily affirmed in whatever form the question has been presented. In *The United States v. Howland*, 4 Wheat., 115, Chief Justice Marshall said: "As the courts of the Union have a chancery jurisdiction in every state, and the Judiciary Act confers the same chancery powers on all, and gives the same rule of decision, its jurisdiction in Massachusetts must be the same as in other states." So *Mr. Justice Story*, in *Boyle v. Zacharie et al.*, 6 Pet., 658, says: "The chancery jurisdiction given by the Constitution and laws of the United States is the same in all the States of the Union and the rules of decision are the same in all." See, also, *Robinson v. Campbell*, 3 Wheat., 222; *Livingston v. Story*, 9 Pet., 654; *Russell v. Southard*, decided at the present term, and reported in 12 Howard, 189.

But while we do not consider this decision of the Supreme Court of Georgia a binding authority, on which we have a right to rest our decision, the respect we entertain for that learned and able court, has led us to examine its opinion with great care; and although we find it not consistent with some of the views heretofore taken by us of one of the questions arising under this marriage settlement, we do not find that the ground on which our decision was actually rested was at all examined by that learned court. That ground is, "That the deed in question is a marriage settlement, complete in itself; an executed trust, which *requires [*273 only to be obeyed and fulfilled by those standing in the relation of trustees, for the benefit of the *cestuis que trust*, according to the provisions of the settlement." (9 How., 211.) This position does not appear to have been taken by the counsel for the complainants in the Supreme Court of Georgia, nor is it noticed by the court in its opinion; though it is conceded, in the course of the opinion, that while "courts of equity will not enforce a mere gratuitous gift,

or a mere moral obligation or voluntary executory trust, it is otherwise, of course, where the trust is already vested."

On the former argument in this court we formed the opinion, that the instrument in question did completely define and declare, and so did create, certain trusts; that they were, in the sense of a court of equity, trusts executed; that the complainants were *cestuis que trust*; that the failure to interpose trustees to hold the property created no difficulty, each party to the settlement being regarded, so far as may be necessary, to effectuate their intent, as holding their several estates as trustees for the uses of the settlement; and so the complainants were entitled to the relief prayed.

We find nothing in the opinion of the Supreme Court of Georgia in conflict with these views. because we do not find they were there adverted to; and after considering the elaborate and able argument of the respondent's counsel at this term, we remain satisfied of the correctness of our opinion, and judgment must be entered accordingly.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Georgia, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, for further proceedings to be had therein in conformity to the opinion of this court.

S. C., 9 How., 196.

Cited—2 Black., 509; 4 Hughes, 310, 636; 1 McCrary, 165, 354; 2 McCrary, 225; 3 McCrary, 47; 1 Biss., 273; Dundy, 364; 1 Cliff., 291; 14 Blatchf., 327.

274*] * WILLIAM W. DE FOREST,
GEORGE F. THOMAS, AND ROBERT
W. RODMAN. *Plaintiffs in Error*,

v.

CORNELIUS W. LAWRENCE, late Collector
of New York.

*Tariff law—construction of—applied to article
not specially mentioned.*

The Tariff Law of 1846, passed on the 30th of July (9 Stat. at Large, 42), contains no special mention of imported sheepskins, dried with the wool remaining on them.

They must be regarded as a non-enumerated article, and charged, with a duty of twenty per cent. *ad valorem*.

THIS case was brought up by writ of error from the Circuit Court of the United States for the Southern District of New York.

The plaintiffs in error, W. W. De Forest & Co., sued the collector to recover back money paid under protest, for duties on importations into New York, in the years 1847 and 1848, from Buenos Ayres, invoiced as sheepskins, having the wool on them.

The collector (under instructions from the Secretary of the Treasury) demanded and received a duty of thirty per cent. *ad valorem* on

the wool upon the sheepskins, and a duty of five per cent. *ad valorem* upon the pelts.

The wool upon the skins was appraised at,	\$18,596.52
Duty thereon at thirty per cent.,	5,578.95
Skins without the wool, Duty thereon at five per cent.,	9,972.14
	498.60
Total valuation of wool and skins,	\$28,568.66

Total duty, \$6,077.55

Whilst the collector thus charged one duty upon the skin and another upon the wool, the importers claimed to enter the articles at a duty of five per cent. upon the whole, and the court decided that the proper duty to be charged was twenty per cent. upon the entire valuation.

The cause of this great difference of opinion was as follows:

By the Act of 19th May, 1828 (4 Stat. at Large, 271, chap. 55, sec. 2, first paragraph), a duty is imposed on wool unmanufactured: "And all wool imported on the skin shall be estimated as to weight and value, and shall pay the same rate of duty as other imported wool."

By the Act of July 14, 1832 (same vol., chap. 227, sec. 2, first paragraph, p. 584), wool unmanufactured is charged with duty: "Provided, that wool imported on the skin shall be estimated, as to weight and value, as other wool."

By the Act of 30th August, 1842 (5 Stat. at Large, chap. 270, *sec. 1, paragraph [*275 first, p. 548), a duty on wool unmanufactured is imposed: "Provided, also, that wool imported on the skin shall be estimated, as to weight and value, as other wool."

In the 5th sec. and sixth paragraph of that same Act, of 1842 (p. 554), duties are imposed "on sheepskins, tanned and dressed, or skivers, two dollars per dozen; on goat or sheepskins, tanned and not dressed, one dollar per dozen; on all kid and lambskins, tanned and not dressed, seventy-five cents per dozen; and on skins tanned and dressed, otherwise than in color, to wit: fawn, kid and lamb, usually known as chamois, one dollar per dozen; . . . on raw hides of all kinds, whether dried or salted, five per cent. *ad valorem*; on all skins, pickled and in casks, not specified, twenty per cent. *ad valorem*."

Subsequently to these three statutes, so mentioning and distinguishing those three several classes of imports, came the statute of 30th July, 1846 (9 Stat. at Large, Little & Brown, chap. 74, p. 42), entitled "An Act reducing the duties on imports, and for other purposes."

The first section enacted, that, from and after the first day of December then next, "in lieu of the duties heretofore imposed by law, on the articles hereinafter mentioned, and on such as may be now exempt from duty, there shall be collected, levied and paid, on the goods, wares, and merchandise, herein enumerated and provided for, imported from foreign countries, the following rates of duty." Then follows the enumeration of various articles, subject to various duties, in schedules from A to H, ranging

from duties of one hundred per centum to five per centum *ad valorem*.

Section 2 enacts that the goods "mentioned in schedule I shall be exempt from duty."

Section 3 imposes on all goods, wares, and merchandise imported from foreign countries, "and not specially provided for in this Act, a duty of twenty per centum *ad valorem*."

In schedule C, of articles subject to thirty per cent. *ad valorem*, "wool unmanufactured" is mentioned, but "wool imported upon the skin" is not specially provided for therein. In schedule H, among other articles subject to the duty of five per cent. *ad valorem*, "raw hides and skins of all kinds, whether dried, salted, or pickled," are mentioned; but "wool imported on the skin" is not therein mentioned. In schedule I, of articles exempt from duty, wool imported on the skin is not mentioned, neither is it mentioned in any one of the schedules, from A to I inclusive.

On the trial of the case in the Circuit Court, Mr. Justice Nelson instructed the jury that the article came most appropriately within the schedule of non-enumerated articles, and as such was chargeable with a duty of twenty per cent.

276*] *To which charge the counsel for the plaintiffs excepted, on the ground that the court should have charged the jury that the article imported by the plaintiffs, raw sheepskins dried, fell under schedule H, of the Tariff of 1846, and was not a non-enumerated article, but on the contrary, was enumerated under said schedule H, and was liable only to a duty of five per cent., and not to a duty of twenty per cent. That the said article being a raw skin dried, and being not otherwise specifically provided for in said Act, was liable only to the same rate of duty as all other raw skins dried. And the counsel for the said plaintiffs requested the court to charge the said jury accordingly, which request was refused by the court, and the counsel for the plaintiffs thereupon excepted.

Upon this exception, the cause came up to this court, and was argued by Mr. Schley for the plaintiffs in error, and by Mr. Crittenden (Attorney-General) for the defendant.

The points for the plaintiffs in error were the following:

I. The Tariff of 1846 provides,

1. For such articles of import as are "specially enumerated," as liable to certain rates of duty.

2. Such as are "exempt" from duty; and,

3. Such as are not "specially provided for in this Act," but, as non-enumerated articles, are made subject generally to a duty of twenty per cent. *ad valorem*.

II. If an article is not "specially enumerated," or "exempt," it must fall under the third class of "non-enumerated" articles.

This Act, therefore, provides for every possible article of import, and whether any duty is leviable, and if so, at what rate, is to be tested by this act alone.

III. The terms "skins" and "hides" are general descriptions or denominations of certain classes of articles, known by that name both as natural products and as articles of merchandise and commerce.

It is to be presumed that Congress used and

intended them to be understood as they are ordinarily used and understood. The "skin" or the "hide," the covering of the flesh of animals, as a composite article, has parts: the fleece and the pelt. When the general term is used, the parts are included; as in speaking of the head, we include the eyes or the hair.

IV. If the article is to be removed from its natural and commercial classification, be broken up, and one part be artificially classed as wool, or hair, or fur, this can only be done by express provision. Such an instance of separation appears in schedule G, where "furs undressed, when on the skin," are made liable to a duty of ten per cent.

*V. "Wool" and "hair" are used to [*277 designate a certain portion of the covering of the animal after it is shorn, clipped, or cut off the skin; until clipped or cut they are a part of the skin. A contract for wool would not justify a delivery of sheepskins; nor a contract for sheepskins, a delivery either of wool, or of a pelt shorn of the wool.

VI. "Wool unmanufactured," mentioned in schedule C, and "hair of all kinds, uncleaned and unmanufactured," mentioned in schedule G, refer to wool and hair, clipped or cut, and not to the skin or hide with the wool or hair on, in its natural state. When the skin or hide is shorn, one part is denominated wool or hair, and the remainder is no longer termed a "skin," but a "pelt."

VII. Thus as "hair" pays a duty of ten per cent., but the skin with the hair on, only a duty of five per cent., in the case of a deerskin; so in the case of a sheepskin, while the "wool" pays a duty of thirty per cent., the skin with the wool on should pay only a duty of five per cent.

VIII. The terms "skins" and "hides" are generic, and include all kinds of skins and hides. Schedule H, embodies this idea in words, "hides and skins of all kinds," and intends the hide or skin of every animal, deer, sheep, calf, horse, &c. Though all these are known in trade as hides and skins, yet to distinguish them, the denominations of deerskins, sheepskins, calfskins, horsehides, &c., are appropriately used. To say that because one kind of skins is called "sheepskins," and another "deerskins," &c., they are by such distinctive terms, removed from the general class designated in schedule H, "hides and skins of all kinds," would be to destroy the class entirely; for one after another, every kind of hide and skin could be thus removed until no kind would be left. If, because a particular skin is called in commerce a sheepskin, it is removed from the genus "skin," by the same argument Saxony wool, or Smyrna wool, would not be comprised under "wool unmanufactured;" nor camwood or fustic, under "dye woods," in schedule H; nor horsehair under "hair of all kinds," nor beaver fur under "furs," nor emeralds under "precious stones," in schedule G, &c.

It is obvious that such a rule of construction would destroy the tariff. Does a stone cease to be a precious stone because it is called an emerald? Or a skin cease to be a skin because it is called a sheepskin?

IX. If schedule H, then, merely described "hides and skins of all kinds," a sheepskin

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would be comprised under it as appropriately as any other kind of skin.

X. But schedule H requires that the "hide or skin" should be "raw," that is, unmanufactured*] tured or undressed, in order to *bring it under that schedule. The article in question in this case, was "raw." Again, schedule H requires that it should be "dried," "salted," or "pickled" (various ways of preserving the skins). The article in question was "dried."

XI. The Buenos Ayres sheepskins imported by the plaintiffs were "raw skins, dried," and as such, were articles enumerated in schedule H. and liable only to a duty of five per cent.

In the argument of these points, the counsel referred to the following authorities: 1 Sumner, C. C. Rep., 166; 1 Story's C. C. Rep., 841, 560, 610; 2 *Id.*, 374; 8 Peters, 277; 10 *Id.*, 187; 3 How., 106; 7 *Id.*, 786; 1 Excheq. R., 281; Hume's Laws of the Customs, 284, 287.

Mr. Crittenden: The importation must fall within the class of articles embraced in the third section of the Act of 1846, as not specially otherwise provided for, and thereby be subjected to a duty of twenty per cent. *ad valorem*.

"Wool, imported on the skin," was, by the Act of 1828, subjected to a specific duty of four cents per pound, and also in addition to an *ad valorem* duty of forty per cent.; and also increasing annually by five per cent., until the *ad valorem* duty amounted to fifty per centum; by the Act of 1832, it was subjected to a specific duty of four cents per pound, with the addition of an *ad valorem* duty of forty per cent.; and by the Act of 1842, it was subjected to a specific duty of three cents per pound, with the additional duty of thirty per centum *ad valorem*. So stood the revenue laws in the statute books when the Revenue Act of 30th July, 1846, was framed, and under consideration, and passed. It is not reasonable to suppose that "wool imported on the skin," an article of foreign importation, which had been, *eo nomine*, so long distinguished from "raw hides and skins," by different descriptions, and by different rates of duty imposed on them, respectively, were, by the Act of 1846, confounded and subjected to one and the same rate of duty, under one and the same name.

By the well-established rules of construing statutes, "if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them." "Where there are different statutes *in pari materia*, though made at different times, or even expired, and not referring to each other, they shall be taken and construed together as one system, and as explanatory of each other. (*Rev. v. Lozdale et al.*, 1 Burr., 447; 4 Bac. Abr., Statute I., 3, 646; *The King v. Mason*, 2 Term R., 586; *Alisbury v. Pattison*, Douglas, 30; 1 Black. Com., 60, and Tucker's note, 3; Dwarries on Statutes, 700.)

279*] "The revenue laws of the United States are all to be taken together as one system, one statute as explanatory of another. The Revenue Act of 30th July, 1846, has reference expressly to the former law for imposing duties and for exempting articles from duties.

In accordance with the established rules for construing statutes, "wool, imported on the skin," so noticed as an article of commerce,

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and as such subjected to duty, in Acts of 1828, 1832, and 1842, cannot be lost sight of in construing the Act of 30th July, 1846; that article of commerce not being otherwise specially provided for in any of the schedules, from A to I inclusive, must, of course, come under the general provision of the third section, which imposes the duty of twenty per cent. *ad valorem* upon all goods imported from abroad, not otherwise specially provided for in the Act.

After the distinctions so clearly drawn, in the revenue law of 1842, between sheepskins, imported with the wool on the skin, and raw hides and skins, dried, salted or pickled, a construction of the Act of 1846, would be preposterous and in violation of the established rules, which should obliterate that distinction, force sheepskins imported with the wool on the skin into the denomination of raw hides, to be subjected to the same rate of duty as if they had been imported divested of the wool.

The evidence adduced by the plaintiffs established, without doubt, that the sheepskins were imported with the wool on the skin. The law applicable to the fact made the importations liable to the rate of duty provided in the third section of the Act of 1846.

The opinions of the witnesses introduced by the plaintiffs, that sheepskins, imported with the wool on the skin, dried, as it came from the body of the sheep, may be comprehended under the denomination of raw hides and skins dried, cannot change the law, can have no legal effect to alter the construction of the statutes. It is the province of the witness to testify as to fact; it is the province of the judge to pronounce the law applicable to the fact.

Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error to the Circuit Court of the Southern District of the State of New York.

The action was brought by the plaintiffs against the defendant, the late collector of the port of New York, to recover back an excess of duties paid under protest on an article imported from Buenos Ayres, described in the invoices and entries as "sheepskins." The importations were under the Tariff Act of 1846. The article was imported with the wool on the skins, and by the instructions* of the Secretary of [*280 the Treasury, the collector was directed to cause the wool to be estimated and appraised, and to be charged with a duty of thirty per cent. *ad valorem* under schedule C, and five per cent. on the skin, under schedule H. The plaintiffs claim that no more than a duty of five per cent. *ad valorem* should be charged upon the entire article. It is usually described, in the invoices, and shipped as sheepskins, and known in trade and commerce by that designation. The skin is in the same condition as when taken from the animal, except it is dried. It is not dressed.

The court below charged the jury, that the article came within neither of the schedules mentioned, but was more properly a non-enumerated article, and chargeable with a duty of twenty per cent. *ad valorem*. And judgment was rendered in the case accordingly.

By the Act of May 19, 1828 (4 Stat. at Large, 271, sec. 2), a duty is charged upon wool imported on the skin; and direction is given to

estimate it as to weight and value, and impose the same duty as on other imported wool.

A similar provision is found in the Act of July 14, 1832 (*Id.*, 584, sec. 2), and also, in the Act of August 30, 1842 (5 *Id.*, 548).

The article is not enumerated according to its previous designation in the revenue laws in the Act of July 30, 1846 (Sess. Laws, 68), and, of course, no duty is specifically charged upon it in that Act as in the previous acts. But it is claimed, on the part of the plaintiffs, that it falls within the description under schedule H, "raw hides, and skins of all kinds, whether dried, salted, or pickled, not otherwise provided for," and which are chargeable only with a duty of five per cent. *ad valorem*.

This description was obviously taken from the Act of 1842 (sec. 5, para. 6), "on raw hides of all kinds, whether dried or salted, five per cent. *ad valorem*; on all skins pickled and in casks, not specified, twenty per cent. *ad valorem*."

The only difference between this Act, and the present one is, that the two classes, "raw hides," and "skins," are now ranged in one class, and the duty of five per cent. charged upon each. "Skins pickled," are classed with "raw hides, dried or salted," which latter article, it is well known, is extensively imported into the country for the purpose of being manufactured into leather, and the duty is fixed at a low rate for the encouragement of the manufacturer.

In this same Act of 1842, it will be remembered, sheepskins, imported with the wool on, were charged with a specific duty, the same as unmanufactured wool, thus distinguishing the article from skins pickled, referred to in the 6th paragraph of the 5th sec. of that Act.

281*] *We have no doubt, from the association of skins with raw hides in the Act of 1846, in connection with the description and classification in the Act of 1842, that they should be regarded as an article imported, like raw hides, for the purpose of being manufactured; and, by no reasonable construction, can be regarded as descriptive of the article in question.

The argument is quite as strong, and we think stronger, in favor of ranging the article under the clause in schedule E: "skins of all kinds, not otherwise provided for," and which is chargeable with a duty of twenty per cent. *ad valorem*.

Neither do we think that the article can be separated, and a duty charged separately upon the estimated quantity of the wool, and upon the skin, according to the rate chargeable upon each. This would be the introduction of a principle in the construction of the Revenue Acts heretofore unknown, and which has no countenance in the provisions of the Acts themselves.

The 20th section of the Act of 1842 looks to the component parts of a manufactured article of two or more materials in fixing the duty; but does not separate it, and charge the duty on each part according to the class to which it belongs. It assesses the duty on the entire article at the highest rate at which any of the component parts might be charged.

It is difficult also to say to what length this principle, if admitted, must be carried in construing these Acts. It could not, consistently, be limited to the article in question; for, while

skins, dried, are charged only with the duty of five per cent. *ad valorem*, "hair of all kinds" is chargeable with a duty of ten per cent.; and the same rule of construction that would separate the sheepskin, and charge a duty separately on the wool, and on the skin, would require the deerskin, with the hair on, to be separated, and the duty to be levied on each part. And so, in respect to every other skin dried, salted or pickled, imported with the hair on.

It is true, that in the Acts of 1832, 1833, and 1842, in each of which a specific duty was charged upon the wool imported on sheepskins, the appraisers were directed to estimate the weight and value, for the purpose of assessing the duty. But the article was not divided, as no separate duty was assessed upon the skin by either of these Acts. The Act of 1842 assessed a duty upon "skins pickled and in casks," but skins imported with the wool on, when separated from the wool, would not fall within this description. The whole duty, therefore, that could be properly assessed upon the article, was assessed upon the estimated quantity of wool imported upon it.

The article has never been classed in any of the Tariff Acts under the designation of skins; but has been charged always, since it [*282 came under the notice of these Acts, with a specific duty. It has been thus charged, since the Act of 1828, down to the present Act, a period of some eighteen years. And although it has been invoiced, and is known in trade and commerce, by the designation of sheepskin raw, and dried, and may, generally speaking, be properly ranged under the denomination of skins, as a class; yet, having a known designation in the Revenue Acts, distinct from the general class to which it might otherwise be assigned, we must regard the article in the light in which it is viewed by these Acts, rather than in trade and commerce. For when Congress, in legislating on the subject of duties, has described an article so as to identify it by a given designation for revenue purposes, and this has been so long continued as to impress on it a particular designation as an article of import, then it must be treated as a distinct article, whether there be evidence that it is so known in commerce or not. It must be taken as thus known in the sense of the revenue laws, by reason of the legal designation given to it, and by which it has been known and practiced on at the custom house.

It is but fair to presume, after having been treated by the law makers for a considerable length of time as an article known by this designation, with a view to the assessment of the rate of duty upon it, that if intended to be charged specifically, or by enumeration, the designation by which it was known to them would have been used, instead of the one known to trade and commerce, if that should be different.

The 3d section of the Act of 1846, enacts, that on all goods, wares, and merchandise not specifically provided for in the Act, a duty of twenty per cent. *ad valorem* shall be charged.

Under the foregoing view of the law of the case, sheepskins, imported with the wool on, must be regarded as a non-enumerated article, and fall within this third section.

The probability is, that the enumeration was omitted from an oversight, else the article would have been chargeable with a duty in the way provided for in the Act of 1842. But, having been omitted, and not specifically provided for, it necessarily comes within the section mentioned, and subject to a duty of twenty per cent. *ad valorem*.

We are of opinion, therefore, the judgment of the court below was right, and should be affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of New York, and was argued by counsel; on 283*] *consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs and damages at the rate of six per cent. per annum.

JOHN WALSH, EDWARD WALSH, AND
DICKINSON B. MOREHEAD, owners of
the STEAMBOAT IOWA, *Appellants*,

v.

PATRICK ROGERS, THOMAS SHER-
LOCK, JOHN B. SIMMONS, EDWARD
MONTGOMERY, JOHN W. BAKER, AND
P. A. ANSHUTE, Claimants of the STEAM-
BOAT DECLARATION, her Tackle, Apparel,
and Furniture.

*Collision on Mississippi River—wholly question
of fact—ex parte depositions taken ex-necessi-
tate.*

In a case of collision, upon the River Mississippi, between the steamboats Iowa and Declaration, whereby the Iowa was sunk, the weight of evidence was, that the Iowa was in fault, and the libel filed by her owners against the owners of the Declaration was properly dismissed.

Ex parte depositions, under the Act of 1789, without notice, ought not be taken, unless in circumstances of absolute necessity, or in cases of mere formal proof or of some isolated fact.

THIS was an appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

The libel was filed by the appellants, in the District Court, where they obtained a decree on the 1st May, 1848, for \$18,500 and costs. An appeal was taken to the Circuit Court.

On the 19th of February, 1850, the cause was heard finally in the Circuit Court, and upon consideration of all the testimony, as well that considered by the District Court, as the testimony subsequently taken, and arguments of counsel, the judgment of the District Court was declared to be erroneous, was ordered to be reversed and annulled, and the libel to be dismissed at the costs of the appellants.

The libelants then appealed to this court.

It was argued by *Messrs. Fendall and Chilton* for the appellants, and *Mr. Badger* for the appellees.

The questions were exclusively those of fact and evidence, as will be seen by a reference to HOWARD 13.

the opinion of the court. No question of law was raised in the case.

Mr. Justice Grier delivered the opinion of the court:

This case presents no question of law for our decision. As is usual in cases of collision, each party makes out a good case by the testimony of the pilot and crew of his own boat. This collision occurred, also, after night; and although the night was *not very dark, [*284 the most calm spectator, on such occasions, is subject to great illusions as to the motion and position of the respective vessels. The attention of passengers is also seldom given to the subject until their fears are excited; and the danger to life and property threatened by the sudden shock of the collision, generally renders them incapable of a clear apprehension of what passes at the time, or a distinct recollection of what preceded the event. The pilot and crew of each boat feel bound to exonerate themselves from blame, and consequently cannot be expected to give a very candid statement of the facts. In such cases the oral examination of witnesses before the court, with a stringent cross-examination by skillful counsel, is almost the only method of eliciting truth from such sources. This may be done in the District Court, and sometimes, possibly, on appeal to the Circuit Court. But such a course of sifting out the truth in doubtful cases cannot be pursued here. We are disposed, therefore, to require that the appellant should be held to make out a pretty clear case of mistake in the court below, before he should expect a reversal of their judgment. Raising a doubt on contested facts, is not sufficient for the action of this court. An appeal should not be a mere speculation on chances.

It is admitted in this case, that if the story told by the libelants' witnesses is true, they are entitled to recover the value of their boat. It is admitted, also, that if the facts testified by the respondents' witnesses are true, the appellants ought not to recover. Their several statements cannot be reconciled; and one or the other of them must be false in all its material allegations.

The libelants' witnesses testify: That on the 1st of October, 1847, about 8 o'clock in the evening, the steamboat Iowa was ascending the River Mississippi, above Morgan's Bend, on a voyage from New Orleans to St. Louis. That she had previously landed a passenger about two miles below the place of collision, on the right bank of the river. That she then crossed the river to the left bank, and was proceeding in her proper place, close to the shore (from ten to twenty-five feet from it). That the Declaration was seen coming down the river towards the Iowa. That the Iowa stopped her engine a minute before the collision. The Declaration turned towards the left bank, and ran quivering into the Iowa, driving her, by force of the collision, against the shore, where she sunk immediately, and so suddenly, that one of the passengers was drowned in his berth. In support of this statement, the pilot, the captain, fifteen of the crew, and five passengers, have testified. They are supported, also, by two witnesses on the right bank, who testified that the Iowa

crossed the river immediately after letting out the passengers. Without criticising these depositions, as to the probability of the facts **285** *] stated, or the consistency of each with itself and the others, we shall merely state the opportunity which they respectively had, by their own statements, for observing the material facts to which they have testified. The pilot and five of the crew were, by their own account, in a situation to know and correctly judge of the facts to which they have testified. The captain and eleven of the crew were not: some were in the cabin, some in the social hall, and many in their beds asleep, till their attention was aroused by the collision. Yet, whether asleep or awake, they all swear as positively to the relative course and position of the vessels, before and at the time of the collision, as those who were in a situation to observe them.

Of the five passengers who corroborate the statement of the crew, one was engaged in the social hall playing cards, and another asleep in his berth, till aroused by the collision; a third was discredited by proof of his declarations, soon after the occurrence, that the pilot of the Iowa was drunk, and caused the collision by his incapacity; and a fourth, by his admission that he expected to recover six hundred dollars lost by the sinking of the Iowa, out of the damages to be recovered from the defendants.

On the contrary, the witnesses for the respondents swear distinctly and positively to the following statement of facts:

1st. That the Declaration was coming down the river in the middle of the channel, rather nearer the left than the right bank, having two or more companies of volunteers, with their officers, on board as passengers.

2d. That it was a clear, starlight night, and that the decks of the Declaration were covered with passengers in a situation to see correctly everything that occurred.

3d. That the Iowa, when first seen, was about a mile off, coming up the right shore of the river, and had not yet crossed to the left.

4th. That when the Iowa came near, or somewhat below the Declaration, she turned suddenly across the river, either because the boat became unmanageable by the pilot from "smelling a bar," or with an intention to cross under the bows of the Declaration.

5th. That from the course pursued by the Iowa she threatened to strike the wheel house of the Declaration; and that, to avoid this, the engine of the Declaration was stopped, and afterwards reversed, so that she was commencing a retrograde movement at the time of the collision.

6th. That the Iowa came on under a full head of steam, and impinged herself against the bows of the Declaration, breaking her flagstaff, and causing the death of one of the soldiers on the deck.

286 *] 7th. That the head of the Declaration was turned round quartering up stream by force of the collision, and that the Iowa continued under a full head of steam till she struck the left bank of the river, and there sunk in a few minutes.

Nineteen of the crew of the Declaration were examined. Eleven of them were in a situation to see what they testify to. Eight

others, whose attention was first called to the matter by the stopping of the engine and backing the boat, corroborate the others as to that fact, without attempting to testify to facts which could not have come under their personal notice. Their statements are circumstantial, consistent, and probable, while those detailed by appellants' witnesses are improbable and almost incredible. But what is perfectly conclusive of the case, is the fact that the testimony of these nineteen witnesses, who may be supposed to be under the usual bias on such occasions, is completely corroborated by that of seventy of the passengers. Fifty-four of these were standing on the decks, or other parts of the vessel, where they had a full view of the whole transaction from the time that the boats came within sight of each other, till the Iowa sunk to the bottom. They all concur in swearing positively to the facts we have stated, and that they could not be mistaken. The remaining sixteen corroborate them as to the stopping and backing of the engine of the Declaration, and the position of the boats immediately after the collision.

If confidence can be placed in human testimony, it is plain that the libelants are not entitled to the judgment of the court in their favor.

Indeed, the only argument which has been urged against this overwhelming mass of testimony is, that the numerous witnesses of respondents coincide so completely in all the circumstances and facts related, not only in their order of narration, but in their language and phraseology, that it leads to the suspicion of a factitious story, got up after consultation. But the number of the witnesses, the respectability and standing of many of them, the fact that their testimony was taken at different times, by different commissioners, at different places, leaves no room for such an imputation. The coincidence of statement and similarity of language and expression may well have arisen from the fact that their testimony was taken under the Act of Congress, *ex-parte*, without cross-examination, and probably by an agent who had the same stereotyped leading questions put to each of the witnesses in the same sequence and in the same words.

While we are on this subject, it will not be improper to remark, that when the Act of Congress of 1789 was passed, permitting *ex-parte* depositions without notice, to be taken, where *the witness resides more than a [**287** hundred miles from the place of trial, such a provision may have been necessary. It then required nearly as much time, labor, and expense to travel one hundred miles, as it does now to travel one thousand. Now, testimony may be taken and returned from California, or any part of Europe, on commission, in two or three months, and in any of the States east of the Rocky Mountains, in two or three weeks. There is now seldom any necessity for having recourse to this mode of taking testimony. Besides, it is contrary to the course of the common law; and, except in cases of mere formal proof (such as the signature or execution of an instrument of writing), or of some isolated fact (such as demand of a bill, or notice to an indorser), testimony thus taken is liable to

great abuse. At best, it is calculated to elicit only such a partial statement of the truth as may have the effect of entire falsehood. The person who prepares the witness and examines him can generally have just so much or so little of the truth, or such a version of it, as will suit his case. In closely contested cases, of fact, testimony thus obtained must always be unsatisfactory and liable to suspicion, especially if the party has had time and opportunity to take it in the regular way. This provision of the Act of Congress should never be resorted to unless in circumstances of absolute necessity, or in the excepted cases we have just mentioned.

Let the judgment of the Circuit Court be affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

Cited—20 How., 280, 340; 7 Wall., 204; 3 Otto., 389; ond., 388; 2 McCrary, 387.

WASHINGTON AND SANDERS TAYLOR, Plaintiffs in Error,

v.

JOHN DOE, *ex dem.* AUSTIN MILLER.

Mississippi laws—Sale after death of debtor under execution levied before, is regular.

By the laws of Mississippi, deeds of trust and mortgages are valid, as against creditors, and purchasers only from the time when they are recorded. A judgment is a lien from the time of its rendition.

Therefore, where a judgment was rendered, in the interval between the execution and recording of a deed, it was a lien upon the land of the debtor.

A *ieri facias*, being issued upon this judgment, was levied upon the land; but, before the issuing of a *renditioni exponas*, the debtor died.

288] *It was not necessary to revive the judgment by a *scire facias*; but the sheriff who had thus levied upon the land could proceed to sell it, under a *renditioni exponas*; and a purchaser, under this sale, could not be ejected by a claimant under the deed given by the debtor.

THIS case was brought up by writ of error from the District Court of the United States for the Northern District of Mississippi.

It was an ejectment, brought in the court below by Miller, against the Taylors, who were the purchasers of the property in question at a sheriff's sale. The controversy was respecting the validity of the sale, the circumstances attending which are detailed in the opinion of the court. The following table shows the date of the various transactions:

Crane was the owner, and in possession of the property.

September 21, 1840, Crane made a deed of trust to Pitser Miller.

November 17, 1840, a judgment was given against Crane, at the suit of some third person, for \$6,000, in the Circuit Court of the County of Marshall.

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Upon this judgment a *ieri facias* was issued, returnable to the first Monday in June, 1841.

December 7, 1840, the deed from Crane to Pitser Miller was recorded.

April 16, 1841, the execution was levied upon the land in controversy. Whereupon Crane claimed the benefit of the valuation law of Mississippi. The property was valued at six thousand dollars, but two thirds not being bid, the papers were returned to the clerk's office.

February 20, 1842, Crane died.

May 30, 1842, twelve months after the return of the papers, a writ of *renditioni exponas*, tested on the first Monday in March, 1842, was issued, commanding the sheriff to sell the land.

August 17, 1842, the sheriff sold the land to the Taylors; and on the same day made them a deed for it and put them in possession.

April 20, 1843, Pitser Miller put up the land for sale under the deed of trust from Crane, when Austin Miller became the purchaser, and received a deed from the trustee.

In October, 1847, Miller brought his action of ejectment against the Taylors in the District Court of the United States for the Northern District of Mississippi, Miller being a citizen of the State of Tennessee.

In December, 1849, the cause came on for trial.

On the foregoing facts, which were established by legal testimony, the court charged the jury, that if they believed, from *the [289 evidence in the case, that the *renditioni exponas*, by virtue of which the land in controversy was sold, and under which the defendants became purchasers thereof, was issued and tested after the death of said William Crane, and without a revival of the judgment by *scire facias*, then such sale and purchase were void, and conferred no title on defendants.

The defendants excepted and brought the case up to this court.

It was argued by Mr. Volney E. Howard for the plaintiffs in error, and by Messrs. Vinton and Stanton for the defendants in error.

Mr. Howard, for plaintiffs in error:

The only question involved in this case is, whether an execution sale is void when the party defendant died before the test of the *renditioni exponas*, and the judgment was not revived by *scire facias*.

1. A judgment in Mississippi is a lien upon all property from the date of its rendition. In this case the judgment was rendered previous to the conveyance, and the purchaser took it subject to the lien and the right of the judgment creditor to sell. (*Pickens v. Marlow*, 2 S. & M., 428; 3 *Id.*, 67; 9 *Id.*, 9.)

2. Sheriffs' sales in Mississippi, under executions issued after the death of the defendant, and without revival by *scire facias*, have always been held only voidable, and not void, and therefore sustained in actions of ejectment. (*Smith et al. v. Winston et al.*, 2 How. Miss. R., 607; 5 How. Miss. R., 256; 9 *Smedes & M.*, 218.)

3. This being an important property rule in Mississippi in relation to real estate, it is submitted, that this court, under its former decisions, will follow the interpretation of the Supreme Court of Mississippi, especially the

late case of *Shelton v. Hamilton*, which is printed as part of this brief, so far as it relates to this principle, and the certified manuscript, copy, herewith filed. (5 Cranch, 22; 2 Cranch, 87; 1 Wheat., 27; 2 Wheat., 316; 10 Wheat., 152; 12 Wheat., 153; 4 Peters, 127; 5 *Id.*, 151.)

The counsel for the defendants in error contended, that the decisions are uniform and almost uninterrupted, to the effect that a levy on real estate does not divest the title of the judgment debtor, or satisfy the execution, as in the case of a levy on personal goods. The land, therefore, descends to the heir in spite of the levy; and in order to subject it by a process tested after the death of the ancestor, the heir must be made a party by *scire facias*. (*Erwin's Lessee v. Dundas et al.*, 4 How. Sup. Ct. R., 290*) *58; 6 Ala., 658; 2 How. Miss. R., 601; 5 *Id.*, 629; *Davis v. Helm*, 3 S. & M., 17; *Smith v. Walker*, 10 *Id.*, 589; 3 Ala., 204; 7 *Id.*, 660.)

The writ of *venditioni exponas* is a proceeding in *personam*, not in *rem*. It must have persons for parties. Against a dead man it is wholly void. (*Gwin v. Latimer*, 4 Yerger, 22; *Overton v. Perkins*, 10 *Id.*, 328; *Rutherford v. Reed*, 6 Humph., 423; *Samuels v. Zackery*, 4 Iredell, 377; *Baden v. McKeene*, 4 Hawks, 279; *Woodcock v. Bennett*, 1 Cowen, 711; *Stymets v. Brooks*, 10 Wendell, 206.)

In *Hughes v. Rees*, 4 Meeson & Welsby, 468, the court say the *venditioni exponas* is "part of the *feri facias*," "a species of *feri facias*," "a writ directing the sheriff to execute the *feri facias* in a particular manner."

The Act of 1840, called the valuation law of Mississippi, did not alter these principles. It enacted, that if lands levied on would not sell for two thirds of their appraised value, the sheriff should return the *feri facias*, with all proceedings, to the court; and if the judgment should not be satisfied after twelve months, a *venditioni exponas* should issue. The sheriff is not authorized to sell without this new process. It is the writ alone which vests in that officer the power to sell and convey lands. (*Natchez Ins. Co. v. Helm*, 13 Smedes & Marsh., 182.)

The cases in *Peck*, 80; 4 Bibb, 345, and 2 Bay, 120, quoted as being opposed to the foregoing authorities, are not in fact such. The case of *Toomer v. Purky*, 1 Constitutional R., 323, would seem to be in opposition to the current of authorities; but it must be regarded as having been decided without due consideration.

Mr. Justice Daniel delivered the opinion of the court:

This was an action of ejectment, instituted in the court below by the plaintiff, a citizen and inhabitant of the State of Tennessee, against the defendants, citizens and inhabitants of the State of Mississippi; and the facts proved in the cause, and about which there appears to have been no contrariety of opinion, were to the following effect: That the plaintiff and the defendants derived their titles from one William Crane, who was at one time seised and possessed of the demised premises. That being so seised and possessed, Crane conveyed the land, on the 21st of September, 1840, to one Pitsier Miller, for the purpose of securing a debt in said conveyance mentioned: that this deed from

Crane, after having been proved, was delivered to the probate clerk of the county wherein the land was situated, on the 7th day of December, 1840, and was on that day recorded. That this *land was afterwards duly advertised [*291 for sale under the trust above mentioned, was regularly sold in pursuance thereof, by the trustee, on the 20th day of April, 1843, to the lessor of the plaintiff, for the sum of \$1,000, and conveyed to him by the trustee by deed which was acknowledged and recorded on the day and in the year last mentioned. That the defendants were in possession of the demised premises at the commencement of this action, and that the land in dispute was worth \$4,000.

The defendants then proved, that on the 17th of November, 1840, a judgment was recovered in the Circuit Court of the county in which the demised premises are situated, against the said Crane, for the sum of \$6,000; that, on this judgment, an execution was sued out against the goods and chattels, lands and tenements, of the said Crane, returnable to the first Monday in June, 1841, which execution, on the same day on which it was sued, came to the hands of the sheriff of the county, and was by him levied on the land in controversy on the 16th of April, 1841. That thereupon the said Crane claimed the benefit of the valuation law of Mississippi, and in pursuance of that law, the land was valued at \$6,000, and that being after such valuation advertised and offered for sale, and two thirds of the appraised value not having been offered for the said land, the execution and papers connected therewith were returned to the clerk's office of the court of the county, according to law; that after the expiration of twelve months, viz.: on the 30th of May, 1842, a writ of *venditioni exponas*, tested on the first Monday in March, 1842, was sued out by the clerk of the county aforesaid, directed to the sheriff of said county, commanding him to sell the land which had been levied upon, and on which the appraisement and suspension had been taken, as before set out; that, by virtue of this writ of *venditioni exponas*, the said sheriff, after duly advertising the land, sold the same on the 17th day of August, 1842, when the defendants became the purchasers thereof, at the price of \$800, and having paid the purchase money, the sheriff conveyed to them the said land by a deed in due form of law, which was acknowledged and recorded on the 17th of August, 1842, the date of the said deed; that under this deed the defendants were in possession of, and claimed title to, the land in question.

The plaintiffs' lessor then proved that Crane, upon an execution against whom the land had been seized, and at whose instance that execution had been stayed under the provisions of the statute, departed this life on the 20th of February, 1842, during the twelve months' suspension of the proceedings on that process, and before the test and suing out of the *venditioni exponas* *under which the land had [*292 been sold, and purchased by the tenants in possession.

Upon the foregoing facts, the judge charged the jury, that if they believed from the evidence, the *venditioni exponas*, by virtue of which the land in controversy was sold, and under which the defendants became the purchasers

thereof, had been sued out and tested after the death of Crane, and without a revival of the judgment by *scire facias*, then the sale and purchase were void, and conferred no title on the tenants in possession.

With reference to the proofs in this case, and the charge pronounced thereon by the court below, a single question only has been discussed by the counsel, and it is certainly that which must be decisive upon the judgment of this court, viz.: the question involving the validity of the proceedings upon the judgment against Crane, and the legal consequences flowing from those proceedings. By the statute of Mississippi (*vide* Howard & Hutchinson's Collection, c. 34, sec. 5, p. 344), deeds of trust and mortgages are valid as against creditors and purchasers, only from the period at which they are delivered to the proper recording officer. By the law of the same State (*vide* How. & Hutch., c. 47, sec. 43, p. 631), a judgment *proprio vigore* operates a lien upon all the property of a defendant from the time that it is rendered.

The trust deed from Crane to Pitser Miller, not having been recorded until after the judgment against Crane, and the sale under the trust not having been made until after the lapse of more than three years from the judgment, and not until two years after the levy of the execution upon the lands under that judgment, the title derived from the sale and conveyance by the trustee, must, by the operation of the statutes above cited, be inevitably postponed to the rights of the claimant under the judgment, unless the latter, with the proceedings had thereon, can have been rendered null by some vice or irregularity which deprived them of legal validity.

It is insisted, for the lessor of the plaintiff, that such vice and irregularity are manifested by the facts which controlled the charge of the judge of the court below, viz.: the suing forth of the *venditioni exponas* and the proceedings upon that process, after the death of the defendant in that judgment, and without any revival thereof against the representative of that defendant.

In considering the objection thus urged, it must be taken as a *concessum* on all sides, that, by the law of Mississippi, the judgment against Crane operated as a lien on his land, and that by the execution and levy, the fruits of that judgment, the lien had attached particularly **293*** and specifically upon the subject of *its* operation. So far, then, as the rights of the parties to the judgment and the subject matter to be affected by those rights were concerned, everything was determined; all controversy was closed. The law had taken the subject entirely to itself, to be applied by its own authority and its own rules. Did the indulgence of appraisement, and the temporary suspension allowed in a certain predicament to the debtor, alter the rights or obligations of the parties, or change the status, or liability, or appropriation, of the subject which the law had already taken into its own hands? To admit of any conclusions like these, would be to open again controversies already closed, and to wrest from the fiat of the law, the subjects it had specially and absolutely applied. The privilege of appraisement and suspension was in itself a great

indulgence; it would become an opprobrium to justice, if it could be converted into a means of abrogating rights which she had expressly and deliberately conferred. The appraisement and suspension wrought no change in the relative position of the parties, it neither released nor weakened the hold taken by the law on the subject, but only completed the proceedings on the conditions which the statute had prescribed, the operation it had begun, and which it had the regular authority to fulfill. We regard the *venditioni exponas* in this case merely as a continuation and completion of the previous execution by which the property had been appropriated, and was still in the custody of the law, and not as a separate, independent, much less an original proceeding, the offspring or result of a distinct and farther adjudication. This interpretation is in conformity with the meaning and purpose of the process of *venditioni exponas*, and with the terms of that writ as provided in the statute of Mississippi, which runs in the following language, viz.: (*Vide* How. & Hutch. Col., c. 42, sec. 18.): "We command you that you expose to sale those goods and chattels, lands and tenements of A B, to the value of—, which, according to our command, you have taken, and which remain in your hands unsold as you have certified to our judges, of our — Court, to satisfy C D the sum of—, whereof in our said court he hath recovered execution against the said A B by virtue of a judgment in the said court, &c.," thus showing the consummation of the right of the plaintiff, the divestiture of possession of the defendant, and the transfer of that possession to the custody and possession of the law by the levy of the previous execution. Considering this to be the situation of the property, and regarding the force of the judgment and levy as not having been affected by the appraisement and suspension of sale, it becomes unimportant to investigate the results attempted to be deduced from the fact *that the *venditioni* ***294** *exponas* was sued out after the death of the defendant Crane. According to our view this fact would have been immaterial both upon the rules of the common law and upon the provisions of the stat. of the 29 Car. II., adopted in many of the states; for by the former the execution would have been valid if tested before the death of the defendant, and by the statute if delivered to the officer before that period; but in this instance not only did the lien which could be enforced by *scire facias* exist from the date of judgment, according to the statute of Mississippi, but it was actually consummated by seizure in the lifetime of the defendant in the judgment. Upon the point of the validity of an execution against the personality, if tested and sued in the lifetime of the debtor, numerous authorities might be cited from the English decisions and from the adjudications of the State Courts, as well as the decision of this court in the case of *Erwin's Lessee v. Dundas et al.*, in 4 How. Rep., 53, in which many of the cases have been reviewed. A particular reference to the cases upon this point, however, is not deemed important in the present instance, though it may not be altogether out of place to refer to several decisions of the Supreme Court of Mississippi ruling a doctrine which would go very far in sustaining the title of the de-

fendants in the ejectment, admitting that the validity of the first execution and levy on the judgment against Crane was a matter regularly open for examination. Thus the cases of *Smith and Montgomery v. Winston and Lawson*, 2 How. Miss. Rep., 601; of *Drake et al. v. Collins*, 5 Id., 258; and of *Harrington v. O'Reilly et al.*, 9 Sm. & Marsh., 216, have laid it down as the law of Mississippi in relation to real as well as personal estate, "that a sale made under an execution which issued without a revival of the judgment is not absolutely void but voidable only, and cannot be avoided collaterally."

This last question this court do not feel themselves now called upon to settle; considering the levy under the first judgment against Crane and the lien thereby created as having been consummated, and the property placed by the proceedings in the custody of the law, they regard the title of the defendants below derived from the judgment, the levy of the *feri facias*, and sale under the *venditioni exponas*, as regular and valid, and one which should have been sustained.

The judgment of the District Court is therefore reversed, and the cause remanded to that court to be tried upon a venire facias de novo, in conformity with this opinion.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of 295*] *Mississippi, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said District Court, with directions to award a *venire facias de novo*, and to proceed therein in conformity with the opinion of this court.

Cited—4 Wall., 243.

THOMAS TREMLETT, Plaintiff in Error,

v.

JOSEPH T. ADAMS.

Bonded Warehousing Act—Must be supplemented by regulation of Secretary of Treasury, as to port of delivery.

The Tariff Law of July 30, 1846 (9 Stat. at Large, 42), reduced the duties on imported coal, and was to take effect on the 2d of December, 1846. The sixth section provided that all goods, which might be in the public stores on that day, should pay only the reduced duty.

On the 8th of August, 1846 (9 Stat. at Large, 53), Congress passed the Warehousing Act, authorizing importers, under certain circumstances, to deposit their goods in the public stores, and to draw them out and pay the duties at any time within one year.

But this right was confined to a port of entry, unless extended, by regulation of the Secretary of the Treasury, to a port of delivery.

Therefore, where New Bedford was the port of entry, and Wareham a port of delivery, the collector of New Bedford (acting under the directions of the Secretary of the Treasury) was right in refusing coal to be entered for warehousing at Wareham.

Where an importer deposited a sum of money, as estimated duties, with the collector, which, upon adjustment, was found to exceed the true duty by a small amount, and the collector offered to pay it 152

back, but the importer refused to receive it, the existence of this small balance is not sufficient reason for reversing the judgment of the Circuit Court, which was in favor of the collector.

THIS case was brought up by writ of error from the Circuit Court for the District of Massachusetts.

It was a suit brought in the Circuit Court by Thomas Tremlett, a merchant of Boston, against Adams, the Collector of the port of New Bedford, for return of duties.

The case is stated in the bill of exceptions, which was as follows:

This was an action of *assumpsit*, brought against the defendant, Collector for the port of New Bedford, to recover the sum of twenty-two hundred and sixty-seven dollars, seventy-seven cents, and interest, excess of duties upon sundry cargoes of coal, imported into the port of Wareham, in the collection district of New Bedford, by the plaintiff, and claimed to be illegally exacted by said defendant, and paid by said plaintiff under protest.

At the trial of the case before his Honor, Judge Sprague, the following facts were admitted by the defendant, namely:

1st. That, in the months of September and October, 1846, *the plaintiff, Thomas [*296 Tremlett, a merchant of Boston, imported from Pictou, in Nova Scotia, into the port of Wareham, in the collection district of New Bedford, nine cargoes of coal, as follows, namely:

	Chaldrons.	T.	Cwt.	Qrs.	Lbs.	Duty charged.	Money deposited.
Brig Indus	121 1-6	157	18	2	12	\$279 14	\$295 00
Schooner Congress	122	173	19	0	12	\$304 42	215 00
Brig Mary Smith	116 1-6	153	10	2	12	298 66	250 00
Brig Acadia	249 11-12	229	7	0	10	576 57	575 00
Brig Charles Edward	153 3-12	210	14	0	26	353 43	360 00
Schooner Arctida	161 5-12	212	19	1	16	372 57	375 00
Brig Hudson	161 2-12	212	17	1	12	371 60	375 00
Brig China	173 5-12	223	17	0	8	400 62	400 00
Brig Moselle	298 8-12	249	19	0	8	457 32	458 00
	1458 9-12	1922	8	1	26	\$3,384 14	\$3,403 00

Amounting, in the aggregate, to 1,458, $\frac{1}{2}$ chaldrons, or 1,922 tons, 8 cwt. 1 qr. 26 lbs., as appears by the custom house records.

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These several cargoes of coal were shipped at Pictou, for the port of Wareham, a port of delivery only; and, upon the arrival at that port of the first mentioned vessel, the brig *Indus*, on or about the 8d of September, 1846, the plaintiff made application at the custom house in New Bedford, to the defendant, Joseph T. Adams, then Collector at said port, to enter said coal, for warehousing, at Wareham, aforesaid, under the provisions of the Act of Congress, entitled, "An Act to establish a warehousing system," &c., passed August 6th, 1846. But the defendant refused to allow the plaintiff to enter said coal for warehousing, as aforesaid, under the Act aforesaid, because said Wareham was not a port of entry, but a port of delivery; and required him, if he would land said coal at said Wareham, to enter the same under the Act for the collection of duties, passed August 30th, 1842, and to deposit \$285 to cover the duties which might be found to be legally due and payable thereon. The plaintiff, in order that said vessel might be permitted to discharge her cargo, complied with this requisition, first entering the following protest in writing:

"I protest against paying duties, wishing to warehouse the coal per brig *Indus*, from Pictou;" and signed "Thomas Tremlett, by his attorney, Jacob Parker."

The usual permit was then granted by the collector, to land the coal from said vessel at said Wareham, and the coal was accordingly landed; and, upon the arrival at said Wareham of the other cargoes of coal, by the several vessels above named, said plaintiff made like applications to the defendant, at the collector's office at New Bedford, to enter each cargo for warehousing under said Act of August 6th, 1846, at Wareham, aforesaid.

But the defendant, in like manner, as in the case of *The Brig Indus*, refused permission to warehouse, as aforesaid, and required the plaintiff to make the same entry as in that case, and deposit a sum of money upon the entry of each cargo, sufficient to cover the duties which might be found to be legally due and payable thereon, under the provisions of the Act of August 30th, 1842, the plaintiff first entering a protest in writing, in each case, and upon the entry of each cargo, in manner and form as in the case of *The Brig Indus*, above mentioned; and said coal was thereupon landed, and deposited in the same manner as that per brig *Indus*.

2d. That all of said coal, landed at said Wareham from the above-named vessels, was deposited in one pile, and remained in the place where it was originally deposited until after December 19th, 1846.

3d. That the aggregate sum deposited with the defendant by the plaintiff, to cover the amount of duties on the several cargoes of coal above mentioned, was \$3,403, and the duties on said coal, computed under the Tariff Act of August 30, 1842, would amount to \$3,364.14; that by the Act of July 30, 1846, the duties on the coal in question would amount to \$1,135.23.

4th. That the brigs *Indus* and *Mary Sophia* were British vessels; that it has been the invariable practice of the collectors at New Bedford, for more than twenty years, to allow foreign vessels the same rights and privileges, as to unloading and discharging their cargoes at the port of Wareham, that are granted to American ves-

sels, and that no objection was made or intimated by the defendant to the plaintiff to his landing the cargoes of said "*Indus*" and "*Mary Sophia*" at said Wareham.

5th. That said Wareham is the principal port, in the collection district of New Bedford, where coal is imported for consumption.

6th. That the defendant, on or before the 19th of December, 1846, delivered to the plaintiff's attorney a statement of the balance due to the plaintiff for money deposited, over and above the amount of duties claimed on the nine cargoes of coal aforesaid, amounting to \$38.86, and offered then to pay the same to M. Parker, the plaintiff's attorney, which he declined to receive; and that on the 18th of November, 1849, Mr. Adams, the defendant, tendered the same amount in specie to Thomas Tremlett, the plaintiff, at his office in Boston, which he refused to receive, and informed the defendant that in 1846 he instructed Mr. Parker, his attorney, not to receive it.

*7th. That the paper hereto annexed [*298 marked A, is a true copy of the commission under which D. Nye acted as an officer of the revenue, from the date of the commission till after January, 1849; and that the paper marked B, annexed hereto, is a true copy of an official letter, received by D. Nye from said defendant, at or about the time it bears date, and that the papers annexed, marked C and D, are true copies of official letters received by the defendant from the Secretary of the Treasury of the United States.

Boston, December 18th, 1849.

(The paper marked A was merely an authority to David Nye to act as deputy-collector, inspector, gauger, weigher and measurer, for the port of Wareham, dated October 3, 1843.

The paper marked B was an authority to Nye, from Adams, under the authority of the Secretary of the Treasury, to warehouse coal, &c., at Wareham, under the Warehousing Act of 1846. But this authority was dated August 22, 1848.

The paper marked C was dated August 27th, 1846, and was a letter from the Secretary of the Treasury to Adams, refusing to allow any article to be warehoused without the limits of a port of entry.

The paper marked D was from the same to same, dated July 5th, 1849, merely saying that the District Attorney had been instructed to defend Adams in the suit brought by Tremlett.)

Upon those facts the plaintiff, by his counsel, requested the court to rule and instruct the jury—

1st. That the right or privilege of warehousing goods at any ports or places within the United States is regulated by the laws of Congress, which specify the ports and places at which, and the manner in which, such warehousing shall be permitted, and that no discretion as to the selection of such ports or places, or as to the manner in which such warehousing shall be allowed, is reposed in the collector, or any other executive officer.

The plaintiff further requested the court to rule and instruct the jury—

2d. That by law there is no distinction as to the exercise of such right of warehousing between ports of entry and ports of delivery, and that if the plaintiff at the time had a right,

under the existing laws, to warehouse his goods in a port of entry in any district in the United States, he had equally a right to warehouse them at any port of delivery in such district, upon complying with the requirements of the laws regulating the warehousing of goods.

The plaintiff further requested the court to rule and instruct the jury—

3d. That the plaintiff, being unlawfully prevented from warehousing his goods as aforesaid, and required to pay duties upon them according to the rates established by the Tariff Law of 1842, ought to recover of the defendant the difference between the amount of duties chargeable under the Tariff Act of 1842 and that under the Tariff Act of 1846, and interest thereon from the time of payment of the several sums.

The plaintiff further requested the court to rule and instruct the jury—

4th. That if, upon the facts, the plaintiff could not recover the whole of the difference between the amount of duties properly chargeable under the Act of 1842, and the amount properly chargeable under the Act of 1846, he was entitled to recover the sum of \$38.86, being the surplus in the defendant's hands over and above the amount of the duty properly chargeable according to the Act of 1842. But the court refused to give the instructions so prayed for; but on the contrary thereof, did rule and instruct the jury that the plaintiff could not maintain his action, nor recover either of said sums of money, or any part thereof; to all which rulings and instructions the plaintiff excepts, and prays that his exceptions may be allowed.

PELEG SPRAGUE, [SEAL.]
Judge, &c.

The jury accordingly found for the defendant, and upon these exceptions, the case came up to this court.

It was argued by *Mr. Sherman* for the plaintiff in error, and by *Mr. Bibb* for the defendant in error. There was also an elaborate brief on the same side, filed by *Mr. Crittenden* (Attorney-General).

Mr. Sherman, for the plaintiff in error, contended that the court below erred—

1st. In refusing the instructions prayed for in behalf of the plaintiff below.

2d. In the instructions which it gave to the jury.

(The arguments of the counsel upon both sides were founded upon a minute examination of preceding laws, which it would be difficult to compress within reasonable limits, and at the same time do justice to the arguments. The reporter, therefore, confines himself to a mere statement of the points.)

Mr. Sherman united both the above points in his arguments.

1st. That, under the Constitution and laws of the United States, a right existed to warehouse the coal at a port of delivery.

2d. The right to warehouse at the port in question being given by law, the plaintiff could not be deprived of that right by any instructions issued by the Secretary of the Treasury to 300* carry the Act into effect. (Sec. 5 of Warehousing Act, 9 Stat. at Large, 53; *Tracy & Balister v. Swartwout*, 10 Pet., 95; *Elliot v. Swartwout*, 10 Pet., 153; and *Greely v. Thomp-*

son, 10 How., 234, decided at the last term of the Supreme Court.)

3d. The defendant, as collector of the customs, having deprived the plaintiff of the right to warehouse his said nine cargoes of coal at Wareham, and to enter the same, under the Tariff Act of July, 1846, upon the payment of \$1,135.13, the duty imposed on the same by that Act, and exacted of the plaintiff a deposit of money, as for duties, amounting to \$3,403, the plaintiff has a right to recover the difference, with interest.

4th. Or, otherwise, if it be decided that the duties were legally due under the Tariff Act of 1842, amounting to \$3,364.11, the plaintiff having deposited with the defendant the sum of \$3,403, is entitled to recover the difference, viz.: \$38.89, with interest. (*Boyden v. Moore*, 5 Mass. R., 365, 369; *Breed v. Hurd*, 6 Pick., 356; *Whipple v. Newton*, 17 Pick., 168.)

On the other hand, the counsel for the defendant in error contended that the first, second, and third instructions, as moved, were not according to the law of the case upon the facts established by the evidence, and facts pertinent to the issue, which no evidence conducted to prove (and are therefore to be considered as not having existed). They would, if given, have misled the jury.

The first and second instructions moved, misconstrue the revenue laws. Important distinctions between ports of entry and delivery, and ports of delivery only, are made by the laws. The Secretary of the Treasury had a discretion to refuse to suffer coal to be warehoused at ports of delivery only, where no collector, naval officer or surveyor resided; where the collector of the port of entry had to discharge, at one, two or three ports of delivery only, annexed to his collection district, all the duties of collector, naval officer and surveyor; and where, in the opinion of the Secretary, the additional charge of a permanent officer to reside at the port of delivery only, with the rent to be paid for warehouses, would overgo the receipts from storage, and diminish the revenue at such port of delivery only.

The third instruction moved by the plaintiff, when applied to the facts of the case, assumes, in the first place, that the Secretary of the Treasury "unlawfully" prevented the warehousing of the coal at Wareham; and in the next place, assumes that because the collector obeyed the instructions of the Secretary, the defendant became a wrong-doer; and in the third place, assumes that the defendant is liable, and, in the language of the count, became indebted to the plaintiff, and promised him to pay the difference of duty on the coal \$301 between the Tariff of 1842, and that of December, 1846.

If the Secretary of the Treasury had been sued as the wrong-doer instead of the collector, the Secretary could have defended and maintained his instructions against warehousing coal at Wareham, a port of delivery only, as being a lawful exercise of a discretionary power confided by the revenue laws existing before the Act to establish a system of warehousing, not impaired by that Act, but confirmed by its fifth section; which discretionary power so given by the laws, was necessary and proper to the uniformity and efficiency of the system of

HOWARD 13.

revenue from the customs, over which the Judicial Department has no control.

The second proposition assumed by the plaintiff, that the defendant, in obeying the instructions to him as collector, by the Secretary of the Treasury, against warehousing the coal at the port of Wareham, became thereby a wrong doer, and liable to the plaintiff for damages, would not follow, if it were conceded that the Secretary of the Treasury, in the exercise of his functions, erred in the construction of the revenue laws, and thereupon issued wrong instructions to the collector against warehousing at Wareham.

The third assumption, as to the amount of the remote consequential damages, would not follow from the plaintiff's first and second premises, if they were conceded.

The conduct of the defendant, as collector, whether he pursued the right line of his duty, or departed from it and became a trespasser, and if a wrong-doer for what damages he became responsible, are matters to be adjudged by the laws in force defining his duties as collector at the time when the plaintiff made his protest against the conduct of the collector; not by the error of the Secretary of the Treasury, whom the law had put over him as a light, a guide and a buckler; nor by laws which did not take effect until months after the plaintiff's protest; nor by the after voluntary act of the plaintiff himself, of omission or commission.

The fourth instruction moved relates to the sum of \$38.66, twice tendered to the plaintiff, and twice refused.

This is certainly a small business, a little matter, a very trifling matter, wherewith the plaintiff hath elected (after two tenders and refusals) to engage the time and attention, first, of the Circuit Court of the United States, by an action originally brought therein, whose cognizance, as defined by law, is intended to be limited to cases "where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars," and second, the time and attention of this court, whose appellate jurisdiction in such like cases is, by the law in [302] tended to be confined to "matters in dispute exceeding the sum or value of two thousand dollars, exclusive of costs."

If the plaintiff had truly stated his said demand, for the said sum of \$38.66, neither the Circuit Court nor this court could have held cognizance of the plea. But by refusing this sum when tendered, and by mixing this matter with his protest about the warehousing, and, by stating his demand at five thousand dollars, he has compelled the Circuit Court and this court to hold cognizance of his complaint.

If the jury had found for the plaintiff the sum of \$38.66, then, according to the twentieth section of the Judiciary Act of 24th September, 1789, "he shall not be allowed, but, at the discretion of the court, may be adjudged, to pay costs."

When, upon the facts given in evidence, the plaintiff moved this fourth instruction, that "he was entitled to recover the sum of \$38.66," he thereby confined and dwindled his demand to that sum; the court was called to adjudicate as to that sum; to lend its assistance to the plaintiff to recover that sum and no more; a

matter far beneath the cognizance of that court.

Mr. Chief Justice Taney delivered the opinion of the court:

This is an action brought by the plaintiff against the Collector of the port of New Bedford, for refusing to permit the plaintiff to enter for warehousing at Wareham sundry cargoes of coal, imported from Pictou, Nova Scotia, which were shipped for Wareham, and arrived in the months of September and October, 1846. Wareham was a port of delivery in the collection district of which New Bedford was the port of entry; and the Collector, in refusing to permit them to be entered for warehousing at Wareham, acted under the directions of the Secretary of the Treasury. The plaintiff was required to pay in cash the duties imposed by the Act of 1842, before the permit for landing at Wareham was granted. And this suit is brought to recover the difference between the duties paid and the duties to which the coal would have been liable if it had been warehoused at Wareham and remained in store as the plaintiff desired until the reduced tariff went into operation. The case depends upon the construction of the Warehousing Act of August 6, 1846.

The law is framed in very general terms, referring to other laws for some of its regulations; and containing but few specific directions as to the manner in which it should be carried into execution. And it authorizes the Secretary of the Treasury to make from time to time such regulations, not inconsistent with law, as might be necessary to give full effect to the provisions of the Act, and secure a just account of the countability under it. This mode of legislation has naturally led to some ambiguity, and has given rise to this controversy.

The Act went into operation on the day it was approved by the President. And the plaintiff insists that, under its provisions, he was entitled, as soon as it passed, to land his goods at the port of delivery upon bonding for the duties; and to have them placed there in store in order to avail himself, if he thought proper, of the reduced tariff, which took effect on the 2d of December, in the same year. The 6th section of the Tariff Act of July 30, 1846, which passed a few days before the Warehousing Act, of which we are now speaking, provided that all goods imported after the passage of that law, and remaining in the public stores on the 2d of December following, when the Act went into operation, should be subject to no other duty upon entry thereof than if they had been imported after that day.

In expounding the Warehousing Act, it must be borne in mind that it was not passed for the purpose of enabling the importer to avail himself of the reduced rates of duty. It is a part of the general and permanent system of revenue; and its evident object is to facilitate and encourage commerce by exempting the importer from the payment of duties, until he is ready to bring his goods into market. The opportunity it afforded of taking advantage of the reduced rates of duty was an accidental circumstance arising from the time at which it happened to be passed. The provisions in the

6th section of the Tariff Act of July 30, 1846, had no reference to goods entered for warehousing. There was no law at that time which authorized the importer so to enter them. And although the Warehousing Act, which passed a few days afterwards, enabled the importer, by warehousing his goods, to take the benefit of the provisions of the previous law, yet it was not passed for that purpose. And it must be regarded and interpreted, not as an act passed for a temporary purpose, or to meet a change of tariff, but as one intended to be equally applicable to goods imported after the 2d day of December, as to goods imported between the 30th of July and that time. The plaintiff had the same legal rights in this respect at the time he offered to enter his coal at Wareham as an importer of the present day, and nothing more; and no greater advantages were intended to be given him by the Warehousing Act.

Previous to the passage of this Act no goods, chargeable with cash duties, could be landed at the port of delivery until the duties were paid at the port of entry. The importer had no right to land them anywhere until they had passed through the custom house. And they could not be landed at the port of delivery without the permit of the proper officer at the **304** port of entry. This permit in effect delivered them to the owner to be landed under the usual inspection, and sold and disposed of as he thought proper; and the permit could not be granted unless the duties had been paid.

There could, therefore, but rarely be any necessity for public stores or warehouses at a port of delivery, before the passage of the Warehousing Act.

It was otherwise at ports of entry. The importer himself had no right to land them even at a port of entry before the duties were paid. But when the entry at the custom house was imperfect, for want of the proper documents, or where the goods were damaged in the voyage, and the duties could not be immediately ascertained; or the cash duties were not paid after the forms of entry had been complied with; in all of these cases, the collector was directed, by existing laws, to take possession of such goods, and place them in public stores, and retain them until the duties were paid. And as all of this was to be done at the port of entry, public stores were necessary at such ports; and they had accordingly been provided for by law, before the passage of the Warehousing Act.

Now, the Warehousing Act, so far as the landing and storing of goods is concerned, places goods entered for warehousing upon the same footing with goods upon which the duties have not been paid. It provides, that in all cases of failure or neglect to pay the duties within the period allowed by law to the importer, to make entry thereof, or whatever the owner, importer, or consignee, shall make entry for warehousing in the manner directed in the Act, the collector shall take possession of the goods and deposit them in the public stores, or in other stores to be agreed on by the collector or other chief officer of the port, and the importer of the goods to be secured in the manner provided for in the Act of 1818 relative to the warehousing of wines and distilled spirits.

The warehoused goods, therefore, are to be taken possession of by the same officer and stored, and treated like goods upon which the importer had failed to pay duty. And, as the latter were necessarily to be taken possession of at the port of entry, and accustomed to be stored there, the natural inference from this association is, that the law contemplated the storage of warehoused goods at the same place, and did not mean to give the importer a right to store them at any port of delivery to which he might have chosen to ship them. The Warehousing Act gives him no peculiar privileges over the importer of goods directed to be placed in the public stores because the duties were not paid; nor any greater right to select for himself the place of storage.

The 2d section of the Act strengthens this construction of the **1st** section. It **[305]** provides that warehoused goods, deposited in the public stores in the manner provided in the 1st section, might be withdrawn and transported to any other port of entry; and directs that the party should give bond for the deposit of them in store, in the port of entry to which they shall be destined. The use of the words "ports of entry," in this provision, implies that they were to be stored in a port of that description in the first instance, and to be deposited again in a like port, if they were transported coastwise.

Again, the directions as to the manner in which they are to be secured while they remain in the store, and to be delivered to the party when he is entitled to receive them, leads to the same conclusion. They cannot be withdrawn without a permit from the collector and naval officer of the port at which they are stored. And as there is no naval officer appointed or needed at a port of delivery, this provision would appear to have contemplated the storage at a port of entry and not of delivery. There are certain expressions in the law which may be applied to a port of delivery as well as of entry. But they were introduced for the purpose of authorizing the Secretary of the Treasury, under the power to make regulations, to have suitable storehouses to provide at a port of delivery, when the nature and importance of the trade might require it.

The Act of 1799, c. 22, sec. 21 (1 Stat. at Large, 642), authorizes the collector, with the approbation of the principal officer of the Treasury Department, to employ proper persons as weighers, gaugers, measurers and inspectors at the several ports within his district; and also, with the like approbation, to provide, at the public expense, storehouses for the safe-keeping of goods, and such scales, weights and measures, as may be necessary. The secretary and collector were, therefore, under this law, to determine where storehouses were necessary; and might provide them at a port of delivery, if they believed the interests of the public and of commerce demanded it. But the law confided it to their discretion, to determine whether they should or should not be provided at any particular port of delivery; and the Warehousing Act has not changed the law in this respect, and does not require that there should be public storehouses at every port of delivery at which the importer might wish to warehouse his goods.

The record shows, that after this transaction took place, the Secretary did authorize goods to be warehoused at Wareham. But the question before us is not whether he might not have authorized it before; but whether, independently of any regulation by the Secretary, the importer had not an absolute right, as soon as the law was passed, to land his goods at the 306*] port of *delivery to which they were destined, and store them there, upon giving the bonds which the law requires. We think he had not, and that the right, given under the Warehousing Act, was confined to a port of entry, unless extended, by regulation of the Secretary, to a port of delivery.

Indeed, the execution of the law would be impracticable under the construction contended for by the plaintiff. For it directs that the bond to be taken on the entry for warehousing, shall be prescribed by the Secretary; and it is made his duty to make regulations to carry the law into full effect, and secure a just accountability. These things require time; and the collector could not act without them. Yet, if the plaintiff's construction be the correct one, his right to enter his coal for warehousing at Wareham was as absolute the day after the law passed as it was when he offered to make the entry. For if the law gave him the right, independently of any regulations by the Secretary, he was not bound to wait until they were made and the form of the bond prescribed; but might have demanded his rights on the 7th of August, and sued the Collector if he failed to obtain them. It is evident that Congress could not have intended to confer upon the importer this right. Nor can the law receive that construction without rejecting the provisions which authorize the Secretary to prescribe the form of the bond, and to direct the manner in which the Act was to be carried into effect. These provisions, in relation to the power of the Secretary, are important, and were intended to guard the public against any abuse of the privileges which the Warehousing Act gave to the importer.

Moreover, many of the ports of delivery are at places where the trade is trivial and unimportant, and where it would be difficult to procure suitable storehouses for a cargo unexpectedly arriving and demanding to be warehoused. In many of them there are not a sufficient number of officers to superintend the landing and warehousing of a cargo of an ordinary ship, and guard it afterwards from being improperly withdrawn. The Warehousing Act does not authorize the appointment of additional officers, at ports of delivery, nor provide for any additional expenses to be incurred by the public in carrying it into execution. And if the collector is bound to grant a permit to land the goods, at any port of delivery which the importer may select for his shipment, it is easy to foresee the abuses to which it would lead; and the frauds that might be practiced under it. Congress can hardly be presumed, from any general or ambiguous language, to have intended, in this law, to dispense with all the safeguards which had been so carefully provided and preserved in previous Acts. We think neither its words nor its manifest object 307*] will justify such a construction, and that the Collector was right in refusing the per-

mit to the plaintiff to land and warehouse the coal in question at Wareham.

As regards the small balance of the plaintiff's deposit which remained in the Collector's hands after the payment of the legal duties, it is no ground for reversing the judgment of the Circuit Court. The defendant offered to pay it, but the plaintiff refused to receive it. The money placed in the hands of the Collector for the estimated duties was a deposit in trust for the United States for the amount that should be found actually due; and for the plaintiff for the balance, if any should remain after the duties were paid. And as the plaintiff refused to receive this balance when tendered, it continues a deposit in the hands of the defendant with the plaintiff's consent; and he cannot subject the Collector to the costs and expenses of a suit until he can show that it is wrongfully withheld.

The judgment of the Circuit Court is therefore affirmed, with costs.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Massachusetts, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

THE PHILADELPHIA, WILMINGTON AND BALTIMORE RAILROAD COMPANY, Plaintiffs in Error,

v.
SEBRE HOWARD.

Evidence—official entries standing in place of record, admissible—docket entry of action proves pendency—treatment, by counsel for corporation, of paper as its deed proves seal—sealing and delivery waives condition previously made—deposition of deceased witness in former cause.

Estoppel, matter of, exhibited in evidence—defense in action of assumpsit operates as, in action on covenant.

Where two parties are named in contract, and but one seals, he alone may sue.

Rules as to construing covenants—construction of reservation of right to annul contract at any time—Measure of damages.

In Maryland, the clerk of a county court was properly admitted to prove the verity of a copy of the docket entries made by him as clerk, because, by a law of Maryland, no technical record was required to be made.

And, moreover, the fact which was to be proved being merely the pendency of an action, proof that the entry was made on the docket by the proper officer, was proof that the action was pending, until the other party could show its termination.

Where the question was, whether or not the paper declared upon bore the corporate seal of the defendants (an incorporated company), evidence was admissible to show that, in a former suit, the defendants had treated and relied upon the instru-

NOTE.—Covenants, when dependent and when independent. See note to Goldsborough v. Orr, 8 Wheat., 217.

ment, as one bearing the corporate seal. And it was admissible, although the former suit was not between the same parties; and although the former suit was against one of three corporations, which had afterwards become merged into one, which one was the present defendant.

The admission of the paper as evidence only left the question to the jury. The burden of proof still remained upon the plaintiff.

[308*] *The evidence of the President of the Company, to show that there was an understanding between himself and the plaintiff, that another person should also sign the paper before it became obligatory, was not admissible, because the understanding alluded to did not refer to the time when the corporate seal was affixed, but to some prior time.

In order to show that the paper in question bore the seal of the corporation, it was admissible to read in evidence the deposition of the deceased officer of the corporation, who had affixed the seal, and which deposition had been taken by the defendants in the former suit.

If the defendants had relied upon the paper in question to defeat the plaintiff in a former suit, they are estopped from denying its validity in this suit. It was not necessary to plead the estoppel, because the state of the pleadings would not have justified such a plea.

Where the covenant purported to be made between two persons by name, of the first part, and the corporate company, of the second part, and only one of the persons of the first part signed the instrument, and the covenant ran between the party of the first part and the party of the second part, it was proper for the person who had signed on the first part to sue alone; because the covenant insured to the benefit of those who were parties to it.

In this particular case, a covenant to finish the work by a certain day, on the one part, and a covenant to pay monthly on the other part, were distinct and independent covenants. And a right in the Company to annul the contract at any time, did not include a right to forfeit the earnings of the other party, for work done prior to the time when the contract was annulled.

A covenant to do the work according to a certain schedule, which schedule mentioned that it was to be done according to the directions of the engineer, bound the Company to pay for the work, which was executed according to such directions, although a profile was departed from which was made out before the contract was entered into.

So, also, where the contract was, to place the waste earth where ordered by the engineer, it was the duty of the engineer to provide a convenient place; and if he failed to do so, the other party was entitled to damages.

Where the contract authorized the Company to retain fifteen per cent. of the earnings of the contractor, this was by way of indemnity, and not forfeiture; and they were bound to pay it over, unless the jury should be satisfied that the Company had sustained an equivalent amount of damage by the default, negligence, or misconduct of the contractor.

Where, in the progress of the work, the contractor was stopped by an injunction issued by a court of chancery, he was not entitled to recover damages for the delay occasioned by it, unless the jury should find that the Company did not use reasonable diligence to obtain a dissolution of the injunction.

If the Company annulled the contract merely for the purpose of having the work done cheaper, or for the purpose of oppressing and injuring the contractor, he was entitled to recover damages for any loss of profit he might have sustained; and of the reasons which influenced the Company, the jury were to be the judges.

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of Maryland.

It was a complicated case, the decision of which involved numerous points of law, as will be seen by the syllabus prefixed to this statement.

There were six exceptions to the admissibility of evidence taken during the progress of the trial in the Circuit Court. The plaintiff

below then offered eleven prayers to the court, and the defendant, thirteen. The court laid aside all the prayers and embodied its instructions to the jury in thirteen propositions.

The facts of the case, out of which all these points of law arose, were the following:

*Prior to 1836, there existed in Maryland a company called the Delaware and Maryland Railroad Company, which, by an Act of the Legislature, passed on the 14th of March, 1836, was united with the Wilmington and Susquehannah Railroad Company; the two united taking the name of the latter.

It will be perceived that this company is not *eo nomine*, one of the parties to the present suit, and it may as well be now mentioned that afterwards a further union of companies took place by virtue of a law of Maryland, passed on 20th of January, 1838. The following companies were united, viz.: The Baltimore and Port Deposit Railroad Company; The Wilmington and Susquehannah Railroad Company; The Philadelphia, Wilmington and Baltimore Railroad Company—the three, thus united, taking the name of the latter company, which was the plaintiff in error.

On the 12th of July, 1836, whilst the Washington and Susquehannah Railroad Company had a separate existence, a contract was entered into between them and Howard for the prosecution of the work in Cecil County, in the State of Maryland. Two copies of this paper were extant. They were substantially alike except in this: that one of them (the one referred to as marked B) was sealed by Sebree Howard, and was signed by James Canby, President, with his private seal affixed. It was not sealed by the Railroad Company. The other (referred to as marked A) was signed and sealed by Howard, and signed also by Canby, as President. It also bore an impression which purported to be seal of the Company.

This latter paper was the basis of the present suit, which was an action of covenant. Some of the points of law decided in the case refer to the paper, which makes it necessary to insert it, viz.:

Agreement between Sebree Howard and Hiram Howard, of the first part, and the Wilmington and Susquehannah Railroad Company, of the second part.

The party of the first part, in consideration of the matters hereinafter referred to and set out, covenants and agrees, to and with the party of the second part, to furnish and deliver, at the proper cost of the said party of the first part, the building materials which are described in the annexed schedule, to the said party of the second part, together with the necessary workmanship and labor on said railroad, and at such times, and in such quantities, as the party of the second part shall designate; and faithfully, diligently and in a good and workmanlike manner, to do, execute and perform the office, work and labor in the said schedule mentioned.

*And the party of the second part, in [*310 consideration of the premises, covenants and agrees to pay the party of the first part the sums and prices in the said schedule mentioned, on or before the first day of November next, or at such other times and in such manner as therein declared.

Provided, however, that in case the party of the second part shall at any time be of opinion that this contract is not duly complied with by the said party of the first part, or that it is not in due progress of execution, or that the said party of the first part is irregular, or negligent; then, and in such case, he shall be authorized to declare this contract forfeited, and thereupon the same shall become null; and the party of the first part shall have no appeal from the opinion and decision aforesaid, and he hereby releases all right to except to, or question the same, in any place or under any circumstances whatever; but the party of the first part shall still remain liable to the party of the second part, for the damages occasioned to him by the said non-compliance, irregularity, or negligence.

And provided, also, that in order to secure the faithful and punctual performance of the covenants above made by the party of the first part, and to indemnify and protect the party of the second part from loss in case of default and forfeiture of this contract, the said party of the second part shall, notwithstanding the provision in the annexed schedule, be authorized to retain in their hands, until the completion of the contract, fifteen per cent. of the moneys at any time due to the said party of the first part. Thus covenanted and agreed by the said parties, this twelfth day of July, 1886, as witness their seals.

SEBRE HOWARD, [SEAL.]

[SEAL.]

[SEAL.]

[SEAL.]

JAMES CANBY, President,

Sealed and delivered in the presence of—

WILLIAM P. BROBSON. [SEAL.]

Schedule referred to above.

The above-named Sebre Howard and Hiram Howard contract to do all the grading of that part of section No. 9, in the State of Maryland, of the Wilmington and Susquehanna Railroad, which extends from station No. 191, to the end of the piers and wharf in the River Susquehanna, opposite Havre de Grace, according to the directions of the engineer, and according to the specification hitherto annexed, for the sum of twenty-six cents per cubic yard, for every cubic yard excavated; the said section to be completed in a workmanlike manner, viz.: one 311*] mile from *station No. 191, by October 15, 1886, and the residue by November 1, ensuing.

They also contract to make the embankment at the river from the excavation of the road, provided the haul shall not exceed a distance of eight hundred feet from the eastern termination of the said embankment; all other portions of the hauling together not to exceed an average of eight hundred feet; and for any distance exceeding the said average the price is to be one and a half cents per cubic yard for each hundred feet.

The party of the second part contracts to pay to the said Sebre and Hiram Howard, the said sum of twenty-six cents per cubic yard in monthly payments, according to the measurement and valuation of the engineer, retaining from each payment fifteen per cent. until the final completion of the work. If any additional work, in consequence of water, grub-

bing or hard material, is required on the side ditch or ditches, or through Cowden's woods, the same is to be decided by the engineer, as in case of rock, &c.

Specification of the manner of grading the Wilmington and Susquehanna Railroad.

Before commencing any excavation or embankment, the natural sod must be removed to a depth of three inches from the whole surface occupied by the same, for the purpose of afterwards sodding the slopes thereof, and all stumps, trees, bushes, &c., entirely removed from the line of road as directed by the engineer. In cases of embankment a grip must be cut about one foot deep for footing the slopes, and preventing them from slipping. The embankments must be very carefully carried up in layers of about one foot in thickness, laid in hollow form, and in so doing, all hauling or wheeling, whether loaded or empty, must be done over the same. The slopes of excavations and embankments will be one and a half horizontal to one perpendicular, except where otherwise ordered by the engineer, and are to be sodded with the sods removed from the original surface.

Side ditches and back drains must be cut wherever ordered by the engineer, at the same price as the common excavation. The side ditches will on an average be about nine feet wide on top, and about two feet deep, and will extend along a great portion of the road. In most places where embankments are to be made, the cutting of the adjacent parts is about sufficient for their formation; and as the contractor is supposed to have examined the ground and profiles, and to have formed his estimates accordingly, no allowance will be made for extra hauling. Where more earth is required than is procured from the excavations, the contractor shall take it from such places as the engineer may *direct, the cost per cubic yard being [*312 the same as the other parts. Where there is any earth from the excavations, more than is required for the embankments, it shall be placed where ordered by the engineer.

All the estimates will be made by measuring the excavations only.

Loose rocks, boulders, ironstone, or other pebbles, of a less weight than one fourth of a ton, are to be removed by the contractor at the same price as the common excavation; but in cases of larger size, or for blasting, the price shall be a matter of special agreement between the contractors and engineer, and if the former should not be willing to execute it for what appears to the engineer a fair price, the latter may put the same into other hands.

No extra allowance will be made for cutting down trees, grubbing, bailing, or other accidental expenses.

Measurements and estimates will be taken about once a month, and full payment will be made by the directors, after deducting fifteen per cent., which deduction on each estimate will be retained until the entire contract is completed, which must be on or before the —

It is distinctly understood by the contractors that the use of ardent spirits among the workmen is strictly forbidden.

WILLIAM STRICKLAND,

Chief Eng. of the Wil. & Sus. R. R.

Indorsed—S. & H. Howard's Contract.

Sebre Howard went to work alone, Hiram Howard never having signed or participated in the contract.

On the 17th of September, 1836, he was served with an injunction issued by the High Court of Chancery of Maryland, against the Maryland and Delaware Railroad Company, its agents and servants, commanding them to desist from the prosecution of a particular part of the work.

On the 30th of October, 1836, the injunction was dissolved.

On the 18th of January, 1837, the directors of the company passed the following resolution:

A communication was received from the chief engineer, representing that the contract of S. & H. Howard for section No. 9, was not in due progress of execution, and recommending that it should be forfeited, which was read, and on motion of Mr. Gilpin, the following resolution was adopted, viz.:

"Whereas, a contract was duly executed between S. Howard (acting for himself and H. Howard) and the Wilmington and Susquehannah Railroad Company, bearing date the 12th day of July last, whereby the said S. & H. 313*) Howard contracted, for the *consideration therein mentioned, to do all the grading of that part of section No. 9, of the said railroad, which extends from station No. 191 to the end of the piers and wharf in the River Susquehannah, opposite Havre De Grace, according to the directions of the engineer of the said railroad, and to the specification thereto annexed, and to complete the same by the time therein mentioned; and whereas, the times appointed for the completion of said contract have elapsed, and the work is not yet completed, and the party of the second part is of the opinion that the contract is not duly complied with by the party of the first part, and that the said contract is not in due progress of execution: Therefore, resolved, that the said contract be, and the same is hereby declared to be forfeited."

A suit was then brought in Cecil County Court, by Sebre and Hiram Howard, against the Wilmington and Susquehannah Railroad Company, which was finally disposed of at October Term, 1847. The result of the suit is shown in the following copy of the docket entries, which were admitted in evidence by the Circuit Court, but the admissibility of which constituted the subject of the first bill of exceptions.

In Cecil County Court, October Term, 1847.

S. & H. HOWARD, use of Charles Howard, use of Hinson H. Cole, \$5,000, use of Daniel B. Banks, \$1,000,

v.

THE WILMINGTON AND SUSQUEHANNAH RAILROAD COMPANY.

Procedendo and record for the court of appeals; leave to amend pleadings; narr. filed; pleas; *similiter*; replication and demurrer; leave to defendant to amend pleadings; amended pleas; replication and demurrer; rejoinder; agreement; leave to defendants to issue commission to Wilmington, Delaware; agreement filed; jury sworn; jury find their verdict for the defend-

ants, under instructions from the court, without leaving their box; December 3d, 1847, judgment on the verdict.

In testimony that the above is a true copy of the docket entries taken from the record of Cecil County Court, for October Term, 1847, I hereunto set my hand, and the seal of said court affix, this 12th of November, A. D. 1849.

R. C. HOLLYDAY, [SEAL.]

Clerk of Cecil County Court.

This suit having thus failed, Sebre Howard, a citizen of the *State of Illinois, brought [*314 an action of covenant in his own name, in the Circuit Court of the United States for the District of Maryland. The declaration set out the following breaches which were filed short by agreement of counsel.

1st breach. In not paying the estimate of the first of January.

2d breach. Damages resulting from the injunction sued out by John Stump.

3d breach. For not building the bridge over Mill creek, and the culvert in Cowden's woods, whereby the plaintiff was damaged by the necessity of making circuitous hauls.

4th breach. For omission seasonably to build the wharf and cribs on the Susquehannah, whereby the plaintiff was prevented from hauling the earth from the excavations made by him upon said road.

5th breach. For refusal to point out a place or places to permit plaintiff to waste or deposit the earth from the excavations of the road.

6th breach. For refusal to pay for the over-haul.

7th breach. For fraudulently declaring contract forfeited, and thereby depriving plaintiff of gains which would otherwise have accrued to him on the completion of the contract, and refusal to pay the amount of the 15 per cent. retained by the defendants under the several estimates.

8th breach. For not paying said fifteen per cent. so retained upon the several estimates.

The defendants put in the following pleas:

Pleas. And the said defendant, by William Schley, its attorney, comes and defends the wrong and injury, when, &c., and says, that the said supposed agreement in writing, in the said declaration mentioned, is not the deed of this defendant. And of this the said defendant puts itself upon the country, &c.

And the said defendant, by leave of the court here, for this purpose first had and obtained, according to the form of the statute in such case made and provided, for a further plea in this behalf, says, that the said supposed agreement in writing, in the said declaration mentioned, is not the deed of the Wilmington and Susquehannah Railroad Company, in the said declaration mentioned. And of this the said defendant puts itself upon the country, &c.

And the said defendant, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, for a further plea in this behalf to the said declaration, says, that the said Wilmington and Susquehannah Railroad Company, in the said declaration mentioned, did not make, or enter into, an agreement in writing with the said plaintiff, sealed with the corporate seal of the said [*315

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Wilmington and Susquehannah Railroad Company, in manner and form as the said plaintiff hath above in his said pleading alleged. And of this the said defendant put itself upon the country, &c.

WILLIAM SCHLEY,

Attorney for Defendant.

It was agreed that leave was given to the defendants to give in evidence any matter of defense which could be specially pleaded.

Upon this issue the cause went to trial, when the jury, under the instructions of the court, which will be hereafter set forth, found a verdict for the plaintiff for \$24,425.24 damages, with costs.

It has been already mentioned that the defendants took six exceptions, during the progress of the trial, to the admission of evidence. They were as follows:

First Exception. At the trial of this cause, the plaintiff, to maintain the issue on his part joined, proved by Richard T. Hollyday, a competent witness, that he is the present clerk of Cecil County Court, and that the following is a true copy of the docket entries under the seal of Cecil County Court in a case heretofore depending in that court.

(Then followed the docket entries above quoted.)

The plaintiff then offered to read said docket entries in evidence to the jury, for the purpose of showing that such a suit was depending in said court, as shown by said docket entries, and for no other purpose; but the defendant, by its counsel, objected to said docket entries as legal and competent evidence in this cause, and insisted that the same ought not to be read to the jury as evidence in this cause, for the purpose for which they were offered, or for any other purpose. But the court overruled the said objection, and permitted the said docket entries to be read in evidence in this cause, and the same were accordingly read to the jury. To the admission of which said docket entries in evidence, the defendant, by its counsel, prayed leave to except.

Second Exception. The plaintiff then further proved, by said Richard T. Hollyday, that he was present in the month of December, 1847, at the trial in Cecil County Court of the said case, specified in the said docket entries referred to in the first bill of exceptions, and being shown the paper marked A, of which the following is a true copy:

(The paper marked A has been already described in this statement.)

He was asked whether or not he had ever seen said paper before, and particularly whether 316*] or not he had seen the paper A *exhibited as a paper of defendant's, and in the possession of the counsel for the defendant in said case, specified in said docket entries at the said trial in December, 1847; but the defendant, by its counsel, objected to said question, and to the admission in evidence of any answer to the same, on the ground that that suit was between different parties; but the court overruled the objection to said question, and to the answer to the same, and permitted the said witness to answer the same, who deposed that the plaintiff in said case, at said trial in Cecil County Court, relied upon another paper, shown to the witness marked B, and which is as follows:

(The paper marked B has been heretofore described in this statement.)

But that one of the counsel for the defendant had then and there in his possession, at said trial, the said paper, marked A, and handed the said paper to Judge Chambers as the real contract in the case, and spoke of it as the real and genuine contract between the parties.

To which said question to said witness, and to the answer given by the said witness thereto, the defendant by its counsel prayed leave to except.

Third Exception. The said Richard T. Hollyday being further examined, stated that whether the impression on said paper, marked A, is or is not the seal of the Wilmington and Susquehannah Railroad Company, he does not know, not having seen at any time the seal of the said Company; but that the witness thinks that said paper A was offered in evidence by the defendant in said cause, in Cecil County Court, as the deed of said Company, and that evidence of that fact that it was such deed was offered by said defendant. The plaintiff then offered to read in evidence to the jury the said paper marked A, but the defendant, by its counsel, objected to the admissibility of said paper in evidence to the jury. But the court overruled the said objection, and permitted the said paper to be read in evidence to the jury, as *prima facie* proved to be the deed of the said Wilmington and Susquehannah Railroad Company; to the admission of which said paper in evidence, the said defendant, by its counsel, excepted.

Fourth Exception. The plaintiff then further proved by Francis W. Ellis, a competent witness, that he is a member of the bar of Cecil County Court, and that he was present at said court in December, 1847, at the trial of said case, specified in said docket entries set out in the first bill of exceptions; that at said trial no evidence whatever was given by the defendant; but that, at the conclusion of the plaintiff's case, an objection was made by the counsel for the defendant in the case, to the plaintiff's *right of recovery, and he thinks the [*317 ground of objection was that the action should not have been brought in the names of Sebre Howard and Hiram Howard. The said witness further stated that, at said trial, one of the counsel for the defendant in that case had in his hands the paper marked A, offered in evidence in this case by the plaintiff, and that he stated, not only to those around him at the bar, but also in conversation with the presiding judge, that said paper was the real contract between the parties.

Evidence of Henry Stump. The plaintiff further proved by Henry Stump, a competent witness, that he was present at the trial, in December, 1847, in Cecil County Court, of the said case, specified in the said docket entries set out in the first bill of exceptions, and that he was so present as one of the counsel for said plaintiff, and that he took part in the trial. That at said trial the said paper, marked A, was offered in evidence by the defendant, and relied on by the counsel for the defendant in that case, the same having been proved by a witness, to be sealed with the corporate seal of said defendant; and that the objection to the right of recovery in that case was based on said

paper, marked A, as a deed; and that the production and proof of said paper A, as the sealed deed of the defendant, at once satisfied him that said suit could not be maintained, and that he therefore suffered the verdict to be taken for the defendant.

The plaintiff then read the agreement of union, dated 5th February, 1838, between the Wilmington and Susquehannah Railroad Company, the Baltimore and Port Deposit Railroad Company, and the Philadelphia, Wilmington and Baltimore Railroad Company, under the last-mentioned name. He then offered to read in evidence a copy of an injunction, issued from the Court of Chancery of Maryland, on the 18th September, 1836, at the suit of John Stump against the Delaware and Maryland Railroad Company. The defendant objected to the admissibility of the copy so offered; but the objection was overruled, and the court permitted said paper to be read in evidence to the jury, "for the purpose of showing the fact that an injunction had issued, which it was admitted had been served on Howard, on the 17th September, 1836, and as furnishing evidence of excuse, on the part of said Howard, for his failure to complete the work to be done, under his contract, by the time therein specified."

Fifth Exception. After evidence, on various points, had been given on both sides, the defendant offered to prove by James Canby, "that when the two papers, respectively marked A and B, were signed by him and by Sebre Howard," and sealed by the latter, that it was then understood between them, that both said 318*] "papers were also, thereafter, to be signed and sealed by Hiram Howard." The plaintiff objected to the evidence, so offered to be given; and the court sustained the objection, and refused to allow the question to be propounded to the said witness, or to be answered by said witness, and rejected as inadmissible the evidence so proposed to be given.

[Mr. Canby had previously proved that he was then the President of the Wilmington and Susquehannah Railroad Company, and that both the papers, A and B, were signed and sealed by him, and by Sebre Howard. He had also proved that, although the impression on paper A was the seal of said Company, yet that it was never placed there by his authority, or by the authority of the board. He had also proved that the section was let to Sebre and Hiram Howard. Evidence had also previously been given, that all the estimates were made in the names of S. & H. Howard; and that all receipts for payments made were given in their joint name.]

The object of the defendant, by the evidence proposed to be given, was to confirm the evidence of the said witness, that the seal of the company impressed on paper A, was not placed there by his authority, or by the authority of the board; and further, and more especially to show that, in point of fact, said paper A was not intended, sealed or unsealed, as it then stood, to be the complete and perfect contract of the Company; and that the actual execution of the contract by Hiram Howard, also, was a condition precedent to its existence as the contract of the Company.

Sixth Exception. This exception covered upwards of an hundred pages of the printed

record. The evidence offered by the plaintiff and objected to by the defendant, consisted principally of so much of the record of the case in Cecil County Court, as preceded the appeal, in that case, to the Court of Appeals; and it was offered by the plaintiff below, for the purpose of introducing, as evidence against the defendant below, the deposition of William P. Brobson, taken in that case, on behalf of the defendant in that case, and whose subsequent decease was proved. The defendant objected to the admission of said deposition in evidence in this case. The court, however, admitted the deposition, and it was accordingly read. The deposition was taken 7th April, 1840.

Seventh Exception. This included an exception to the refusal of the court to grant the prayers offered by the counsel for the defendants, and also an exception to the instructions given by the court to the jury. It has been already stated that the court laid aside the prayers offered by the counsel on both sides, and gave its own instructions to the jury; but by way of illustration, *the prayers [319 offered by the counsel for the plaintiff are here inserted also.

Plaintiff's Prayers.

1st. If the jury believe that Sebre Howard made with the defendants the contract in question, and went on to perform the work under the same, and so continued the same until the month of January, 1837, when the Company declared his contract forfeited, and that the engineers of the Company made an estimate of the work so done, showing a balance due the contractor, Howard, of ———, then plaintiff is entitled to recover that sum, with interest.

2d. If the jury believe the facts stated in the foregoing prayer, and further find that the plaintiff was stopped by the officers of the defendant from proceeding in the work, which stoppage was induced by the injunction issued and given in evidence; and if they further find that the defendant had neglected to procure any title to the land worked upon until after such injunction was laid and dissolved, then the plaintiff is entitled to recover such amount of damages as the jury may find from the evidence that he sustained by reason of his being turned off from said work.

3d. If the jury find the facts stated in the preceding prayers, then by the true construction of the contract the plaintiffs are entitled to the excess of overhaul, resulting from going off the Company's lands, and descending to and ascending from Mill Creek, in the construction of the embankment east of Mill Creek.

4th. If the jury find all the facts stated in the preceding prayers, and further find that the plaintiffs were obstructed in the performance of their work by the absence of proper cribs at the River Susquehannah, where plaintiff was at work at the time; and if they further find that he was, in consequence of such non-performance by defendants, turned away from this work, then plaintiffs are entitled to recover such amount as the jury may find he sustained damage by reason of such omission of defendant.

5th. That by the true construction of the contract in this case, the defendants were bound to furnish ground to waste the earth upon,

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which was to be dug out of the hills through which the road was to be cut by plaintiff; and if they find that the defendants refused to do so, plaintiff is entitled to recover such sum as the jury may find he sustained loss by not being furnished with ground to waste such earth upon.

6th. That plaintiff is entitled to recover for any and every overhaul exceeding an average of 800 feet.

7th. That if the jury find that the plaintiff 320*] faithfully performed *his work under this contract, and was only prevented from finishing it by the misconduct of the defendant, then plaintiff is entitled to recover such sum as he would have made by completing said contract.

8th. If the jury believe that the defendant willfully and fraudulently, and without any reasonable or proper cause, declared the contract given in evidence forfeited, then the plaintiffs are entitled to recover, notwithstanding such declaration of forfeiture, for any damages arising to them, after such declaration of forfeiture, in consequence thereof.

9th. That by the true construction of the contract given in evidence, it was the duty of the defendant to have all the culverts and bridges upon the route of said road, within the limits of plaintiffs' contract, prepared for the free pursuance of his work; and if the jury believe that defendants or persons employed by them neglected so to do, they, defendants, are liable for such damages as plaintiffs show they sustained in consequence of such omission or neglect of defendant.

10th. That by the true construction of this contract, it was the duty of defendants to prevent or remove all obstructions to the plaintiffs' work which it was within their power to remove; and it was their duty to have obtained a right to work on the road before said plaintiffs commenced their work; and if they find that, in consequence of legal proceedings against said company, plaintiffs were obstructed and hindered in the performance of their work, and thereby seriously damaged, that plaintiffs are entitled to recover for such damage.

11th. That plaintiffs are entitled to recover for all work and labor actually done and performed under said contract, including the 15 per cent. retained upon the several estimates, after deducting the payments shown to have been made.

And the defendant offered the following:

Defendant's Prayers.

1st. The defendant, by its counsel, prays the court to instruct the jury that if they shall find, from the evidence in this cause, that the seal upon the contract, offered in evidence by the plaintiff, dated 12th July, 1836, was not affixed to the said contract by the authority of the Wilmington and Susquehannah Railroad Company, and was affixed without the authority of the defendant in this suit, and was so affixed after the execution of the agreement of union, offered in evidence by the plaintiffs, dated the 5th of February, 1838, the plaintiff is not entitled to recover upon it in this suit.

321*] *2d. If the jury shall find, from the evidence in this cause, that at the trial in Cecil County Court, in December, 1847, of the

case of *Sebre Howard and Hiram Howard* against *The Wilmington and Susquehannah Railroad Company* spoken of in their testimony, by Mr. Hollyday, Mr. Ellis, Mr. Stump, and Mr. Scott, the plaintiffs in said suit offered in evidence to the jury, in support of the issue joined on their part, the contract offered in evidence in this cause, marked exhibit B, and shall further find, from the evidence in the cause, that the defendant in said suit offered no evidence whatever in support of the issue joined on its part, and that the counsel for the defendant in that suit, when the plaintiffs offered to read in evidence the contract, marked B, objected to the admissibility of the same in evidence upon the issue joined in said suit, upon the ground that whereas the plaintiffs in that suit declared on an alleged contract, made by the said plaintiffs with the said defendant in that suit, yet the said paper, so offered to be read in evidence by the said plaintiffs, being executed only by said Sebre Howard, and under his seal, was the contract alone of said Sebre Howard, and was not the same contract alleged by the plaintiffs in the pleadings in that case; and shall further find, from the evidence in the cause, that this was the only objection made and argued in the trial of said cause on the part of the defendant, and was the only point then and there decided by the said court, then the reliance on said objection does not estop or debar the defendant in this suit from denying that the paper, marked exhibit A, now offered in evidence in this suit by the plaintiff, is not the deed of the Wilmington and Susquehannah Railroad Company, even if the jury shall find, from the evidence in the cause, that the said paper A was then and there in court, in the possession of the defendant's counsel in that suit, and was spoken of by him, as stated by the witnesses, as the real contract between the parties; provided, they shall also find, from the evidence in the cause, that the counsel who appeared for the defendant in said suit were then wholly ignorant of the fact that said seal had been placed on the said contract, without any authority, as aforesaid.

3d. If the jury shall find, from the evidence in the cause, that the work done on the 9th section of the Wilmington and Susquehannah Railroad on and after the 12th day of July, 1836, so far as done by the plaintiff, Sebre Howard, was so done by said plaintiff as one of the firm of Sebre & Hiram Howard, and that all the estimates were made out as in favor of said firm, and received and receipted for by the plaintiff, so far as any moneys were received by him from the said Company in the *name and on behalf of said firm; [322 and that the plaintiff, in his dealings and transactions with said Company, professed to act as one of said firm, and for and on behalf of said firm, and never notified the said Company, or any of its officers, whilst engaged in work on said road, that he was not acting as a member of said firm, and for and on behalf of said firm, then the plaintiff is not entitled to recover in this case upon the first breach by him assigned in his declaration.

4th. If the jury shall find, from the evidence in the cause, that the resolution of the Board of the Wilmington and Susquehannah Railroad Company, dated 18th January, 1837,

offered in evidence in this cause, was duly passed by said Board, and shall not find from the evidence in the cause that the same was fraudulently passed by said Board, or by said Company, then the plaintiff is not entitled to recover on the 7th breach of his declaration.

5th. If the jury shall find with the defendant on the fourth prayer, and shall also find, from the evidence in the cause, that notice was given on the same day, to the plaintiff in the suit, of the passage of said resolution, then the said contract was thereby rendered null so far as concerned any liability thereunder on the part of the defendant; and that the plaintiff is not entitled to maintain this suit.

6th. If the jury shall find, from the evidence in the cause, that the first mile of said section No. 9 was not finished on or before the 15th day of October, 1836, and was not, in fact, finished at any time, nor accepted by the defendant as fully and completely graded by the plaintiff, or by the said firm of Sebre Howard and Hiram Howard; and shall further find, from the evidence, that the alleged excuses, alleged in pleading by the plaintiff, were not in any respect the cause of, or contributory to the failure on the part of the said plaintiff, or of the said plaintiff and said Hiram Howard, to finish the same in the time limited for that purpose in said contract, then the plaintiff is not entitled to recover in this case on said first breach in his said declaration.

7th. If the jury shall find, from the evidence, that the injunction issued by John Stump, offered in evidence in this cause, was issued without any justifiable cause, and without any basis in right, and that the issuing of said injunction was not based on any actual omission of duty on the part of said Company, then the plaintiff is not entitled to recover on the second count of his declaration.

8th. If the jury shall find, from the evidence in the cause, that the plaintiff was contractor on another section of the road of the said Company, and that said former section was completed by him before the making of the **con-323*** tract offered in evidence *in this case; and shall further find, that in the execution of said former contract the plaintiff provided bridges and other modes of intercommunication from one part of his work to another, without any complaint; and shall further find that it was the known usage of said Company to leave to the contractors the business of construction of their bridges, so as to pass with materials and excavation from one part of their work to another, and that such is the known and uniform usage of other public works, then the plaintiff is not entitled to recover on the second breach of his declaration.

9th. If the jury shall find, from the evidence in the cause, that the plaintiff, at the time he was stopped by the assistant engineer, Mr. Farquhar, from throwing more earth against the outer crib of the embankment at the river, might readily and conveniently have deposited many thousand cubic yards of earth within the limits of said embankment, if he had chosen so to do; and that the plaintiff perversely and stubbornly refused so to do; then the plaintiff is not entitled to recover on the fourth breach of his declaration.

10th. If the jury shall find, from the evi-

dence, that the excavations made by the plaintiff, in the month of December, 1836, were needed by the defendant for the embankment at the river; and shall also find that the same could have been conveniently deposited there by the plaintiff, and that the plaintiff knew these facts, then the plaintiff is not entitled to recover on the fifth breach of his declaration.

11th. If the jury shall find that fair and proper estimates were made by defendant for all the overhaul of earth made by the plaintiff, over the average haul of 800 feet, then the plaintiff is not entitled to recover on the 6th breach of his declaration.

12th. If the jury shall believe that, at the time of the execution of the agreement, the road to be excavated and graded was staked out and marked upon the ground, and that a profile was shown, showing the depth of excavation to be made, and the height of the embankments, and that afterwards the plan of the road was altered and changed, by which the excavations were to be deeper and wider, and some of the embankments higher and some lower, to suit the altered plan of the road, and that the work done by the plaintiff, and for which he claims damages, was in grading the road according to the altered plan, then the plaintiff is not entitled to recover in this action.

13th. If the jury shall believe that all the work done in pursuance of the agreement stated in the declaration was done by Sebre and Hiram Howard, and not by Sebre Howard alone, that then the plaintiff is not entitled to recover.

*The court thereupon rejecting the [***324** respective prayers on both sides, gave the jury the following instructions:

Court's Instructions to the Jury.

SEBRE HOWARD

v.

THE PHILADELPHIA, WILMINGTON AND BALTIMORE RAILROAD COMPANY.

1st. If the corporate seal of the Wilmington and Susquehannah Railroad Company was affixed to the instrument of writing upon which this suit is brought, with the authority of the Company, while it had a separate existence for the purpose of making it at that time, and as it then stood the contract of the Company, then the said instrument of writing is the deed of the said corporation, although it was never delivered to the plaintiff nor notice of the sealing given to him; and although no seal was affixed by the corporation to the duplicate copy delivered to him; and the defendant in the present action is equally bound by it, and in like manner.

2d. If the jury find from the evidence that this instrument of writing was produced in court, and relied upon by the present defendant, as a contract under the seal of the Wilmington and Susquehannah Railroad Company, in an action of *assumpsit* brought by Sebre and Hiram Howard against the last-mention[ed] Company in Cecil County Court; and that the said suit was decided against the plaintiffs upon the ground that this instrument was duly sealed by the said corporation as its deed, then the defendant cannot be permitted in this case

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to deny the validity of the said sealing, because such a defense would impute to the present defendant itself a fraud upon the administration of justice in Cecil County Court.

8d. If upon either of these grounds the jury find the instrument of writing upon which this suit is brought to be the deed of defendant, then the plaintiff is entitled to recover in this suit any damage he may have sustained by a breach of the covenants on the part of the corporation; but if they find that it is not the deed of the defendant upon either of these grounds, then their verdict must be for the defendant.

4th. The omission of the plaintiffs to finish the work within the times mentioned in the contract, is not a bar to his recovery for the price of the work he actually performed; but the defendant may set off any damage he sustained by the delay, if the delay arose from the default of the plaintiffs.

5th. If the defendant annulled this contract, as stated in the testimony, under the belief that [325*] the plaintiff was not prosecuting *the work with proper diligence, and for the reasons assigned in the resolution of the Board, they are not liable for any damage the plaintiff may have sustained thereby, even although he was in no default, and the Company acted in this respect under a mistaken opinion as to his conduct.

6th. But this annulling did not deprive him of any rights vested in him at that time, nor make the covenant void *ab initio*, so as to deprive him of a remedy upon it for any money then due him for his work, or any damages he had then already sustained.

7th. The increased work occasioned by changing the width of the road and altering the grade having been directed by the engineer of the Company under its authority, was done under this covenant, and within its stipulations, and may be recovered in this action, without resorting to an action of *assumpsit*.

8th. If the jury find for the plaintiff upon the first or second instructions, he is entitled to recover the amount due on the work done by him in December, 1836, and January, 1837, according to the measurements and valuation of the engineer of the Company, and cannot go into evidence to show that they were erroneous, or that he was entitled to a greater allowance for overhaul than the amounts stated in the estimates of the engineer.

9th. Also, if from any cause, without the fault of the plaintiff, the earth excavated could not be used in the filling up and embankments on the road and at the river, it was the duty of the defendant to furnish a place to waste it. And if the Company refused, on the application of the plaintiff, to provide a convenient place for that purpose, he is entitled to recover such damages as he sustained by the refusal, if he sustained any; and he is also entitled to recover any damage he may have sustained by the delay of his work or the increase of his expense in performing it, occasioned [by] the negligence, acts, or default of the defendant.

10th. Also, the plaintiff is entitled to recover the fifteen per cent. retained by the Company, unless the jury find that the company has sustained damage by the default, negligence or misconduct of the plaintiff. And if such dam-

age has been sustained, but not to the amount of the fifteen per cent., then the plaintiff is entitled to recover the balance, after deducting the amount of damage sustained by the Company.

11th. The corporation was not bound to provide bridges over the streams to enable the plaintiff to pass conveniently with his carts from one part of the road to another.

12th. The decision of the Court of Appeals is conclusive evidence that the injunction spoken of in the testimony, was *not [*326 occasioned by the default of the defendant; and the plaintiff is not entitled to recover damages for the delay occasioned by it, unless the jury find that the Company did not use reasonable diligence to obtain a dissolution of the injunction.

13th. If the jury find that the resolution of the Company annulling the contract was not in truth passed for the reasons therein assigned, but for the purpose of having the remaining work done upon cheaper terms than those agreed upon in the contract with the plaintiff, or for the purpose of oppressing and injuring the plaintiff, then he is entitled to recover damages for any loss of profit he may have sustained by the refusal of the Company to permit him to finish the work he had contracted to perform, if he sustained any.

The defendant, by its counsel, prayed leave to except, in respect of all and each of the prayers offered on the part of the defendant, to the court's refusal to grant said several prayers respectively; and also prayed leave to except to the instructions given by the court to the jury, and to each one of said instructions, severally and respectively; and prayed that the court here would sign and seal this, its seventh bill of exceptions, according to the form of the statutes in such case made and provided; and which is accordingly done this 16th day of November, 1850.

R. B. TANEY, [SEAL.]
U. S. HEATH, [SEAL.]

Upon all these exceptions the case came up to this court, and was argued by **Mr. Schley** for the plaintiffs in error, and **Messrs. Nelson and Johnson** for the defendant in error.

The reporter has not room to notice the arguments of Mr. Schley, for the plaintiffs in error, upon the points of evidence brought up in the first six exceptions. The points made by him upon the 7th exception which included the rulings of the court as instructions to the jury, were the following:

1. The defendant in error cannot, as sole plaintiff in the action, maintain the suit. Whether the contract be the deed of the Company, or a mere contract by parol, the covenantees or promisees, as the case may be, are Sebre Howard and Hiram Howard. This point, if well taken, is decisive of the case. (Platt on Covenants, 18; *Clement v. Henley*, 2 Rolle's Abr., 22; *Faiths, F.*, Pl. 2; *Vernon v. Jefferys*, 2 Stra., 1146; *Petrie v. Bury*, 3 Barn. & Cress., 353, 10 Eng. C. L. Rep., 108; *Rose v. Poulton*, 2 Barn. & Ad., 822; 22 Eng. C. L. Rep., 194; *Scott v. Godwin*, 1 Bos. & Pull., 67; *Anderson v. Martindale*, 1 East, 497; 1 Wms'. Saunders, 201, f., and cases cited there; 1 Saunders, Pl. & Ev., 390; *Wetherell v. Langton*, 1 Exch. Rep., Welsby, Hurl. & Gord., 634; *Foley v. Adden-*

327*] *brooke*, 4 Q. B., 197; *45 Eng. C. L. Rep., 195; *Hopkinson v. Lee*, 6 Q. B., 964; 51 Eng. C. L. Rep., 963; *Wakefield v. Brown*, 9 Q. B., 209, 58 Eng. C. L. Rep., 217; *Smith v. Ransom*, 21 Wend., 204.)

2. Unless the instrument, on which the action is founded, was, in fact, the deed of the Wilmington and Susquehanna Railroad Company, existing and operative as such, at the time of the union of the companies, an action of covenant cannot be maintained thereon, under the Act of 1837, against the plaintiff in error. This point, if well taken, is decisive of the case.

3. If the last preceding proposition cannot be supported, in its full extent, still, upon the issue joined on the plea of *non est factum*, the plaintiff in error was not estopped, in law, from showing that the paper was not, in fact, the deed of the Wilmington and Susquehanna Railroad Company. (*Wilson v. Butler*, 4 Bing. N. Cas., 748, 33 Eng. C. L. Rep., 521; 1 Chitty's Plead., 603, and cases referred to in the notes.)

4. The alleged production of the instrument, in the former suit, as a deed, would not, as matter of law, have been a fraud upon the administration of justice. Fraud or no fraud was a question of fact for the jury; and the application of the doctrine of estoppel ought to have been only upon the hypothesis, that the jury would find fraud, as a fact in the case. Accident, mistake or surprise, might afford good ground for relief in equity, under very peculiar circumstances; but not for the application of estoppel *in pais*, in the absence of all intention to perpetrate a fraud. Reference is made to the various cases collected in the notes, in 44 Law Lib., 467; *Conard v. Nicholl*, 4 Pet., 295; *United States v. Arredondo*, 6 Pet., 716.

5. Even if the instrument was properly held to be the deed of the said Company, yet, upon its true construction, time was of the essence of the contract. As the evidence clearly showed that the work was not performed within the time limited in that behalf, and as there was no valid excuse for the default, the plaintiff below could not recover on the basis of said agreement. The proper form of action would have been *assumpsit*, upon a *quantum valebat*, for the work and labor done. This objection, if well taken, is decisive of the case. (1 Chitty's Plead., 340, and cases in note 4; *Watchman v. Crook*, 5 Gill & Johns., 254; *Watkins v. Hodges & Lansdale*, 6 Harr. & Johns., 38; *Bank of Columbia v. Hagner*, 1 Pet., 455, 465; *Longworth v. Taylor*, 1 M'Lean's Rep., 395; *Fresh v. Gilson*, 16 Pet., 327, 334; Notes to *Cutler v. Powell*, Smith's L. C., 44, Law Lib. 17, 27; Gibbon's Law of Contracts, sec. 20 to sec. 47, and the cases there stated.)

6. By force of the declaration of forfeiture, if validly made (that is, if made under the circumstances stated as the hypothesis of the fifth instruction), the instrument was annulled, so far as it imposed any obligation upon the Company. It could not be made, thereafter, the basis of an action against the Company. Whilst conceding that the plaintiff below was not thereby deprived of any rights, completely vested in him before forfeiture; yet, it will be insisted, that the remedy, for the enforcement of such rights, is not by an action

upon the instrument itself. *Assumpsit*, upon a *quantum valebat*, would have been the appropriate form of action, or relief could have been had in equity. It will, therefore, be respectfully insisted that the sixth instruction (which is founded on the same hypothesis as the fifth), confounds the distinction between right and remedy. As to the first branch, *vide Mathewson v. Lydiate*, 5 Co., 22 b; S. C. Cro. Eliz., 408, 470, 546. As to second branch, 1 Chitty's Plead., 340, note 4, and cases there cited.

7. At all events, no action at law can be maintained against the plaintiff in error, on said annulled contract (if validly annulled), under the provisions of the Act of 1837, c. 30. The forfeiture was declared on the 18th January, 1837. The Act was passed on the 20th January, 1838. The instrument, therefore, was not a subsisting obligation of the Wilmington and Susquehanna Railroad Company, when the Act of union was passed.

8. The claim to the fifteen per cent. retained by the Company, was not a vested right, at the time the contract was annulled. Even if the sixth instruction was correct, the tenth instruction was erroneous. By the express terms of the agreement, the retained per cent. was not demandable until the completion of the contract. As the contract was never fulfilled by the contractor, the retained per cent. cannot be demanded, in an action based on the contract.

9. No recovery can be had in this suit, in respect of any matter not embraced in the contract. The subject matter of the contract is to be limited and confined to the original plan of the work, as contemplated and established, when the contract was made. The obligation of the contract cannot be extended beyond the subject matter. It had not the capacity of expansion or contraction, in accordance with any changes that the Company might choose to make. Such additional work cannot be recovered in this action, as declared in the seventh instruction of the court, as work done under the covenant, and within its stipulations. (2 Stark. Ev., 768; *Fresh v. Gilson*, 16 Pet., 327.)

10. There was no implied covenant on the part of the Company, to procure a place for the waste of the surplus excavations, if any. But even if there was such implied covenant, there was no evidence in the cause from which it could reasonably be inferred that there was any excavation to be wasted as surplus.

11. The defendant below was not liable, in any manner, for the consequences of the injunction issued from chancery. The action was grounded on the alleged covenant; and the Company, by its contract, had not warranted against interruption by the wrongful acts of any stranger. There is a wide difference between allowing the interruption to avail to the plaintiff below, as an excuse on his behalf for non-performance of the work within the prescribed time, and in making the delay of the Company, in removing the cause of interruption, a ground of action, against the defendant below, as being a violation by the Company of its covenant. (Platt on Covenants, 601, 3 Law Lib., 269, and case referred to in the notes there.)

12. It will be insisted, that there was no evidence in the cause to justify the hypothesis of the thirteenth instruction of the court; that

there was nothing from which the jury could legitimately find the facts of fraud and oppression, which are made the basis of that instruction.

13. And it will also be insisted, that the thirteenth instruction is erroneous, in this: that thereby it is laid down, that the loss of profits, if any, sustained by the plaintiff, is the proper measure of damages to be allowed by the jury, if they should find that the Company improperly refused to permit the plaintiff to perform his work. (*Gilpins v. Consequa*, Peters, C. C. Rep., 85; *Hopkins v. Lee*, 6 Wheat., 109; *Bell v. Cunningham*, 3 Peters, 69, 86; 2 Greenl. on Ev., sec. 261; *Fairman v. Pluck*, 5 Watts, 516, 518; *Story on Contracts*, 216; *Short v. Skipwith*, 1 Brock. Rep., 108.)

14. The third prayer of the defendant ought to have been granted. Even if, in fact, or by estoppel, the paper A was the deed of the company; yet, if the work was really performed by, or on behalf of, the firm of S. & H. Howard, and the dealings and transactions of the Company, in relation to said work, were with the said firm (without notice of any proposed or actual separate performance of the work by the plaintiff, individually, as under said paper A), then the defendant had a right to insist, that as the work was done by said firm, the privity of contract, in relation thereto, was with said firm, and that the estimate was payable only to the firm, under the paper B, as the subsisting contract between the parties, or otherwise upon an *assumpsit* to said firm.

15. The ninth and tenth prayers of the plaintiff ought to have been granted. The evidence of Mr. Heckert shows that "the embankment under the change of grade was 650 feet long and 100 feet wide, and there was much space 330*] wherein Howard *could have placed the earth from his excavations to make the said embankment." Besides this, there were express directions from the engineer to the plaintiff below, to place the embankment (not against the crib, but) on each side of the center line of the embankment for the width of twenty-five feet on each side of said center line. His conduct in throwing the embankment against the outer crib was willful and perverse.

The counsel for the defendants made the following references to authorities, to show that the exceptions were not sustainable:

On the First Exception: Act of Assembly of Maryland, 1817, c. 119; Peake's Evidence, 34; *Jones v. Randall*, Cowper's Rep., 17.

On the Second and Third Exceptions: Acts of Assembly of Maryland, 1831, c. 296; 1835, c. 93; 1837, c. 30; Agreement of Union, 1838, February 5th (page 29th of the Record); 4 S. & R., 246; 2 Hill, 64; 1 Metcalf, 27; 5 Monroe, 530; 17 Conn., 345, 355; 18 *Id.*, 138, 443; *Fishmonger v. Robertson*, 5 Mann. & Grang., 131, 192, 193.

On the Fourth Exception: Same authorities cited in support of the 4th instruction.

On the Sixth Exception: 1 Greenl. Ev., sec. 553, p. 618; 1 Adolphus & Ellis, 19.

On the Seventh Exception: In support of the 1st, 2d and 3d instructions. Coke's Lit., lib. 1, sec. 5. 36, (a.) note 222; 2 Leonard, 97; 1 Vent., 257; 1 Levinz, 46; 1 Siderfin, 8; Carthew, 360; 3 Keble, 307; 1 Kyd. on Corporations, 268.

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In support of the 4th Instruction: *Terry v. Dance*, 2 H. Black., 389; 1 East, 625, 631; 2 Johns., 272, 387; 5 Johns., 78; 15 Mass., 500; 19 Johns., 341; 2 Wash. C. C. Rep., 456; *Campbell v. Jones*, 6 T. R., 570; *Fishmonger v. Robertson*, 5 Mann. & Granger, 197; *Howard v. Philadelphia Railroad Co.*, 1 Gill., 311; *Goldsborough v. Orr*, 8 Wheat., 217; 1 Williams' Saund., 320; b.; *Portage v. Cole*, *Id.*, 220, n. 4; *Carpenter v. Crenwell*, 4 Bing., 409; *Boon v. Eyre*, 1 H. Bla., 273.

Mr. Justice Curtis delivered the opinion of the court:

Sebre Howard brought his action of covenant broken, in the Circuit Court of the United States for the District of Maryland, and upon the trial, the defendants took seven bills of exception, which are here for consideration upon a writ of error. Each of them must be separately examined.

The first raises the question, whether Howard could prove that a certain suit was pending in Cecil County Court by the testimony of the clerk of that court to the verity of a copy of the docket entries made in that suit by him, as clerk.

*It is not objected that a copy of the [*331 docket entries was produced instead of the original entries, because no court is required to permit its original entries to go out of the custody of its own officers, in the place appointed for their preservation; but the objection is, that a formal record ought to have been shown. There are two distinct answers to this objection, either of which is sufficient.

By the Act of Assembly of Maryland (1817, c. 119), the clerk of the County Court is not required to make up a formal record. The docket entries and files of the court stand in place of the record. When a formal record is not required by law, those entries which are permitted to stand in place of it are admissible in evidence. Several judicial decisions in England have been referred to by the counsel of the plaintiff in error, to the effect, that the finding of an indictment at the sessions cannot be proved by the production of the minute book of the sessions, from which book the roll, containing the record of such proceedings, is subsequently made up. (See 2 Phil. Ev., 194.) But the distinction between those cases and a case like this is pointed out in a recent decision of the Court of King's Bench in *Regina v. Yeeveley*, 8 Ad. & El., 806, in which it was held, that the minute book of the sessions was admissible to prove the fact that an order of removal had been made, it appearing that it was not the practice to make up any other record of such an order; and Lord Denman fixes on the precise ground on which the evidence was admissible in this case, when he says, "the book contains a caption, and the decision of the sessions; and their decision is the fact to be proved."

So in *Arundell v. White*, 14 East, 216, the plaintiff offered the minute book of the Sheriff's Court in London, containing the entry of the plaint, and the word "withdrawn," opposite to the entry; and proved it was the usual course of the court to make such an entry when the suit was abandoned by the plaintiff; it was held to be competent evidence to prove the abandonment of the suit by the plaintiff and its final

termination. In *Commonwealth v. Bolkom*, 3 Pick., 281, it was decided that the minute book of the sessions, showing the grant of a license to the defendant, was legal evidence of that fact, there being no statute requiring a technical record to be made up.

And in *Jones v. Randall*, Cowper's R., 17, copies of the minute book of the House of Lords were admitted in evidence of a decree, because it was not the practice to make a formal record.

The principle of all these decisions is the same. Where the law, which governs the tribunal, requires no other record than the one, a copy of which is presented, that is sufficient. 332*] In *Maryland*, no technical record was required by law to be made up by the clerks of the county courts; and, therefore, no other record than the one produced was needful to prove the pendency of an action in such a court.

But there is another point of view in which this evidence was clearly admissible.

The fact to be proved was the pendency of an action. An action is pending when it is duly entered in court. The entry of an action in court is made by an entry on the docket, of the title of the case, by the proper officer, in the due course of his official duty. Proof of such an entry being made by the proper officer, accompanied by the presumption which the law entertains, that he has done his duty in making it, is proof that the action was duly entertained in court, and so proof that the action was pending; and if the other party asserts that it had been disposed of, at any particular time after it was entered, he must show it. The docket entry of the action was therefore admissible for this special purpose, because it was the very fact which, when shown, proved the pendency of the action, until the other party showed its termination.

The second bill of exceptions was taken to the ruling of the court admitting a witness to testify that he was present at the trial of the above-mentioned case in Cecil County Court, in December, 1847, in which Sebre Howard and Hiram Howard were shown by the docket entries to have been plaintiffs, and the Wilmington and Susquehannah Railroad Corporation defendant; that the plaintiffs at that trial relied on a paper writing, shown to the witness, and set out in the bill of exceptions; that one of the counsel of the defendant had in his possession another paper writing, also shown to the witness, and being the deed declared on in this suit; and that the defendant's counsel handed this last-mentioned paper to the presiding judge, and spoke of it as the true and genuine contract between the parties.

To render the ruling, to which this bill of exceptions was taken, intelligible, it is necessary to state, that the Wilmington and Susquehannah Railroad Corporation was the defendant in that action, which was *assumpsit*, founded on the paper first spoken of by the witness, which did not bear the seal of the corporation; that by the Act of Assembly of 1837, c. 30, the Baltimore and Susquehannah Company, the Baltimore and Port Deposit Company, and the Philadelphia, Wilmington and Baltimore Company, were consolidated, under the name of the Philadelphia, Wilmington and Baltimore Railroad Company, and that this action

being covenant, against the Philadelphia, Wilmington and Baltimore Railroad Company, and the plea *non est factum*, the plaintiff was endeavoring to prove that the *paper [*333 declared on bore the corporate seal of the Wilmington and Susquehannah Railroad Company. This being the fact to be proved, evidence that the corporation, through its counsel, had treated the instrument as bearing the corporate seal, and relied upon it as a deed of the corporation, was undoubtedly admissible. It is objected that the parties to that suit were not the same as in this one; but this is wholly immaterial. The evidence does not derive its validity from any privity of parties. It tends to prove an admission by the corporation, that the instrument was sealed with its seal. It is further objected that the admission was not made by the defendants in this action, but by the Wilmington and Susquehannah Corporation. It is true the action in the trial of which the admission was made, being brought before the union of the corporations, was necessarily in the name of the original corporation; but as, by virtue of the act of union, the Wilmington and Susquehannah Company, the Baltimore and Port Deposit Company, and the Philadelphia, Wilmington and Baltimore Company were merged in and constituted one body corporate, under the name of the Philadelphia, Wilmington and Baltimore Railroad Company, it is very clear that at the time the trial took place in Cecil County Court, all acts and admissions of the defendant in that case, though necessarily in the name of the Wilmington and Susquehannah Company, were done and made by the same corporation which now defends this action. This exception must therefore be overruled.

The third exception is that the court permitted the deed to be read to the jury, although only vague and inconclusive evidence had been given, that it bore the corporate seal. We do not consider the evidence was vague, for it applied to this particular paper, and tended to prove it to be the deed of the Company. Whether it would turn out to be conclusive, or not, depended upon the fact whether any other evidence would be offered to control it, and upon the judgment of the jury. But the deed was rightly admitted to be read as soon as any evidence of its execution, fit to be weighed by the jury, had been given by the plaintiff. It was argued that this evidence was not sufficient to change the burden of proof; and it is true that, upon the issue whether the paper bore the corporate seal, the burden of proof remained on the plaintiff throughout the trial, however the evidence might preponderate, to the one side or the other (*Powers v. Russell*, 13 Pick., 69); but the court did not rule that the burden of proof was changed, but only that such *prima facie* evidence had been given as enabled the plaintiff to read the deed to the jury.

The subject matter of the fourth exception became wholly immaterial in the progress of the cause, and could not be assigned *for [*334 error, even if the ruling had been erroneous. (*Greenleaf's Lessee v. Birth*, 5 Pet., 132.) But we think the ruling was correct.

The fifth exception was taken to the refusal of the court to allow a question to be answered

by James Canby, one of the defendant's witnesses. This witness had already testified as follows:

"Leslie and White were the first contractors, and they were induced to relinquish it at the instance of the board, and it was then let to Sebre and Hiram Howard; the terms and price, and other essentials of the contract, were entered into on the 12th July, 1836; and on that day two papers were prepared and were then signed by him, and also signed by Sebre Howard; and deponent, as President of the Company, expressly directed the Secretary, Mr. Brobson, that the seal of the Company was not to be fixed to either paper until Hiram Howard signed and sealed both of them. The two papers, respectively marked A and B, being shown to him, he stated that they are the two papers to which he refers; that the impression of the seal on said paper A. is the seal of the Wilmington and Susquehannah Railroad Company, but that said seal was not placed there, he is very positive, at any time whilst he was President of said Company, and was never placed there by his authority or by the authority of the Board."

The defendant now insists he had a right to prove by this witness, that although the paper bore the corporate seal of the Company, it was not its deed, because of an understanding between the witness and the plaintiff that Hiram Howard was to execute the paper. If the offer had been to prove that at the time the corporate seal was affixed, it was agreed the instrument should not be the deed of the Company, unless, or until, Hiram Howard should execute it, the evidence might have been admissible. (*Pawling et al. v. The United States*, 4 Cranch, 219; *Derby Canal Company v. Wilmot*, 9 East, 360; *Bell v. Ingestre*, 12 Ad. & El., N. S., 317.) But the understanding to which the question points, was prior to the sealing, and in no way connected with that act, of which the witness had no knowledge. It did not bear upon the question whether the instrument was the deed of the Company, and was properly rejected.

The sixth exception rests on the following facts: The plaintiff offered to read the deposition of a deceased witness taken by the defendants in the case in Cecil County Court, to prove that the paper in question bore the seal of the corporation placed there by the deponent, an officer of the corporation. The defendant objected, but the court admitted the evidence. We consider the evidence was admissible upon 335*] two grounds: to *prove that in that case the defendant had asserted this instrument to be the deed of the corporation, and relied on it as such; and also, because the witness being dead, his deposition, regularly taken in a suit in which both the plaintiff and defendant were parties, touching the same subject matter in issue in this case, was competent evidence on its trial. It is said the parties were not the same. But it is not necessary they should be identical, and they were the same, except that Hiram Howard was a coplaintiff in the former suit, and this diversity does not render the evidence inadmissible. (1 Greenl. Ev., 553; 1 Ad. & El., 19.)

The seventh and last bill of exceptions covers nine distinct propositions given by the court to

the jury as instructions. The first of the instructions excepted to was as follows:

"If the jury find from the evidence that this instrument of writing was produced in court, and relied upon by the present defendant, as a contract under the seal of the Wilmington and Susquehannah Railroad Company, in an action of *assumpsit* brought by Sebre and Hiram Howard, against the last-mentioned Company in Cecil County Court; and that the said suit was decided against the plaintiffs upon the ground that this instrument was duly sealed by the said corporation as its deed, then the defendant cannot be permitted in this case to deny the validity of said sealing, because such a defense would impute to the present defendant itself a fraud upon the administration of justice in Cecil County Court."

It is objected that this instruction applied the doctrine of estoppel, where the matter of the estoppel had not been relied on in pleading. The rules on this subject are well settled. If a party has opportunity to plead an estoppel and voluntarily omits to do so, and tenders or takes issue on the fact, he thus waives the estoppel and commits the matter to the jury, who are to find the truth. (1 Saund., 325 a., n. 4; 2 B. & A., 668; 2 Bing., 377; 4 Bing. N. C., 748.) But if he have not opportunity to show the estoppel by pleading, he may exhibit the matter thereof in evidence, on the trial, under any issue which involves the fact, and both the court and the jury are bound thereby. (1 Salk., 276; 17 Mass., 369.) Now, the plea in this case was *non est factum*, which amounts to a denial that the instrument declared on was the defendant's deed at the time of action brought. If sealed and delivered, and subsequently altered, or erased, in a material part, or if the seal was torn off, before action brought, the plea is supported. (5 Coke, 23, 119; b.; 11 Coke, 27, 28; Co. Lit., 35 b., n. 6, 7.) It follows that a replication to the effect that on some day, long before action brought, the instrument was the deed of the defendant, would be bad on demurrer, for it would not completely answer the plea.

*The plaintiff cannot be said to have [336 opportunity to plead an estoppel, and voluntarily to omit to do so, when the previous pleadings are such that if he did plead it, it would be demurrable.

Besides, a plea of *non est factum* rightly concludes to the country, and so the plaintiff has no opportunity to reply specially any new matter of fact. He can only join the issue tendered, and if he were prevented from having the benefit of an estoppel, because he has not pleaded it, it would follow that the plaintiff can never have the benefit of an estoppel when the defendant pleads the general issue, for in no such case can he plead it. This was clearly pointed out in *Trevivan v. Lawrence*, 1 Salk., 276, where the court say, "that when the plaintiffs' title is by estoppel, and the defendant pleads the general issue, the jury are bound by the estoppel." And it is in this way that the numerous cases of estoppels *in pais* which are in the recent books of reports, have almost always been presented.

It is further objected, that the facts supposed in the instruction did not amount in law to an estoppel. We think otherwise. *Hull v. White*,

3 C. & P., 137, was detinue for certain deeds. The defendant wrote to the plaintiffs' attorney, and spoke of the deed as in his possession under such circumstances as ought to have led him to understand a suit would be brought upon the faith of what he said. Best, *Ch. J.*, ruled: "If the defendant said he had the deeds, and thereby induced the plaintiffs to bring their action against him, I shall hold that they may recover, though the assertion was a fraud on his part." In *Doe v. Lambly*, 2 Esp., 635, the defendant had informed the plaintiffs' agent that his tenancy commenced at Lady-day, and the agent gave a notice to quit on that day. This not being heeded, ejectment was brought, and the tenant set up a holding from a different day. But Lord Kenyon refused to allow him to show that he was even mistaken in his admission, for he was concluded. *Mordecai v. Oliver*, 3 Hawks, 479; *Crocket v. Lasbrook*, 5 Mon., 530; *Trustees of Congregation, &c., v. Williams*, 9 Wend., 147, are to the same point.

These decisions go much further than this case requires, because the defendant not only induced the plaintiff to bring this action, but defeated the action in Cecil County Court, by asserting and maintaining this paper to be the deed of the Company; and this brings the defendant within the principle of the common law, that when a party asserts what he knows is false, or does not know to be true, to another's loss, and his own gain, he is guilty of a fraud; a fraud in fact, if he knows it to be false, fraud in law, if he does not know it to be true. (*Polhill v. Walter*, 3 B. & Ad., 114; *Lobdell v. Baker*, 1 Met., 201.)

337*] *Certainly it would not mitigate the fraud, if the false assertion were made in a court of justice and a meritorious suit defeated thereby. We are clearly of opinion, that the defendant cannot be heard to say, that what was asserted on the former trial was false, even if the assertion was made by mistake. If it was a mistake, of which there is no evidence, it was one made by the defendant, of which he took the benefit, and the plaintiff the loss, and it is too late to correct it. It does not carry the estoppel beyond what is strictly equitable, to hold that the representation which defeated one action on a point of form should sustain another on a like point.

The next instruction is objected to on the ground that Hiram Howard ought to have been joined as a coplaintiff. By reference to the indenture, it will be seen that it purports to be made between Sebre Howard and Hiram Howard, of the first part, and the Wilmington and Susquehanna Railroad Company, of the second part. The covenants are not by or with these persons *nominatim*; but throughout, the party of the one part covenants with the party of the other part. Sebre Howard alone and the corporation sealed the deed.

It is settled that if one of two covenantees does not execute the instrument, he must join in the action, because whatever may be the beneficial interest of either, their legal interest is joint, and if each were to sue, the court could not know for which to give judgment. (*Stingsby's case*, 5 Coke, 18, *b.*; *Petrie v. Bury*, 8 B. & C., 353.) And the rule has recently been carried so far as to hold, that where a joint covenantee had no beneficial interest, did not

seal the deed, and expressly disclaimed under seal, the other covenantee could not sue alone. (*Wetherell v. Langton*, 1 Wels., H. & G., 634.) But this rule has no application until it is ascertained that there is a joint covenantee, and this is to be determined in each case by examining the whole instrument. Looking at this deed, it appears the covenant sued on was with "the party of the first part," and the inquiry with whom the covenant was made, resolves itself into the question, what person, or persons, constituted "the party of the first part," at the moment when the deed took effect.

The descriptive words, in the premises of the deed, declare Sebre and Hiram Howard to be the party of the first part; but inasmuch as Hiram did not seal the deed, he never in truth became a party to the instrument. He entered into no covenant contained in it. When, in the early part of the deed, the party of the first part covenants with the party of the second part to do the work, it is impossible to maintain that Hiram Howard is there embraced, under the words "party of the first part," as a covenantor. And when, in the next sentence, the party of the *second part [**338** covenants with the party of the first part to pay for the work, it would be a most strained construction to hold, that the same words do embrace him as a covenantee. There can be no sound reason for the construction, that the words "party of the first part" mean one thing, when that party is to do something, and a different thing, when that party is to receive compensation for doing it. The truth is, that the descriptive words are controlled by the decisive fact, that Hiram did not seal the deed, and so *error demonstratio* plainly appears. An examination of the numerous authorities cited by the counsel for the plaintiff in error will show that they are reconcilable with this interpretation of the covenants; for, in all the cases in which one of the persons named in the deed did not seal, he was covenanted with *nominatim*. Our conclusion is, that the action was rightly brought by Sebre Howard alone.

The next instruction excepted to was as follows: "The omission of the plaintiffs to finish the work within the times mentioned in the contract, is not a bar to his recovery for the price of the work he actually performed; but the defendant may set off any damage he sustained by the delay, if the delay arose from the default of the plaintiffs."

The time fixed for the completion of the contract was the first day of November, 1836. The Company agreed to pay twenty-six cents per cubic yard, in monthly payments, according to the measurement and valuation of the engineer. These monthly payments were made up to December, 1837; and when the contract was determined by the Company, January 18th, 1838, under a power to that effect in the instrument, which will be presently noticed, there remained due the price of the work done in December, and on eighteen days in January.

The question is, whether the covenant to pay was dependent on the covenant to finish the work by the first day of November. So far as respects each monthly installment, earned before breach of the covenant to finish the work on the first day of November, it is clear the covenants were independent. Or, to state it

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more accurately, the covenant to pay at the end of each month, for the work done during that month, was dependent on the progress of the work, so far as respected the amount to be paid; but was not dependent on the covenant to finish the work by a day certain. The only doubt is, whether, after the breach of this last mentioned covenant, the defendants were bound to pay for work done after that time.

There is an apparent, and perhaps some real conflict, in the decisions of different courts, on this point. (2 Johns., 272, 387; 10 Johns., 203; 2 H. Bl. 380; 8 Mass., 80; 15 Mass., 503; 5 Gill & 339*) [Johns., 254.] We do not deem it needful to review the numerous authorities because we hold the general principle to be clear, that covenants are to be considered dependent or independent, according to the intention of the parties, which is to be deduced from the whole instrument; and in this case we find no difficulty in arriving at the conclusion, that the covenants were throughout independent. There are, in this instrument, no terms which import a condition, or expressly make one of these covenants in any particular dependent on the other. There is no necessary dependency between them, as the pay for work done may be made though the work be done after the day. The failure to perform on the day does not go to the whole consideration of the contract, and there is no natural connection between the amount to be paid for work after the day, and the injury or loss inflicted by a failure to perform on the day. Still it would have been competent for the parties to agree that the contractor should not receive the monthly installment due in November, if the work should not be then finished, and that he should receive nothing for work done after that time.

But we find no such agreement. On the contrary, the covenant to pay for what shall have been done during each preceding month is absolute and unlimited, and the parties have provided a mode of securing the performance of the work and the indemnification of the Company from loss, wholly different from making these covenants in any particular dependent on each other. They have agreed, as will be presently more fully stated, that the Company may declare a forfeiture of the contract in case the work should not proceed to their satisfaction, and may retain fifteen per cent. of each payment to secure themselves from loss. Without undertaking to apply to this particular case any fixed technical rule, like that held in *Terry v. Duntze*, 2 H. Bl., 389, we hold it was not the intention of these parties, as shown by this instrument, to make the payment of any installment dependent on the covenant to finish the work by the first day of November; and that consequently the instruction given at the trial was correct.

The sixth instruction, which is also excepted to, must be read in connection with the fifth and the provision of the contract to which they refer. The contract contains the following clause:

"Provided, however, that in case the party of the second part shall at any time be of opinion that this contract is not duly complied with by the said party of the first part, or that it is not in due progress of execution, or that the said party of the first part is irregular or

negligent, then, and in such case, he shall be authorized to declare this contract forfeited, and thereupon the same shall become null, and the party of the *first part shall have no [*340] appeal from the opinion and decision aforesaid, and he hereby releases all right to except to, or question the same in any place under any circumstances whatever; but the party of the first part shall still remain liable to the party of the second part for the damages occasioned by the said non-compliance, irregularity, or negligence."

The instructions thereon were:

5th. "If the defendant annulled this contract, as stated in the testimony, under the belief that the plaintiff was not prosecuting the work with proper diligence, and for the reasons assigned in the resolution of the board, they are not liable for any damage the plaintiff may have sustained thereby, even although he was in no default, and the Company acted in this respect under a mistaken opinion as to his conduct."

6th. "But this annulling did not deprive him of any rights vested in him at that time, or make the covenant void *ab initio*, so as to deprive him of a remedy upon it for any money then due him for his work, or any damages he had then already sustained."

The law leans strongly against forfeiture, and it is incumbent on the party who seeks to enforce one, to show plainly his right to it. The language used in this contract is susceptible of two meanings. One is the literal meaning, for which the plaintiff in error contends, that the declaration of the Company annulled the contract, destroying all rights which had become vested under it, so that if there was one of the monthly payments in arrear and justly due from the Company to the contractor, and as to which the Company was in default, yet it could not be recovered, because every obligation arising out of the contract was at an end.

Another interpretation is, that the contract, so far as it remained executory on the part of the contractor, and all obligations of the Company dependent on the future execution by him of any part of the contract might be annulled. We cannot hesitate to fix on the latter as the true interpretation.

In the first place, the intent to have the obligation of the contractor, to respond for damages, continue, is clear. In the next place, though the contractor expressly releases all right to except to the forfeiture, he does not release any right already vested under the contract, by reason of its part performance, and *expressio unius exclusio alterius*. And finally, it is highly improbable that the parties could have intended to have put it in the power of the Company to exempt itself from paying money, honestly earned and justly due, by its own act declaring a forfeiture. The counsel for the plaintiff in error seemed to feel the pressure of this difficulty, and not to be willing to maintain that *vested rights were [*341] absolutely destroyed by the act of the Company; and he suggested that though the covenant were destroyed, *assumpsit* might lie upon an implied promise. But if the intention of the parties was to put an end to all obligation on the part of the Company arising from the covenant, there would remain nothing from

which a promise could be implied; and if this was not their intention, then we come back to the very interpretation against which he contended; for if the obligation arising from the covenant remains, the covenant is not destroyed. We hold the instruction of the court on this point to have been correct.

The next instruction excepted to, was in these words: "The increased work occasioned by changing the width of the road and altering the grade having been directed by the engineer of the Company under its authority, was done under this covenant, and within its stipulations, and may be recovered in this action, without resorting to an action of *assumpsit*."

The covenant of the plaintiff was "to do, execute, and perform the work and labor in the said schedule mentioned." And the schedule mentions "all the grading of that part of section 9, &c., according to the directions of the engineer," &c. We think this instruction was correct. The plaintiff in error insists that the covenant was to do the grading precisely as shown by a profile made before the contract was entered into. If this were so, the Company would have been disabled from making any change either of width or grade, without the consent of the defendant. We do not think this was the meaning of the contract, and both the Company and the contractor having acted on a different interpretation of it, the Company must now pay for the increased work of which they have had the benefit.

The ninth instruction was as follows:

9th. "Also, if from any cause, without the fault of the plaintiff, the earth excavated could not be used in the filling up and embankments on the road and at the river, it was the duty of the defendant to furnish a place to waste it. And if the Company refused, on the application of the plaintiff, to provide a convenient place for that purpose, he is entitled to recover such damages as he sustained by the refusal, if he sustained any; and he is also entitled to recover any damage he may have sustained by the delay of his work or the increase of his expense in performing it, occasioned [by] the negligence, acts or default of the defendant."

To this the plaintiff in error objects, "that it assumes that the Company was bound to provide a place on which to waste the earth." The contract says the contractor is to place earth, not wanted for embankment, "where 342*" ordered by the engineer." *He can rightfully place it nowhere until ordered by the engineer, and if such an order was refused or delayed, and the contractor was thereby injured, he had a clear right to damages. It cannot be supposed such an order was to be given or obeyed, if obedience to it would be a trespass. Before giving it, the Company was bound to make it a lawful order, the execution of which would not subject the parties to damages for a wrong, and therefore was bound to provide a place, and, of course, a reasonably convenient place as well as seasonably to give the order.

The plaintiff in error also excepted to the tenth instruction, which must be taken together with the clause of the contract to which it relates, to be intelligible. The contract contains the following provision:

"And provided, also, that in order to secure

the faithful and punctual performance of the covenants above made by the party of the first part, and to indemnify and protect the party of the second part from loss in case of default and forfeiture of this contract, the said party of the second part shall, notwithstanding the provision in the annexed schedule, be authorized to retain in their hands, until the completion of the contract, fifteen per cent. of the money at any time due to the said party of the first part; thus covenanted and agreed to by the said parties, this twelfth day of July, 1836, as witness their seals."

The instruction was:

10th. "Also, the plaintiff is entitled to recover the fifteen per cent. retained by the Company, unless the jury find that the Company has sustained damage by the default, negligence, or misconduct of the plaintiff. And if such damage has been sustained, but not to the amount of fifteen per cent. then the plaintiff is entitled to recover the balance, after deducting the amount of damage sustained by the Company."

It is argued that here is a stipulation that the fifteen per cent. may be retained by the company until the completion of the contract by the defendant; that it never was completed by him, and so the time of payment had not arrived when this action was brought.

Now, it is manifest that one of the events contemplated in this clause was a forfeiture such as actually took place; that in that event the contract never would be completed by the defendant, and so its completion could not with any propriety be fixed on as to the limit of time during which the Company might retain the money, unless it was the intention of the parties that the fifteen per cent. so retained should belong absolutely to the Company in case of a forfeiture of the contract. But the parties have not only failed to provide for such forfeiture of the fifteen per cent., but have plainly [*343 declared a different purpose. Their language is, that this money is retained, "to indemnify and protect the party of the second part from loss, in case of default and forfeiture of this contract."

There is a wide difference both in fact and in law, between indemnity and forfeiture; yet it is the former and not the latter which the parties had in view. Whether an express stipulation for a forfeiture of this fifteen per cent. could have been enforced, it is not necessary to decide.

But when the parties have shown an intent to provide a fund for indemnity merely, the legal, as well as the just result is, that after indemnity is made and the sole purpose of the fund fully executed, the residue of it shall go to the person to whom it equitably belongs. Rightly construed, the words "until the completion of the contract" refer to the time during which all monthly payments were to be made, and give the right to retain the fifteen per cent. out of each and every payment, rather than fix an absolute limit of time during which these sums might be retained. In neither event, contemplated by this clause, would this limit of time be strictly proper. If a forfeiture of the contract took place, it was manifestly inapplicable; and if no forfeiture did take place, but damage were suffered by the Company,

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from default of the contractor, equal to the fifteen per cent. it cannot be supposed their right to retain was to cease with the completion of the contract. This objection, therefore, must be overruled.

The plaintiff in error also excepts to the 12th instruction. We do not deem it needful to determine whether there was evidence to go to the jury, that the Company did not use reasonable diligence to obtain a dissolution of the injunction, because we consider so much of the instruction as relates to this subject, to be a proper qualification of the absolute and peremptory bar, asserted in the first part of the instruction; and if the Company desired to raise any question concerning the proper tribunal to decide on the matter of diligence, or respecting the evidence competent to justify a finding thereon, some prayer for particular instructions respecting these points should have been preferred. But we consider there was some evidence bearing on this question of diligence, and that it was for the jury and not the court to pass thereon.

Two objections are made to the thirteenth instruction. The first is, that this instruction assumed the existence of evidence, competent to go to jury, to prove that the defendants fraudulently terminated the contract under the clause which enabled them to declare it forfeited. To this objection, it is a conclusive answer that the defendants themselves prayed [344*] for an instruction substantially *like that given. The other objection is, that the jury were instructed to allow by way of damages, such profit as they might find the plaintiff had been deprived of by the termination of the contract by the defendants, if they should find the act of termination to be fraudulent.

It is insisted that only actual damages, and not profits, were in that event to be inquired into and allowed by the jury. It must be admitted that actual damages were all that could lawfully be given in an action of covenant, even if the Company had been guilty of fraud. But it by no means follows that profits are not to be allowed, understanding, as we must, the term "profits" in this instruction as meaning the gain which the plaintiff would have made if he had been permitted to complete his contract. Actual damages clearly include the direct and actual loss which the plaintiff sustains *propter rem ipsam non habitam*.

And in case of a contract like this, that loss is, among other things, the difference between the cost of doing the work and the price to be paid for it. This difference is the inducement and real consideration which causes the contractor to enter into the contract. For this he expends his time, exerts his skill, uses his capital, and assumes the risks which attend the enterprise. And to deprive him of it, when the other party has broken the contract and unlawfully put an end to the work, would be unjust. There is no rule of law which requires us to inflict this injustice. Wherever profits are spoken of as not a subject of damages, it will be found that something contingent upon future bargains, or speculations, or states of the market, are referred to, and not the difference between the agreed price of something contracted for and its ascertainable value, or cost. (See *Masterton v. Mayor of Brooklyn*, 7

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Hill's R., 61, and cases there referred to.) We hold it to be a clear rule, that the gain or profit, of which the contractor was deprived, by the refusal of the Company to allow him to proceed with, and complete the work, was a proper subject of damages.

We have considered all the exceptions; we find no one tenable, and the judgment of the court below is affirmed, with costs.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Maryland, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs and damages at the rate of six per centum per annum.

Cited—6 Blas., 374; 15 Blatchf., 426; 4 Cliff., 13; 1 Holmes, 197.

*MARTIN VERY, Appellant, [*345

v.

JONAS LEVY.

Equity will hold creditor to his agreement to receive specific articles in satisfaction of debt—consideration—If clause in power of attorney is ambiguous, principal is bound by reasonable interpretation upon which agent and debtor acted.

In equity, where a creditor agrees to receive specific articles in satisfaction of a debt, even although it be a debt upon bond, secured by mortgage, he will be held to the performance of his agreement.

But, in order to bring a case within this principle, there must be,

1. An agreement not inequitable in its terms and effect.

2. A valuable consideration for such agreement.

3. A readiness to perform, and the absence of laches, on the part of the debtor.

Where the agreement to receive payment in goods was made by a person who acted under a power of attorney from the creditor, authorizing him to trade, sell, and dispose of notes, bills, bonds or mortgages, and under this power, a partial payment was received in goods, which was afterwards recognized as a payment by the creditor, the power was sufficient to authorize an agreement to receive the remaining amount, also in goods, at any time when called for within twelve months, especially as the bond had yet four years to run.

This agreement was not inequitable; there was a valuable consideration for it; and the debtor was always ready to comply with it, on his part.

The creditor cannot now allege fraud in his debtor. It is not charged in the bill; and although he may not have known of the agreement when the bill was framed, yet, when the answer came in, he might have amended his bill, and charged fraud.

THIS was an appeal from the Circuit Court of the United States for the District of Arkansas.

In 1841, one Darwin Lindsley owned a lot of land in the Town of Little Rock, and State of Arkansas, which was known as lot No. 7, in block or square No. 35, in that part of the city west of the Quapaw line, and known as the Old Town.

On the 3d of March, 1841, he sold this lot to Jonas Levy, who gave two bonds, each for

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\$4,000, one payable five years after date, and the other six years after date. Both were to carry interest, at 7 per cent., payable quarter yearly. The bond, payable in five years, was not involved in the present suit, and no further notice need be taken of it. Both bonds were secured by a mortgage of the property.

On the 25th of March, 1841, Lindsley assigned the six years' bond to Martin Very, a citizen of the State of Indiana.

This bond had the following credits indorsed upon it:

1841, March 15	\$ 550.00
1842, January 29	181.12
1843, March 3 (in goods)	1,898.25

The last credit was signed Martin Very, by J. S. Davis, and arose in this way:

On the 25th of November, 1842, Davis addressed the following letter to Levy:

NEW ALBANY, Indiana, Nov. 25, 1842.

DEAR SIR—My object in writing to you is to **346*** inquire what *you will give in cash and jewelry for the last note that you gave to Darwin Lindsley, and which was assigned by him to Martin Very. I have bought a part of the note, and am authorized to make disposition of it, and I thought, as a matter of justice, you should have the refusal of the note, at a considerable discount, if you desired it. Please let me hear from you at your earliest convenience. I write for myself and Mr. Very.

I am, respectfully yours, &c.

MR. JONAS LEVY.

JOHN S. DAVIS.

(Indorsed) MR. JONAS LEVY, Little Rock, Arkansas.

(Postmarked) New Albany, Ind., Nov. 26.

On the 28th of January, 1843, Very executed the following power of attorney to Davis:

Know all men by these presents, that I, Martin Very, of the County of Floyd and State of Indiana, have made, constituted and appointed, and do, by these presents, make, ordain, constitute and appoint, John S. Davis, of the City of New Albany, Indiana, my true and lawful attorney, for me and in my name and for my use, to ask, demand, sue for, recover and receive, all such sum or sums of money, notes, bills, bonds, mortgages or debts, which are or shall be due, owing or belonging to me, in any manner or by any means whatsoever; and I hereby give my said attorney full power and authority to trade, sell, and dispose of any notes, bills, bonds or mortgages, held or owned by me, on any resident or residents of the State of Arkansas; and I hereby give my said attorney full power and authority, in and about the premises, to have, use and take all lawful ways and means, in my name, for the purposes aforesaid; and upon the receipt of such debts, dues, or sums of money, to make, seal and deliver, acquittances and other sufficient discharges for me, and in my name; or, upon the sale of any bill, bond, note or mortgage, to execute a good and sufficient assignment of the same to the purchaser thereof, for me, and in my name; and generally, to do and perform, in my name; all other acts and things necessary to be done and performed in and about the premises, as fully and amply, to all intents and purposes, as I myself could or might do, if personally present; and attorneys, one or more, under him, for the purpose aforesaid, to make and constitute,

and again at pleasure revoke. And I hereby ratify and confirm all and whatsoever my said attorney shall lawfully do, in my name, in and about the premises, by virtue of these presents; and I hereby make this power of attorney irrevocable, to all intents and purposes. In testimony whereof, I have hereunto *set my [***347** hand and seal, this, the 28th day of January, in the year of our Lord 1843.

MARTIN VERY. [SEAL.]

Signed, sealed, and delivered in presence of
JOS. P. H. THORNTON.

Under this power, Davis went to Little Rock, and, on the 3d of March, 1843, put the receipt above mentioned upon the back of the bond for \$1,898.25, paid in goods; and, on the same day, executed the following paper, viz.:

LITTLE ROCK, March 3d, '43.

I hereby agree to take in goods, such as jewelry, &c., the balance due me on a note assigned by D. Lindsley to me, as also a mortgage assigned by the said Lindsley; said goods to be delivered to me, or any agent at Little Rock, Arkansas, at reasonable prices, at said Little Rock; said goods to be called for within twelve months from this time.

MARTIN VERY.

By J. S. DAVIS, Attorney in fact.

Davis stated in his deposition that, in January, 1844, he wrote to Levy, directing him to pay the balance, in jewelry, watches, &c., to Mr. Waring, in Little Rock; that he received an answer from Levy, declining to do so; but that he had lost or mislaid this answer from Levy.

On the 3d of February, 1844, Davis wrote to Levy the following letter:

NEW ALBANY, Feb. 3, 1844.

DEAR SIR—If you can pay the balance of your note in good silver or gold watches, and good jewelry, at fair prices, say about half of each, or two thirds watches, you will please notify me of the fact by return mail, and I will send on for them at once. The things you let me have before were too high—at least Mr. Very says so. Let me hear from you. I am your friend.

JOHN H. DAVIS.

MR. J. LEVY.

(Postmarked) New Albany, Ind., Feb. 5.

(Indorsed) MR. JONAS LEVY, Jeweler, Little Rock, Ark.

In April, 1848, Very filed his bill in the Circuit Court of the United States for the District of Arkansas against Levy, for the purpose of foreclosing the mortgage. The answer of Levy admitted all the allegations of the bill, but set up as a defense the execution of the power of attorney by Very to Davis, and the subsequent agreement between Davis and himself, by which *the goods were to be called for with- [***348** in twelve months. It was then alleged, that not only during the next twelve months, but always afterwards, Levy had kept on hand goods enough of the proper character to pay the balance due, been always ready and still was ready to deliver them, and had often urged the complainant to receive and accept them, and would deposit them in the custody of anyone directed by the court.

Levy brought into court a large quantity of goods and jewelry, which was placed in the hands of a receiver.

The case being heard on bill, amendment, answers, replications, exhibits, and testimony, the court held Very bound by the agreement, and found that Levy always had sufficient goods on hand ready to be delivered; and directed the master to ascertain the balance due on the bond, and the value of the goods delivered to the receiver.

The master reported the balance due on the 3d March, 1844, to be \$2,002.59, and the value of the goods, 5,776.99. No exception was taken to the report, and it was confirmed.

The court then ordered the complainant to select out of the goods, to the amount of \$2,002.59, and on his failure, after notice to his solicitor, that the master should do so. The complainant failed to select; the master set apart the requisite amount, the residue were redelivered to Levy, and the court decreed that Very should receive the goods so set apart by the master, and that the bond and mortgage were satisfied; denied the relief prayed, and dismissed the bill; all costs to be paid by the complainant.

Very appealed to this court. It was argued by **Mr. Sebastian** for the appellant, and by **Mr. Lawrence** for the appellee, on whose side there was also a brief filed by **Mr. Pike**.

Mr. Sebastian, for appellant:

Much irrelevant matter is drawn into the case, which it is not my purpose to notice; and except the points noticed below, the whole defense fails, upon the well-settled principle that matters set up in an answer by way of avoidance avail nothing unless proved. (1 Munf. Rep., 373; 1 Johns., 590; 14 *Id.*, 74; 4 Paige, 33; *Cutheart v. Robinson*, 5 Pet. Rep., 267; *United States Bank v. Beverley*, 1 How. U. S. Rep., 151.)

Under the power given to Davis, he had authority, as is contended for Very, only to receive the amount of the bond and mortgage in money, or to sell and transfer them, and no other authority whatever to agree to receive at a future day a payment in goods, and to bind his principal so to receive them—no authority to substitute a new contract, by which Very 349*] must *necessarily be a loser, and bind Very to its performance. From the pleadings and evidence, it is clear that Davis did not receive payment, in money or otherwise. Is it not equally clear that he did not sell and transfer the bond and mortgage? And in what part of the power can the authority be found for Davis to bind Very by a new contract, to be performed in future? The whole object of the power was to close up and put an end to his business in Arkansas, and not to entangle himself with new contracts, liabilities, and litigation, and which has been the result of the unwarrantable construction put on the power by Levy, and the unauthorized acts of Davis under it.

And it a well-settled principle of law, and nowhere controverted, that if an agent exceed his authority, his acts in such excess do not bind his principal. (*Taggart v. Standbery*, 2 McLean's Rep., 549; *Planters' Bank v. Cameron et al.*, 3 Sm. & Marsh. Rep., 613; *Gordon v. Buchanan*, 5 Yerg. Rep., 79; 2 Kent's Com., 1st ed., 483; 3 Eng. Ark. Rep., 230; *Wahrendorf v. Whitaker*, 1 Missouri Rep., 148; 8 Stew. Ala. Rep., 26, 27; *Fox v. Fisk*, 6 How. Miss. Rep., 345; *Fenn v. Harrison*, 3 Term

Rep., 759; *Stewart v. Donnelly*, 4 Yerg. Rep., 180; *Thompson v. Stewart*, 3 Conn. Rep., 183; 1 Hovenden on Frauds, 180; *North River Bank v. Aymar*, 3 Hill's N. Y. Rep., 266; *Piatt v. Oliver*, 2 McLean's C. C. R., 316; Story on Agency, secs. 165, 172.)

This was a special authority to Davis, and not a general one, and Levy was bound to know the extent of his authority; and if that authority was exceeded, Levy must be the loser by the unauthorized act, and not Very, who gave not the authority. (2 Kent's Com., original ed., 484; *Payne v. Stone*, 7 Smedes & Marsh. Rep., 373; *Gullett v. Lewis*, 3 Stewart's Ala. Rep., 26, 27; 1 Hovenden on Frauds; 179, 181; 3 Hill's Rep., 266; *Owings v. Hull*, 9 Pet. Rep., 628; Story on Agency, secs. 72, 73, 81, 165; Story on contracts, sec. 231; *Denning v. Smith*, 3 Johns. Ch. Rep., 344.)

And a special power must be strictly pursued, and cannot be enlarged. (*Batty v. Curwell*, 2 Johns., 50; *Mayor, &c., of Little Rock v. The State Bank*, 3 Eng. Ark. Rep., 230; 2 Kent's Com., 1st ed., 484; *Dickenson v. Gili land*, 1 Cow. Rep., 498; *Nixon v. Hyserott*, 5 Johns., 59; Story on Agency, sec. 165.)

And although Davis' power should be esteemed, in technical parlance, as a general agency, yet the act performed under it must have reference to, and be limited by, "the purpose for which the power was given." And the purpose in this case, as is clearly shown by the power itself, was not to make new obligations to be performed by himself, but to receive payment and *close up finally those [*350 due to him from others. (See 3 Sm. & Marsh. Rep., 613; Story on Agency, secs. 21, 62-69, 83, 89; 6 How. Miss. Rep., 345; 4 Yerg. Rep., 180; *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. Rep., 337; Story on Contracts, sec. 287.)

And even in such case the act performed must appear to have been a necessary means of carrying into effect the power granted by the principal. And could the new contract made by Davis be deemed a legitimate and necessary means of receiving payment in money, or of effecting a sale of the securities? Surely not. (See 3 Sm. & Marsh. Rep., 613; Story on Agency, secs. 62-69, 83; 5 Johns., 59.)

Here, too, a special power of attorney was given in writing, and such powers are subjected to a "strict interpretation." (Story on Agency, secs. 68, 69; Story on Contracts, sec. 287.)

A factor is a general agent, yet he cannot bind his principal to sales on credit, or to any mode of payment other than the receipt of the money at the sale, unless there be a general usage established controlling such agency. (2 Kent's Com., 1st ed., 485, 486.)

And any general agent to receive payment of a debt is bound to receive it in money only, unless otherwise directed. (*Martin's Adm. v. The United States*, 2 Monroe's Rep., 90; 4 Yerg. Rep., 180; 6 How. Miss. Rep., 345; 3 Stewart's Ala. Rep., 27; Story on Agency, secs. 62, 98, 99, 181; Story on Contracts, sec. 289.)

And the power to sell and transfer could surely not authorize the compromittment of Very's rights, by any species of contract whatever not embraced in the letter, spirit, or meaning of the terms used in the power. (*Clarke's*

Leake v. Courtney, 5 Pet. Rep., 347; 5 Johns., 59; Story on Agency, secs. 62-69, 89; *Williamson v. Berry*, 8 How. U. S. Rep., 544.)

And the opinion of Davis as to the extent of his powers under the agency, and that he was authorized to bind Very by this new contract with Levy, cannot aid the latter, nor is it any evidence of Davis's authority to make it. (*Clarke's Ex'rs v. Van Riemdyk*, 9 Cranch's Rep., 158; *Garvin v. Lowry*, 7 Sm. & Marsh. Rep., 27; 5 Wheat. Rep., 337.)

The act of Davis' agreeing to receive goods in payment was never ratified by Very; nor can such ratification be presumed, because the evidence of Davis himself, invoked by Levy, shows that Very knew not of the existence of such a contract, and that the payment in goods, indorsed on the bond, was no part of the contract to receive other goods, in future. And an acquiescence in receiving the goods already paid cannot be tortured into a ratification of an unauthorized act of a faithless agent to receive others in future, and of which the principal had no knowledge.

351*] *For the ratification of such an act, whether in fact or presumed, could not be binding on Very, without a full knowledge of its existence and of all the circumstances under which it was made. (*Lyon v. Tams & Co.*, 6 Eng. Ark. Rep., 205; *Cairnes v. Blecker*, 12 Johns., 305; 2 Kent's Com., 4th ed., 616; 2 Stark. Ev., 7th Am. ed., 43, notes A. B; *Armstrong v. Gilchrist*, 2 Johns. Cas., 430, note A, 7 Sm. & Marsh. Rep., 27; *Owings v. Hull*, 9 Pet. Rep., 629; Story on Agency, secs. 90, 289, 242, *et seq.*)

Besides, even were it in law true, which is denied, that Davis had authority to bind Very by the new contract entered into with Levy, yet from the evidence of Davis himself, who is Levy's own witness, such contract was obtained by the false pretenses and fraud of Levy himself, both by the suppression of truth and utterance of falsehood, and could not be binding either upon Davis or Very, in law or equity. For fraud vitiates and renders void all contracts into which it enters. (See Story on Contracts, secs. 165, 167, *et seq.*, 177, *et seq.*, 542, *et seq.*; Roberts on Frauds, Philadelphia ed. of 1807, 521; 2 Saund. Pl. & Ev., 527, 528; *Anderson v. Lewis*, 1 Freeman's Ch. Rep., 206; *Bell v. Hill*, 1 Hayw. Rep., 95; *Reigal v. Wood*, 1 Johns. Ch. Rep., 406; *Stoddard v. Chambers*, 2 How. U. S. Rep., 318; *Barnesley v. Powell*, 1 Ves., 120; *Pope v. Anderson*, 1 Sm. & Marsh. Ch. Rep., 156.)

Levy's entire defense rests on this unauthorized contract made by Davis; and a contract, too, which the only evidence (that of Davies) establishing its existence, proves conclusively to have been obtained by fraud. And will a court of equity, under such circumstances, enforce it?

The counsel for the appellee made the following points:

Point 1. The arrangement made by Davis was warranted by the letter of attorney, regarding that in connection with, and explaining it by, the other facts in the case.

The debt was not due within about three years. All the interest accrued was overpaid. Levy was looked upon as insolvent, and the mortgaged property not worth the debt.

The power of attorney not only authorized Davis to collect and receipt for money due Very, but to sell, trade, and dispose of the bond and mortgage in question, and to assign the same. Davis' testimony shows that this power, though general in its terms as to any and all debts, was really intended to apply only to this identical debt. It is very evident that the real object of the power was to enable Davis to dispose of the claim, or make some kind of compromise or arrangement by which it might be closed up at once. The letter of Davis himself shows that it *had already [*352 been in contemplation to allow Levy to pay the debt in goods, and that it was thought to be only just to give him the refusal, in offering the claim for sale, and he was applied to accordingly.

When this was done, Davis owned part of the claim. He says in his testimony that such was the case, but that when he made the arrangement he no longer had an interest. He did not tell Levy that. And if he no longer had an interest in the claim, why was the power of attorney expressly declared to be irrevocable?

In considering whether the arrangement made by Davis was within the power conferred, it is legitimate to consider whether a proposal to receive payment in goods at a fair price was an unusual or extraordinary inducement to be held out in order to procure purchasers for a debt not due within three years; whether Very could have imagined that such a claim could be disposed of, traded or sold, without some discount or change of the mode of payment; whether it was to be expected that Levy would pay the whole debt in money at that time.

Davis had a general power given him to sell, trade or dispose of the claim. He was not limited as to the person to whom he should sell, or the mode in which the price should be paid. No one can doubt that if he had sold it to a third person for goods or jewelry, part paid at once, and part to be paid in twelve months, the sale would have been within the power, for surely there is no warrant to say that an unqualified power to sell a debt limits the agent to sell for cash.

And as there was no restriction as to the person, it was quite as competent to him to sell to Levy as to anyone else. It was natural to expect that Levy would give more than anyone else.

Again, how was the power to collect to be exercised, except by a compromise of some kind. The debt was not due, and could not be collected by law. It could only be collected by the consent of Levy, a consent not to be expected without any consideration. Taking the whole language of the power together, it is obvious that Very meant to dispose of the claim in some way to some person, and the previous letter of Davis shows that the object was to dispose of it to Levy for goods, at a discount.

All grants of power are to be construed liberally, so as to meet the ends and purposes of the parties. (*Kenworthy v. Bate*, 6 Ves., 798; *Nicolet v. Pilot*, 24 Wend., 240; *North River Bank v. Rogers*, 22 Id., 649; *McMorris v. Simpson*, 21 Wend., 612.)

For the general rules as to the construction of powers, we need refer only to 2 Sugden on

Port., c. 8, 9, 13; 32 Wend., 651; 1 Wash. C. C. R., 457.

353*] *In *Parsons v. Administrators of Gaylord*, 3 J. R., 463, C gave his bond to B; on payment of which B was to convey land to him. B delivered the bond to F with authority to receive payment; F took a note in payment of it. Held that his agency authorized this, and B's subsequent dissent made no difference, but the bond was extinguished.

The extent of a power given to an agent is deducible as well from facts as from express obligation. In the estimate of such facts, the law has regard to public security, and often applies the rule that he who trusts must pay. (*Parsons v. Armor & Oakley*, 3 Pet., 428.)

In law, however, it may be in words or technical language, there is no difference between a general agency, so far as the principal is concerned, when considering what acts bind him, and an agency giving the agent general and unlimited power to do any particular act or transact any particular business, without pointing out the mode of doing the act. (Story on Agency, secs. 17, 18, 127, V. 1, 128, 129, 133; *Andrus v. Kneeland*, 6 Cow., 354; *Jeffrey v. Bigelow*, 13 Wend., 518; *Planters' Bank v. Cameron et al.*, 3 S. & M., 613; 2 Kent, 617, 620; *Sandford v. Handy*, 23 Wend., 266; *Le Roy v. Beard*, 8 How. S. C. R., 466; *Anderson v. Cowley*, 21 Wend., 219.)

In either case, all the incidents necessary to effectuate the objects of the power are implied and go with it. A power shall be construed as a plain man would understand it. (*Withington v. Herring*, 5 Bing., 442.)

Point 2. Even if the acts of Davis were originally an excess of power, they were so acquiesced in and ratified by Very, that he was ever after estopped to repudiate the agreement.

Undoubtedly so far as goods were actually received, it was a good payment. Notice to the agent is notice to the principal; and if Very had any ground to complain that his agent had acted in bad faith, or transcended his authority; if he meant not to abide by the contract made by him, good faith required that he should at once notify Levy of that determination. There is no pretense that he did so, or that he was at all dissatisfied. So far as the goods were received, he accepted them. That appears in the bill itself.

Suppose Levy had, during the year, delivered the residue of the goods, could Very then have repudiated the acts of his agent? And if that agent had authority to receive goods in payment, had he not authority to agree and contract to secure them?

In his bill of complaint, Very expressly states, as one of the payments made on the bond, the sum of \$1,898.25, without explanation or qualification, and exhibits the bond, 354*] with the *indorsement, "Received on the within, in goods, the sum of eighteen hundred and ninety-eight dollars and twenty-five cents, March 3, 1843, Martin Very, by J. S. Davis." This is an explicit admission that he received the goods, an admission that it was a valid payment, and an admission either of an original authority in Davis to receive pay in goods, or of a ratification by Very of his act in receiving them.

How can he profit by the act of his agent by

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adopting part of the transaction and repudiating the residue? Especially, how can he do this, when the latter was the price given by his agent for the benefit which he did not object to accept? (*Le Roy v. Beard*, 8 How., 466.)

Under the authority given by the power of attorney, and in pursuance of the previous proposition contained in the letter, Davis received nearly \$2,000 in goods, and agreed in writing to receive the residue within twelve months. Can Very be allowed, after thus inducing Levy to pay, in goods and money, the whole debt to within a little over \$2,000, can he be allowed, after thus getting the debt reduced to not much more, if not actually less than the value of the mortgaged property, to enforce it against that property, repudiating the agreement made for him and in his name, by his agent?

And though Davis denies in his testimony that the receipt of the goods actually accepted, and the written agreement to receive the residue in the same way, were concurrent acts and parts of a single transaction, yet his own letter and all the circumstances infallibly demonstrate that this is an utter falsehood, and that Levy paid the amount in goods long before it was due, in consideration of the promise to receive the residue in the same way, or in performance of the very written agreement itself.

On what ground is Very to be allowed to escape from this firm contract, made by his agent in his name, in pursuance of an ample power? (*Righter v. Steel et ux.*, 3 Sandford, Ch. R., 608.)

It is perfectly evident that Davis executed the power in entire good faith towards Very. All the circumstances show that he did precisely what was intended to be done; and his statement, that he afterwards wrote to Levy to turn over the residue of the goods to a particular person at Little Rock, makes the proof on this point conclusive, and shows that all that Davis did was ratified.

No weight is due to the statement of Davis, that Levy declined turning over the residue of the goods, because it is inconsistent with the undeniable fact that he always retained the *goods, kept them apart, did not expose [*353 them to sale, said they were to go in payment of the debt; because the letter is not produced, and was rather too important to be lost, and because the refusal may have been a qualified one, on good grounds, which the letter would show.

Point 3. The arrangements so made extinguished the original debt and mortgage.

As was held by the Supreme Court of Arkansas in *Levy v. Very*, above cited, if the agreement of Very, by his agent Davis, had been under seal, it would, together with the payment made in goods, have completely extinguished the original obligation, and been pleadable in bar at law. (See, also, *Care v. Barber*, Sir T. Raym., 450; *Thatcher v. Dudley et ux.*, 2 Root, 169; *Good v. Cheeseman*, 2 Barn. & Ad. R., 328; *Cartwright, Adm.*, v. *Cook*, 3 Id., 701; *Cole & Woolsey v. Houston*, 3 Johns. Cas., 243; *Boyd v. Hitchcock*, 20 J. R., 76; *Watkinson v. Inglesby & Stokes*, 5 J. R., 386; *Strong v. Holmes*, 7 Cow., 224; *Brooks v. White*, 2 Met., 283; *McCreary v. McCreary*, 5 Gill & Johns., 147; *Downer v. Sinclair*, 15 Vt., 495.)

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In a court of equity the technical law rule that a contract can only be dissolved *eo ligamine quo ligatur*, disappears altogether; a rule which originally prevented absolute payment in money, of a bond, being pleaded at law. A court of equity looks through the form to the substance, and an unsealed agreement, the substance being the same, avails there, to precisely the same extent as a sealed one.

And then the principle applies, as established in *Pennel's case*, 5 Co., 117, that, though payment of a less sum, on the day, in satisfaction of the greater, cannot be a satisfaction of the whole; yet the gift of a horse, or the like, in satisfaction, is good, for it shall be intended that the horse might be more beneficial to the party than the money, or he would not have accepted it in satisfaction.

And where any other articles than money are received, and agreed to be accepted in full satisfaction of a debt, the court will not estimate their value in money's worth, but hold the consideration to be good, and the promise to discharge the entire debt a valid contract. (*Brooks v. White*, 2 Metc., 283; *Boyd v. Hitchcock*, 20 J. R., 76; *Kellogg v. Richards*, 14 Wend., 116.)

The law of tender has nothing whatever to do with this case. The agreement was, that Very would receive the residue of his debt in goods "to be called for" within twelve months. No tender was necessary. Levy was only bound to deliver the goods when called on. Of course, his store was the place of delivery. If he kept the goods there, ready to be delivered, and remained always ready, that was enough.

356* *No specified day, and no place being fixed for the delivery of the residue of the goods, Levy could not be in default until Very had called for the goods, and he had refused to deliver them. His store was the place of delivery. This is well settled. (*Vance v. Bloomer*, 20 Wend., 199; *La Farge v. Rickert*, 5 Wend., 187; *Robbins v. Lute*, 4 Mass., 475; *Morton v. Wells*, 1 Tyler, 386; *Adm'rs of Conn v. Est. of Gano*, 1 Ohio, 483; *Savary v. Goe*, 8 Wash. C. C. R., 140; *Sheldon v. Skinner*, 4 Wend., 525; *Cranche v. Fastolfe*, Sir T. Raym., 418; *Ranson v. Johnson*, 1 East, 203; *Whitehouse v. Frost*, 12 Id., 615; *Mitchell v. Merrill*, 2 Black., 89; 1 Hill, 523; 2 Hill, 352; *Coie v. Houston*, 3 Johns. Cas., 243.)

After the end of the year, Levy held the goods as trustee of Very, and at his risk. (4 Wend., 529; 8 J. R., 478; 3 Johns. Cas., 258.) And it made no difference that the goods of Very were mixed with his own, part of a large quantity. (*Whitehouse v. Frost*, *ubi sup.*)

As to Davis's testimony in regard to the statements of Levy, on which he was induced to make the arrangement, and their falsehood, it is directly contradicted by his own letter, which shows that the proposition came from himself, and was made to Levy before Davis went to Little Rock, for reasons and from motives wholly different from those stated by him in his deposition.

Mr. Justice Curtis delivered the opinion of the court:

This is a suit in equity to foreclose a mortgage, commenced in the Circuit Court of the

United States for the District of Arkansas. The bill alleges that on the 3d of March, 1841, the respondent, Levy, executed his writing obligatory, for the sum of \$4000 bearing interest at the rate of seven per cent. per annum, payable to Darwin Lindsley in six years after its date, and secured the same by a mortgage on certain premises situated in the City of Little Rock; that by assignment from Lindsley the complainant became the owner of this bond and mortgage on the 25th of March, 1841, and the bill prays for an account and foreclosure.

The answer of Levy admits the execution of a bond and mortgage, and their assignment to the complainant, and avers that on the 3d of March, 1843, he agreed with the complainant, through one John S. Davis, his agent, to deliver goods, such as jewelry, &c., in which the respondent dealt, at Little Rock, upon reasonable prices, in satisfaction of this bond and mortgage, within twelve months from the 3d of March, 1843; that in pursuance of that agreement he did actually deliver on that day a part of the goods, agreed to be of the value of \$1,893.25, and afterwards, on the [*357 same day, the complainant, through his agent, Davis, signed and delivered to the respondent a memorandum in writing as follows:

"Little Rock, March 3d, '43. I hereby agree to take in goods, such as jewelry, &c., the balance due me on a note assigned by D. Lindsley to me, as also a mortgage assigned by said Lindsley; said goods to be delivered to me, or any agent at Little Rock, Arkansas, at reasonable prices at said Little Rock; said goods to be called for within twelve months from this time. Martin Very. By J. S. Davis, Attorney in fact."

That in further pursuance of this agreement, the respondent kept in his hands, and ready for delivery, and withdrawn from his trade, a sufficient amount of goods, such as are referred to in the memorandum, during the whole year which elapsed after the making of the agreement, and was constantly ready and willing to deliver the same at Little Rock, but the complainant was not there, and did not authorize anyone to receive them; that the respondent has ever since been ready and willing to perform his agreement, and offers to bring the goods into court, or place them in the hands of a receiver. The court below appointed a receiver, ascertained the amount of goods necessary to satisfy the unpaid residue of the bond, ordered the receiver, upon demand, to deliver the same to the complainant, in full satisfaction of the bond and mortgage, decreed the mortgage satisfied, and ordered the complainant to pay the costs. From this decree the complainant appealed.

An agreement by a creditor, to receive specific articles in satisfaction of a money debt, is binding on his conscience; and if he ask the aid of a court of equity to enforce the payment, he can receive that aid only to compel satisfaction in the mode in which he has agreed to accept it. A court of equity will even go further; and in a proper case will enforce the execution of such an agreement. At law, a mere accord is not a defense; and before breach of a sealed instrument, there is a technical rule, which prevents such an instrument from

being discharged, except by matter of as high a nature as the deed itself. (*Alden v. Blague*, Cro. Jac., 99; *Kaye v. Waghorne*, 1 Taunt., 428; *Bayley v. Homan*, 3 Bin. N. C., 915.) But no such difficulties exist in equity. On the broad principle that what has been agreed to be done, shall be considered as done, the court will treat the creditor as if he had acted conscientiously, and accepted in satisfaction what he had agreed to accept, and what it was his own fault only that he had not received. Indeed, even a court of law, in a case free from the technical difficulties above noticed, will do the same thing. (*Bradly v. Gregory*, 2 Camp., 383.)

358*] *In order, however, to bring a case within these principles, three things are necessary. An agreement, not inequitable in its terms and affect; a valuable consideration for such agreement; readiness to perform and the absence of laches on the part of the debtor.

In this case the agreement was in writing, and one objection to it, made by the complainant, is, that the person who executed it on his behalf was not authorized to do so. The authority was in writing, and gave the attorney "full power and authority to trade, sell and dispose of any notes, bills, bonds or mortgages, held or owned by me, on any resident, or residents of the State of Arkansas." Acting under this power, Davis did actually accept a partial payment in goods, amounting to \$1,898.25, and signed the memorandum in writing, which is relied on. The bond being produced, bears the following indorsement:

"Received on the within, in goods, the sum of eighteen hundred and ninety-eight dollars and twenty-five cents, March 3d, 1848. Martin Very. By J. S. Davis."

The complainant, in his bill, treats this as a payment, and it does not appear that he made any objection to it, though Davis says, in one of his letters, he thought the prices were too high.

Upon this state of facts we are of opinion Davis had authority to enter into the agreement in question. Besides the power to collect and sell, is the power to trade this bond and mortgage. It might be difficult to attach any general legal signification to this word. But considered in reference to the particular facts of this case, we think its meaning sufficiently clear.

It is proved by Davis, that the power, though general in its terms, was given solely in reference to this particular bond and mortgage. The bond had yet four years to run. When, therefore, Davis was authorized to collect this bond, the parties to the letter of attorney must have had in view some agreement respecting its extinguishment, which should vary its original terms of payment; and when he was further empowered to trade it, it is not an inadmissible interpretation that the new agreement for its extinguishment, which he was empowered to make, might be an agreement to receive specific articles in payment. It has been said that special powers are to be construed strictly. If by this is meant, that neither the agent, nor a third person dealing with him in that character, can claim under the power any authority which they had not a right to understand its language conveyed, and that the au-

thority is not to be extended by mere general words beyond the object in view, the position is correct. But if the words in question touch only the particular mode in which an object, admitted to be within the *power, is [*359 to be affected, and they are ambiguous, and with a reasonable attention to them would bear the interpretation on which both the agent and a third person have acted, the principal is bound, although upon a more refined and critical examination the court might be of opinion that a different construction would be more correct. (*Le Roy v. Beard*, 8 Howard, 451; *Lorraine v. Cartwright*, 3 Wash. C. C. R., 151; *De Tastett v. Crowlillat*, 2 Wash. C. C. R., 132; 1 Liv. on Agency, 403, 404; Story on Agency, sec. 74.) Such an instrument is generally to be construed, as a plain man, acquainted with the object in view, and attending reasonably to the language used, has in fact construed it. He is not bound to take the opinion of a lawyer concerning the meaning of a word not technical, and apparently employed in a popular sense. (*Witherington v. Herring*, 5 Bing., 456.)

In this case, the complainant, besides empowering Davis to collect a bond not yet payable, has authorized him to trade it—a word frequently used in popular language to signify an exchange of one article for another, by way of barter.

This power was intended by the complainant to be acted on by the respondent, a jeweler, in the State of Arkansas, and we think he cannot complain that it was understood in its popular sense; more especially when he accepted, without objection, goods amounting to \$1,898.25, and gave the defendant no notice of his dissent from that construction of the power under which his agent received them, in part payment of the bond.

But it is insisted that, if Davis had authority to receive those goods in part payment, he had not power to enter into an executory agreement to receive the others. This might have presented a question of some difficulty, if the effect of that agreement had been to give a credit to the obligor, or to subject the principal to any risk, or place his claim in any less advantageous position than it would have been in if no contract had been made in reference thereto.

It must be borne in mind, that it is proved by Marcus Dotter and Emanuel Levy, and other witnesses, that the defendant had on hand more than sufficient goods, of the description mentioned, at the time the other goods were delivered and the memorandum signed. By the memorandum, the residue of the goods was to be delivered, at any time within twelve months, when called for by the complainant. The defendant was obliged to keep this amount of these goods constantly on hand, and ready for delivery. He could, therefore, gain nothing by delay. On the other hand, the complainant might have found it more convenient not to take all at one time; the bond bore interest, which was accruing by the delay; and if the defendant, *upon demand, should [*360 fail to comply, the bond would remain in force, and no right of the complainant to the money debt, or its security by the mortgage, would be prejudiced.

Under these circumstances, we are of opinion that, as Davis had authority to receive payment

in goods, he had also authority to enter into this agreement, having the same object in view, and providing for its accomplishment in a way apparently more beneficial for the creditor than the receipt of all the goods at the time the arrangement was made.

That the agreement itself imports a consideration, deemed by the law valuable, there can be no doubt. An agreement to give a less sum for a greater, if the time of payment be anticipated, is binding; the reason being, as expressed in *Pennel's case*, 5 Co. R., 117 that peradventure parcel of the sum, before the day, would be more beneficial than the whole sum on the day. (Coke's Lit., 212, b; Com. Dig., Accord, B. 2; *Brooks v. White*, 2 Met., 283.) And when the time of payment is not anticipated, the law deems the delivery of specific articles a good satisfaction of a money debt, because it will intend them to be more valuable than the money to the creditor who has consented to the arrangement. (Bac. Ab., Accord, A; *Pennel's case*, 5 Co. R., 117; *Booth v. Smith*, 3 Wend., 66; *Kellogg v. Richards*, 14 Wend., 116; *Steinman v. Magnus*, 11 East, 390; *Levin v. Jones*, 4 B. & C., 513.)

In this case, both these rules apply; for the time of payment was to be anticipated, and specific articles delivered.

We consider it also clearly proved, that the defendant has been ready to perform at all times since the agreement was made. It is said by Davis that, in 1844, January, he thinks, he addressed a letter to Levy, requesting him to pay the money coming to Very in jewelry, watches, &c.; and also requested him to put them up, and deliver them to Mr. Waring, in Little Rock; and that Levy declined paying, as requested. That he has searched for Levy's letter, but cannot find it.

It is certainly highly improbable that Levy, who had had these goods on hand, and set apart from his trade, ready for delivery, ever after the agreement was made, should have thus refused to deliver them.

He produces a letter of Davis, which, though it bears date on the 8d of February, 1844, is undoubtedly the letter Davis speaks of, and is as follows:

"NEW ALBANY, Feb. 3, 1844. Dear Sir— If you can pay the balance of your note in good silver or gold watches, and good jewelry, at fair prices, say about half of each, or two-thirds watches, you will please notify me of the fact by return mail, and I will send on for them 361* at once. The things you let me *have before were too high, at least Mr. Very says so. Let me hear from you. I am, your friend. John S. Davis. Mr. J. Levy."

It thus appears, Davis was mistaken in supposing he designated a person in Little Rock to receive the goods; and unless it was the purpose of this letter to vary the original understanding of the parties in respect to the proportion of watches to be delivered, it is difficult to see what fair object it could have had. The testimony of Davis that Levy refused, without undertaking to state the contents of Levy's letter, or the substance of its contents, cannot be deemed sufficient to prove a refusal by Levy to perform his contract. Before the defendant can be prejudiced by testimony of a refusal, it is reasonable the court should know what it

was. It certainly was not a refusal to deliver the goods to Waring, as Davis says, for Waring was not mentioned by Davis in his letter. The conduct of Davis in this matter is somewhat strange. He made the memorandum in writing as Very's agent, agreeing to accept payment of the balance of the bond in these articles; he delivered to Very the jewelry received, but says he did not tell Very of the contract to receive the balance in goods; and eleven months afterwards he wrote the letter of the 3d of February, which seems to be a new proposal, as if no contract had yet been made on the subject; he misstates the contents of his own letter in a material particular, says he has lost Levy's letter, but the latter declined paying as requested. We are not satisfied that a breach of contract by Levy, or any laches on his part, is made out.

It is asserted by the complainant's counsel that the contract was void on account of Levy's fraud; that it was obtained from Davis by false statements and the suppression of material facts by Levy, and, of course, cannot be the basis of any right in a court of equity.

But this ground is not open to the complainant. No fraud is charged in the bill, and though the complainant may not have anticipated, when the bill was filed, that this contract would be set up in the answer as a defense, yet on the coming in of the answer he might have amended his bill, as he did in another particular, averring that if any such agreement was in fact made, it was void, and charging in what the fraud consisted. Not having done so, he cannot now avail himself of it. Besides the evidence comes in a very irregular way, and is wholly unsatisfactory. It is brought out by Davis, in answer to interrogatories which do not call for any statements touching such subjects, but relate to wholly different matters. Thus the 19th interrogatory inquires: "For what reason was the agreement, marked *B, given or executed, [*362 if ever executed?" To this Davis replies: "That said agreement was executed and delivered for several reasons: The first of which reasons was, that Levy represented that he had expended large sums of money in defending suits for the benefit of Very, and for the purpose of saving Very from losing the money for which this suit is brought; the second reason was, that said Levy represented himself as insolvent or wholly unable to pay the debt due Very; and third, that the property mortgaged was of little value, and would only pay at best a very small portion of the money intended to be secured by the mortgage; all which statements and representation thus made by said Levy, said Davis, subsequent to the signing and delivering said agreement, found to be false."

The 20th interrogatory inquires: "What was the inducement and consideration for giving and executing the said agreement B?" To this he answers: "That the inducement and consideration for giving and executing agreement 'B' were the false representations of said Levy of his circumstances, the value of the property mortgaged, and that he, said Levy, had paid large sums of money to save said debt secured by said mortgage for said Very; these statements and representations were

made before and at the time said agreement "B" was executed and delivered, and said Davis then believed them to be true, but subsequently found them to be false."

This is all the testimony in support of the charge of fraud. What he means, when he says he subsequently found the representations to be false, he does not explain. That he had any personal knowledge of their falsehood he does not say; and his statement indicates only that, by subsequent inquiry, and the information elicited thereby, he became satisfied that he was deceived. It would not be in conformity with settled rules of pleading and evidence in courts of equity, to convict a party of a fraud, not charged on the record, and brought out for the first time by the voluntary statements of a witness in answer to no question, and resting at last upon mere hearsay.

The decree of the Circuit Court is affirmed, with costs.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Arkansas, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

Cited—19 How., 130; 23 How., 472; 2 Otto, 425; 1 Filippin, 206.

363*] *HORACE H. DAY, Plaintiff in Error, v.

W. JAMES WOODWORTH, MILLER TURNER, WILLIAM W. PYNCHORN, ROBERT L. FULLER, ANDREW SISON, HARVEY CLEMENCE, THOMAS BOLTON, MERRET BRISTOL, JOSEPH BOWEN, ANDREW ELMANDORF, SETH G. POPE, EDWARD GORHAM, EPHRIAM C. BRETT, ARNOLD TURNER, MARCUS TOBY, GEORGE J. KIPP, JOHN B. BUMP, — ATTHOUSE, ERASTUS BROWN, ERASTUS F. RUSSELL, JOHN C. RUSSELL, ASA C. RUSSELL, EDWARD P. WOODWORTH, LORING G. ROBBINS, LORENZO H. RICE, AND MARK ROSSITER.

As to which party shall open and close case is not the subject of bill of exceptions—Exemplary damages may be given in trespass—counsel fees not part of damages.

Norx.—Vindictive damages in actions for torts.

In actions for tort, a jury may give exemplary, punitive, or vindictive damages, on account of the enormity of the offense, rather than as a measure of compensation. *Doe v. Filittor*, 13 Mees. & W., 45; *Pastorius v. Fisher*, 1 Rawle, 27; *Phillips v. Lawrence*, 6 Watts. & S., 150; *Nelson v. Morgan*, 2 Mart., 257; *Tift v. Culver*, 3 Hill N. Y., 180; *Auchmuty v. Ham*, 1 Denio, 495; *Brizee v. Maybee*, 2 Wend., 144; *Bride v. McLaughlin*, 5 Watts., 375; *Morrison v. Hart*, 2 Bibb, 4; *Smith v. Lush*, 4 Bibb,

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Where an action of trespass *quare clausum fregit* was brought, and the defendants justified, and the court allowed the defendants, upon the trial, to open and close the argument, this ruling of the court is not a proper subject for a bill of exceptions.

The suit being brought by the owner of a mill dam below, against the owners of a mill above, for forcibly taking down a part of a dam, upon the allegation that it injured the mill above, it was proper for the court to charge the jury, that if they found for the plaintiff, upon the ground that his dam caused no injury to the mill above, they should allow, in damages, the cost of restoring so much of the dam as was taken down, and compensation for the necessary delay of the plaintiff's mill; and they might also allow such sum for the expenses of prosecuting the action, over and above the taxable costs, as they should find the plaintiff had necessarily incurred, for counsel fees, and the pay of engineers in making surveys, &c.

But if they should find for the plaintiff, on the ground that the defendants had taken down more of the dam than was necessary to relieve the mill above, then they would allow in damages the cost of replacing such excess, and compensation for any delay or damage occasioned by such excess; but not anything for counsel fees or extra compensation to engineers, unless the taking down of such excess was wanton and malicious.

In actions of trespass, and all actions on the case for torts, a jury may give exemplary or vindictive damages, depending upon the peculiar circumstances of each case. But the amount of counsel fees, as such, ought not to be taken as the measure of punishment, or a necessary element in its affliction. The doctrine of costs explained.

Whether the verdict would carry costs or not, was a question with which the jury had nothing to do.

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of Massachusetts.

It was an action of trespass *quare clausum fregit* brought by Day, a citizen of New York, against the defendants in error, citizens of Massachusetts, for pulling down a mill dam within the town of Great Barrington, in the County of Berkshire, Massachusetts.

The defendants put in a plea of not guilty, and also a special plea of justification, viz.:

And the defendants further say, that at the time when the said trespasses are alleged to have been committed, and for a long time previously thereto, and prior to, and at the time of the erection of the said plaintiff's said dam, certain mills and a certain mill dam, the property of, and in the use and possession of *the Berkshire Woolen Company (a [*364 corporation duly established by the laws of the State of Massachusetts), had been and were then lawfully erected and maintained, by, upon and across said stream on which plaintiff's dam was built; that while said mills and dam were thus erected and maintained, and used by said corporation, the plaintiff unlawfully caused to be erected in said stream, and below said dam, and at the time of said alleged trespass, unlawfully caused to be maintained therein the said dam in his declaration mentioned, in such manner as to injure the said mills and dam of the said corporation; that the defendants, by direction of said Berkshire Woolen Company,

502; *Whittemore v. Cutter*, 1 Gall., 478; *Conard v. Pacific Ins. Co.*, 6 Pet., 262; *Weld v. Bartlett*, 10 Mass., 470; *Colby v. Sampson*, 5 Mass., 310; *Rich v. Bell*, 16 Mass., 294; *Burrill v. Lithgow*, 2 Mass., 526; *Nedgwick on Damages*, 34, 39 to 46, 487, et seq., 541; *Emblem v. Myers*, 6 Hurst. & Nor., 54; 3 L. J. Exch., 71; 8 W. R., 665; *Bell v. Midland Railway Co.*, 9 W. R., 612.

For expulsion of plaintiff from his residence. *The Yankee v. Gallagher*, 1 McAll., 467.

In patent cases. *Seymour v. McCormick*, 16 How.,

and as their agents and servants, did enter upon the said plaintiff's close, and did break down and demolish said plaintiff's dam, in the manner least injurious to said dam; that they broke down and demolished no more of said dam than was necessary to remove or relieve the injury to said company's mills and dam caused by the maintenance of said plaintiff's said dam as aforesaid, and that said defendants did not break and enter the plaintiff's close, any further or otherwise, nor thereupon use more force or violence, than were reasonably necessary to relieve the injury aforesaid.

The plaintiff joined issue upon the plea of not guilty, and replied to the special plea as follows:

And as to the said plea of the said defendants by them first above pleaded, the said plaintiff says that he ought not be barred from having and maintaining his aforesaid action thereof against them; because he says, that although true it is that at the said time when, &c., the said Berkshire Woolen Company were then the owners and possessed of the said mills and dam in the said plea mentioned, and although true it is that the said mills and dam were upon and across the same stream on which the said plaintiff's dam then was, and although true it was that the said defendants committed the said trespasses by command of the said corporation, for replication nevertheless in this behalf, the said plaintiff says, that the said defendants of their own wrong and without the residue of the cause in their said plea alleged, broke and entered the close of the said plaintiff, and tore down and destroyed the said dam and committed the said trespasses in the introductory part of the said plea mentioned, in manner and form as the said plaintiff hath above complained, and this he prays may be inquired of by the country. Wherefore he prays judgment and for his costs.

By B. R. CURTIS, Esq.,

His Attorney.

And the defendants do the like.

By WILLIAM WHITING, Esq.,

Their Attorney.

365*] *Upon the trial, the jury came into court once for instructions, and afterwards returned three times with verdicts.

The final verdict was as follows:

In the above-entitled cause the jury find that the reduction of the said dam of the said plaintiff, to the extent of three inches for its entire length, was justified; but that the

further reduction was not justified; and so the jury find that the said defendants, of their own wrong, and without the residue of the cause by the said defendants in their said first plea alleged, committed the trespasses in the said plea mentioned, in manner and form as the said plaintiff hath, in his said declaration, complained; and thereof assess damages in the sum of two hundred dollars.

ROBERT ORR, Foreman.

Whereupon the court entered up judgment for two hundred dollars damages, without costs. The reason why the judgment was entered "without costs" may be seen by a reference to a book recently published by Stephen D. Law, Esq., p. 256. The book is upon the jurisdiction and practice of the United States Courts.

The bill of exceptions contains the proceedings of the court with respect to these several verdicts, and was as follows:

Bill of Exceptions.

This is an action of trespass for breaking and entering the plaintiff's close and tearing down his mill dam. The defendants justified under an alleged right to enter, &c., because the dam was a nuisance to mills above, on the same stream, belonging to the Berkshire Woolen Company, whose servants the defendants were, and that, by command of the said company, the defendants entered and took down so much and no more of the said dam as was necessary to relieve the mills above.

At the trial the defendants claimed the right to begin and offer their evidence first, and open and close the argument. The plaintiff claimed the same right. The presiding judge ruled in favor of the defendants, and the plaintiff's counsel excepted to the ruling. The presiding judge instructed the jury in his first summing up, that the defendants had a right by law to enter the plaintiff's close, and to take down so much of plaintiff's dam as was necessary to relieve the mills above from all practical injury occasioned by that dam; but that if the defendants had taken down more of the dam than was necessary for that end, or if none was necessary to be taken down for that end, the jury must find for the plaintiff.

That if the jury should find for the plaintiff on the last ground, viz.: that the plaintiff's dam caused no injury to the mills above, the plaintiff was entitled to a complete indemnity. *and the jury would allow in damages ***366** the cost of restoring so much of the dam as was

480; Parker v. Corbin, 4 McLean, 462; Contra, Hall v. Miles, 2 Blatchf., 194; Buerk v. Imhauser, 10 Off. Pat. Gaz., 907.

When the injury has been inflicted maliciously, oppressively, vindictively, or wantonly, or with circumstances of contumely or indignity. Phila. R. R. Co. v. Quigley, 21 How., 203; Sutton v. Mandeville, 1 Cranch C. C., 187; Nagle v. Mullison, 43 Penn. St., 48; Dibble v. Morris, 26 Conn., 416.

Not against those constructively liable, as owners of privaters. The Amiable Nancy, 3 Wheat., 546.

Where a great point of law touching the liberty of a citizen has been violated. Huckle v. Money, 2 Wils., 205.

For debauching plaintiff's daughter. Tullidge v. Wade, 3 Wils., 18; Stout v. Prall, Cox, 79; Knight v. Wilcox, 18 Barb., 212.

In libel, slander, assault and battery, false imprisonment. Tillotson v. Cheetham, 3 Johns., 56; Christian v. Lord Kennedy, 1 Murr., 428; Brace-

girdle v. Orford, 4 Maule & S., 77; Bateman v. Goodyear, 12 Conn., 575; Smith v. Lush, 4 Bibb, 502; Taylor v. Church, 8 N. Y., 4 Seld., 452; Hunt v. Bennett, 19 N. Y., 173; Knight v. Foster, 39 N. H., 576; Fry v. Bennett, 3 Bosw., 200; Guard v. Risk, 11 Ind., 156.

In cases of wantonness and cruelty, as beating a horse to death, or wantonly killing animals. Woert v. Jenkins, 14 Johns., 382; Champion v. Vincent, 20 Tex., 811.

In cases of marine torts, or illegal captures. Boston Manuf. Co. v. Fiske, 2 Mass., 120; The Amiable Nancy, 3 Wheat., 546.

Where there has been gross or willful negligence or carelessness. Peoria Bridge Association v. Loomis, 20 Illinois, 235; Whipple v. Walpole, 10 N. H., 130; Linsley v. Bushnell, 15 Conn., 225; Huntly v. Bacon, 15 Conn., 267; Pennsylvania R. R. Co. v. Ogier, 36 Penn. St., 60; Hopkins v. Atlantic & St. Lawrence R. R. Co., 26 N. H., 7.

taken down, and compensation for necessary delay of plaintiff's mill; and they might also allow such sum for the expenses of prosecuting the action, over and above the taxable costs, as they should find the plaintiff had necessarily incurred for counsel fees and the pay of engineers in making surveys, &c. But if the jury should find for the plaintiff on the first ground, viz.: in that the defendants had taken down more of the dam than was necessary to relieve the mills above, unless such excess was wanton and malicious, then the jury would allow in damages the cost of replacing such excess, and compensation for any delay or damage occasioned by such excess, but not anything for counsel fees or extra compensation to engineers.

The plaintiff's counsel requested the court to instruct the jury that they might allow counsel fees, &c., if there was any excess in taking down more of the dam than was justifiable, and gave as a reason that the defendants thereby became trespassers *ab initio*. The presiding judge instructed the jury as above set forth on this point.

After being charged by the presiding judge, the jury retired, and subsequently came into court for instructions, preferring a written request, as follows:

U. S. C. C. JURY ROOM, Dec. 8, 1849.

TO HIS HONOR JUDGE SPRAGUE:

If the jury find that the plaintiff's dam was too high and ought to be reduced, but not to the extent of the reduction by the defendants, can the jury find a verdict to that effect for the plaintiff according to law? If so, can they find damages for the excess of such reduction?

R. ORR, Foreman.

Thereupon the presiding judge gave anew the instructions above set forth, except that he instructed them not to allow anything for counsel fees, &c., if they should find that the reduction of the dam to any extent was justifiable. The jury again retired, and subsequently returned into court with a written paper, in the words following:

U. S. C. C. JURY ROOM, Dec. 8, 1849.

In the case of *H. H. Day* against *Woodworth et al.*, the jury find that the reduction of the plaintiff's dam to the extent of three inches for its entire length justifiable. The jury further find that the defendants pay to the plaintiff the sum of \$1,000 in full for such excess of reduction and delay.

ROBERT ORR, Foreman.

The plaintiff asked to have a verdict presented to the foreman *for his signature. [*367] ture, following the words of the issue. The presiding judge stated that he was not prepared to say to the jury that that would be the same in substance as their finding, and ruled that the verdict, to be presented to the foreman for his signature, should also set forth that part of the finding that the plaintiff's dam was lawfully reduced to the extent of three inches throughout its entire length. There was no evidence that the defendants had reduced the plaintiff's dam through its entire length, but it appeared that the plaintiff's dam was one hundred and twelve feet long, and that the part cut down by the defendants was the most westerly part, about fifty-four feet in length, and that this fifty-four feet was cut down about — inches, and that this would have the effect of reducing the obstruction presented by the dam more than three inches for its entire length.

To the above rulings of the presiding judge the plaintiff excepted.

In this stage of the proceedings, the defendants' counsel desired of the presiding judge to inquire of the jury whether something for counsel fees was not included in the sum of \$1,000 mentioned in said finding of the jury.

The presiding judge being of opinion that there was no evidence which would warrant the jury in finding damages to the amount of \$1,000 for the said excess of reducing the dam, without expressing this opinion, made the inquiry requested, to which the foreman answered, that they did not allow anything for counsel fees, but only for the excess and delay, as appeared by the written verdict. The defendants' counsel then urged that the written verdict said that the sum of \$1,000 was to be in full, and requested the presiding judge to ask the jury if they did not allow that sum in the expectation that the plaintiff was to recover no more. The foreman of the jury responded in substance as before, but one of his fellows said he understood the plaintiff was to recover no more, and that each party was to pay his own costs, and that he had agreed to the verdict on that understanding. This understanding was denied by another of the jury, and the presiding judge then said that it must be the verdict of each juror, and that this was not the verdict of the one who said he had agreed to it on the misunderstanding, and therefore the presiding judge

In actions of crim. con. *Baile v. Bryson*, 1 Murr., 17; *Towe v. Summers*, 2 Nev. & M., 267.

In willful trespass on lands accompanied by insult, or malice. *Merest v. Harvey*, 5 Taunt., 442; *Major v. Pulliam*, 3 Dana, 584; *Sears v. Lyons*, 2 Stark., 317; *Kolb v. Bankhead*, 18 Tex., 228.

For willful or malicious injuries to personal property, as taking same. *Bull v. Griswold*, 19 Ill., 631; *Merrills v. Tariff*, Man'g Co., 10 Conn., 384; *Huntley v. Bacon*, 15 Conn., 271; *Rose v. Story*, 1 Barr., 191; *Williams v. Newberry*, 32 Miss. (3 George), 256; *Goetz v. Amba*, 27 Miss. (6 Jones), 28.

For injuries to the person, as assault and battery. *Cook v. Ellis*, 6 Hill, N. Y., 465.

For breach of promise of marriage, and seduction. *Coryell v. Colbaugh*, Cox, 77; *Southard v. Buxford*, 6 Cow., 254; *Wells v. Padgett*, 3 Barb., 323; *Ingersoll v. Jones*, 5 Barb., 661; *Goodall v. Thurman*, 1 Head (Tenn.), 209; *Stevenson v. Belknap*, 6 Clarke (Iowa), 97.

Not where master whips a seaman, unless punished. *Howard*, 18.

ment is wantonly inflicted. *Gould v. Christlanson*, Blatchf. & H., 507.

For willful and malicious collision. *Ralston v. The State Rights*, Crabbe, 22.

Jury decide amount, but where sum is extravagant, court will interfere, but not unless the verdict bears evident marks of prejudice, passion or corruption. *Walker v. Smith*, 1 Wash. C. C., 152; *Sharpe v. Brice*, 2 W. Black, 942; *Benson v. Frederick*, 3 Burrows, 184; *Duborley v. Gunning*, 4 Term R., 651; *Sargent v. Denniston*, 5 Cow., 403; *Graham on New Trials*, 410 *et seq.*; *Butler's N. P.*, 327.

For personal injuries, accompanied with circumstances of aggravation, fraud, or oppression. *Chiles v. Drake*, 2 Met. (Ky.), 146; *Heirn v. McCaughan*, 32 Miss. (3 George), 17.

For obstructing a public highway. *Windham v. Rhame*, 11 Rich. Law (S. C.), 233; *Jefcoat v. Knotts*, 11 Rich. Law (S. C.), 649.

In cases of fraud. *Ohio v. Chapman*, 15 Tex., 400.

proceeded to sum up anew on the subject of damages, referring to the evidence, and giving to the jury substantially the instructions, in point of law, before given, and adding that, if the plaintiff should recover \$1,000 damages, he would, as the prevailing party, by law recover his taxable costs; and having so done, directed the jury again to retire; to this proceeding the plaintiff's counsel excepted. Subsequently, **368*** the jury again returned into court, and brought in a second verdict, in writing, in the words following:

U. S. C. C. JURY ROOM. }
BOSTON, Dec. 8, 1849. }

In the case of *Horace H. Day v. Woodworth et al.* the jury find that the reduction of the plaintiff's dam to the effect of three inches for its entire length was justifiable.

The jury further find, that the defendants pay to the plaintiff the sum of \$200 for such excess of reduction and delay.

ROBERT ORR, Foreman.

This verdict was put in the form in which it appears on the record, but before it was signed the plaintiff's counsel suggested to the presiding judge, that, as the jury had been instructed that in one event the plaintiff would recover costs, some of the jury might have agreed to this verdict with that understanding, and requested that this inquiry might be made of the jury; thereupon the presiding judge inquired of the jury whether, in rendering this verdict, they had any reference to costs, and the foreman of the jury, having replied that they had not, was about to sign the verdict, when one of his fellows objected, and stated that he had agreed to the verdict in the belief that, as prevailing party, the plaintiff could recover his costs; thereupon the presiding judge charged the jury a third time on the subject of damages, referring to the evidence, and repeating in substance the instructions in point of law before given; and further instructed them that the plaintiff, recovering only \$200, would not recover costs, and that it would be a violation of their oaths to have any regard to the costs, it being their duty to find the actual damage proved, and no more, and directed them again to retire; which having done, they brought in the verdict which appears of record. To all these proceedings the plaintiff excepted, and prayed that his exceptions might be allowed, and that this bill of exceptions might be signed and sealed by His Honor the judge; all of which being found true, the same is accordingly signed and sealed.

PELEG SPRAGUE, [SEAL.]

Judge of the U. S. Mass. District.

Upon this exception the case came up to this court, and was argued by *Mr. Gillet* for the plaintiff in error, no counsel appearing for the defendants.

Mr. Gillet made the following points:

First. The affirmative was with the plaintiff, and he had the right to introduce evidence first, and the right to open and close the argument. (*Burrill's Practice*, 233.)

369* *Where the general issue is pleaded, the plaintiff has always the right to begin. (*Carter v. Jones*, 6 Carr. & Payne, 64; *Colton v. James*, 1 Moo. & Mal., 273, 275, and 505; *Cooper v. Wakley*, 8 Carr. & Payne, 474 and note; *Fish v. Travers*, 8 Carr. & Payne, 578;

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Price v. Seaward, 1 Carr. & Marsh., 23; *Booth v. Mills*, 15 Mees. & Wels., 669; *Cripps v. Wells*, 1 Carr. & M., 489; *Mercer v. Whall*, 5 Adol. & El., N. S., 447; *Harrison v. Gould*, 8 Carr. & P., 580; *Ayer v. Austin*, 6 Pick., 225; *Brooks v. Barrett*, 7 Pick., 94; *Ware v. Ware*, 8 Maine, 42; *Lunt v. Wormell*, 19 Maine, 100, 102; *Sawyer v. Hopkins*, 22 Maine, 268; *Robinson v. Hitchcock*, 8 Met., 64; *Sullivan v. Reardon*, 5 Pike, 140; *Lexington Ins. Co. v. Pacer*, 16 Ohio, 324.)

Second. The judge erred in refusing to instruct the jury, that if the defendants cut down the plaintiff's dam more than was necessary to relieve the mills above, that they were not authorized to allow anything in addition to cover counsel fees or extra compensation paid by him to engineers.

Third. The judge erred in charging the jury that it would be a violation of their oaths to have any regard to whether their verdict would carry costs or not.

Fourth. This being an action of tort, the plaintiff was not limited to the actual damages proved; but the jury were authorized to give him such as the circumstances of the case might indicate as proper. (*Allen v. Blunt*, 2 Wood. & M., 121; *Jennings v. Maddox*, 8 B. Mon., 109; *Whipple v. The Cumberland Man. Co.*, 2 Story, 661; *Washburn v. Gould*, 3 Story, 136; *Whitmore v. Cutter*, 1 Gall., 478; 1 Bald., 328; *The Apollon*, 9 Wheat., 379; *Staats v. Ez. of Teneyck*, 3 Caines' R., 111; *Kingsbury v. Smith*, 13 N. H. R., 122; 4 Johns., 1; *Street v. Patrick*, 12 Maine, 9; *Beal v. Thompson*, 3 B. & P., 407; *Pulkin v. Leavitt*, 13 Vt. R., 379; *Earle v. Sawyer*, 4 Mass., 1, 12; *Boston Man. Co. v. Fiske*, 2 Mason, 119, 120; *Sedgwick on Damages*; *Curtis on Patents*, &c.)

Mr. Justice Grier delivered the opinion of the court:

The plaintiff in error was plaintiff below in an action of trespass, charging the defendants with tearing down and destroying his mill dam. The defendants pleaded in justification that the Berkshire Woolen Company owned mills above the dam of plaintiff, who illegally erected and maintained the same, so as to injure the mills above; that by direction of said company, and as their agents and servants, they did enter plaintiff's close, and did break down and demolish so much of the plaintiff's dam as was necessary to remove the nuisance and injury to the mills above, and no more, and as they lawfully might. To this plea the plaintiff replied *de injuria*, &c.

*On the trial of this issue, the defend- **[370]** ants "claimed the right to begin and offer their evidence first, and open and close the argument. The plaintiff claimed the same right. The court ruled in favor of the defendants, to which the plaintiff excepted." This ruling of the court is now alleged as error.

Our attention has been pointed to numerous decisions of English and American courts on this subject, which we think it unnecessary to notice more particularly, than to state, that the question whether a defendant in trespass who pleads a plea in justification only, has a right to begin and conclude, has been differently decided in different courts. It is a question of practice only, and depends on the peculiar

HOWARD 18.

rules of practice which the court may adopt. The English courts have regretted that an objection to the ruling of the court at *nisi prius* on this question should ever have been permitted to be received as a ground for a new trial. But although a court may sometimes grant a new trial where the judge has not accorded to a party certain rights to which, by the rules of practice of the court, he may be justly entitled, we are of opinion that the ruling of the court below on such a point is not the proper subject of a bill of exceptions or a writ of error. A question as to the order in which counsel shall address the jury does not affect the merits of the controversy. As a matter of practice, the Circuit Court of Massachusetts had a right to make its own rules. The record does not show that the rule of the court is different from their judgment on this occasion. So that the plaintiff has failed to show any error in the decision, assuming it to be a proper subject of exception.

The great question, on the trial of this case, appears to have been whether the plaintiff's dam was higher than he had a right to maintain it, and if so, whether the defendants had torn down more of it, or made it lower than they had a right to do.

The plaintiff's counsel requested the court to instruct the jury that "they might allow counsel fees, &c., if there was any excess in taking down more of the dam than was justifiable, and give as a reason that the defendants thereby became trespassers *ab initio*."

The court instructed the jury "that if they should find for the plaintiff on the first ground, viz.: that the defendants had taken down more of the dam than was necessary to relieve the mills above, unless such excess was wanton and malicious, then the jury would allow in damages the cost of replacing such excess, and compensation for any delay or damage occasioned by such excess, but not anything for counsel fees or extra compensation to engineers."

371*] *This instruction of the court is excepted to, on two grounds: First, because "this being an action of trespass, the plaintiff was not limited to actual damages proved;" and second, that the jury, under the conditions stated in the charge, should have been instructed to include in their verdict for the plaintiff, not only the actual damages suffered, but his counsel fees and other expenses incurred in prosecuting his suit.

It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive or vindictive damages upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured. In many civil actions, such as libel,

slander, seduction, &c., the wrong done to the plaintiff is incapable of being measured by a money standard; and the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindictive rather than compensatory.

In actions of trespass, where the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff which he would have been entitled to recover, had the injury been inflicted without design or intention, something farther by way of punishment or example, which has sometimes been called "smart money." This has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case. It must be evident, also, that as it depends upon the degree of malice, wantonness, oppression, or outrage of the defendant's conduct, the punishment of his delinquency cannot be measured by the expenses of the plaintiff in prosecuting his suit. It is true that damages, assessed by way of example, may thus indirectly compensate the plaintiff for money expended in counsel fees; but the amount of these fees cannot be taken as the measure of punishment or a necessary element in its infliction.

This doctrine about the right of the jury to include in their verdict, in certain cases, a sum sufficient to indemnify the plaintiff *for [**372** counsel fees and other real or supposed expenses over and above taxed costs, seems to have been borrowed from the civil law and the practice of the courts of admiralty. At first, by the common law, no costs were awarded to either party, *eo nomine*. If the plaintiff failed to recover he was amerced *pro falso clamore*. If he recovered judgment, the defendant was in *miseriordia* for his unjust detention of the plaintiff's debt, and was not therefore punished with the *expensa litis* under that title. But this being considered a great hardship, the Statute of Gloucester (6 Ed. I., c. 1) was passed, which gave costs in all cases when the plaintiff recovered damages. This was the origin of costs *de incremento*; for when the damages were found by the jury, the judges held themselves obliged to tax the moderate fees of counsel and attorneys that attended the cause. (See Bac. Abr., tit. Costs.)

Under the provisions of this statute every court of common law has an established system of costs, which are allowed to the successful party by way of amends for his expense and trouble in prosecuting his suit. It is true, no doubt, and is especially so in this country (where the Legislatures of the different States have so much reduced attorneys' fee bills, and refused to allow the *honorarium* paid to counsel to be exacted from the losing party), that the legal taxed costs are far below the real expenses incurred by the litigant; yet it is all the law allows as *expensa litis*. If the jury may, "If they see fit," allow counsel fees and expenses as a part of the actual damages incurred by the plaintiff, and then the court add legal costs *de incremento*, the defendants may be truly said to be in *miseriordia*, being at the mercy both of court and jury. Neither the common law, nor the statute law of any state, so far as we are

informed, has invested the jury with this power or privilege. It has been sometimes exercised by the permission of courts, but its results have not been such as to recommend it for general adoption either by courts or Legislatures.

The only instance where this power of increasing the "actual damages" is given by statute is in the patent laws of the United States. But there it is given to the court and not to the jury. The jury must find the "actual damages" incurred by the plaintiff at the time his suit was brought; and if, in the opinion of the court, the defendant has not acted in good faith, or has been stubbornly litigious, or has caused unnecessary expense and trouble to the plaintiff, the court may increase the amount of the verdict, to the extent of trebling it. But this penalty cannot, and ought not, to be twice inflicted; first at the discretion of the jury, and again at the discretion of the court. The expenses of the defendant over and above taxed **373*** costs are usually *as great as those of plaintiff; and yet neither court nor jury can compensate him, if the verdict and judgment be in his favor, or amerce the plaintiff *pro falso clamore* beyond tax costs. Where such a rule of law exists allowing the jury to find costs *de incremento* in the shape of counsel fees, or that equally indefinite and unknown quantity denominated (in the plaintiff's prayer for instruction) "&c.," they should be permitted to do the same for the defendant where he succeeds in his defense, otherwise the parties are not suffered to contend in an equal field. Besides, in actions of debt, covenant, and *assumpsit*, where the plaintiff always recovers his actual damages, he can recover but legal costs as compensation for his expenditure in the suit, and as punishment of defendant for his unjust detention of the debt; and it is a moral offense of no higher order, to refuse to pay the price of a patent or the damages for a trespass, which is not willful or malicious, than to refuse the payment of a just debt. There is no reason, therefore, why the law should give the plaintiff such an advantage over the defendant in one case, and refuse it in the other. (See *Barnard v. Poor*, 21 Pickering, 882; and *Lincoln v. The Saratoga Railroad*, 29 Wend., 435.)

We are of opinion, therefore, that the instruction given by the court in answer to the prayer of the plaintiff was correct.

The instruction to the jury, also, was clearly proper as respected the measure of the damages, and that the jury had nothing to do with the question whether their verdict would carry costs.

The judgment is therefore affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Massachusetts, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs, for the defendants in error.

Cited—21 How., 213; 23 How., 9; 15 Wall., 231, 453; 1 Otto, 433; 8 Otto, 276; 7 Blatchf., 506; 2 McArthur, 207.

JOSEPH FOWLER, JUNIOR, *Appellant*,

v.

NATHAN HART.

Reformation of mortgage without notice to subsequent mortgagee—foreclosure and sale thereafter with notice—Estoppel.

Real property, in Louisiana, was bound by a judicial mortgage.

The owners of the property then took the benefit of the Bankrupt Act of the United States.

A creditor of the bankrupt then filed a petition against the assignee, alleging that he had a mortgage upon the same property, prior in date to the judicial mortgage, but that, by some error, other property had been named, and praying to have the error corrected. Of this proceeding the judgment creditor had no notice.

*The court being satisfied of the error, ordered the mortgage to be reformed, and thus gave the judgment creditor the second lien instead of the first; and then decreed that the property should be sold free of all incumbrances. Of this proceeding, and also of the distribution of the proceeds of sale, the judgment creditor had notice, but omitted to protect his rights.

In consequence of this neglect, he cannot afterwards assert his claim against a purchaser, who has bought the property as being free from all incumbrances.

THIS was an appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

The facts are stated in the opinion of the court.

It was argued by *Mr. Bradley* for the appellant, no counsel appearing for the appellee.

Mr. Bradley thus stated his case and points:

Daniel T. Walden, as indorser of two notes of William Christy, was indebted to Fowler, the complainant, and suit was brought by him upon these two notes, and judgment recovered, as above stated.

At that time, Daniel T. Walden held and owned the premises described in the petition of Fowler, and also at the time when the third judgment was converted into a mortgage. Nor was there then any legal mortgage, nor had Fowler any notice of any equitable mortgage on that property. Just prior to that time, Walden, being indebted to the defendant, Hart, had given him a special mortgage, describing with particularity certain other property, not embracing or touching any part of the premises now claimed by Fowler. In this condition of things, Walden was declared bankrupt. Hart then filed his petition in the Bankrupt Court, setting up, as against the assignee and Walden, that there was a mistake in the description of the property intended to be conveyed by Walden's mortgage to him, and claiming that the said mortgage was intended to convey the premises now claimed by Fowler.

No process was served upon Fowler, or upon the other creditors of Walden. The Bankrupt Court, however, proceeded to take the proofs and adjudicate, and in its judgment affirmed the pretensions of Hart, ordered the mistake to be corrected, set up his special mortgage on these particular premises, and ordered them to be sold to satisfy that special mortgage, and the surplus, if any, to be brought into the general fund. The sale was made in execution of that order, and at that sale Hart became the purchaser, for a sum less than the amount of

his mortgage, received a deed, went into possession, and has ever since been in possession, claiming under that proceeding and sale.

The Circuit Court decided, on this state of 375*] facts, that the law *and the evidence are in favor of the defendant; ordered, adjudged and decreed, that there be judgment in favor of the defendant, Hart, and that the cause be dismissed at complainant's costs. And Fowler appealed.

In the case of *Houston et al. v. The City Bank of New Orleans*, 6 How., 505, 506, this court distinctly affirmed the power of the District Court, in bankruptcy, to convene the mortgage creditors, sell the mortgaged property, pay the proceeds to the mortgagees, according to their respective priorities, and order the cancellation of the mortgages. No such order has been made in this case.

The questions arising in this case, and not hitherto decided by this court, are:

1st. The powers of the District Court to exercise, in a summary proceeding, a jurisdiction heretofore limited to courts of equity, to correct mistakes in deeds, and reform them according to the intent of the parties; and,

2d. To correct a mistake in a deed, as between third parties, creditors, or purchasers, without notice.

3d. To make such correction, without causing such third parties to be convened and made parties to the suit.

First.

I. This court has said, in *Ex-parte Christy*, 3 How., 812, that the District Court, sitting in bankruptcy, is clothed with the most ample powers and jurisdiction "over the rights, interests, and estate of the bankrupt, and over the conflicting claims of creditors; and,

II. Page 817: The District Court has a concurrent jurisdiction, to the same extent and with the same powers as the Circuit Court, over liens, judgments and securities.

III. But it is submitted, that this jurisdiction must be over liens and securities already created, and not over such as are to be created by the superior power of a court of equity.

IV. A court of law of general jurisdiction has, unquestionably, jurisdiction over the same subjects, to a certain extent; but it has not, and never has been supposed to have, that creative power which has been hitherto confided to courts of equity alone, to compel men to reform their deeds and contracts according to the intent of the parties.

V. The 8th section of the Bankrupt Act gives to the Circuit Court concurrent jurisdiction with the District Court, in bankruptcy; and it may well have been designed for such cases as this, and to prevent that injustice, danger of which might well be apprehended from the exercise of the summary powers given to the District Court in bankruptcy.

376*] *VI. It is not essential to the exercise of the summary jurisdiction granted, and intended to be conferred, inasmuch as, by this 8th section, provision is made for the means which may be needed to effect a full settlement of the estate of the bankrupt.

VII. Inasmuch, then, as the power is not given in terms in the Bankrupt Act, and is not essential as a means to accomplish the end sought by that act, it is submitted that it does

not exist, and that the court in bankruptcy had no power to correct a mistake, if any such existed, in the description of the property claimed by the defendant, Hart.

Second.

I. The recording of the judgment created a mortgage upon the real property of Walden, and that mortgage had priority, according to its date.

II. It was a lien such as was recognized by the law of Louisiana, and protected by the Bankrupt Act. (*Waller v. Best*, 3 How., 111; *Peck v. Jenness*, 7 Id., 620, 621.) "It is clear, therefore, that, whatever is a valid lien or security upon property, real or personal, by the laws of any state, is exempted by the express language of the Act."

III. The mortgage creditor takes as a purchaser, and, taking as a purchaser, his title can only be affected by notice. It is not pretended there was, prior to the mortgage of Fowler, any notice in this case of the mistake, if any, in the description of the property in Hart's mortgage.

IV. A court of equity would have had no power to order the correction of the mistake, as against him, *a multo fortiori*, the court in bankruptcy had not power to do so, and to direct the cancellation of his mortgage.

Third.

I. Nor is he estopped in any manner by the decree in bankruptcy. Such decree could only be operative upon parties and privies. The record shows that the only parties to the proceeding to correct the alleged mistake were Hart, and Christy, the assignee, and Walden. Interrogatories are propounded to Walden, but he never appeared and answered. Christy alone answered, denying the allegations of the petition, and proof was taken, and upon these the decree was made.

II. Hart had notice, at the time of filing his said petition, of the lien of Fowler, because he was returned as a creditor by judicial mortgage, and therefore, having a lien, he was entitled to be convened. The object being to affect his rights, so far as they were superior to those of the general creditors, Hart could only limit *those rights by a proceeding in [*377 which Fowler could defend them.

III. Nor is he estopped by the notice and order of sale. The property therein described is said to be bounded by New Levee, Commerce, St. Joseph, and Julia streets.

The property in the decree correcting the mistake is described as containing 23 feet 5 inches front upon New Levee Street, between Julia and St. Joseph streets, by 125 feet 6 inches deep on the line next to St. Joseph Street, and 124 feet 7 inches on the said line of lot No. 2, and designated as the house or store No. 110 in said New Levee Street; and the description of the property in the petition of the assignee for the sale of the property is still different, and makes it house No. 10. The description in the original mortgage is, a certain lot of ground, No. 2, the house numbered 109, situated between St. Joseph and Julia streets, measuring 18 feet 10 inches front on New Levee Street, by 124 feet 7 inches deep on the dividing line of lot numbered 3, and 123 feet 8½ inches on the dividing line

of lot No. 1, and about 21 feet 8 inches in the rear of the dividing line of lot No. 5. So that in fact the lot described in the mortgage was alongside of the one which it was pretended was designed to be conveyed, and both were within the description in the said notice to Fowler. He, therefore, was not only neither party nor privy, but he had no notice of such pretended claim to put him on inquiry.

VII. Finally, it does not appear that there ever was any order by the court in bankruptcy to erase and cancel the said mortgage of said Fowler, and the same is now and hath ever been a valid and subsisting lien upon the lot claimed in his petition. In such case the law of Louisiana is clear that he had a right to proceed against the person holding the land, and to a judgment for the sale of the lot, and an account of the rents and profits in the hands of Hart, holding and claiming the same adversely.

Mr. Justice McLean delivered the opinion of the court:

This is an appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

Fowler filed his bill in the Third District Court of New Orleans, representing that on the 16th December, 1839, he recovered a judgment in the Commercial Court of New Orleans, against Daniel T. Walden and William Christy for \$3,530.22, besides interest; that on the 29th December, 1839, he caused the judgment to be duly inscribed in the office of the recorder of mortgages for the Parish of New Orleans, by which the same became a judicial mortgage on the real estate of the defendants in the parish; that Walden afterwards became bankrupt, and **378**] *Christy was appointed his assignee; and that he procured an entry of cancellation to be made by the recorder of judicial mortgages without his consent, and illegally; that the mortgage remains in force.

And the plaintiff states that when the judgment was recorded, and up to the time of the bankruptcy of Walden, he was the owner and in possession of a certain lot of ground and buildings thereon in the City of New Orleans, to wit: in the second municipality, in the square bounded by New Levee, St. Joseph, Commerce, and Julia streets, measuring 23 feet 5 inches front on New Levee Street, by about 125 feet 6 inches in depth on the side nearest St. Joseph Street, 124 feet 7 inches in depth on the side nearest Julia Street, and about 21 feet 8 inches on the rear line; which property is liable to the judicial mortgage of the petitioner; that Christy, the assignee of Walden, sold the same lot to one Nathan Hart, of New York, who took possession thereof, and still remains in possession; that he well knew, at the time of his purchase, that the petitioner's mortgage was a lien on the same, and that Christy, the assignee, had no power to cancel the same. And the petitioner avers that his judgment lien was good under the 2d section of the Bankrupt Law.

On the application of Hart, he being a citizen of New York, the suit was removed from the State Court to the Circuit Court of the United States.

In his answer Hart denies that the petitioner has a mortgage on the property described in his petition; and states that he purchased the

same for the sum of \$4,700, under a sale of the marshal, on the 16th June, 1845, in pursuance of a decree of the United States District Court, entered the 23d May, 1845, sitting as a court of bankruptcy, in the matter of the bankruptcy of Daniel T. Walden, and confirmed according to law by a sale duly recorded from Christy, the assignee, before a notary public the 19th June, 1845; and clear of all mortgages, the same having been canceled, by order of the judgment of said court, the 23d May, 1845, on a rule, notice of which was duly served on petitioner.

The mortgage of the defendant, Hart, on the above property was dated 22d May, 1838, the judicial mortgage of the petitioner took effect the 29th December, 1839. But after the bankruptcy of Walden, and before the sale of the property to Hart by the assignee, it was discovered that there was a mistake in the mortgage in describing the property intended to be mortgaged. To correct this mistake a bill was filed by Hart against Christy, the assignee, and on the 5th December, 1844, a decree was obtained correcting the mortgage so as to describe the lot intended to be mortgaged. Of this proceeding the petitioner, Fowler, seems to have had no notice.

*Afterwards, on the 24th April, 1845, [**379** the assignee petitioned the District Court, stating "that there is still in his possession, as assignee, the following described property, specially mortgaged to Nathan Hart to secure the payment of the sum of \$8,655, with interest, which he prays may be sold on certain terms named. The lot above described is stated, and also other property of the bankrupt. The court ordered that due notice of the petition be published in two newspapers printed in the district, ten days at least before the time assigned for the hearing, and that the petition be heard on the 23d May ensuing.

On the 10th May, 1845, the following rule was entered by the court: "The assignee of the said estate having filed in this court a petition as above described, it is ordered by the court that a hearing of the said petition be had on Friday, the 23d May next, at 10 o'clock A. M., when, as one of the mortgage creditors of said estate, you are notified to appear and show cause why the property, as described below, should not be sold upon the terms and in the manner and form set forth in said petition, and why the said assignee should not be authorized to erase and cancel the mortgages, judgments, and liens recorded against said bankrupt, and in favor of certain creditors of the estate, effecting the property surrendered, so that said assignee may convey a clear and unincumbered title to any purchaser thereof, reserving to such creditors all their rights in law to the proceeds of the sale of the said property upon the final distribution thereof."

To this rule was appended the following, with other descriptions of property ordered to be sold: 1. "Property in the second municipality, bounded by New Levee, Commerce, St. Joseph, and Julia streets, with the improvements thereon, mortgaged to Nathan Hart. Terms, one third cash, the balance on a credit of twelve and eighteen months."

To the property above designated No. 1, the name of Joseph Fowler was appended, and the marshal returned "that he had received the

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same on the 12th May, 1845, and on the same day served a copy of the rule on the within-named Joseph Fowler.

The principal objection to the validity of the sale of the property to Hart is founded on the procedure in the District Court, for the correction of the misdescription of the mortgage. As between the mortgagor and mortgagee, there can be no objection to this proceeding. The District Court had jurisdiction of the matter, and it is but the ordinary exercise of the powers of a court of chancery to reform a mortgage or other instrument so as to effectuate the intention of the parties. But it is alleged that Walden having become a bankrupt, his property was vested in his assignee for the benefit of his creditors, and that the judicial mortgage of the petitioner could not be affected by a procedure in which the petitioner was not a party, and of which he had no notice.

The assignee generally represents the creditors, and being made a party to the proceeding on the mortgage, he appeared and denied the allegations of the petition of the mortgagee; but on the hearing the District Court was satisfied of the truth of the allegations in the bill, and reformed the mortgage so as to describe truly the property intended to be mortgaged. It is true that Fowler, the petitioner, was not a party to this proceeding, and if the action of the District Judge had here terminated, it would be difficult to maintain the decree.

By the 11th section of the Bankrupt Law the court had power to order the assignee to redeem and discharge "any mortgage or other pledge or deposit, or lien upon any property," &c. It also necessarily had the power, on the sale of mortgaged premises, to distribute the proceeds as the law required. And in regard to the property in question, it appears that due notice was given to Fowler of the application for the sale of it by Hart, who claimed to have a special mortgage on it; and the property was substantially described, and the day stated on which the court would act on the application. And in addition, a notice was published in two newspapers ten days before the time set for hearing by the court. The object of this notice was stated to be, to make an unembarrassed title to the purchaser, and enable Fowler to make any objections he might have to the sale, and the cancellation of his mortgage. That the rights of creditors were reserved as to the proceeds of the mortgaged premises on a final distribution.

Whether the petitioner, Fowler, took any steps under this notice does not appear; and in the absence of such evidence, it may well be presumed that he acquiesced in the procedure. The notice afforded him an opportunity to assert his rights, and to object to the decree for the reform of Hart's mortgage, of which he now complains, as fully as if he had been made a party to that proceeding. This he could have stated as an objection to the sale of the premises, or in claiming the proceeds of that sale. The reform of the mortgage by the court could not have estopped him from the assertion of his rights, as he was not a party to that proceeding of the court. But, having neglected to assert his rights on the above occasion, it is now too late to set them up against the purchaser of the property at the sale.

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Although there is some discrepancy in the description of the property contained in the notice from that in the decree reforming the mortgage, yet substantially it is believed to embrace the same property; and as the [*381] notice was served upon the petitioner, as having a mortgage on the property, we think it was sufficient.

The decree of the Circuit Court is affirmed, with costs.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said District Court in this cause be, and the same is hereby affirmed.

Cited—3 Bank. Reg., 163; 9 Bank. Reg., 310.

JOHN H. HOWARD, *Plaintiff in Error*,

v.

STEPHEN M. INGERSOLL.

JOHN H. HOWARD AND JOSEPHUS ECKOLLS, *Plaintiffs in Error*,

v.

STEPHEN M. INGERSOLL.

Construction of Act of Commissioners fixing western boundary of Georgia—"western bank of river."

In 1802, when Georgia ceded her back lands to the United States, she had jurisdiction over the whole of the Chattahoochee River, from its source to the thirty-first degree of north latitude.

The rule is that, where a power possesses a river, and cedes the territory on the other side of it, making the river the boundary, that power retains the river, unless there is an express stipulation for the relinquishment of the rights of soil and jurisdiction over the bed of such river.

When Georgia ceded to the United States all the land situated on the west of a line running along the western bank of the Chattahoochee River, she retained the bed of the river and all the land to the east of the line above mentioned.

The river flows in a channel, between two banks, from fifteen to twenty feet high, between the bottom of which and the water, when the river is at a low stage, there are shelving shores, from thirty to sixty yards each in width.

The boundary line runs up the river on and along its western bank, and the jurisdiction of Georgia in the soil extends over to the line which is washed by the water, wherever it covers the bed of the river within its banks.

THESE two cases were argued and decided together. The suits related to the same tract of land and the rights of the same parties, although they came up from different states. The first, which is referred to in the opinion of the court as No. 121, was an action on the case brought by Ingersoll in the Circuit Court of Alabama (state court) to recover damages for the wrongful obstruction, by Howard, of the Chattahoochee River, whereby the waters of that stream were backed in such a manner as to overflow Ingersoll's land and obstruct the use of his mill. This mill was built between the high bank of the river and low water

mark, as it was called, so that when the water was high it was overflowed; but when the water was low, it was on dry ground. At such times, it was worked by a race fed from the river by means of a wing dam. Howard built **382*** a dam below, which backed the water upon the mill, and impeded its operations. On the trial of this cause the jury returned a verdict in favor of Ingersoll for the sum of \$4,000. The cause was carried to the Superior Court of Alabama, where the judgment was affirmed; whence it was brought to this court under the 25th section of the Judiciary Act.

HOWARD & ECKOLLS, Plaintiffs
in Error, } No. 181.
v.
INGERSOLL.

This case was brought by writ of error from the Circuit Court of the United States for the District of Georgia. Howard & Eckolls, the builders of the dam, brought a suit against Ingersoll in the Superior Court of Muscogee County, Georgia, to recover damages for an illegal entry upon their land covered with water, and fishing thereon. The jury found a verdict for the plaintiffs for the sum of \$600. A bill of exceptions brought the case up to this court.

After these general observations upon the two cases, let us now take them up separately; and first of

HOWARD, Plaintiff in Error, } No. 121.
v.
INGERSOLL.

It has been always stated that this case was brought from the Supreme Court of Alabama. The bill of exceptions, which was taken on the trial of the cause in Russell Circuit Court, was as follows:

Bill of Exceptions.

On the trial of this cause the plaintiff (Ingersoll) produced a patent from the United States to himself, dated in 1802, to fractional section No. 11, township 7, range 80, and proved title in himself to lots 1, 2, 3, and 4, in the Town of Girard, lying in Russell County, Alabama, and specifically described in some of the counts of the declaration; said land has for its eastern boundary the State of Georgia, and is immediately west of the Chattahoochee River, on the bank thereof. The river has, for the most part, high bluff banks; but in some places the banks are low, and the adjacent lands on either side (where they are low) are subject to inundation, for nearly a mile out of the banks. Immediately at the plaintiff's lands and lots there are banks of the river from fifteen to twenty feet high, and very abrupt, and are high on both sides and above and below, for considerable distances. The abrupt and high banks, however, do not extend down to the water's edge at ordinary low water. The bed of the river at this point is about two hundred yards wide from bank to bank; and by the bed is meant the space between these abrupt and high **383*** banks, and is composed of rocks and slues among the rocks from one side to the other; ordinary low water and extreme low water together prevail for about two thirds of the year, during which time the river is confined to a channel about thirty yards wide, leaving the bed of the river, as above described, exposed on each side of this channel, from thirty

to sixty yards. Immediately under the western abrupt and high bank, and within the latitude of the north and south boundary line of plaintiff's land, said lines being drawn down to the water's edge, and in the bed of the river, as above described, east of said western abrupt and high bank, the plaintiff erected a mill previous to 1842, and continued the possession and use thereof until overflowed by defendant's dam. The place on which said mill was situated was covered with water in ordinary high water, but was bare and dry in ordinary low water.

To supply his mill with water the plaintiff had erected a wing dam, which ran in a north-east direction into the river, and supplied his mill with water at all seasons, and diverted a portion of the stream to the said mill, which passed again into the river above defendant's dam, and he, plaintiff, had blown out rock to give room to his mill wheel.

It was further proved, that, in 1845, the defendant erected a dam across the river, about three hundred yards below the plaintiff's mill, and opposite the City of Columbus, Georgia. The said dam was four to five feet high, and at ordinary low water backed the water on plaintiff's mill, so as to prevent its working; in high water the said dam made no difference, as the water was level above it and on both sides of it. The plaintiff further proved the value of his mill and the injury he sustained. The defendant introduced in evidence the Act of Cession of the State of Georgia to the United States; the Constitution of the State of Georgia; an Act of the State of Georgia granting to the City of Columbus, the right to lay off lots on her river boundary, running across the Chattahoochee River, to high water mark, on the western bank of said river. All of which evidence, being printed in the public Acts, are to be read and considered in full as part of this bill of exceptions.

The defendant also offered in evidence an authenticated deed to him, from the City of Columbus, granting him said lots, running across the river, and authority to erect the dam across the river; which original deed and accompanying plat, it is agreed, may form a part of this bill of exceptions, and may be exhibited as such. The plaintiff's land was situated at a point of the river where there were falls or rapids, and where it was not navigable, and that it was far above tide water, and a fresh-water stream, and between Miller's Bend and Cochee Creek. ***The defendant's dam [384** raised the water to a point on the western high bank which [is] dry at ordinary low water. One witness proved that he never knew a sheriff or constable of Georgia to come over on the western bank to serve any writ, or process, or other official act; and stated that he, the witness, had good opportunity to know if any such thing had been attempted, as he had lived on the western bank for ten years.

At the place at which plaintiff's mill was erected the summit of the bank was never overflowed, even at the highest stages of the river, the water of which always remained several feet below it. The plaintiff gave in evidence to the court, which was not allowed to go as evidence to the jury, although requested by plaintiff, Acts of the State of Georgia, convey-

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ing authority to the commissioners to negotiate the cession of territory from Georgia to the United States, and also the Act of Georgia ratifying said cession; all of which may be read from the public acts. The court charged the jury, that one passing from Georgia to Alabama, across the Chattahoochee River, at ordinary low water, would be upon the bank as soon as he left the water on the western side, although an inappreciable distance from the water, and that the line described in the Treaty of Cession from Georgia to the United States, as running up said river, and along the western bank thereof, is the line impressed upon the land by ordinary low water; and if they believed the plaintiff's mill was west of that line, and defendant's dam backed the water so as to obstruct the operation of said mill, the plaintiff was entitled to recover; to which charge the defendant excepted.

The defendant asked the court to charge the jury, that if the bank of the river was ordinary low water mark, the plaintiff had no right to the use of the water at that stage; which charge the court refused; to which defendant excepted, and prays his exceptions to be signed and sealed, and made a part of the record of this cause, which is accordingly done in term time.

J. J. WOODWARD. [L. S.]

The judgment of the Circuit Court was affirmed by the Supreme Court of Alabama, and brought to this court to be reviewed, under the 25th section of the Judiciary Act.

HOWARD & ECKOLLS, Plaintiffs
in Error,
v.

INGERSOLL.

No. 131.

This action was brought by way of petition by Howard and Eckolls, the owners of the dam below, against Ingersoll, the owner of the mill above, for entering the close (ground covered with water) of the petitioners and fishing. [385*] Ingersoll removed *the cause into the Circuit Court of the United States, where it was tried in July, 1850. The court having refused to charge the jury as prayed for by the plaintiffs, they brought the case to this court, although there was a verdict in their favor for \$600 damages.

The following is the bill of exceptions:

On the trial of this cause the plaintiffs proved, by the articles of cession, dated on the 18th day of June, 1802, between the United States and Georgia, that the boundary line between Georgia and the Territory, now State, of Alabama, was a line beginning on the western bank of the Chattahoochee River, and running along the western bank thereof. And did further prove, by competent testimony of witnesses, both for the plaintiffs and on the part of the defendant, that at the part of the said River Chattahoochee, where the closes in the said declaration mentioned are situated, the said river (not being a tide water, and not being navigable) is considerably reduced at its lowest state, especially in droughts, being quite narrow at such state, particularly in some places where it is confined by rocks projecting from the opposite sides of the river, and in other places spreading out more at large. That between the water in this state of the river, and a high and perpendicular bluff on the western or Alabama side, the dis-

tance varies, according to one witness, from 30 to 100 yards; according to another, the bluff banks are high and precipitous; at some places they are 30 feet, at others 100, and again 150 feet from the main channel; by another, at the foot of the bluff bank is a flat space from 50 to 150 feet wide, between ordinary water mark and the bluff bank; from very low water mark to the bluff bank is more than 50 to 150 feet. According to another witness it is from 100 to 120 feet from the bluff bank to medium water mark, and from 80 to 100 feet from medium water mark to low water mark; that this intermediate space is a flat or bottom land, gradually descending from the base of the bluff to the water; that in places upon this flat there is a growth of shrubbery, and some trees, such as pines, gums, oaks, willows, alders, poplars, &c.; that the growth on this flat would be liable to be destroyed if the flat were long or often overflowed; that there is a road or cart-way underneath this bluff, a grist mill, one post of which stands in the water (the water approaching very near the bluff at that point), and there being just room between the mill and the bluff for the above road to pass. There is also a saw mill (but not on the closes in the declaration mentioned), and a cotton gin factory under the bluff on this flat; and a small portion of it has at times been cultivated. That in the ordinary winter state of the river the water covers this *flat about half way to the [*386 bluff, to the base of a bank or ridge of sand and gravel, having an inclination of about forty-five degrees; that in very full states of the river, that is, in freshets, the water covers the flats, reaching to, or nearly to, the bluff; and in the freshet of 1840, known as the Harrison freshet, it extended twelve feet up the base of the bluff; that the extent to which this flat is covered with water varies with the height of the freshets in said river, it being all dry land at the lowest state of the river, and a portion of it being always, except in high freshets, uncovered with water; that it is only in the full state of the river that the water overflows the sand bank or ridge before mentioned.

Whereupon the plaintiffs prayed the court to instruct the jury that the true interpretation of the said article of cession in the year 1802, between the United States and Georgia, requires the boundary line between the State of Georgia and the Territory, now State, of Alabama, to be drawn on and along the western bank of the Chattahoochee River. And that wherever the jury may find that bank to be, the jurisdiction and limits of the State of Alabama must terminate, and cannot pass beyond that line to the eastward of the same, but that all east of said line, whether it be land or water, is included within the limits and jurisdiction of Georgia, and no grant from the United States or the State of Alabama can confer title to any part of the same, either directly or indirectly, either by virtue of the said grant, or as an incident to the same.

Which instruction the said court refused to give, except subject to this modification, to wit: that the articles of cession was an instrument, the interpretation of which belonged to the court and not to the jury, and gave the said instruction subject to the said modification; and moreover instructed the jury that, by the true

construction of those articles of cession, the boundary line between the State of Georgia and Alabama was to be drawn on and along the western bank of the Chattahoochee River at low water mark, when the river was at its lowest state.

To which refusal and instruction the plaintiffs except, and pray this bill of exceptions to be signed, sealed, and enrolled, which is done this fifth day of July, 1850.

JNO. C. NICOLL, [L. s.]

District Judge for the District of Georgia.

These cases having been brought before this court upon these two bills of exceptions, were argued by *Messrs. Johnson and Berrien* for the plaintiffs in error, and *Mr. Coxe* for the defendant in error. The reporter gives the following notes of the argument of *Mr. Berrien*, which have been kindly revised by him, and **387*** having no notes of *Mr. Coxe's* argument, begs to refer the reader to the report of the Alabama case, in 17 Alabama Reports, 780; where will be found the argument of the counsel for Ingersoll, and also the opinion of the court as delivered by Dargan, *Ch. J.*

Mr. Coxe contended that this court had no jurisdiction over the Alabama case, because Ingersoll claimed under a title derived from the United States, and the judgment was in his favor, and not against its validity, as required by the 25th section of the Judiciary Act.

Mr. Berrien, for plaintiffs in error:

I will consider, 1st. The question of jurisdiction; 2d. That of boundary.

Jurisdiction. This question arises under the 25th section of the Judiciary Act of 1789 (1 Stat. at Large, 85). The object of the section is to give appellate jurisdiction to the Supreme Court of the United States from decisions of the state courts, in all cases in which it is necessary to determine (I use the words of the Act) the validity of a treaty, of a statute, or an authority exercised under the United States, or the construction of any clause of the Constitution or of a treaty, or of a statute of, or commission held under, the United States. No further detail is necessary to present the question of jurisdiction than to state, that the United States and Georgia both claimed lands lying east and west of the River Chattahoochee; that the United States exercised jurisdiction over them by organizing the Territory of Mississippi, recognizing in the Act the claims of Georgia, saving her rights, and providing for the appointment of commissioners to adjust these conflicting claims (Act of 1798, 1 Stat. at Large, 549; Act of 1800, 2 Stat. at Large, 69); that Georgia acquiesced in this proposal; that commissioners were appointed, and articles of cession defining the boundary between the territory claimed by the United States and by Georgia were duly executed and confirmed. On the true ascertainment of that boundary the rights of the parties in these cases depend.

Georgia ceded to the United States all her right, title, &c., to all lands lying west of that line. The United States ceded to Georgia all their right, title, &c., to all lands lying east of it. The plaintiffs in error, deriving their title from Georgia, claimed under her original title, modified as it was by these articles; and there-

fore claimed also under the United States, that is to say, under the cession to Georgia by the United States of all their right, title, &c., to all lands lying east of a line running on and along the western bank of the River Chattahoochee. They *claimed the whole river, the **[*388** shore or flats between the margin of the water, and the bank, and founded their claim on the legislative grant of Georgia and these articles of cession by the United States.

The question in controversy between the parties was, what was the line which they established. In No. 121 the court decided it to be "the line impressed upon the land by ordinary low water." In No. 131 it was declared to be "a line drawn on and along the western bank of the Chattahoochee River at low water mark, when the river was at its lowest state."

These decisions were therefore adverse to the claim set up by the plaintiffs in error under the Act of Cession by the United States, denying their exclusive right to the river in every stage, to the shores and flats between the water's edge and the base of the bank, and to its inner edge or slope. The validity of this claim it is not material to consider on this question of jurisdiction. It is sufficient that it was made in the Supreme Court of Alabama, that it was made under the cession from the United States to Georgia, from whom they derived title, and that that court decided against it. In the construction of the 25th section of the Judiciary Act, this court has said, "it must appear that the right, title, &c., under a statute or commission of the United States, was specially set up by the party claiming the same in the state court, and the decision be against the same." (*Montgomery v. Hernandez*, 12 Wheat., 129.) But the court has also said that it is "not necessary that the question shall appear in the record to have been raised, and the decision made in direct and positive terms, *ipsis verbis*; it is sufficient if it appear that the question must have been varied, and must have been decided, to induce the judgment." (1 Stat. at Large, 86, in notes and authorities cited.) Now, the plaintiffs claimed under Georgia. She had restricted her limits, having, by the Act of Cession, withdrawn them from the Mississippi to the line agreed upon in those articles. To determine on the validity of her grant it was necessary to decide where that line was, and this depended on the construction of the articles of cession—the joint act of the United States and Georgia. Again, the bill of exceptions states, that at the point to which this controversy applies, the river is bounded by banks from fifteen to twenty feet high; that the bed of the river, the space between these banks, is about two hundred yards wide; that at ordinary low water the channel is about thirty yards wide, leaving from thirty to sixty (or rather eighty) yards of flats exposed on each side between the channel and banks; that the mill of defendant in error was placed below the western high bank in the bed of the river, and that the site of the mill was covered with water in ordinary high *water, but was bare and dry in ordi- **[*389** nary low water. The plaintiffs claimed the western high bank, including the whole river, the flats, and the inner face of that bank, and that this was the line defined in the Act of Cession made by the United States. If this

claim was affirmed, the defendant in error was a trespasser, and this judgment could not have been rendered. It was disaffirmed, and so disaffirming it the court denied the validity of the Act of Cession, under which plaintiff claimed, or they gave a construction to those articles adverse to his claim, and in either case the appellate jurisdiction of this court is manifest.

But the learned counsel has yielded the question of jurisdiction by conceding, as he has done, that these records "present but a single question, viz.: what is the true constitution of that part of the compact between the State of Georgia and the United States," &c. Surely it belongs to this court to decide, in the last resort, on the construction of a compact entered into by commissioners of the United States acting under the authority given by a statute of the United States.

But again, the learned counsel yields the question of jurisdiction by contending, as he may rightfully contend, that these actions "were local in their character," for then, especially in the Alabama case, No. 121, in which alone the jurisdiction of this court is contested, it became necessary for the Supreme Court of Alabama to decide that the *locus* of the alleged trespass was within the limits of that State, which could only be done by giving a construction to the Act of Cession, and thus deciding the locality of the line of boundary between Georgia and Alabama, which they prescribe. Without this judgment could not have been rendered for the plaintiff in the court below.

The question of jurisdiction is submitted. I proceed to examine the question of boundary.

Its decision depends on the construction to be given to the following words in the Act of Cession: "West of a line beginning on the western bank of the Chattahoochee River, where the same crosses the boundary line between the United States and Spain, running up the said River Chattahoochee, and along the western bank thereof"; and on the mutual cession of the United States and Georgia—the United States ceding to Georgia all their right, title, &c., to the territory lying east of that line, and Georgia ceding to the United States all her right, title, &c., to the territory lying west of it. That line, then, limits the precise boundary between the contracting parties. The United States have relinquished all claim to territory lying east of it; Georgia has in like manner relinquished her claim to territory lying west of it.

But the learned counsel supposes that this 390*] cession by the United States is valueless, because the commissioners of the United States exceeded their power in making it; that they were limited, by the Act creating the commission, to an acceptance of a cession from Georgia; of a cession of lands lying west of the Chattahoochee, and were not authorized to cede to Georgia the right, title, &c., of the United States to territory lying east of that line.

To give to the learned counsel the whole benefit of his argument, let it be conceded that the commissioners of the United States exceeded their powers in making the cession to Georgia; as the commissioners of Georgia certainly did exceed their powers in ceding to the United States all the right, title, &c., of Georgia to the territory lying west of a line drawn on the bank

of the Chattahoochee, for they were limited to a cession of the territory lying west of a line seventy miles west of the Chattahoochee. (Marb. & Craw. Dig. Laws Geo.) Both parties, then, exceeded their powers. With a view to the amicable adjustment of the controversy they assumed to themselves powers which were not conferred upon them. What then? The learned counsel is aware that the subsequent ratification of the acts of an agent who has exceeded his powers is equivalent to the original grant of the powers which he has exercised. Now, Georgia and the United States have acquiesced in the settlement of the controversy made by the articles—Georgia by an express Act of legislation, the United States by repeated Acts, resulting in the organization of the Territory of Alabama and her subsequent admission as a State.

We enter, then, upon the consideration of the articles of cession, having established our claim to the full benefit of the mutual cession of the United States and Georgia. Under these articles the plaintiffs in error claim that the boundary which they describe is a line beginning on the western bank of the Chattahoochee, running up the river and along the western bank thereof; meaning thereby the elevated bank, which, with that on the eastern side, contains the river in its natural channel when there is the greatest flow of water.

The line is to begin on the bank, to run up the river and along the bank. It is to run up, to indicate its direction; on and along the bank, to mark its locality. The line thus clings to the bank.

What, then, is the western bank? Is it the margin of the river, — the varying line marked by the contact of the water with the land, in its different stages of high, low, ordinary high, and ordinary low or extreme low water, and which of them? Or is it the bank of earth which, with that on its opposite side, contains the river in its natural channel when there is the greatest flow of water? This inquiry may be considered, 1st. Technically; 2d. With a view to the probable intention of the parties, as that is to be inferred from the statutory history of the transaction, taken in connection with the character of the river and the consequences to result from either construction.

Before entering upon this inquiry, there are certain terms which will occur in the progress of this discussion, to which it is necessary to affix a definite meaning.

We are seeking to ascertain the meaning of the expression, the *bank of a river*. What, then, is a river? What are its banks? A river is defined to be a body of flowing water, of no specific dimensions, larger than a brook or rivulet, less than a sea — "a running stream, pent in on each side by walls or banks." (Woolwich on Sewers, 51; Rutherf., 90, 91; *vide etiam Livingston v. Morgan*, 6 Mart. R., 19.)

A river is said to be "pent in by walls or banks," and is thus contradistinguished from a sea or an ocean, which encompasses the land, rather than is encompassed by it. A river consists of water, a bed, and banks. The bed or channel is the space over which the water flows—"the hollow bed in which waters flow." Nautically, the term "channel" is opposed

to "shallows;" the former indicating the deeper portion of the stream, that along which vessels pass. In ordinary phraseology, the bed or channel is the hollow space between the banks which bound the river. It is usual in cases of this sort to refer to lexicographers.

A bank is defined to be "a steep declivity, rising from a river, lake, or sea." (Webster, def. Bank.)

Ripa extremas terre, quæ aqua alluitur. And again: *Ripa recte definitur id quod flumen continet naturalem vigorem cursui sui tenens.* (Bayley's Latin Lexicon, def. *Ripa*.)

Bouvier says: "Banks of rivers contain the river in its natural channel when there is the greatest flow of water." (Bouv. L. Dict., def. Banks of Rivers; *Morgan v. Livingston*, ante.)

Mr. Justice Story defines shores or flats to be the space between the margin of the water in a low stage, and the banks which contain it in its greatest flow, thus distinguishing flats or shores from banks. (*Thomas v. Hatch*, 3 Sumn., 178.)

Chief Justice Parsons, citing Lord Hale's definition of the term "shores," considers it as synonymous with flats, and therefore substitutes this latter expression. (*Storer v. Freeman*, 6 Mass. R., 438, 439.) His opinion in that case confirms the position for which we are contending. Chief Justice Parker holds a similar doctrine. (*Hatch v. Dwight*, 17 Mass. R., 289, 298.)

Chief Justice Marshall says: "The shores of a river border on the water's edge." (*Handley's Lessee v. Anthony*, 5 Wheat., 374, 385.)

392*] "If the shore borders on the edge of the water, it must extend outwards to the bank, and therefore cannot be the bank, which, in certain stages of the river, it separates from the water's edge.

A river, then, consists of water, a bed and banks; these several parts constituting the river, the whole river. It is a compound idea; it cannot exist without all its parts. Evaporate the water, and you have a dry hollow. If you could sink the bed, instead of a river you would have a fathomless gulf. Remove the bank, and you have a boundless flood. He who owns the river must therefore own the water, the bed, and the banks; since these are parts of that which belongs to him—the elements which constitute the river, of which he is owner.

1. The question of boundary considered technically. I proceed to consider, first, the language of the articles of cession; the description of the river in the record; the position of the mill of the defendant in error.

The articles of cession are found in Hotchk. Dig. Laws Ga., 88. Its language is familiar to the court. It requires the line to run on and along the western bank.

The description of the river is found in *Howard v. Ingersoll*, Rec., p. 5; *Howard & Eckolls v. Ingersoll*, Rec., p. 4. It is described as bounded—"pent in"—by high banks, up to which it sometimes flows, being two hundred yards wide, while at others it is reduced to a channel of thirty yards in width.

The eastern boundary of defendant's land is the State of Georgia. (*Howard v. Ingersoll*, Rec., p. 5.) His mill site is in the bed of the river, and is covered with water at ordinary

high water. It is not on the high bank, nor at its base; for a cart road passes between the mill and the bottom of the bank. (*Howard & Eckolls v. Ingersoll*, Rec., p. 4.)

The Supreme Court of Alabama decided that this mill site was within the State of Alabama, *in al. verba*, that a mill site in the bed of the river, between which and the bank there was a cart road, and which mill site was overflowed at ordinary high water, was west of a line drawn on and along the western bank of the Chattahoochee River.

The grounds of that decision it is my duty to examine. It rests—

1. On the consideration of convenience.
2. On cases relative to riparian rights, as calculated to show that the term "bank" may be considered as equivalent to low water mark.
3. On the supposed analogy of the case of *Handley's Lessee v. Anthony*, to this case.

A brief remark on each of these. To the argument of convenience, I might safely reply in the language of the maxim, **Cujus est dare, ejus est disponere*. Georgia yielded to the United States, almost gratuitously, the vast domain, which now constitutes the States of Alabama and Mississippi. She had a perfect right to prescribe the limits of her cession, and to consult her own convenience in determining them. But what is the inconvenience? It is said, it would be burdensome to the citizens of Alabama, to answer in the courts of Georgia for offenses committed on the western margin of the Chattahoochee River. But this would be true also of the Flint, Ocmulgee, or any of the other great rivers of Georgia. The inconvenience should be considered before the act is committed. But the Supreme Court of Alabama was influenced, also, by a consideration of the convenience of Georgia, and decided to divest Georgia of all that part of the bed of the river which lies between the foot of the bank, and low water mark, because it would be inconvenient to her to exercise jurisdiction over it. Why more so than over the eastern side of a river which, according to the decision of the Supreme Court of Alabama, is, for nine months of the year, only thirty yards wide?

This argument of convenience will, however, be considered hereafter in examining the case of *Handley's Lessee v. Anthony*.

I proceed with the consideration of the opinion of the Supreme Court of Alabama.

In commenting on the decision of the court in *Hatch v. Dwight*, ante, and quoting the words of Chief Justice Parker, who says, "the owner may sell the land without the privilege of the stream, as he will, if he bounds his grant by the bank," the Supreme Court of Alabama proceeds as follows: "Now, I admit that if the grant be limited to the bank of the river, the land covered by the water will not pass by it, that is, the bed of the river will not be granted; but we consider it well settled, that if land be granted on a running stream, not navigable, and in which the tide does not ebb and flow, and the words used to designate the boundary be the river, or the bank of the river, then the grant will extend to the middle of the stream, unless there be some other expression used, or some other circumstance, showing that the parties did not intend that the grant should extend *ad filum aquæ*."

Now, with great respect to the Supreme Court of Alabama, I am utterly unable to distinguish between a grant which is "limited to the bank of a river," and one in which "the words used to designate the boundary" are "the bank of the river." I have supposed that the boundary of a grant was the limit of the grant, and that was to be ascertained by "the words used to designate" it, and yet the Supreme Court of Alabama, admitting that a grant, which is limited to the bank of a river, **[394*]** must stop at the bank, nevertheless decides that a grant, in which the words used to designate the boundary are the bank of the river, will extend *ad flum aque*, to the middle of the river, and proceeds to determine that the defendant's grant, which is bounded by the bank, extends to ordinary low water mark, and includes the site of his mill, which is in the bed of the river, separated from the bank by a cart road, and overflowed at ordinary high water.

I submit to your Honors that the rights of the plaintiffs in error cannot be sacrificed; that the boundary of the State of Georgia cannot be removed from the permanent bank, on and along which it was to run, by this process of reasoning. In commenting on the case of *Handley's Lessee v. Anthony*, the Supreme Court of Alabama say: "But Judge Marshall, who delivered the opinion, did note that the word 'river,' and not 'bank,' was used; hence it is supposed that if the term 'bank' had been used instead of 'river,' the court would not have held low water mark to be the line; but I think all must admit that the river is inseparably connected with the bank, even if the bank be not included within the legitimate meaning of the term 'river,' and being thus connected, the bank begins where the water touches the land, and we can, therefore, keep within the legitimate meaning of the term 'bank,' and fix the line at low water mark."

Now, this is to assume the whole question in controversy—to assert that the uncovered portion of the bed of a river, that which is left bare by the retiring waters, constitutes its bank, although the very day after such a decision had been pronounced, what is thus denominated a bank should resume its proper character of a bed, and be covered by the waters of the river in their fuller flow. And the assumption is made in direct opposition to authority, which makes the bank of a river to be part of the river, not a distinct thing, "inseparably connected" with it, but part and parcel of the river itself—one of the elements of that compound idea, which is expressed by the term "river," indispensable to its existence. Who can conceive the idea of a river without banks? As I have before said, such a body of flowing water would not be a river, but a boundless flood. Hence, in the language of authority, a river is said to consist of water, bed, and banks, "inseparably connected," indeed, but so connected as part and parcel of one great whole, the river.

The argument of the Supreme Court of Alabama makes the bed of the river (that portion of it which is left bare at low water), its bank, while the real bank, that by which the waters of the river are "pent in," in their fuller flow, is divorced from all connection with the

river, of which we have seen that **[395*]** constitutes an essential part. And again; it is a mere assumption of the question in controversy, for, if bowing to the authority of that high tribunal, we were to admit that because the river and the bank are inseparably connected, the bank must begin where the water touches the land, it would no more follow that this rule was to be applied in the lowest than in the highest or medial state of the river.

But the court proceeds. Having admitted the position stated by Judge Parker, in *Hatch v. Dwight*, that "the owner of land (lying on a stream) may sell the land, without the privilege of the stream, as he will if he bounds his grant by the bank," and *uno flatu* affirmed, that in a grant of land so situated, in which "the words used to designate the boundary" are the bank, will extend to the middle of the stream, thus making a distinction not obvious to ordinary intelligence, between a grant, which is bounded by a bank, and one in which the bank is designated as the boundary, they declare: "It may, however, be safely said, that when a private grant is bounded by the bank, or a running stream, in which the tide does not ebb and flow, no well-considered case can be found that limits the grant short of low water mark, unless there are other words or expressions used in the deed, showing that the parties did not intend that the grant should extend to low water mark"—thus plainly contradicting the admission previously made in commenting on the case of *Hatch v. Dwight*. Now, without insisting on this recalled admission, I venture to submit to your Honors, looking to the fact that the defendant's eastern boundary is the State of Georgia, whose western boundary is a line drawn on and along the western bank of the Chattahoochee; that no surveyor's chain, acting under the authority of the United States, or Alabama, has ever been stretched east of that permanent or elevated bank. Looking to these facts, I venture to submit, nay, even to affirm, that no well or ill-considered case can be found (that which we are considering, alone excepted) which would extend the defendant's grant one inch beyond that line. It is so bounded by its express terms, and no intendment can carry it further. The doctrine of riparian rights can have no place here. These are accessory, incidental to the principal grant; but both the principal and its incident must apply to lands within the jurisdiction of the granting power.

The defendant's grant can neither directly or by intendment extend one inch beyond, and eastward of a line drawn on and along the western bank of the Chattahoochee, for then it would pass into the jurisdiction of another sovereignty. Since, as well by virtue of her original title, as by the express cession of the United States, all east of that line belongs to Georgia.

[396*] I will now examine the case of *Handley's Lessee v. Anthony*, for the purpose of determining the supposed analogy of that case to this.

Two things are there decided:

1. That a tongue of land projecting from the main land of Indiana, between which and the main land there is a narrow channel made by the waters of the Ohio, when they are high; but which is dry until the river is ten feet above

its lowest state, the inhabitants of which had always paid taxes to and voted in Indiana, which had been considered within its jurisdiction while it was a territory, and after it became a state, while the jurisdiction of Kentucky had never been extended over them—that such a body of land was not an island within the State of Kentucky.

2. That under the cession by Virginia to the United States of her territory, northwest of the River Ohio, the State of Indiana, formed out of that territory, extended to low water mark.

In examining this case, it is very manifest that in determining the rights of the parties, it was only necessary to decide the first of these propositions, viz.: That what was claimed as an island was, in fact, part of the main land of Indiana, only occasionally and partially separated from it by a bayou, making part of the River Ohio, mingling with other streams, and returning to the river. The matter in controversy was determined by this decision. The question of the extent of the boundary of Indiana was not necessarily involved in it. Any opinion upon it was therefore *obiter*, not binding upon the court, and open to examination by counsel. But it will not be necessary to exercise this privilege. The rights of plaintiffs in error will be protected from the influence of this opinion, by showing the diversity between the cases.

This opinion is founded,

1st. On the words of the cession, which transfer to the United States, "territory situate, lying, and being northwest of the River Ohio." The difference between the cases is striking. Georgia cedes to the United States all her territory lying west of a line to be drawn on and along the western bank of the Chattahoochee River. The territory ceded by Virginia is bound by the river; that yielded by Georgia, by a line drawn on the western bank of the river. The importance attached by the court to this diversity in the terms of the two cessions is manifest. In pronouncing the opinion in *Handley's Lessee v. Anthony*, the Chief Justice says, not casually or incidentally, but deliberately, and of set purpose, and as a precaution indispensable to the inquiry (in substance), that in pursuing this inquiry, the court must recollect that it is the river and not the bank, which **397*** constitutes *the boundary. Now, why this precaution, if this diversity in the terms, the boundary by the "river" or by the "bank," would make no difference as to the extent of the grant? The same distinction is recognized by Mr. Justice Story, in *Thomas v. Hatch*, *ante*; by Chief Justice Parker, in *Hatch v. Dwight*, before cited; and again by Mr. Justice Story, in *Dunlap v. Stetson*, 4 Mason, 349, 366.

There is then an essential difference between the boundary in this case, and that in *Handley's Lessee v. Anthony*, between a boundary by a river, and on a bank.

2. The next ground of the decision in that case, was the difficulty of drawing any other line, where a river is the boundary. Here the diversity which I have just remarked upon, is again recognized. The difficulty is supposed to exist where a river, not where a bank is the boundary. To apply the decision in that case to the one at bar, is to assume the question in controversy here, and entirely to disregard the

distinction so emphatically stated by the Chief Justice in that case.

But what is this difficulty? The rights of riparian proprietors on navigable rivers are limited to high water mark. (3 Kent's Com., 7th ed., 514.) On non-navigable rivers to the thread of the stream.

Mr. Justice Wayne delivered the opinion of the court:

The point for decision in these cases is one of boundary, between the States of Georgia and Alabama. It is, what is the line of Georgia on the western bank of the Chattahoochee River, from the 31st deg. north latitude, "where the same crosses the boundary line between the United States and Spain; running thence up the said River Chattahoochee, and along the western bank thereof, to the great bend thereof, next above the place where a certain creek or river called 'Uchee' (being the first considerable stream on the western side, above the Cussetas and Coweta towns), empties into the said Chattahoochee River."

Its determination depends upon what were the limits of Georgia and her ownership of the whole country within them, when that State, in compliance with the obligation imposed upon it by the revolutionary war, conveyed to the United States her unsettled territory; and upon the terms used to define the boundaries of that cession.

In the case from Alabama, "the court charged the jury, that one passing from Georgia to Alabama, across the Chattahoochee River, at ordinary low water, would be upon the bank as soon as he left the water on the western side, although an inappreciable distance from the water; and that the line described in the Treaty of Cession from Georgia to the United States, as running *up said river and [**398** along the western bank thereof, is the line impressed upon the land by ordinary low water; and if they believed the plaintiff's mill was west of that line, and the defendant's dam backed the water so as to obstruct the operation of the mill, the plaintiff was entitled to recover."

In the case from the Circuit Court of the United States for the District of Georgia, the District Judge presiding, the jury was instructed "that by the true construction of these articles of cession, the boundary line between the State of Georgia and Alabama was to be drawn on and along the western bank of the Chattahoochee River, at low water mark, when the river was at its lowest state."

All of us think that both of these instructions were erroneous, though there is a difference among us as to the construction given by the majority of the court to the article defining the boundary of Georgia upon the river, and the reasoning in support of it. These differences will be seen in the opinions which our brothers have said they meant to give in these cases.

We will now give our views of what were the limits of the State of Georgia when it ceded its unsettled territory west of the Chattahoochee River to the United States; that State's then ownership of the whole of it, citing in support of our conclusions indisputable historical facts, and the legislation of Georgia, of South Carolina, and of the United States, upon the subject.

It is well known to all of us, when the colonies dissolved their connection with the mother country by the Declaration of Independence, that it was understood by all of them, that each did so, with the limits which belonged to it as a colony. There was within the limits of several of them, a large extent of unsettled territory. Other states had little or none.

The latter contended, as all of them had united in a common Declaration of Independence, and in a common war to secure it, which no one colony could do for itself, that the unsettled lands within the former ought to become a common property among all of the States.

On the 6th of September, 1780, Congress recommended this subject to the consideration of the States. On the 10th of October after, it was resolved by Congress "that the unappropriated lands that may be ceded or relinquished to the United States by any state, should be disposed of for the common benefit of the United States; and be settled and formed into distinct republican states; which shall become members of the federal union and have the same rights of sovereignty, freedom, and independence, as the other States." (3 Journals of Congress, 516, 535.)

From these references we have the whole policy of Congress concerning those unsettled territories, so happily, since, consummated 399*] by the States and by Congress. It was not, however, achieved without some delays and objections from the states to which these lands belonged. Some of the states, Maryland taking the lead, refused to sign the articles of confederation until after strong assurances had been given that such cessions would be made. And when that State did so, it was with the declaration that she did not relinquish or intend to relinquish the right which she had with the other states to the "back country," as she termed the unsettled lands within the limits of some of the States.

Early in 1781, Virginia made such a relinquishment. New York quickly followed, and Massachusetts and Connecticut, always willing to make any sacrifice for the common cause, relinquished their unsettled lands after the war had been concluded.

The cause assigned by each of these four States for doing so, and the principles upon which these cessions were accepted by the United States, involved North and South Carolina and Georgia in the obligation to do the same. Though not done for several years, it was never denied by either of these States.

All of the states had been actuated by the same spirit for independence. When the war had been happily concluded, all of them looked to the wild territory within the United States, as the first source from which revenue could be raised to pay the war debt of the Union. It then was \$42,000,000.

It would be difficult to say which class of its creditors had the strongest claims upon the justice and gratitude of the people of the United States. But all felt, and it was conceded by the other classes of creditors, that the soldiers who had patiently borne the privations of the field, and bravely met its hazards to secure the liberties of the country, ought to have their claims paid by portions of the public lands,

with certain available securities from Congress for the residue.

From these references we learn that the States entered into the Union, with the understanding by all of them, that each had an undiminished sovereignty within its colonial limits. That there were within the limits of some of them unsettled lands over which Congress had no legislative control. But that it was early recognized by these States whilst the articles of confederation were in the course of ratification and immediately after they were completed, that their unsettled territories were to be transferred by them to the United States, to be disposed of for the common benefit, and to be formed into distinct republican states, with all the rights and sovereignty of the other states.

We have seen that relinquishments had been made by Virginia, New York, Massachusetts, and Connecticut. Southern Carolina did the same in 1787, after the settlement of her territorial disputes with Georgia.

*We will now state what those disputes were, and how they were adjusted, in order that the jurisdiction of the State of Georgia, and that State's ownership of the whole territory ceded by it to the United States in 1802, may be fully understood, in connection with the principles or rules by which its western boundary upon the Chattahoochee River must be interpreted.

Georgia was originally a province, formed by royal prerogative, out of a portion of that territory which was within the chartered limits of South Carolina. It was a corporation under the title of "Trustees for establishing the Colony of Georgia in America, which was to continue for twenty-one years, with power in the trustees to form laws and regulations for its government, after which all the rights of soil and jurisdiction were to vest in the crown."

It was described in the Act of Incorporation, "as all those lands, countries, and territories, situate, lying, and being in that part of South Carolina in America, which lies from the northern stream of a river, then commonly called the Savannah, all along the sea coast to the southward under the most southern stream of a certain other great water or river, called the Alatomaha, and westward from the heads of the said rivers respectively in direct lines to the South Seas."

It may be well here to say, that the power of the King to alter, change, enlarge, or diminish the limits of his royal governments in America, cannot be denied. "Those governments were of two kinds, royal and proprietary. In the former, the right of the soil and jurisdiction remained in the crown, and their boundaries, though described in letters patent, were subject to alteration at its pleasure; for as it possessed the right of soil and government, and delegated them to its governors during pleasure, it might dispose of them in what manner and to whom it thought fit, might alter, extend or abridge them as its inclination or policy might declare. In proprietary governments the right of soil as well as jurisdiction was vested in the proprietors. These charters were in the nature of grants, and their limits being fixed by these charters, could not be altered but by their consent."



South Carolina, then, could not object either to the first charter given to Georgia, or to the subsequent extension of its boundaries by the King, though forming a part of what had been within the charter of that royal colony.

In 1763, Great Britain having then acquired—by Treaty with Spain—Florida, Pensacola, and all that Spain had held in North America, east and southeast of the River Mississippi; all of that country between the Alatomaha and Florida, originally within the chartered limits [401*] of South Carolina, but which had *always been disputable territory between England and Spain, the then Governor of South Carolina assumed to be at his disposal under his royal commission. Within the year 1763 he granted to many persons in Carolina large tracts of land, lying between the Alatomaha and St. Mary's rivers. His power to do so was objected to by Georgia, but her remonstrances were not regarded. The subject was brought to the notice of the Board of Trade. The Governor's conduct was disapproved, declared to be unwarrantable, and orders were given that no charters or grants should be issued for lands on the south of the Alatomaha River, which had been surveyed under warrants from South Carolina. But as surveys had been made under the Governor's warrants, and grants issued by South Carolina for the lands, before the orders of the Board of Trade were received, they were not formally recalled. These transactions, however, excited much attention at the time in England, from the representations which were made concerning them by Governor Wright, of Georgia. The ultimate consequence was, that the King, in January, 1764, extended the limits of Georgia, including within them all that country which had been within the chartered limits of South Carolina, and limiting the south boundary of that colony by the northern stream of Savannah River, as far as the head of the same. The language of the letters patent, granted to Sir James Wright, is, that the Colony of Georgia shall be bounded on the north by the most northern stream of a river, then commonly called Savannah, as far as the head of the said river; and from thence westward as far as our territories extend; on the east by the sea coast, from the said River Savannah, to the most southern stream of a certain other river, called St. Mary's, including all islands within twenty leagues of the coast lying between the said Rivers Savannah and St. Mary's, as far as the head thereof; and from thence westward as far as our territories extend by the north boundary line of our provinces of East and West Florida," which was "a line drawn from that part of the Mississippi which is intersected by latitude 31, due east, to the Appalachicola." (See the King's Proclamation and letters patent to Sir James Wright, Wat., 744.)

For twenty years after this extension of Georgia, its limits were not called in question by South Carolina; or perhaps, to speak more properly, they had not been a subject of inquiry by that State, though what they were, was well understood by the authorities of Georgia. Nothing had occurred between 1764 and 1776, from which any contest concerning them could arise, and it was not until two years after the Provisional Treaty of Peace be-

tween England and the United States was made, that South Carolina claimed any part of the unsettled territory of *Georgia, [402 within the limits defined by the King's patent of January, 1764.

The Provisional Treaty of Peace with the King of Great Britain was signed in November, 1782. In the 2d article will be found the boundaries of the United States. They are repeated in the Definitive Treaty concluded at Paris on the 8d September, 1783. In less than four months after the Provisional Treaty was made, Georgia declared, legislatively, that the southern boundary of the State was a line drawn from the Mississippi in the latitude of 31 degrees, on a due east course to the River Chattahoochee; and in other respects according to the southern boundary of the United States, as that was settled by the Provisional Treaty between the United States and Great Britain. The southern boundary of the United States is described, in the treaties with England, "as a line to be drawn, due east, from the middle of the Mississippi River, in the latitude of 31 degrees north of the equator, to the middle of the River Appalachicola or Chattahoochee; thence along the middle thereof, to its junction with the Flint; thence straight to the head of the St. Mary's River; and thence down along that river to the Atlantic Ocean." Compare this boundary with that in the commission to Governor Wright, for the Colony of Georgia, and they will be found identical. Indeed, unless the chartered limits of Georgia, as they are stated in that commission, had been taken by the negotiators of the Treaty with England as their guide, they would not have had any by which to run the southern line for the United States from the Mississippi to the Chattahoochee, and thence as it is described to the Atlantic Ocean.

The next action of Georgia, asserting its jurisdiction over its limits, will be found in the 18th sec. of the Act of February, 1783, Wat. Dig., 264. It defines what those limits were. In February, 1785, Georgia passed another Act for the establishment of a county to the west of the Chattahoochee, within a line to be drawn down the Mississippi from where it receives the Yazoo, till it intersects the 31st degree of north latitude; thence due east as far as the lands might be found to reach, which had at any time been relinquished by the Indians; then along the line of relinquishment to the River Yazoo and down to its mouth, calling it the County of Bourbon.

This last Act, and the two which preceded it, attracted the notice of the authorities of South Carolina; and then that State, for the first time since 1764, denied that the limits of Georgia were as she had declared them to be, and claimed for itself within them a large extent of country.

South Carolina re-asserted her claim upon the principle that her surveys had been made in 1763, between the Rivers Alatomaha *and St. Mary's, forgetting that her [403 then Governor had been reproved and had apologized for authorizing them to be made, and denied that the source of the Keowee River was the head of the Savannah River, and that the country between its source and the source of the Tugaloo River down to the mouth of the Keowee, where it empties into the Savannah, belonged to Georgia.

Neither State would yield, and the border excitements, growing out of the differences, admonished both that it would be best and safest for them to resort to that court which had been provided in the 9th article in the confederation for "the settlement of disputes then existing or that might arise between two or more states concerning boundary, jurisdiction, or any other cause whatever."

South Carolina presented a petition for that purpose. Georgia was cited to appear, and did so. Congress then provided for the appointment of judges, and at this point of the proceedings, Carolina withdrew her petition, it having become the conviction of both States, from information brought out by the controversy, that these differences could be amicably adjusted.

Carolina had contended that as the original boundaries of Georgia were the Rivers Savannah and Alatomaha, and lines drawn due west from their sources to the Mississippi; that all the land lying south of the Alatomaha, and a line drawn due west from its source to the Mississippi, as far as the northern boundary of the Floridas, continued to be a part of the Province of South Carolina, out of which Georgia was taken. And that when the British Crown, by its proclamation of October, 1763, annexed to Georgia all the lands lying between the Rivers Alatomaha and St. Mary's, it meant only the lands between those rivers below their sources, and not such as lay above those sources, and between lines drawn from them respectively west to the Mississippi; which tract of country, of course, even after the proclamation, still continued a part of South Carolina.

Georgia, on the contrary, maintained, that when the proclamation annexed to its government all the lands lying between the Rivers Alatomaha and St. Mary's, it meant not merely the tract of country which lay between those rivers, below their sources, but also the whole territory held by the British Crown, between the northern boundaries of Florida, as established by the same proclamation, and the ancient line of Georgia.

Carolina further claimed the land lying between the North Carolina line and the line due west from the mouth of the Tugaloo River to the Mississippi, because the River Savannah loses that name at the confluence of the Tugaloo and Keowee Rivers, and consequently that spot was said to be the head of Savannah River. Georgia contended that the source of the Keowee was the head of the Savannah River.

404*] *At this time, neither State had such original documents from the archives of England as were sufficient to determine its right with certainty. But Georgia had secondary proof of the letters patent which were given by the King to Governor Wright, in 1764, though they had been taken away, with him when he fled from the State during the Revolutionary War. The original commission and letters patent were subsequently obtained from the records of the Board of Trade in England. They fully confirmed the correctness of the secondary proof upon which the State had acted. There was also at the same time disclosed from those records, in detail, all of the action of the Board of Trade and of the King, concerning Governor

Boone's surveys in 1763, of the land between the Alatomaha and St. Mary's, with the disapprobation of all that he had done in that matter and the Governor's apology for his conduct. Though done already, we will introduce into this connection the boundaries of Georgia in the letters patent to Governor Wright, that the controversy between Georgia and South Carolina, and its amicable termination, may be better understood.

After South Carolina withdrew her petition from Congress, the said States entered into a convention for the settlement of the territorial differences between them. It was concluded at Beaufort, in April, 1787. Carolina was represented by three of her most distinguished citizens of that day, and Georgia by three of hers, in whom the State had every confidence. It was ratified by both States, though one of the three commissioners from Georgia, Mr. Houston, was dissatisfied with, and would not sign it.

By this convention, it was agreed, "that the most northern branch or stream of the River Savannah, from the sea or mouth of such stream to the fork or confluence of the river now called Tugaloo and Keowee, and from thence the most northern branch or stream of the said River Tugaloo, till it intersects the northern boundary line of South Carolina, if the said branch or stream of Tugaloo extends so far north, reserving all the islands in the said River Tugaloo and Savannah to Georgia; but if the head spring or source of any branch or stream of the said River Tugaloo does not extend to the north boundary line of South Carolina, then a west line to the Mississippi to be drawn from the head spring or source of the said branch or stream of Tugaloo River, which extends to the highest northern latitude, shall forever hereafter form the separation limit and boundary between the States of South Carolina and Georgia. (1 Art. Convention, Wat. Dig., 754.)

From this article, we see that South Carolina abandoned the ground taken in her petition, and only claimed territory in Georgia in the event that a geographical fact should [*405 turn out differently from what the commissioners of Georgia said it was, and accordingly with what the commissioners of South Carolina supposed it to be. That was, whether or not the head spring or source of any branch or stream of Tugaloo extended to the north boundary line of South Carolina. If it did not, then from wherever the head spring or source of that river might be lower than this north boundary line, Carolina could claim from it by a line drawn west to the Mississippi, all the land which was between that line and the higher north line which Georgia had before declared to be the boundary of this State. But if the head spring or source of the Tugaloo did reach the north boundary line of South Carolina, then that stream to its source was to be the boundary between the two States, to the west of which Carolina could not then claim any land. Georgia, on its part, by the same article, withdrew its claim to that part of South Carolina which is between the Keowee and Tugaloo Rivers, where the most northern branch of the Tugaloo intersects the northern boundary line of South Carolina.

South Carolina, however, acting upon the

opinion of its commissioners, that the head spring of the most northern branch of the Tugaloo did not intersect the northern boundary line of that State, ceded to the United States, in three months after the convention with Georgia had been made, all the territory which it was supposed Carolina had got by it in Georgia.

The cession is as follows: "All the territory or tract of country included within the River Mississippi, and a line beginning at that part of said river which is intersected by the southern boundary line of the State of North Carolina, and continuing along the said boundary line until it intersects the ridge or chain of mountains which divides the eastern from the western waters; then to be continued along the top of the said ridge of mountains until it intersects a line to be drawn due west from the head of the southern branch of Tugaloo River to the said mountains; and thence to run a due west course to the River Mississippi.

The United States accepted the cession, and until by actual exploration it had been ascertained that the head spring or branch of the Tugaloo River was north of the line of South Carolina, it was not known that the land actually transferred to the United States by the South Carolina cession was only a tract of country about twelve miles wide from north to south, extending from the top of the main ridge of mountains which divides the eastern from the western waters, lying between latitude 35° N., the southern boundary of North Carolina, and the northern boundary of Georgia, as set-
406*] tled by the convention between *Georgia and South Carolina in 1787; and that by that convention it was established that South Carolina had no unsettled territory to the west of the top of that ridge.

It was, however, a transfer of all the claim of South Carolina to unsettled land. North Carolina afterwards ceded to the United States its western lands. Georgia was the only remaining State which had not done so.

The termination of her differences with South Carolina placed Georgia, as to its limits, accordingly with that State's declaration of them in 1788; or as they had been given by the King in his commission to Governor Wright in 1764, and as they had been used by the United States, for the treaties of peace with England, and afterwards in its negotiations with His Catholic Majesty from 1793 to 1795, which resulted in the Treaty of that year with the latter.

It may as well be mentioned here, however, that in the course of that negotiation, Spain contended that the boundary of West Florida was at the junction of the Yazoo with the Mississippi, in latitude 32° 39', running from that point east to the Chattahoochee River. The claim was founded upon certain proceedings of the King of Great Britain between the years 1763 and 1767, extending the northern boundary of West Florida from 31° north to the mouth of the Yazoo, within two months after the commission had been given to Governor Wright, in which 31° north, or the north boundary line of our provinces of East and West Florida "were declared to be the southern boundary of Georgia. These proceedings were an application to the King in 1764, by the Board of Trade for an extension of the boundaries of West

Florida, and commissions given by the King in 1767 and 1770 to Governors Elliot and Chester, by which they were made Captains-General and Governors of West Florida, bounded to the southward by the Gulf of Mexico, including all its lands within six leagues of the coast, from the River Appalachicola to Lake Pontchartrain; to the westward by the said lake, the Lake Maurepas, and the River Mississippi; to the northward by a line drawn due east from the mouth of the Yazoo River, where it unites with the Mississippi, due east to the Appalachicola." This pretension upon the part of Spain was considered as altogether inadmissible by our negotiators, on the ground that the United States commissioners and those of the King of England, in making the Treaties of 1782 and 1783, had taken the boundaries of East and West Florida as laid down in the proclamation of the King of England dated the 7th October, 1763, as the true boundaries of those provinces when they were finally confirmed to Spain in 1783. And further, that Spain could not rightfully dispute it or attempt to extend [*407 her boundary to the north of 31 degrees, because she had been substantially a party to all the negotiations which resulted in a peace between herself and England and between England and the United States; with a full knowledge by the Spanish negotiators that the boundaries between England and the United States had been fixed in the line of 31 deg. from the Mississippi to the Appalachicola or Chattahoochee. Spain conceded it.

After the Treaty had been made, however, it was suggested, as the treaties with England had been made with the United States, and not with the State of Georgia, that the former might claim the territory between 31 deg. north and the line from the Yazoo to the Chattahoochee, upon the ground that the King had extended Florida to the latter, or limited Georgia to that line after he had declared the southern line of Georgia was to be the northern line of Florida. But the United States did not at any time assert such a claim. It could not well have been done upon principle, after the United States had rejected those papers as giving any ground of claim to Spain and had insisted on the negotiation upon the southern boundary of the United States as defined in the Treaty of Peace with England upon the ground that it had been from 1763 the boundary of Georgia. It may not be amiss, however, to notice as a historical fact, the objections which were made against the availableness of these documents for the extension of the boundary of Florida to the Yazoo when they were first produced. No patent could be found from the King under the great seal of Great Britain for such a purpose. There was no record of such a grant in the Board of Trade, nor in any other of the archives of England concerning her possessions in America. It could not be found in the archives of Florida. Without such a patent, or a proclamation in the nature of a patent for such a purpose, no colonial claim for territory was complete.

Such was and has been the uniform basis of colonial limits; and it is somewhat remarkable that in no instance besides of English colonial grant, is the King's patent wanting. In this instance, the extension is vested exclusively upon

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two commissions to two Governors of West Florida; one three years after the petition from the Board of Trade, to Governor Elliott in 1767, and the other to Governor Chester in 1770. In the first there is a recital of the boundaries of West Florida, when Governor Johnstone received his commission in 1763, followed by this declaration, that the King had recited, by letters patent under the great seal of Great Britain, his grant of boundaries for Florida as to its northern line of 31 deg. from the Mississippi to the Chattahoochee and extended them to the Ya-⁴⁰⁸ zoo, by a line drawn from *it on the Mississippi to the Appalachicola. The same boundary was given in the commission to Governor Chester. There is no doubt that Governors Elliott and Chester permitted settlements and gave grants for land within the limits of these commissions from their dates until Florida became, in 1783, by a retrocession from England, again a part of the dominions of His Catholic Majesty. From these circumstances, a patent from the King for the enlargement of Florida was presumed. It was not unreasonable that it should be. But it was not considered by the United States that its operation could set aside the previous grant to the colony of Georgia of the same territory, as the King, in his treaties with the United States, had recognized the line of the latter as the boundary of Florida, and that it had been accepted in that character by the United States as its southern boundary. In fact, admitting that the King's patent had been given, his Treaty with the United States was a revocation of it; and Spain could not claim from its Treaty with England any right to the extension, that having been a political act of the King of England for the benefit of his own subjects, when, by his proclamation of 1763, Florida, as it had been acquired from Spain, was for the first time erected into the two distinct governments of East and West Florida.

It appears, from what has been said, that the limits of Georgia, after the settlement of her territorial dispute with South Carolina, were not questioned; in other words, that they had been rightly asserted in the Act of 1783, and that such portion of the State, afterwards designated as the Mississippi Territory, was within its acknowledged boundary. Georgia became then for the first time in a condition to transfer to the United States its unsettled territory. In less than a year after the last appeal from Congress to the State to do so, her delegates in Congress were authorized to make a cession of a part of it. The beginning of it was at the middle of the Chattahoochee, where it is intersected by the thirty-first degree of north latitude; thence due north one hundred and forty British statute miles; thence due west to the middle of the River Mississippi; thence down the middle of the river where it intersects the thirty-first degree of north latitude; thence along the said degree to the beginning. The quantity offered, and the conditions upon which it was to be ceded, were objected to by the United States. It was particularly unacceptable to Congress, because such a cession left a larger portion of unsettled territory within the State undisposed of, and interfered with the original obligation and intention of Congress to establish in the unsettled territories which might be relin-

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quished by the States to the United States, other States, to become a part of the Union upon an entire equality with the rest. Congress *refused to accept the cession tendered, [⁴⁰⁹ at the same time offering to accept from Georgia all her territorial claims west of the River Appalachicola, or west of a meridian line running through or near the point where that river intersects the thirty-first degree of north latitude. Georgia, in turn, refused the proposal of the United States, and thenceforward maintained her jurisdiction within her limits, until a cession was made of her unsettled territory to the United States in 1802. In 1789 an Act was passed by the State reserving to certain persons and companies pre-emption rights to her lands. In 1795, by another Act, in which the territorial jurisdiction of the State was re-asserted, Georgia granted and transferred, for valuable considerations, to several companies, all of her territory bordering westwardly on the Mississippi River, in distinct tracts. Among others, a tract comprehending a part of what was subsequently declared by Congress to be the Mississippi Territory. The prices for some of these alienations were paid into the treasury of the State, and patents for them were issued by the Governor. At the next session, however, of the General Assembly, the Act of 1795 was declared to be void on account of the fraud, bribery, and corruption by which it had been passed. But the companies to which Georgia had conveyed had sold part of the land to innocent purchasers before the Revoking Act was passed. They appealed to Congress to maintain them in their rights, as well against any future claim of Georgia, as against any claim that the United States might make to the land which had been conveyed by Georgia. Unfavorable at first as these sales by Georgia were to a transfer of its unsettled territory to the United States for the common benefit of all the States, they contributed to that result afterward. The action of the State had involved it in difficulties of a very uncertain termination in a legal point of view. It had just been released from an unpleasant litigation (*American State Papers, Public Lands, Vol. I., p. 167; Moultrie et al. v. The State of Georgia, not reported*), growing out of an Act passed by the State in 1789, conveying lands between the Mississippi and Tombigbee rivers to the Virginia, South Carolina, and Tennessee Yazoo companies, by the 11th amendment of the Constitution, by which the States were declared not to be suable in the courts of the United States by citizens of another state or by citizens or subjects of a foreign state. This, however, did not conclude the rights of the parties in favor of the State to the lands which the State had contracted to convey to them. The right of the State, too, to large bodies of land within the Yazoo and its southern boundary, was doubtful on account of grants from Spain before it had ceded Florida to England; from England, also, on account of such as *had been made under the au-⁴¹⁰ thority of the governors of West Florida; and by Spain again after the retrocession of the territory to it by England in 1783. But the greatest difficulty in the way of the State continuing to hold its unsettled territory, was that the Indian title had only been extinguished to about three millions of acres out of fifty millions. At one

time the Indians were not inclined to sell; the State was not in a pecuniary condition to buy them out. The Indians were formidable in tribes and numbers. Their habitations and their hunting grounds covered the larger part of the State. Its white population was then small, and too scattered for warlike concentration against Indian hostilities or their casual incursions into the white settlements for plunder. They were masters of the forest, and intervened all over the State between the white settlements, so that no one of them could have intercourse or give aid to another without a license to pass through their hunting grounds or at the risk of attempting it without permission. On the other hand, white men in numbers, no longer under the influences of social life, or caring nothing for its restraints, hovered constantly on the borders of the Indians, exasperating them by depredations and misleading them into all the excesses of a corrupt civilization, or into feuds with each other or forays against the whites. Each day was an anticipation of attack, and when the night came repose was only taken with the rifle ready to repel it. In this condition of things, and without any efficient power in the State to make a change, it became necessary for the United States to use its constitutional right to give relief. That was not so much a matter of choice as it was of obligation. Constitutionally they could alone regulate commerce with the Indian tribes. Constitutionally they had the power to make war; their obligation was to bear its expenses and defend the States against it in whatever way it might happen; and constitutionally Congress was bound to guard against war, to prepare for and prevent it, from whatever quarter it might be likely to come. The recent Treaty, too, with Spain, bound that nation and the United States to restrain the Indian tribes, in the territories of each, from war among themselves, and from such as might lead to aggressions upon the territories of either nation. Added to such considerations, the people who had settled to the west of the Chattahoochee, between it and the Yazoo River, claimed from the United States the protection which Georgia could not give; and they asked for a securer and more definite political organization than they had had either under English or Spanish rule, or from Georgia legislation.

Nine years had gone by since the failure of the last attempt to obtain it, without anything [411*] having been substantially done *by Georgia to transfer to the United States its unsettled territory, in compliance with the resolution of Congress of 1780. All the other States had done so. It was not likely at the time, that it would be done for some years yet. Under such circumstances, Congress, still thinking that the United States had, under the cession of South Carolina, a right to territory in Georgia, passed the Act of the 7th April, 1798, for the amicable settlement of limits with the State of Georgia, and authorizing the establishment of a government in the Mississippi Territory. It was done with an express recognition of Georgia's right of soil and jurisdiction in the Territory. (Sec. 6 of the Act.) This, however, did not satisfy that State, and she remonstrated to Congress against it. But the political necessity under which Congress had

been called upon to act, soon became obvious to all, and to none more than to the people and the Legislature of Georgia. It is not necessary to give an account of all that passed from that time to the transfer of the territory to the United States. Three of Georgia's most distinguished citizens were appointed commissioners to negotiate with three others of national reputation upon the part of the United States for a cession, and happily that was done in 1802, which had been so long delayed; thus consummating that great policy of our early national existence, from which so many States have been added to the Union.

From the account which has been given of the territorial claims of Georgia, and her legislation concerning them, with that of South Carolina denying them, and the final adjustment of the dispute between these States and that of the United States for the cession by Georgia of her unsettled territory, we have learned that when Georgia did cede it to the United States, that she was then in possession, and had a right to all the land, subject to the Indian title, which that State had declared to be within her limits, except so much as there was between the Tugaloo and Keowee Rivers, which Georgia had ceded to South Carolina by the Convention of 1787. We further learn, that the adjustment with South Carolina, left in Georgia the Chattahoochee River from its source to the 31st degree of north latitude, as Georgia had claimed her limits to be, since the King's patent to Sir James Wright, in 1764.

In other words, that the Chattahoochee, from its source to that point, was at all times after that patent within Georgia, with the right of soil and jurisdiction when its unsettled territory was ceded to the United States. This fact being so, it gives us a key from the laws of nations to aid us in the interpretation of its cession as to the boundary between Georgia and Alabama, which must prevail, as it would in all other cases, *where there may be [*412 a transfer by one nation of a part of its territory to another, with a river for its boundary, without an express stipulation for the relinquishment of the rights of soil and jurisdiction over the bed of such river.

The rule *jure gentium*, to which we refer, is not now for the first time under the consideration of this court. We are relieved, then, from its discussion, by citations from Vattel and other writers upon the laws of nations, to show what it is; but it will be found in the 23d chapter of Vattel. Among the writers after him it is not controverted by any one of them. Besides, it is according to what had been anciently the practice of nations, substantiated by an adherence to it down to our own times. In *Handley's Lessee v. Anthony*, 5 Wheat. 379, this court said, by its organ, Chief Justice Marshall, "when a great river is the boundary between two nations or states, if the original property is in neither, and there be no convention about it, each holds to the middle of the stream. But when, as in this case, one state is the original proprietor, and grants territory on the one side only, it retains the river within its domain, and the newly created state extends to the river only." The river, however, is its boundary

Georgia was certainly the original proprietor

of the River Chattahoochee to 81 degrees north, when her territory west of it was ceded to the United States, and that cession must be understood to have been made under the rule, unless by terms in her grant to the United States it was taken out of it, with the view to give to the new State which was to be formed out of the cession, a co-equality of soil and jurisdiction in the river which was to separate them. In the interpretation of the boundary which Georgia retained for itself upon the Chattahoochee, it must be kept in mind that the cession was made in contemplation of a new state to be formed with the Chattahoochee as a part of its boundary. National considerations then entered into the spirit of the transfer with which its eminent negotiators on both sides were familiar.¹ If we disregard them now, and permit ourselves to view this question in the narrower limits of verbal definitions, and upon the principles upon which private rights were adjusted on rivers, between proprietors of land on either side of them, we should do so forgetting all the circumstances and objects for which the cession was made, the parties to it, and the new party that was to be brought out of it as an independent state.

But we will now examine the article in the 413*) cession for the "boundary of Georgia upon the Chattahoochee, for we think its terms are coincident with the principle of national law, under which we have put this question.

We give the article entire, intending, after it has been done, to use it with direct reference to the cases in hand as to the question of boundary on the Chattahoochee River, between the States of Georgia and Alabama, as that question was raised in the courts below.

"The State of Georgia cedes to the United States all the right, title, and claim, which the said State has to the jurisdiction and soil of all the lands situated within the boundaries of the United States, south of the State of Tennessee, and west of a line beginning on the western bank of the Chattahoochee River, where the same crosses the boundary line between the United States and Spain, running thence up the said River Chattahoochee and along the western bank thereof, to the great bend thereof, next above the place where a certain creek or river called Uchee (being the first considerable stream on the western side above the Cussetas and Coweta towns), empties into the said Chattahoochee River; thence in a direct line to Nicajack, on the Tennessee River; thence crossing the said last-mentioned river, and thence running up the said Tennessee River, and along the western bank thereof to the southern boundary line of the State of Tennessee."

The plaintiff in error derives his title to the land which he claims from the State of Georgia and his right to construct a dam across the Chattahoochee to the point where it terminates on the western bank under that title and the convention by which Georgia ceded her unsettled territory to the United States. He claims that his land runs across, from the eastern bank of the Chattahoochee to the bank on the western

side. The defendant in error claims under a patent from the United States to himself to fractional section 11, township 7, range 30, and proved title to himself to lots 1, 2, 3, 4, in the Town of Gerard, in Russell County, Alabama, specifically described, in some of said counts of his declaration, as land having for its eastern boundary the State of Georgia, and is immediately west of the Chattahoochee River, on the bank thereof.

In the first case, No. 121, it was ruled by the court below, that the line established by the articles of cession was the line impressed by ordinary low water. In the case from the Circuit Court of the United States for the District of Georgia, the judge instructed the jury that the line was to be drawn on and along the western bank of the Chattahoochee River at low water mark, when the river was at its lowest state.

From the bill of exceptions, in the first case, it appears that *** immediately at the [*414 plaintiff's lands and lots, the banks of the river are from fifteen to twenty feet high on both sides, abrupt above and below for considerable distances. The high banks, however, do not extend down to the water's edge at ordinary low water. The bed of the river at this point is about two hundred yards wide from bank to bank; by the bed is meant the space between these abrupt and high banks; and is composed of rocks and slues among the rocks from one side to the other. Ordinary low water and extreme low water together prevail for about two thirds of the year, during which time the river is confined to a channel about thirty yards wide, leaving the bed of the river as above described, exposed on each side of this channel from thirty to sixty yards. Immediately under the western abrupt and high bank, and within the latitude of the north and south boundary line of plaintiff's land, those lines being drawn down to the water's edge, and in the bed of the river, as above described, east of the western abrupt and high bank, the plaintiff erected a mill previous to 1842, and continued in the possession and use of it until overflowed by defendant's dam. The place on which the mill is, is covered with water in ordinary high water, but is bare and dry in ordinary low water.

"To supply his mill with water, the plaintiff had erected a cross dam, which ran in a north-east direction into the river, and supplied his mill with water at all seasons, by diverting a portion of the stream to the mill, which passed again into the river above the defendant's dam; and the plaintiff had blown out a rock to give room to his mill to work."

The evidence in the case, from the Circuit Court of Georgia, in respect to the situation of the plaintiff's mill and the description of the river, is substantially the same.

It appears from it, that the mill of the plaintiff, by his own showing, is in the bed of the river, to the east of the abrupt bank, by the prolongation of his north and south boundary line from the bank; which he claims a right to prolong, from his being the owner of the land to the bank of the river, as a riparian right.

Upon this evidence, the court in Alabama charged the jury, that one passing from Georgia to Alabama, across the Chattahoochee River at ordinary low water, would be upon

1.—The commissioners on the part of the United States were Mr. Madison, Mr. Gallatin, and Mr. Lincoln. Those on the part of Georgia were James Jackson, Abraham Baldwin, and John Milledge.

the bank as soon as he left the water on the western side, although an inappreciable distance from the water, and that the line described in the Treaty of Cession from Georgia to the United States, as running up said river, and along the western bank thereof, is the line impressed upon the land by ordinary low water; and if they believed plaintiff's mill was west 415*] of that *line, and defendant's dam backed the water so as to obstruct the operation of the mill, the plaintiff was entitled to recover. The defendant in this case excepted to the charge, and asked the court to instruct the jury, if the bank of the river was ordinary low water mark, that the plaintiff had no right to the use of the water at that stage, which the court refused to give. In the case from the United States Circuit Court, the defendants below—plaintiffs in error here—prayed the court to instruct the jury, that the true interpretation of the article of cession requires the boundary line between Georgia and Alabama to be drawn on and along the western bank of the Chattahoochee River; and that, wherever the jury might find that bank to be, the jurisdiction and limits of Alabama must terminate, and cannot pass to the eastward of the same; but that all east of such line, whether it be land or water, is included within the limits and jurisdiction of Georgia; and no grant, from the United States or the State of Alabama, can confer title to any part of the same, either directly or indirectly, by virtue of such grant, or as an incident to the same. This prayer was refused; and the court instruct the jury, that the boundary line between the States of Georgia and Alabama was to be drawn on and along the western bank of the river, at low water mark, when the river was at its lowest stage.

In our view, the words of the cession have the same meaning in law that they have in common parlance. They are not at all uncertain, if taken connectively, as to the locality intended for the western line of Georgia on the Chattahoochee. Separate the word "bank" from "on and along the bank," and consider it only in connection with the other words, "running up the river," and it might be inferred that the water of the river, at some stage of it, was to be the boundary, and that those owning the land on either side were riparian proprietors, *usque ad filum aquæ*. But not so when they are considered together, as we will presently show.

When the commissioners used the words "bank" and "river," they did so in the popular sense of both. When banks of rivers were spoken of, those boundaries were meant which contain their waters at their highest flow; and in that condition they make what is called the bed of the river. They knew that rivers have banks, shores, water; and a bed; and that the outer line on the bed of a river, on either side of it, may be distinguished upon every stage of its water, high or low; at its highest or lowest current. It neither takes in overflowed land beyond the bank, nor includes swamps or low grounds liable to be overflowed, but reclaimable for meadows or agriculture, or which, being too low for reclamation, though not 416*] always covered *with water, may be used for cattle to range upon, as natural or uninclosed pasture. But it may include spots lower than the bluff or bank, whether there is

or is not a growth upon them, not forming a part of that land which, whether low or high, we know to be upland or fast lowland, if such spots are within the bed of the river. Such a line may be found upon every river, from its source to its mouth. It requires no scientific exploration to find or mark it out. The eye traces it in going either up or down a river, in any stage of water. With such an understanding of what a river is, as a whole, from its parts, there is no difficulty in fixing the boundary line in question. Wherever that outer bed line shall be, from its beginning on the bank, at the 31st degree of north latitude, to the mouth of the Uchee, on the western side, is the western boundary of Georgia on the bank and along the bank running up the River Chattahoochee.

If the language of the article had been, "beginning on the western bank of the Chattahoochee, and running thence up the river," and no more had been said, the middle thread of the river ordinarily, and without any reference to the fact that Georgia was the proprietor of the river, it would have been said to be the dividing line between the two States. But there is added, "running up the said River Chattahoochee and along the western bank thereof." This last controls any uncertainty there may be; for if the first call or object to locate the line is the bank of the river, it is plain that the western limit of Georgia on and along the bank of the river, must be where the bank and the water meet in its bed within the natural channel or passage of the river. The words "along the bank," added to the words "on the bank," distinguish this case from all of those in which courts have had the greatest difficulty where a line was to be fixed when it is on the bank without a call for the stream or along the river, or up or down the river. (Angell, 19.) Along the bank, is strong and definite enough to exclude the idea that any part of the river or its bed was not to be within the State of Georgia. It controls any legal implication of a contrary character. Such a line, too, satisfies the calls on and along the bank in the navigable and unnavigable parts of the river. In the former, Alabama has all the uses of the river, including the use of the western bank for navigation and commerce, which the State of Georgia can claim. In that part of the river not navigable, Georgia has both soil and jurisdiction for all such purposes as are implied by both, and the stream or water of the river for all such purposes as it may be used in any stage of the water.

Such a line may be made certain on every part of the river, whatever may be the changes on the western bank from washings,*the [*417 abrasions of extraordinary floods, or from any of those sudden causes which in nature change the beds of rivers. In such cases the proprietors would continue to hold according to the original boundaries of their grants. We repeat, "along the bank thereof," is the controlling call in the interpretation of the cession. It excludes the idea that a line was to be traced at the edge of the water as that may be at one or another time or at low water, or the lowest low water. Water is not a call in the description of the boundary, though the river is; and that, as we have shown, does not mean water

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alone, but banks, shores, water and the bed of the river. If water, as one of the river's parts, had been meant, it would have been so expressed.

The call is for the bank, the fast land which confines the water of the river in its channel or bed in its whole width, that is to be the line. The bank or the slope from the bluff or perpendicular of the bank may not be reached by the water for two thirds of the year, still the water line impressed upon the bank above the slope is the line required by the commissioners; and the shore of the river, though left dry for any time, and but occasionally covered by water in any stage of it to the bank, was retained by Georgia as the river up to that line. Wherever it may be found, it is a part of the State of Georgia, and not a part of Alabama. Both bank and bed are to be ascertained by inspection, and the line is where the action of the water has permanently marked itself upon the soil. Wherever that line may be, is to be determined in each trial at law by the jury upon proofs, the jury being instructed by the court that the bed of the river, wherever that may be, belongs to Georgia, whether it extends at certain points to the face of the bank where, from the perennial flow of the water there is no margin, or to other points where there is.

We must reject, altogether, the attempt to trace the line by either ordinary low water or low water. These terms are only predicable of those parts of rivers within the ebb and flow of the tides, to distinguish the water line at spring or neap tides. Such a difference is uniform twice within every month of the year, and because it is so, it is termed ordinary. In that part of a river in which there is no ebb and flow, the changes in the current are irregular and occasional, without fixed quantity or time of recurrence, except as they are periodical with the wet and dry seasons of the year. And low water is the farthest receding point of ebb tide. Nor do we think that the interpretation of this article is aided by any cases upon the rights of riparian proprietors. Such rights depend upon calls in grants for land either from sovereignties having an equal right in the stream to the thread of the river, or from grants [418*] from a state having the entire *ownership of a river. In this instance, two sovereignties were dealing for a cession of country from one to the other, with a river as a boundary between them to be marked on that bank of it from which the ceded land was to commence. Now, as between them, there were no antecedent calls upon the river to raise the question of riparian rights. But, on the contrary, the river at the time formed a part of what was Georgia, and the commissioners negotiated upon the footing, that though the United States had formed the Mississippi Territory, it was done with the disclaimer in terms, that it in no way whatever should affect either the rights of sovereignty or soil which Georgia had in the territory. Moreover, we do not think that the commissioners could have contemplated that the State of Georgia and the United States were to have a divided or equal sovereignty in the river, or that the United States was to retain any right of soil in the same, when we find the commissioners in terms calling for the boundary line between Spain

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and the United States in the middle of the Chattahoochee, and then transferring the western line of Georgia to the western bank of it.

If the running water of the river had been intended to be the line, and that the United States and Georgia were to have an equal right of soil and sovereignty in the bed of the river, on the western bank, why was it that the middle of the river, at latitude 31 degrees north, was abandoned for the western bank? The only answer which can be given is, that Georgia meant to retain the river to the western bank, and that the United States conceded it. Again; the extension of the line from the middle of the river at that point to the bank, necessarily excludes that the water of the river at any stage less than that which covers the bed of it, was to be any guide for the line.

We think that the instructions given by the courts below were erroneous.

Our interpretation of the first article of the cession made by Georgia to the United States, is that the western line of Georgia upon the Chattahoochee River, from its beginning in the 31st degree of north latitude to the great bend thereof, next above the place where a certain creek or river called Uchee (being the first considerable stream on the western side, above the Cussetas and Coweta towns), empties into the said Chattahoochee River, is a line to run up the river on and along its western bank, and that the jurisdiction of Georgia in the soil extends over to the line which is washed by the water, wherever it covers the bed of the river within its banks. The permanent fast land bank is referred to as governing the line. From the lower edge of that bank, the bed of the river commences, and Georgia retained the bed of the river from the lower edge of the bank on *the west side. And where the bank is [*419 fairly marked by the water, that water level will show at all places where the line is.

Mr. Justice Nelson:

This is a writ of error to the Supreme Court of the State of Alabama.

Ingersoll, the plaintiff below, and defendant here, brought an action against Howard for setting back the water of the River Chattahoochee upon his lands and mill by the erection of a dam across the said river, at the City of Columbus, in the State of Georgia; by reason whereof the operations of his mill were obstructed, and the use of his premises impaired.

The defendant pleaded the general issue.

On the trial, it appeared that the plaintiff was the owner of a lot of land held under a patent from the United States, situate on the west bank of the Chattahoochee River, in the State of Alabama, opposite the City of Columbus, and which lot had for its eastern boundary the State of Georgia.

This river has high bluff banks in some parts of it on both sides; in others, the banks are low, and the adjacent lands subject to inundations in high water, extending for nearly a mile from the bank. At the plaintiff's land the banks are from fifteen to twenty feet high on both sides, and somewhat abrupt above and below for some distance. The abrupt and high banks, however, on the plaintiff's side of the river, do not extend down to the water's edge at ordinary low water. Between the high

bluff and the water at this stage, the distance varies from fifty to one hundred and fifty feet; and this intermediate space is flat bottom land gradually descending from the base of the bluff to the water and upon which flat grow trees, such as pines, oaks, gums, poplars, &c. Upon this flat, the plaintiff's grist mill is built, and a road made along under the bluff leading to it. There is, also, a saw mill and cotton gin factory standing upon it. And a small portion of the flat is at times put under cultivation.

In the ordinary state of the river, in the winter season, the water covers this flat about half way to the high bluff, extending to the base of a bank or ridge of sand and gravel; and, in freshets, the water covers the flats reaching to the bluff. It is only in a full state of the river, or freshets, that the water overflows the sand bank or ridge before mentioned.

I have collected these facts from the two cases before us between these parties, each of which involves the same general question.

The plaintiff supplies his grist mill with water by a wing dam extended obliquely into the river.

420*] *The defendant erected a dam across the river, some three hundred yards below the plaintiff's mill, and opposite the City of Columbus. The dam is from four to five feet high; and at an ordinary stage of the river, the water is thrown back upon the plaintiff's mill so as to prevent its use. The defendant possesses a grant of the bed of the river upon which his dam is erected, derived from the State of Georgia, and extending to high water mark on the western bank of the river.

The court charged the jury, that a person passing from the State of Georgia across the River Chattahoochee to the State of Alabama, at ordinary low water, would be upon the bank as soon as he left the water on the western side; and that the line described in the Treaty of Cession from Georgia to the United States, as running up said river, and along the western bank thereof, is the line impressed upon the land by ordinary low water; to which charge the defendant excepted.

The defendant asked the court to charge, that if the bank of the river was ordinary low water mark, the plaintiff had no right to the use of the water at that stage; which was also refused, and an exception taken.

This case involves a question of much higher interest and importance than a simple decision upon the rights of these parties, as the court see that the decision cannot be reached without a determination of the boundary line between two sovereign States, for a distance of some one hundred and fifty miles. The facts in the records are few, being confined to a description of the localities respecting this boundary at the point in dispute, and the few that are disclosed, very imperfectly and confusedly stated. It is to be regretted that the court is obliged to pass upon a question of this magnitude under these embarrassments, and in the absence of any opportunity, on the part of the two States interested, to furnish the necessary topographical information in respect to the River Chattahoochee and its western banks for the whole distance within which they constitute the boundary between them.

This information would have been useful to aid the court in a proper determination of the question, and would naturally have been furnished, if the controversy had been between the States themselves.

The words of the cession of Georgia to the United States, in 1802, describing the boundary line in question, and which are material to be noticed, are as follows: Georgia cedes the territory "west of a line beginning on the western bank of the Chattahoochee River, running thence up the said River Chattahoochee, and along the western bank thereof and the great bend;" and the United States cede to Georgia all their rights "to the territory lying [***421** "east of the boundary line herein described as the eastern boundary of the territory ceded by Georgia to the United States."

This is the description of a line that has become the boundary between Georgia and Alabama, for a distance of one hundred and fifty miles.

Two constructions are contended for, arising out of the description: On the part of Georgia, it is claimed that her boundary extends to high water mark, on the western bank of the Chattahoochee River for the whole length of this line. On the part of Alabama, that it stops at ordinary low water-mark, on the western bank of said river.

The difference is very material, as it will be seen that upon the former construction, Alabama can have a water or river line for her boundary only during high water or a freshet, which is but an occasional and temporary state of the river; and consequently the owners of the land on the Alabama side, for the greater portion of the year, and for all practical use of the water for agricultural or hydraulic purposes, would be deprived of a river boundary. And this difference is the more striking when we see, from the evidence in the record, scanty and meager as it is, the strip of land between the high bank and the river, that is, between high and ordinary low water mark, would be from ten to twenty and more rods in width, varying with the character of the bank, which would belong to Georgia, or to the owners on the Georgia side of the river; and over which the jurisdiction and government of Georgia would necessarily extend to the exclusion of Alabama.

We have no evidence, in the record, as to the distance the tide ebbs and flows up this river. It probably does not reach the point where the boundary in question begins, which is at the 31st degree of north latitude. It is navigable for steamboats up to Columbus, which is within some thirty or forty miles of its termination as a boundary between the two States; and as I am informed, is navigable above the great bend, or west point, for small craft, for some one hundred miles, though interrupted by rocks and falls between that and Columbus.

Grants of land, bounded by the sea or by navigable rivers, where the tide ebbs and flows, extend to high water mark; that is, to the margin of the periodical flow of the tide, unaffected by extraordinary causes, and the shores below common high water mark belong to the State in which they are situated. But grants of land bounded on rivers above tide water, or where the tide does not ebb and flow, carry the

grantee to the middle of the river, unless there are expressions in the terms of the grant, or something in the terms taken in connection [422*] with the situation *and the condition of the lands granted, that clearly indicate an intention to stop at the edge or margin of the river. There must be a reservation or restriction, express or necessarily implied, which controls the operation of the general presumption, and makes the particular grant an exception.

These are familiar principles of universal application, governing the construction of grants of land bounded upon the sea or tide water, or upon fresh water rivers, navigable or unnavigable, and whether made by states or individuals, or in large or small tracts. And in applying them to the description of the cession before us, we shall be enabled to determine where the boundary line in dispute should be drawn. The words are, "beginning on the western bank of the Chattahoochee River," "running thence up the said River Chattahoochee, and along the western bank thereof."

Where land adjoining a fresh water river, or above tide water, is described as bounded by a monument, whether natural or artificial, such as a tree or stake standing on the bank, and a course is given as running from it up or down the river to another monument standing upon the bank, these words necessarily imply, as a general rule, that the line is to follow the river, according to its meanderings and turnings; and the grantee takes to the middle of the river. Such is the uniform construction given to this description where the common law prevails. It has been repeatedly applied to grants abutting on the River Mississippi, the Missouri, the Hudson, the Connecticut, and other great rivers in the United States, above tide water. (3 Kent's Com., 427, 428, 429, and notes; Angell on Water-courses, c. 1, ed. 1850.)

Had the description in this case been limited to the first two calls in the grant, it would have been impossible to have taken it out of this rule of construction; and the owners on the Alabama side would have been carried to the middle of the river. But the third call, which is, "along the western bank thereof," limits the effect and operation of the other two, and excludes the bed of the river. It indicates an intent to reserve the river within the boundary and jurisdiction of Georgia, and to confine the grantee to the western edge or bank. And this raises the material and important question in the case, namely: where shall that line be drawn. On behalf of Georgia, it is contended, it shall be drawn on the bank or bluff, as described in the record, at high water mark; on behalf of Alabama, at the bank or ridge of sand and gravel, where the western margin of the river is found at ordinary low water mark.

Now, it is to be observed that the language of the cession, beginning on the western bank and running thence up the river and along the bank, does not necessarily, nor, as I think, [423*] reasonably, *call for a line along the bluff or high bank, such as confines the body of water in the river at high water, or when swollen with floods. The bank inclosing the flow of water, when at its ordinary and usual stage, is equally within the description; and the limit within this bank, on each side, is

more emphatically the bed of the river, than that embraced within the more elevated banks when the river is at flood. These are more or less distant from the ordinary channel, depending upon the character of the river and topography of the adjacent lands. There are usually in rivers of this description, banks representing the point which is reached at high water, and which bound it at that stage of the river. They may be, and not unfrequently are, at a considerable distance from the accustomed bed and the banks which then bound it. The flats intermediate may comprise the most valuable portion of farms bounded upon the river and extending back to the uplands, notwithstanding they may be inundated by the spring and fall freshets. The valleys of the Mohawk, and Hudson, and Connecticut Rivers, may be referred to as illustrations, and also the Susquehannah, both in New York and Pennsylvania. Some of the finest alluvial bottom land in New York is found in the valley of the Mohawk, between the banks of the river at its usual stage and the banks at high water, which is the beginning of the uplands. If these alluvial bottoms are found in the valley of the Chattahoochee, and for aught I know they may be, according to the boundary line contended for by the plaintiff in error, the settlements within the State of Georgia would not be bounded by the river; as most valuable possessions for sites of towns, and for hydraulic and even agricultural purposes, might be found lying along its western margin.

I cannot think that it is necessary to occupy more time in attempting to refute the claim to this boundary line according to the terms used in the cession by Georgia.

Then, if we leave the bank at what is called high water mark, as not given by any reasonable interpretation of the grant, on what principle or rule of construction is an intermediate line to be drawn short of the ordinary and permanent bed of the river. It would be a boundary wholly undefinable, and designated neither by high water nor low water, nor by the usual stage, but left to vibrate between what is called high water and the accustomed bed of the river.

The term "high water," when applied to the sea, or to a river where the tide ebbs and flows, has a definite meaning. The line is marked by the periodical flow of the tide, excluding the advance of waters above this line in the one case by winds and storms, and in the other by freshets or floods.

*But in respect to fresh water rivers, [424 the term is altogether indefinite, and the line marked uncertain. It has no fixed meaning in the sense of high water mark when applied to a river where the tide ebbs and flows, and should never be adopted as a boundary in the case of fresh water rivers, by indentment or construction, whether between states or individuals. It may mean any stage of the water above its ordinary height, and the line will fluctuate with every varying freshet or flood that may happen.

In our judgment, the true boundary line intended by Georgia and the United States, and the one fairly deducible from the language of the cession, is the line marked by the permanent bed of the river by the flow of the water at

its usual and accustomed stage, and where the water will be found at all times in the season except when diminished by drought or swollen by freshets. This line will be found marked along its borders by the almost constant presence and abrasion of the waters against the bank. It is always manifest to the eye of any observer upon a river, and is marked in a way not to be mistaken. The junction of bank and water at this stage of the river satisfies the words of the cession, and furnishes a line as fixed and certain as is practicable; and is just and reasonable to all the parties concerned. It excludes the high bluffs or banks, which the river touches but occasionally, when swollen with freshets or floods; and also an intermediate line, which can be neither marked nor described; and adopts a boundary along the bank and margin of the river of some permanency, and which parties providing for a river boundary between them would naturally have in their minds. That they intended a river boundary in this Treaty of Cession I cannot doubt. That Georgia intended to reserve to herself the bed of the river is equally clear. The line which I have designated satisfies both intentions; and in my humble judgment, no other boundary line will.

There are some general considerations bearing upon the question which should not be overlooked.

This court observed, in the case of *Handley's Lessee v. Anthony*, 5 Wh., 374, 379, through the Chief Justice, that "when a great river is the boundary between two nations or states, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when, as in this case, one state is the original proprietor, and grants the territory on one side only, it retains the river within its own domain, and the newly created state extends to the river only. The river, however, is the boundary." "In case of doubt," says Vattel, "every country lying upon a river is presumed to have no other limits *425* but the river; because nothing *is more natural than to take a river for a boundary when a state is established on its borders; and wherever there is doubt, that is always to be presumed which is most natural and probable."

Again the court say: "Even when a state retains its dominion over a river which constitutes the boundary between itself and another state, it would be extremely inconvenient to extend its dominion over the land on the other side which was left bare by the receding of the water. Wherever the river is a boundary between states, it is the main, the permanent river which constitutes that boundary; and the mind will find itself embarrassed with insurmountable difficulty in attempting to draw any other line than the low water mark."

These views are sound and just, and the mind at once assents to them. And they apply directly and with great cogency to the question before us.

Let us now return to the case immediately under consideration. The court instructed the jury that the boundary line described in the Treaty of Cession from Georgia to the United States, as running up the said river and along the banks thereof, was the line impressed upon the land by ordinary low water. I am not certain, but that the line here designated, or rather

intended to be designated, is the same that we have attempted to define in this opinion. "Ordinary low water," however, like "low water," is a relative term, and in the abstract and without practicable application, has no definite meaning, and furnishes no satisfactory guide by which to ascertain or determine the line in question. I freely admit, that if the terms of the cession would justify the interpretation given to that of the territory northwest of the Ohio, I should greatly prefer the line adopted in *Handley's Lessee v. Anthony*, which was low water mark.

But the call here for the bank seems necessarily to connect that with the river in defining the boundary, and restricts it somewhat to a greater extent than in the description of the line in the case mentioned.

As the general question involved is one of very great importance, and the ruling not necessarily conveying the instruction I think should have been given, I agree that a new trial should be granted.

The defendant requested the court to instruct the jury that, if the bank of the river was ordinary low water mark, the plaintiff had no right to use the water at that stage, which was refused.

This instruction, we suppose, was asked for on the ground that, admitting the boundary line to be fixed at ordinary low water mark, inasmuch as the bed of the river within that limit *belonged to Georgia, and the defend- [*426 ant's grant, derived from that State, authorized the erection of his dam to the height claimed, he had a right to set back the water up the bed within the aforesaid limit; and the complaint, therefore, that the back water interfered with the supply of water to the plaintiff's mill, by obstructing the natural current of the river, was unfounded, as the defendant had a right, to this extent, to obstruct it. If this was the meaning of the instruction prayed for, there was error in the refusal.

Undoubtedly the plaintiff has no right, under his grant from the United States, to erect a dam in the bed of the river within the boundary line of Georgia, for the purpose of supplying his mill with water. But I am not prepared to admit that he cannot supply it by diverting the water upon his own land, without crossing the boundary line as by sinking a trench or ditch, if by so doing he works no injury to the rights of others. Every proprietor of land on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands. No proprietor has a right to use the water to the prejudice of other proprietors, above or below, unless he has acquired a prior right to divert it. He has no property in the water itself, but a simple usufruct while it passes along. Anyone may reasonably use it who has a right of access to it; but no one can set up a claim to an exclusive right to the flow of all the water in its natural state; and that what he may not wish to use himself shall flow on till lost in the ocean.

Streams of water are intended for the use and comfort of man; and it would be unreasonable, and contrary to the universal sense of mankind, to debar a riparian proprietor from the application of the water to domestic, agricultural and manufacturing purposes, pro-

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vided the use works no substantial injury to others.

These principles will be found stated more at large by Chancellor Kent, in his Commentaries (3 Kent's Com., 439, 440, 441); and also by Parke, J., in a very recent case in the Court of Exchequer in England (*Embry et al. v. Owen*, 4 Eng. Law and Eq. R., 466, 476, 477.)

Mr. Justice Grier:

I concur with my brother Nelson.

Mr. Justice Curtis:

In these cases I concur with the majority of the court in the opinion that each of the judgments should be reversed, but I withheld my assent from much of the reasoning contained in the opinion. I do so, because I am not entirely satisfied of its correctness, as I apprehend its extent and bearings; and because the cases involve a question of boundary between the States of Georgia and Alabama, and highly important riparian and other rights connected therewith, or dependent thereon, in reference to which I desire to stand committed to no opinion, and to no course of reasoning, beyond what seems to me absolutely necessary for a final decision upon the private rights now before us.

This obliges me to state my own views of what I deem necessary to be decided, and the conclusions at which I have arrived. I shall do so very briefly, and without entering into an examination of the principles and authorities which have brought my mind to those conclusions.

My opinion is: 1. That the calls contained in the Act of Cession, place the western line of Georgia on the western bank of the Chattoohocchee River, at the place in question in these cases.

2. That the Act of Cession is silent as to the particular part of the bank on which the line is to be run. But inasmuch as it must be run on some particular part of the bank, we are obliged to resort to the presumed intentions of the commissioners and the parties; inferable from the nature of the line, as a line of boundary of political jurisdiction as well as of proprietorship; and according to that presumed intention, we must declare it to be on that part of the bank which will best promote the convenience and advantage of both parties, and most fully accomplish the apparent and leading purpose to establish a natural boundary.

3. That the banks of a river are those elevations of land which confine the waters when they rise out of the bed; and the bed is that soil so usually covered by water as to be distinguishable from the banks, by the character of the soil, or vegetation, or both, produced by the common presence and action of flowing water. But neither the line of ordinary high water mark, nor of ordinary low water mark, nor of a middle stage of water, can be assumed as the line dividing the bed from the banks. This line is to be found by examining the bed and banks, and ascertaining where the presence and action of water are so common and usual, and so long continued in all ordinary years, as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as in respect to the

nature of the soil itself. Whether this line between the bed and the banks will be found above or below, or at a middle stage of water, must depend upon the character of the stream. The height of a stream, during much the larger part of the year, may be above or below a middle point between its highest and least flow. *Something must depend also [*428 upon the rapidity of the stream and other circumstances. But in all cases the bed of a river is a natural object; and is to be sought for, not merely by the application of any abstract rules, but as other natural objects are sought for and found, by the distinctive appearances they present; the banks being fast land, on which vegetation, appropriate to such land in the particular locality, grows wherever the bank is not too steep to permit such growth, and the bed being soil of a different character and having no vegetation, or only such as exists when commonly submerged in water.

4. Taking along with us these views respecting the bed and banks of a river, it will be obvious that the lowest line of the bank, being the line which separates the bank from the bed, is a natural line, capable of being found in all parts of the river, impressed on the soil; and this is true of no other line on the bank; for though in some places the banks of a river may have so marked a character that there would be no difficulty in tracing the upper line of the bank, and pronouncing, with certainty, that the bank there terminates, yet it is not to be supposed that this would be true throughout the course of a long river, and one of these cases finds, that in some places the banks of this river are low, and the adjacent lands on either side subject to occasional inundation. In such cases it would be impracticable to fix on a precise line as the upper termination of the bank. Now, it is clear, that inasmuch as this line of the Act of Cession was to be a line of boundary of political jurisdiction, it must have been deemed by the commissioners when they fixed it, and by the parties when they assented to it, of great importance, to have a natural boundary, capable, not only of being ascertained upon inquiring, but of being seen and recognized in the common practical affairs of life. And, therefore, I am of opinion, that as the calls for this line do not expressly require it to be on any particular part of the bank, it should be located on the bank where the leading purpose, to have a natural boundary between the two jurisdictions, will be most effectually attained. The convenience and advantage of both parties require this. The line, therefore, is at the lowest edge of the bank, being the same natural line which divides the bank from the bed of the river.

The above brief statement of my views, while it exhibits all to which I have given my assent in these cases, will show why I concur in the opinion that the rulings, brought before us by these writs of error, were erroneous.

Order in No. 121.

This cause came on to be heard on the transcript of the record *from the Supreme [*429 Court of the State of Alabama, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court

in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Supreme Court, to be proceeded with in conformity to the opinion of this court, and as to law and justice may appertain.

Order in No. 131.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Georgia, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to award a *venire facias de novo*, and to proceed therewith in conformity to the opinion of this court.

Rev'g—17 Ala., 780.
Cited—19 How., 506, 607; 2 Sawy., 457.

JOHN NORRIS, *Plaintiff*,

v.

EDWIN B. CROCKER AND ELISHA EGBERT.

Action pending for penalty under Act of 1793 respecting fugitives, barred by Act of 1850.

The fourth section of the Act of Congress, approved on the 12th day of February, 1793 (1 Stat. at Large, 302) entitled "An Act respecting fugitives escaping from justice, and persons escaping from the service of their masters," is repealed, so far as relates to the penalty, by the Act of Congress approved September 18th, 1850 (9 Stat. at Large, 462), entitled "An Act to amend and supplementary to, the above Act."

Therefore, where an action for the recovery of the penalty prescribed in the Act of 1793 was pending at the time of the repeal, such repeal is a bar to the action.

THIS case came up from the Circuit Court of the United States for the District of Indiana, upon a certificate of division in opinion between the judges thereof.

The following certificate explains the question:

UNITED STATES OF AMERICA.

District of Indiana.

At a Circuit Court of the United States, begun and holden at Indianapolis, for the District of Indiana, on Monday, the nineteenth day of May, in the year one thousand eight hundred and fifty-one, and continued from day to day until Friday, the thirtieth day of May, one thousand eight hundred and fifty-one.

430*] JOHN NORRIS

v.

EDWIN B. CROCKER AND
ELISHA EGBERT.

Present, Honorable John McLean, and the Honorable Elisha M. Huntington, judges.

This is an action of debt brought to recover the penalty of \$500, upon the fourth section of the Act of Congress, approved February 12, 1793, entitled "An Act respecting fugi-

tives from justice, and persons escaping from the service of their masters;" declaration in the usual form, and demurrer and joinder thereto.

The case coming on to be argued on demurrer, it occurred as a question, whether the aforesaid section of the aforesaid Act of February 12, 1793, is repealed, so far as relates to the penalty given by said section, by the Act of Congress of September 18th, 1850, entitled "An Act to amend and supplementary to the Act entitled, 'An Act respecting fugitives from justice, and persons escaping from the service of their masters,'" approved February 12th, 1793; and whether, if repealed, the same can affect this action, which was pending before the passage of the last-named Act; on which questions the opinions of the judges were opposed.

Whereupon, on motion of the plaintiff, by his counsel, that the points on which the disagreements hath happened, may, during the term, be stated under the direction of the judges, and certified under the seal of the court to the Supreme Court to be finally decided.

It is ordered that the foregoing statement of the pleadings and the following questions involved, which are made under the direction of the judges, be certified according to the request of the plaintiff, by his counsel, and the law in that case made and provided, to wit:

I. Is the fourth section of the Act of Congress, approved on the 12th day of February, A. D. 1793, entitled "An Act respecting fugitives from justice, and persons escaping from the service of their masters," repealed, so far as relates to the penalty, by the Act of Congress, approved September 18th, 1850, entitled "An Act to amend and supplementary to the Act entitled 'An Act respecting fugitives from justice, and persons escaping from the service of their masters,'" approved February 12th, 1793?

II. Whether, if the fourth section of the last-named Act of February 12th, 1793, is repealed, so far as relates to the penalty by the Act to amend and supplementary to the same, that repeal will, in law, bar the present action that was pending at the time of the appeal.

*Upon this certificate, the cause [430] came up to this court, and was argued by Mr. O. H. Smith for the plaintiff, and Mr. Chas. for the defendants.

Mr. Smith, for the plaintiff:

On the part of the plaintiff, we contend that the Act of 1850 does not repeal the fourth section of the Act of 1793, but is only cumulative and we ask this court so to certify to the Circuit Court.

The defendants maintain that the Act of 1850 does repeal, by implication, the fourth section of the Act of 1793, and every distinct offense created by that section; therefore, if the court should even think that part of the section is repealed by implication, which we submit they will not, still if the whole of the section is not repealed, the certificate must be for the plaintiff, and the demurrer in the Circuit Court must be overruled.

Before we proceed to examine the two acts and to compare them, we will direct the attention of the court to some plain and familiar principles, for the construction of statutes, to

which we are willing to construe these acts, as applicable to this case.

1. "Generally, statutes are to be construed to operate *in futuro*, unless a retrospective effect be clearly intended." (*Prince v. United States*, 2 Gallis. C. C. R., 204.)

2. "In doubtful cases, a court should compare all the parts of a statute, and different statutes *in pari materia*, to ascertain the intention of the Legislature." (*Sloop Elizabeth*, Paine's C. C. R., 11.)

3. "Where a statute is made in addition to another statute on the same subject, without repealing any part of it, the provisions of both must be construed together. (13 Mass., 324, 344.)

4. "Statutes can never be applied retrospectively, by mere construction." (9 B. A., 221; 10 Mass., 437; 12 Mass., 383; 16 Mass., 215; 1 Blackf. R., 220.)

5. "Subsequent statutes, which add accumulative penalties, and institute new methods of proceeding, do not repeal former penalties and methods of proceeding, ordained by preceding statutes, without negative words." (6 Price, 131; 9 B. A., 227.)

6. "The law does not favor a repeal by implication, nor is it to be allowed unless the repugnancy be quite plain; for as such repeal carries with it a reflection upon the wisdom of the former Parliament, it has ever been confined to the repealing as little as possible of the preceding statute." (2 Wash., 297; 2 Barn. & Ald., 149; 6 Maule & Selwyn, 116; 15 East, 372; 9 B. A., 228.)

7. "Although two Acts of Parliament are seemingly repugnant, yet if there be no clause of *non obstante* in the latter, they shall, if possible, have such construction that the latter [432*] may not *be a repeal of the former by implication." (*Weston's case*, Dyer, 347; 11 Rep., 63; Hard., 344; 9 B. A., 228.)

With these general and fundamental principles before us, we proceed to direct the mind of the court—

1st. To the section of the Act of Congress upon which this action was brought, and

2d. To the section of the Act of 1850, passed pending the action, which is relied upon as repealing the fourth section of the Act of 1793.

1. The section of the Act of 1793 upon which this action is founded, reads as follows:

"That any person who shall, knowingly and willingly, obstruct or hinder such claimant, his agent or attorney, in so seizing or arresting such fugitive from labor, or shall rescue such fugitive from such claimant, his agent or attorney, when so arrested, pursuant to the authority herein given or declared, or shall harbor or conceal such person, after notice that he or she was a fugitive from labor as aforesaid, shall for either of the said offenses forfeit and pay the sum of \$500; which penalty may be recovered by and for the benefit of such claimant, by action of debt in any court proper to try the same," saving, &c.

This section, the court will see, gave several distinct causes of action for the penalty:

1. Against any person who should knowingly and willingly "obstruct" the claimant, his agent or attorney, from "seizing or arresting the fugitive."

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2. Against those who shall knowingly and willingly "hinder" the claimant, his agent or attorney, in so "seizing or arresting the fugitive."

3. Any persons who shall knowingly and willingly "rescue" such fugitive from such claimant, his agent or attorney, when so arrested, pursuant to the authority herein given or declared."

4. Against persons "who shall 'harbor' such fugitive," "after notice that he or she was a fugitive from labor."

5. Against persons "who shall conceal such person, after notice that he or she was a fugitive from labor."

The section of the Act of 1850, that is relied upon as repealing the fourth section of the Act of 1793, as to the penalty, by implication, we maintain is merely cumulative. We proceed to give the section; and in order to show the additions that have been made to the section of the Act of 1793, by the Act of 1850, we give the section, and place the additions in brackets.

"That any person who shall knowingly and willingly obstruct (or prevent) such claimant, his agent, or attorney (or any person or persons lawfully assisting him, her or them), from arresting *such a fugitive from service [433 or labor (either with or without process as aforesaid), or shall rescue (or attempt to rescue) such fugitive from service or labor from (the custody of) said claimant, his or her agent or attorney (or other person or persons lawfully assisting as aforesaid), when so arrested pursuant to the authority herein given and declared (or shall aid, abet or assist such person, so owing service or labor as aforesaid, directly or indirectly to escape from such claimant, his agent or attorney, or other person or persons legally authorized as aforesaid), or shall harbor or conceal such fugitive (so as to prevent the discovery and arresting of such person) after notice (or knowledge) of the fact that such person was a fugitive from service or labor as aforesaid."

It will be seen, by an examination of the above section, that it creates new offenses, and punishes them differently, and is therefore cumulative.

The section above does not make "harboring" or "concealing" a slave subject to a penalty, unless it is done "so as to prevent the discovery and arresting of such person after notice," &c., while the section of the law of 1793 on which these actions are founded, makes the offense to "harbor or conceal such person, after notice that he or she was a fugitive from labor," subject to a penalty of \$500. These offenses are entirely different, and are visited with different penalties. The Legislature (Congress), therefore, did not repeal the offense of "harboring" or "concealing" slaves from their masters, either in express terms [or] by implication. Both acts can well stand together, and the rule of law is to construe them as we have already stated.

Let us now come to the Act of Congress of 1850, and inquire whether it could have been the intention of the framers of that Act to repeal the Act of 1793. We maintain the negative of this proposition, as being clear and conclusive.

1. Had such been the intention of the Legis-

lature, the Act would have contained an express repealing clause, which it does not.

2. Congress was composed of good lawyers and wise legislators, who would never have left to construction and implication that which they intended to have enacted.

3. The object of the Act of Congress of 1850 was evidently to give greater facilities to the master of the slave, in securing the fugitive; and can it be for a moment supposed that Congress intended to repeal the Act of 1793, wipe out all liabilities incurred under that Act, and deprive the master of the rights that had accrued to him, of action in suits pending, or otherwise? Most certainly not.

4. It is clear that the Act of 1850 cannot, under any construction, have a retrospective operation, and therefore could in no event operate on the rights of the plaintiff which had accrued before the passage of the Act, unless it was by way of repeal of the previous Act by implication.

5. The title of the Act is conclusive as to the object and intention of the Legislature in its passage. It was, as it expressly declares, amendatory to, and supplementary of, the Act of 1793. Not a repeal of the Act, but amendatory and supplementary to that Act; "additional," "adding what is wanting." See Webster's Dictionary as to the words "supplementary" and "to amend."

6. The Act of 1850, in the language of Judge Nelson, in his able charge to the grand jury, "was passed for the purpose of carrying more effectually into execution a provision of the Constitution of the United States." "The Supplementary Act is obviously framed with great skill and care, and bears upon its face the deep conviction of the body that enacted it, that the constitutional provisions had not only been disregarded; but that a settled purpose, a fixed determination existed in some portions of the country to set its obligations at naught. The Act meets this condition of things, real or supposed, and clothed the public authorities with power adequate to the exigency." This view of the object and effect of the Act is certainly very erroneous, if the Act was a repeal of the penal part of the Act of 1793, as is contended. If it enacted impunity and absolutism to all offenders under the Act of 1793, dismissed all actions pending for violations of its provisions with costs, and being retroactive in its operation, left no cause of action for any penalty incurred prior to its passage, though not within the offenses named by the Act of 1850, we submit that this court should not give to the Act of 1850 such a construction, but should construe it to be what its title declares it to be—an Act to amend, and supplementary to, the Act of 1793. This construction will accord with the object and intention of the Legislature, will enforce the rights of the plaintiff and maintain the majesty of the laws and the integrity of the Union.

Mr. Chase, for defendant, contrasted the two laws, and then proceeded with his argument.

It was evident, from this comparison, that the design of the Act of 1850 was to enlarge the Act of 1793 and make it more efficient and stringent, by extending the definitions of the prohibited offenses, and by substituting for the

penalty of \$100 for the benefit of the claimant, the public punishment of a fine of \$1,000 and imprisonment and for mere liability to an action for the injury, the definite award of \$1,000 as civil damages for each servant lost. No offense is described in the Act of 1793 which is not expressly mentioned and prohibited in the Act of 1850; while the penalties and sanctions of the latter Act are entirely distinct, both in nature and magnitude, from those of the former.

The rules of law applicable to this law are, I apprehend, too well settled to admit of much diversity of opinion. The first is this:

Acts of the Legislature prohibiting the same offenses and injuries as former Acts, but imposing different penalties or giving different remedies, repeal, so far, such former Acts. (*Rez v. Cator*, 4 Burr., 2026; *Nichols, qui tam, v. Squire*, 5 Pick., 168; *Commonwealth v. Kimball*, 21 Pick., 873; *Adams v. Ashby*, 2 Bibb, 96; 2 Dana, 330; *Hickman v. Littlepage*, 2 Ib., 334; *Milne v. Huber*, 3 McLean, 212; *The State v. Whitworth*, 8 Porter, Ala., 434; *McQuiklin v. Doe, ex dem. Stoddard*, 8 Black., 581; *Leighton v. Walker*, 9 N. H., 50.)

The leading case is *Rez v. Cator*, 4 Burr., 2026. The defendant had been convicted upon 5 Geo. I., c. 27, and 23 Geo. II., c. 13, for enticing and seducing artificers in the manufactures of the United Kingdom into foreign service. Both Acts were upon the same subject. The offense was within each. The first imposed a penalty of £100 and three months' imprisonment for the first offense, and for the next a fine at discretion and twelve months' imprisonment. The second Act imposed a penalty of £500 and twelve months' imprisonment for the first offense; and for the next £1,000 and two years' imprisonment. Lord Mansfield held, "The latter Act seems to have been a repeal of the former: it was made to supply the deficiencies of the former."

The language of the Supreme Court of Massachusetts, in *Nichols, qui tam, v. Squire*, 5 Pick., 168, is very clear: "We think the Statute of 1785, c. 24, upon which the *qui tam* action is founded, is repealed, if not by Stat. 1800, c. 57 (which seems to have had a different object in view), yet certainly by Stat. 1817, c. 191, which appears to cover the whole subject matter of the Statute of 1785. By the Statute of 1817 the selling of tickets in any lottery not granted or permitted by the Commonwealth is prohibited under a new penalty; and where the Legislature impose a second penalty for an offense, whether smaller or larger than the former one, a party cannot be allowed to sue on one or the other, at his option. This point of repeal by implication is supported by authority. In the case of *Bartlett v. King*, 12 Mass., 537, an exceedingly useful statute, passed in 1754, concerning bequests and donations to pious and charitable uses, was held not to be in force: the Legislature having in 1785 legislated upon the same subject, and omitted to re-enact the provisions of that statute."

The opinion of the Supreme Court of Alabama, in *The State v. Whitworth*, 8 Porter's Ala. Rep., 434, is equally decided: "The Act of 1829, inhibiting gaming, covers the whole ground of the previous statute, so far as the

keeping, exhibiting, carrying on or being in any manner interested in, any gaming table or bank whatever is concerned, and includes every offense connected with the subject matter; and as it provides a different, and in some respects a milder punishment for these offenses than the previous statutes, it repeals them so far as the same offenses are provided to be punished by it."

It seems needless to quote from the other cases cited. These authorities are sufficient to establish the proposition, that the Act of 1850, so far as it imposes new and different penalties and punishments for the same offenses prohibited by the Act of 1793, repeals that Act.

The second rule of law laid down by the defendants is this:

No judgment can be rendered in any suit for a penalty after the repeal of the Act by which it was imposed. The repeal of a statute puts an end to all suits founded upon it. (*Rex v. Justices of the Peace for the City of London*, 3 Burr., 1456; *Yeaton v. The United States*, 5 Cranch, 281; *Schooner Rachel v. The United States*, 6 Cranch, 329; *The Irresistible*, 7 Wheat., 551; *The United States v. Preston*, 3 Pet., 57; *Commonwealth v. Marshall*, 11 Pick., 850; *Commonwealth v. Kimball*, 21 Pick., 873; *Commonwealth v. Leftwich*, 5 Rand., 657; *People v. Livingston*, 6 Wend., 526; *Commonwealth v. Welch*, 2 Dana, 310; *Lewis v. Foster*, 1 N. H., 61; *Stevenson v. Doe*, 8 Black., 508; *Pope v. Lewis*, 4 Ala., 487; *Road in Hufield Township*, 4 Yeates, 392; *Maryland v. Baltimore and Ohio Railroad Company*, 3 How. U. S. Rep., 534; 18 Maine, 109; 25 Maine, 452; *Miller's case*, 1 Wm. Black., 451.)

The leading case is *Rex v. Justices of London*, 3 Burr., 1456. It was a motion for a mandamus requiring the justices to proceed in a matter depending before them after the Act regulating the proceeding had been repealed. The matter had been by them adjourned unto a day after the repealing clause took effect, and they then refused to proceed farther. "Lord Mansfield was very clear, and the rest of the court concurred with him, that no jurisdiction now remained in the Sessions."

In the case of *Yeaton v. The United States*, 5 Cranch, 281, this court said, upon appeal from a sentence of condemnation, where the law under which the sentence had been pronounced had been repealed after the sentence, "The cause is to be considered as if no sentence had been pronounced; and if no sentence [437*] had been pronounced, it has been long settled, on general principles, that after the expiration or repeal of a law no penalty can be enforced or punishment inflicted for violations of the law, committed while it was in force, unless some special provision be made for that purpose by statute."

And it makes no difference whether the penalty goes to the public, or in part or in whole to an individual.

In *Lewis v. Foster*, 1 N. H., 61, a judgment had been rendered in an action of debt for a penalty under a statute which gave the whole penalty to the plaintiff. Before execution the statute was repealed. The defendant, by a proceeding in review, brought the case before the Supreme Court, where it stood as if no judgment had been rendered. The court said:

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"The plaintiff's right of action was taken away by the repeal of the law on which it was founded. Every right he acquired by a judgment was subject to be lost on review of the cause. We must try the cause in the same manner as if there never had been a judgment, but we now find no act which will warrant a judgment in favor of the plaintiff."

So in *Pope v. Lewis*, 4 Ala. 489, the court said: "The principal question in this cause is whether any judgment can be rendered in an action founded on a penal statute after its repeal. The counsel for the defendant in error maintain, that by the commencement of the suit for the penalty prescribed by the statute for selling rope and bagging without inspection, the defendant acquired a vested right in the penalty, which the subsequent repeal of the statute by the Legislature cannot deprive him of. The foundation of a claim to a penalty prescribed by law is derived entirely from the statute authorizing a judgment to be rendered in favor of anyone who will sue for it." "This claim is imperfect until a judgment be rendered for it. . . . It follows, neces-

sarily, that as the right to the penalty is inchoate until judgment, if from any cause no judgment can be rendered for the penalty, the absolute or vested right to it can never exist. It cannot admit of doubt that the Legislature may at pleasure repeal any penal law; and it is equally well settled that after such repeal no judgment can be rendered, either of corporal punishment or pecuniary fine. Nor is it easy to perceive how, upon principle, any other decision could be made."

The whole matter is summed up in an expression of *Mr. Chief Justice Taney*, in *Maryland v. The Baltimore and Ohio Railroad Company*, 3 How., 534: "The repeal of the law imposing a penalty is itself a remission."

These principles and authorities seem to leave no doubt upon either question certified from the Circuit Court. It appears to be quite clear, both that the provisions of the 4th section of the *Act of 1793, giving a penalty for [*438] the offenses therein described, are repealed by the operation of the 7th section of the Act of 1850, giving different penalties for the same offenses; and that this repeal bars actions for penalties pending at the taking effect of the last Act.

Mr. Justice Catron delivered the opinion of the court:

The following questions are certified to us on a division of opinion from the Circuit Court for the District of Indiana:

1. Whether the 4th section of the Act of 1793, respecting persons escaping from service of their masters is repealed, so far as relates to the penalty, by the Act of 1850, on the same subject.

2. Whether, if the Act of 1793 is repealed as to the penalty, the repeal will bar an action that was pending at the time of the repeal.

The fugitive slave law of 1850 does not repeal the 4th section of the Act of 1793 in terms; and if it is repealed, it must be by implication. As a general rule it is not open to controversy, that where a new statute covers the whole subject matter of an old one, adds offenses, and prescribes different penalties for those enumer-

ated in the old law, that then the former statute is repealed by implication; as the provisions of both cannot stand together.

To ascertain whether there be repugnance, the two enactments must be compared.

The 4th section of the Act of 1793 provides: 1st. That any person who shall, knowingly and willingly, obstruct or hinder a claimant, his agent or attorney, in arresting a fugitive from labor:

Or, 2d. Shall rescue the fugitive from the claimant, his agent or attorney, after he has been arrested:

Or, 3d. Shall, knowingly and willingly, harbor or conceal the fugitive, knowing he is such: That for committing either of said offenses such person shall forfeit and pay the sum of five hundred dollars: which penalty may be recovered by the claimant for his own benefit; and reserving also to the claimant his right of action in damages for the actual injuries he may have sustained, be they more or less.

The Act of 1850, section 7, declares:

1st. That any person who shall, knowingly and willingly, obstruct, hinder or prevent, such claimant, his agent or attorney—or any person or persons lawfully assisting him, her or them, from arresting such fugitive—either with or without process:

Or, 2d. Shall rescue, or attempt to rescue, such fugitive, when arrested, from the custody of the claimant, his agent or attorney, **439*** or from the custody of any other person or persons lawfully assisting:

Or, 3d. Shall aid, abet, or assist the person owing service, directly or indirectly, to escape from such claimant, his agent or attorney, or other person or persons legally assisting:

Or, 4th. Shall harbor or conceal such fugitive, so as to prevent his discovery and arrest, after notice or knowledge of the fact that such person was a fugitive: The person so offending, in either of the cases specified, shall be subject to a fine not exceeding one thousand dollars, and imprisonment not exceeding six months, on conviction by indictment. Second. That the person thus offending, shall forfeit and pay, by way of civil damages, to the party injured by such illegal conduct, the sum of one thousand dollars for each fugitive lost, by reason of such conduct, to be recovered by action of debt.

And the question is, whether the foregoing provisions of the Act of 1850 are repugnant to those contained in the Act of 1793, so far as the penalty of five hundred dollars is concerned.

The former statute gives this penalty to the owner in three cases: for obstructing an arrest; for a rescue; and for harboring the fugitive. It was given, regardless of the fact, whether the owner had or had not recovered his slave; and in addition, by the Act of 1793 he might sue for, and recover the value, if the slave was lost by the illegal conduct of the defendant; or he might recover inferior damages if the slave was obtained.

By the Act of 1850, a penalty is inflicted, by way of fine, on conviction; and imprisonment is added. The prosecution is at the instance of the United States, with which the owner of the slave is not necessarily connected, the government taking the penalty recovered: nor is it of any consequence, under this mode of proceed-

ing, whether the owner has or has not recovered his slave; the offender being equally liable to prosecution for committing any one of the offenses enumerated in the statute, including the old one, found in the Act of 1793; and the additional ones, superadded in that of 1850, and which are indicated by the words in italics. The recent statute covers every offense found in the former Act, which subjects the offender to a penalty of \$500, and prescribes a new and different penalty, recoverable by indictment; and is plainly repugnant to the Act of 1793.

A seeming difficulty exists, in the concluding part of the seventh section of the new Act, which awards civil compensation to the owner for the loss of each slave, if that loss was occasioned by any one of the illegal acts that are made indictable: but no recovery under, and by force of the statute, can be had, unless the owner has lost the slave. The policy of the law is *obvious. On trials, illegal con- ***440** duct, and loss, might be fully established; but then, the wide range of proof, as to value, could still, in effect, defeat the suit by a verdict for low damages: and therefore Congress fixed the value alike in every case of loss, and took the assessment of damages from the jury. This provision is new, and inconsistent with the 4th section of the Act of 1793, in this: The former Act imposes a penalty of five hundred dollars, in the enumerated cases, regardless of any actual loss on the part of the owner: whereas, for the same offenses, the Act of 1850 allows civil damages of \$1,000 for each slave lost; but nothing when he is regained—loss being the ground of action: nevertheless, the party injured is left to his common law remedy for any damage he may have sustained short of actual loss of the slave by the illegal conduct of the offending party: and for actual loss also, if he prefers and elects that remedy to an action for civil damages under the statute; but both modes cannot be pursued.

We therefore answer, to the first question certified, that the Act of 1850 has repealed, so far as relates to the penalty, the fourth section of the Act of 1793.

The next question referred to us for decision presents no difficulty.

The suit was pending below when the Act of September 18, 1850, was passed, and was for the penalty of \$500, secured by the 4th section of the Act of 1793. As the plaintiff's right to recover depended entirely on the statute, its repeal deprived the court of jurisdiction over the subject matter. And in the next place, as the plaintiff had no vested right in the penalty, the Legislature might discharge the defendant by repealing the law. We therefore answer, to the second question certified, that the repeal of the fourth section of the Act of 1793 does bar this action, although pending at the time of the repeal.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Indiana, and on the points or questions on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion agreeably to the Act of

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Congress in such case made and provided, and was argued by counsel; on consideration whereof, it is the opinion of this court: 1st. That the fourth section of the Act of Congress, approved on the 12th day of February, A. D. 1793, entitled "An Act respecting fugitives from justice and persons escaping from the service of their masters," is repealed, so far as relates to the penalty, by the Act of Congress approved September 18th, 1850, entitled "An Act to amend, and supplementary to, the Act entitled 'An Act respecting fugitives from justice and persons escaping from the service of their masters,'" approved February 12th, 1793. 2d. That the repeal of the said fourth section will in law bar the present action that was pending at the time of the repeal. Whereupon, it is now here ordered and adjudged by this court, that it be so certified to the said Circuit Court.

Cited—17 How., 96; 2 Wall., 466; 5 Wall., 544; 7 Wall., 514; 9 Wall., 575; 11 Wall., 92, 94, 95; 7 Otto, 551; 8 Otto, 401; 3 Sawy., 429; 4 Sawy., 251; 12 Blatchf., 193, 348; 7 Bank. Reg., 261; 10 Bank. Reg., 409; 1 Ben., 372; 1 Dill., 62, 232, 254; 2 Abb. U. S., 318; 4 Biss., 334; McCahon, 233; Woolw., 202; 3 Woods, 346.

LEWIS ROGERS, Appellant,

v.

JOSEPH G. LINDSEY, HENRY S. ATWOOD, AND JOHN S. BENNETT.

Instrument construed as authority to control and collect certain judgments, not as an assignment thereof.

The following paper, viz.:

"The President or Cashier of the Planters' and Merchants' Bank will please hold, subject to the order of Mr. J. G. Lindsey, all the debts referred to in the inclosed letter from Mr. McFarlin, except the two drafts of McCollier Minge, upon the Messrs. Ellicotts, of Baltimore, which, when collected, please place to my credit"—imports an authority to Lindsey to control the settlement and collection of these several demands; but not necessarily a transfer of the title or interest in them.

The circumstances of the case favor this construction. Lindsey had become personally responsible for a sum of money, which these debts were intended in part to meet. As an honest transaction, it would answer all purposes, if he had only a power to collect the debts.

Where Lindsey, under this power, assigned an interest in one of these judgments, and the bill charged that the assignee knew of the interest of the original creditor, which the assignee, in his answer, did not deny, he failed to bring himself within the rules which protect a purchaser for a valuable consideration without notice, and his claim must be set aside.

Lindsey's having assigned this judgment to a third person, and then taken a re-assignment of it, does not vary the case. He stands then in his original position.

THIS was an appeal from the Circuit Court of the United States for the Southern District of Alabama.

The bill was filed by Rogers against Lindsey, Atwood, and Bennett, under the circumstances mentioned in the opinion of the court, and which it is not necessary to repeat.

The cause was heard upon the bill, answers, exhibits and proofs, in the said District Court, on the 17th of April, 1850, and the court being of opinion that the plaintiff, Rogers, by his contract with the defendant, Lindsey, had assigned

and transferred the judgment in the said court, in favor of Rogers & Gray against John S. Bennett, to said Lindsey, and that he, Lindsey, and the assignees under him, were entitled to the money made thereon, ordered and decreed that the plaintiff's bill be dismissed with costs.

Rogers, the complainant, appealed to this court.

*It was argued by **Mr. Crittenden** [*442 (Attorney-General) and **Mr. Chilton** for the appellant, and **Mr. J. A. Campbell** for the appellee.

The arguments of the respective counsel were so much connected with the facts and circumstances of the case, that it is impossible to narrate them without protracting this report to an inconvenient length.

Mr. Justice Nelson delivered the opinion of the court:

This is an appeal from the Circuit Court of the United States for the Southern District of Alabama.

Lewis Rogers, the appellant, and complainant below, was one of the firm of Rogers & Gray, doing business in the City of Richmond in 1836, and in the course of their business purchased of Joseph G. Lindsey, one of the defendants, a large amount of bills of exchange on the house of Goodman, Miller & Co., of the City of Mobile, of which about the sum of \$20,000 was unpaid, and the bills protested. Subsequently, in 1837, a settlement was effected with the firm at Mobile, and payment received in several promissory notes, all of which were indorsed by Lindsey. Among these notes was one made by Bissell & Carville, a business firm in Alabama, dated 20th April, 1837, and indorsed by John S. Bennett, payable 1st January, 1838, for \$3,297.27, and which was also indorsed by Goodman, Miller & Co., and Lindsey. This note, and a large amount of the paper thus received in discharge of the debt of \$20,000, was dishonored at maturity, and duly protested, and judgments recovered against the several parties liable, in the Circuit Court of the United States in the Southern District of Alabama. The judgment recovered March, 1840, against Bennett, on the note of Bissell & Carville, amounted to \$3,875. About this time the partnership of Rogers & Gray was dissolved, and the effects assigned to Rogers, the complainant.

In June, 1840, while the securities, taken in payment of the balance of \$20,000 due to the firm of Rogers & Gray, stood in this condition, Lindsey came to the City of Richmond, and made a proposition for the settlement of his liabilities as indorser upon them. They had been left with the Planters' and Merchants' Bank of Mobile, for collection, and judgments recovered upon them as stated. Lindsey represented that all, or nearly all the parties except himself upon the paper were insolvent, and that little, if anything, could be realized on the judgments. And he proposed to take them and give a note for \$20,000, made by himself, and indorsed by four other persons, citizens of Alabama, who he represented were responsible, and would pay the note at maturity, if Rogers would make a new advance *to him of [*443 \$10,000 on the note of one Hudgings, a citizen of Virginia.

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Upon the faith of these representations, and after some inquiries into the responsibility of the parties, Rogers agreed to the proposition, and took the note of \$20,000, which was payable the first of January thereafter, and advanced the \$10,000 on the Hudgings note; and at the same time gave to Lindsey the following writing:

"The President or Cashier of the Planters' and Merchants' Bank will please hold, subject to the order of Mr. J. G. Lindsey, all the debts referred to in the inclosed letter from Mr. McFarlin, except the two drafts of McCollier Minge upon the Messrs. Ellicotta, of Baltimore, which, when collected, please place to my credit." 18th June, 1840.

The list of debts referred to in the letter of McFarlin were the securities that had been left with the bank at Mobile by Rogers for collection, and which had passed into judgments, as already stated.

When this note of \$20,000 fell due, on the 1st of January, 1840, it was dishonored, and the paper duly protested. This note has never been paid.

Lindsey, after receiving the authority to control the securities and judgments in the bank at Mobile, returned, and made collections out of them to the amount of between \$3,000 and \$4,000.

Besides this amount, he has collected the judgment against Bennett to the amount of \$6,292.66, principal and interest, that being the amount due at the date of the collection by the marshal, on the execution, June 5th, 1848. The judgment had been recovered March, 1840, and execution issued returnable November term following. An *alias* was issued 31st January, 1842, returnable March term following; and a *pluries* 24th December, 1842; a second and third, January and March, 1844; and a fourth and fifth, March, 1845, and April, 1848, on the last of which the sale took place of the property of Bennett.

The execution had been delayed by proceeding in the courts to stay the sale.

This bill was filed in the court below to arrest this \$6,292.66, in the hands of the marshal, Rogers claiming that the money belongs to him. It has been brought into court, and awaits the final decree in the cause.

On the 24th December, 1842, Lindsey petitioned for the benefit of the Bankrupt Act, passed August 19th, 1841, and obtained his discharge on the 2d May, 1843.

None of the securities or judgments that he received from Rogers in June, 1840, at the 444*] time he gave him the note of \$20,000, is found in the list of his assets. The only allusion to them is an obscure reference in his list of creditors to the note of Bissell & Carville, which he says was given to C. D. Hunter as security for a debt due him.

The ground upon which Rogers claims that he is entitled to the money collected on the judgment against Bennett, is: 1. That according to the agreement with Lindsey, at the time he took the note of \$20,000, it was not intended to vest in the latter any interest in the securities and judgments that had been left in the Planters' and Merchants' Bank at Mobile, for collection; but only to confer an authority upon him to take charge of the settlement and col-

lection of the same, so that the proceeds might be applied to the payment of the note. In other words, that there was no assignment of these judgments intended, but a power to settle and convert them into money for the purpose stated, as Lindsey's residence in Alabama enabled him to give his personal attention to the business; and as he was deeply interested in realizing the payment of them, as he was on all the securities.

2. That admitting there had been an absolute assignment to Lindsey, and that it was so intended, still the complainant is entitled to arrest the money in the hands of the marshal, and have it applied to his debt, on the ground that it was obtained by false representations, both in respect to the value of these judgments, Lindsey representing that they were worthless, and also in respect to the solvency and responsibility of the sureties upon the note of \$20,000.

On the part of Lindsey, it is insisted that this note was given on the express condition that the judgments in the bank at Mobile were to be assigned absolutely to him for his own benefit; and that no fraudulent representations, as alleged, were made by him at the time.

The first question must depend upon the effect of the written instrument that passed between the parties as the result of the negotiation between them, as we have no other evidence on this branch of the case, except the allegations in the bill and answer. And on looking at that instrument, we are satisfied that upon a fair construction, it imports an authority to Lindsey to control the settlement and collection of these several demands; but not necessarily a transfer of the title to, or interest in them.

This interpretation satisfies the words of the instrument; and there is nothing in the transaction itself, or in the relation in which the parties stood to each other, that should induce the court to give it a strained construction in favor of this defendant.

If a transfer of the interest had been contemplated, as the instrument *was drawn [*445 for the purpose of carrying into effect the agreement and understanding of the parties, it is surprising that words importing an assignment are altogether omitted, and those importing only an authority over the list of judgments, used. It would have been most natural to have drawn an assignment in terms. Nor do we perceive that it could have been of any material importance to Lindsey to have stipulated for a transfer. The debt of \$20,000 was his, and it would fall due in six months, and the purpose of giving this note as set up at the time, was to get some delay, so as to be able to realize something out of the securities in the bank at Mobile. And whether he, therefore, took a transfer of them, or a full authority to settle and collect them, would seem, in view of any honest purpose, a matter more of form than substance.

Our conclusion therefore is, that Lindsey took no interest in these judgments, as assignee, by operation of the written directions given to the Planters' and Merchants' Bank, by Rogers, on the 18th June, 1840; nor is there any evidence in the case leading to that conclusion.

Having arrived at this result, it is unimpor-

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tant to inquire into the question of fraud relied on as vitiating the assignment upon the assumption that one had been established. There is certainly very strong grounds for doubting as to the *bona fides* of the transaction on the part of Lindsey.

The bill states that he represented the sureties upon the note of \$20,000 as men of undoubted means, and who would not allow their paper to be dishonored, and that, if he did not take it up at maturity, they would.

This Lindsey substantially admits in his answer. And yet, the note was dishonored, and no portion of it paid by these sureties, and, as is apparent from the evidence, the demand could not have been collected by force of law. It is unimportant, however, to pursue this branch of the case.

The next and only remaining question in the case is, in respect to an interest set up by the defendant, Atwood, in this judgment against Bennett. He claims an interest to the amount of \$2,500, by an assignment from Lindsey, since his discharge under the Bankrupt Act, sometime in the year 1843 or 1844, by way of securing the payment of an old debt due before the proceedings under that Act.

The bill charges, that Atwood knew Lindsey had obtained the control of the judgment against Bennett by false representations; and that he conspired with him to consummate the fraud thus committed upon the complainant.

This allegation is not met and denied in the answer. Nor is there any denial of knowledge that Lindsey had obtained no interest in, or 446*) title to, the judgment from the plaintiffs in the same, or from Rogers, the complainant. He says he does not remember that he ever saw any evidence of title to the judgment in Lindsey from Rogers & Gray, the plaintiffs, or from either of them, but avers that he knew he had a title to the same from one Hunter. Neither does Atwood set up in his answer that he obtained the assignment of the interest he claims in the judgment *bona fide*, and without notice of the title of the complainant.

Under these circumstances, and in view of the nature of the defense set up by Atwood, it is quite clear he does not bring himself within the rule in equity which protects the title of a purchaser without notice. The bill virtually charged him with notice of the complainant's interest in the judgment, for the purpose of invalidating any claim that he might set up to the same under the assignment; and in order to protect himself, and to show that he was not in privity with Lindsey, he was bound to aver in his answer, that the purchase was made for a valuable consideration without notice.

Neither can he protect himself under the averment in the answer, that Lindsey obtained a title to the judgment from Hunter.

The facts are, that Hunter, in the fall of 1841, took an assignment of this judgment from Lindsey, in consideration of a lot of land in Wilcox County, Alabama; and that in the spring of 1844 he re-assigned the same, and took Lindsey's note for the demand. Lindsey, being the original party to the fraud, is disabled from setting up this title of Hunter, conceding it to be a good one against the complainant. The re-assignment clothes him with no better

title than he possessed when he assigned the judgment to Hunter.

A purchaser with notice may protect himself by obtaining the title of a purchaser for a valuable consideration without notice, unless he be the original party to the fraud. The *bona fide* purchase purges away the equity from the title in the hands of all persons who may obtain a derivative title, except it be that of the original party, whose conscience stands bound by the violation of the trust, and a meditated fraud. (1 Story, Eq. Jur., 397, 398, and cases.) Atwood, therefore, can derive no benefit from the purchase of Hunter, even if that had purged the equity of Rogers, as that equity immediately attached on the re-assignment of the judgment to Lindsey, and bound it in his hands; and anyone coming in under him chargeable with notice stands in no better situation.

In every view, therefore, that we have been able to take of the case, we think the decree of the court below erroneous, and should *447 be reversed, and the proceedings remitted; with directions to enter a decree that the complainant is entitled to the fund in court collected upon the judgment against Bennett, together with costs of suit in this court and in the court below.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Alabama, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to that court to enter a decree in favor of the complainant for the fund in court collected upon the judgment against Bennett, together with the costs of this suit in this court and in the said Circuit Court.

MORGAN MCAFEE, MADISON MCAFEE,
AND JAMES ALFORD, *Plaintiffs in Error.*

v.

JAMES T. CROFFORD.

Trespass for carrying away slaves—verdict may include consequential damages—defendant allowed to recoup judgment against plaintiff as principal and himself as surety—evidence in mitigation.

In an action of trespass, for forcibly invading a plantation, carrying off some slaves, and frightening others away, it was proper for the plaintiff to give in evidence the consequential damages which resulted to his wood and corn.

It was proper, also, to allow the defendant to give

NOTE.—*Rights and liabilities of sureties.* See note to Hall v. Smith, 5 How., 96.

What forbearance or extension of time to principal debtor will discharge surety. See note to Crueth v. Sims, 5 How., 192.

When variation of contract or agreement for delay, discharges surety. See note to Miller v. Stewart, 9 Wheat., 680.

Mitigation of damages, in actions of tort.

In action for pulling down a building, evidence that the building was peaceably taken down, in

in evidence a judgment against the owner of the plantation, as principal, and himself as surety, and his own payment of that judgment. It was allowable, both as an explanation of his motives, and to show how much he had paid; both reasons concurring to mitigate the damages.

Evidence was also allowable to show that arrangements had been entered into between the principal and surety, whereby time would be given for the payment of the debt. This was allowable, as a palliation of the conduct of the principal in removing his slaves without the State.

Evidence was also admissible to show that the surety had not been compelled to pay the debt, by showing that the creditor had been enjoined from collecting it. This was admissible, in order to rebut the evidence previously offered on the other side.

It was proper for the court to charge the jury that, in assessing damages, they had a right to take into consideration all the circumstances.

THIS case was brought up by writ of error from the District Court of the United States for the Northern District of Mississippi.

It was an action of trespass brought by Crofford, who described himself as a citizen of Tennessee, but who had a plantation in Arkansas. The suit was brought against the **448** *and Alford, for acts which are described by the testimony stated in the first exception. In the course of the trial there was but one bill of exceptions taken, which included the whole case. It will be better understood by dividing the rulings of the court below, which is rendered necessary by the great length of the exception.

There were three exceptions to the admission of evidence, and one to the charge of the court to the jury. The declaration contained four counts to the following effect:

1st. For entering upon the defendant's plantation, in the State of Arkansas, and forcibly carrying off and converting to the use of plaintiffs in error, a number of slaves of the value of \$15,000.

2d. For entering, and by threats and violence, chasing and frightening away from said plantation, other slaves of the value of \$40,000, whereby said slaves were greatly damaged and lessened in value.

conformity with the directions of commissioners of the township, with a view of saving the neighborhood from threatened violence, is admissible to mitigate the damages, but that the building has been presented by grand jury as a public nuisance and recommended its abatement is not admissible. *Reid v. Blas*, 8 Watts. & S., 180.

The return to, or re-possession by, plaintiff, of personal property, wrongfully taken or converted, is admissible in mitigation of damages. *Baldwin v. Cole*, 8 Mod., 212; *Cook v. Hartle*, 8 Car. & P., 568; 6 Bac. Abr., 628; *Vosburgh v. Welch*, 11 Johns., 175; *Murray v. Barling*, 10 Johns., 172; *Gibbs v. Chase*, 10 Mass., 125; *Hanner v. Wilsey*, 17 Wend., 91; *Connah v. Hale*, 23 Wend., 402; *Reynolds v. Shuler*, 5 Conn., 323; *Dewitt v. Morris*, 13 Wend., 490; *Wheelock v. Wheelock*, 5 Mass., 104; *Greenfield Bank v. Leavitt*, 17 Pick., 1; *Merrill v. How*, 11 Shep., 128.

So where goods are retaken from the trespasser by warrant or distress or execution in favor of third party against the owner, such re-capture, when the property is thus by operation of law applied to the owner's use, may be shown in mitigation. *Higgins v. Whitney*, 24 Wend., 379; *Otis v. Jones*, 21 Wend., 394; *Sherry v. Schuyler*, 2 Hill, 204; see *Hanner v. Wilsey*, 17 Wend., 91.

In trespass for cutting and destroying a valuable picture, it is evidence in mitigation of damages, that it was a gross libel on defendant's sister. *DuBois v. Bressford*, 2 Camp., 510; *Davis v. Nest*, 6 Car. & P., 187.

In trespass against officers of the customs for taking a port-folio, evidence that it contained drawings liable to seizure for non-payment of duty,

3d. For the injury done to the defendant's business of planting, and cutting and selling cordwood, by thus forcibly carrying off some of the slaves and frightening away others.

4th. For the value of the services of the slaves during the time they were gone from the defendant's plantation and wood yard.

The plea was a general issue with an agreement, entered of record, that any matter constituting a good plea in bar might be given in evidence upon reasonable notice.

First Exception. Upon the trial, Crofford, the plaintiff, offered to read the depositions of three of his neighbors, Parker, Driver, and Kafkemeyer, who testified in substance to the following facts: About the last of October, or 1st of November, 1846, the McAfees and Alford, assisted by several other persons, all armed, crossed the Mississippi River in skiffs, and forcibly carried off twenty-one slaves from Crofford's plantation. Crofford was absent. His overseer remonstrated, but the assailants replied that they intended to take all the negroes, and would kill anyone who interfered. There were forty-two negroes, men, women and children, on the plantation; but as the assailants were engaged for several days in catching and transporting them to the opposite bank of the river, four women and seventeen men were so frightened that they ran off into the swamps, and remained out five or six weeks. Crofford had some 1,800 or 2,000 cords of wood cut at the time of these occurrences, which, on account of the absence of the slaves, was either floated off or greatly injured by a subsequent rise in the river. In addition to this, the neighbor's hogs, cattle, horses, and mules, broke into the plantation, and nearly destroyed 120 acres of growing corn; all of which was the consequence of the absence of the hands.

*These witnesses testify, that the **[*449]** slaves carried over the river, being twenty-one in number, were worth \$12,580; wood worth \$2.50 per cord, and corn 50 cents per bushel.

is evidence in mitigation if not in justification. *De Gondonin v. Lewis*, 10 Ad. & El., 117.

In trespass against officer for arresting and imprisoning plaintiff on suspicion of felony, the bad character of plaintiff is not admissible in mitigation of damages. *Russell v. Shuster*, 8 Watts. & Serg., 306.

In action of assault and battery, the acts or declarations of plaintiff at a different time, or antecedent facts which are not fairly considered as part of same transaction, though irritating or provoking, are not evidence in mitigation. The provocation must be so recent as to induce a presumption that the violence was done under the immediate influence of the feelings and passions excited by it. *Lee v. Woolsey*, 19 Johns., 319; *Sedgwick on Damages*, 563.

That defendant was acting under command of officers of the law, and without intention to do plaintiffs wrong, is evidence in mitigation of damages. *The Martha Anne*, Olcott, 18.

Provocation and heat of passion in assault and battery, are admissible in mitigation of damages. *Cushman v. Waddell*, Baldw., 57.

In an action of slander, defendant cannot give evidence, in mitigation of damages, that the plaintiff had been hostile to him for a long time, and had proclaimed that he did not wish to live in peace and on good terms with him. *Andreas v. Bartholomew*, 2 Met., 509.

When property, unlawfully taken, is afterwards returned to the owner, before suit brought, and is accepted by him, the return and acceptance is evidence in mitigation of damages. *Hibbard v. Stewart*, 1 Hilt., 207.

To all this testimony the plaintiffs in error objected, but the court overruled the objection, and the depositions were read.

The counsel for the defendants below excepted.

Crofford then proved that his plantation was in Crittenden County, Arkansas, and then closed his case.

Second Exception. The defendants below, on their part, offered in evidence the record of a judgment, rendered in one of the courts of Mississippi, in favor of the Commercial Bank of Manchester against James T. Crofford and Morgan McAfee, for the sum of \$4,142.98, together with divers writs of *fi. fa.* issued thereon, levied upon Crofford's property, delivery bond given and forfeited, and *fiert facias* issued upon this. By virtue of this last *fi. fa.* the slaves forcibly carried away from the plantation, in Arkansas, were levied upon and most of them sold, producing the sum of \$6,132, which fully satisfied the said execution.

The McAfees also proved that Morgan McAfee was only security for Crofford in the aforesaid judgment, and that at the time of executing the delivery bond mentioned above, Crofford promised not to remove his negroes from Tallahatchie County until said debts should be paid.

The McAfees then introduced a witness whose evidence, drawn out upon cross-examination, constituted the subject of this exception. The witness was introduced to prove various admissions made by Crofford in reference to the amount of his corn crop and his cordwood; which witness, upon cross-examination, stated, that in the same conversations Crofford said that Morgan McAfee had agreed with him to obtain from the said Bank of Manchester an extension of one, two and three years, in which to pay the said debt, and also to credit thereon a judgment of Crofford against Morgan McAfee, in the United States District Court at Pontotoc, for about \$1,500 or \$2,000. To this evidence, elicited on cross-examination, the McAfees excepted.

Third Exception. The McAfees then proved that before the trespass complained of, Morgan McAfee had paid the debt to the Bank of Manchester, which had assigned the judgment to Madison McAfee.

As rebutting testimony, Crofford offered to introduce the record of a proceeding by *quo warranto* in one of the courts in Mississippi, by which it appeared that at the time of the sale of the negroes upon said execution, the said bank, its agents, and its assignees, were enjoined from collecting any of its demands, though the levy upon a part of the negroes was made before the execution of the writ of *in-450** junction. Crofford also offered to introduce records showing that he had existing unsatisfied judgments to the amount of \$2,847 against Morgan McAfee. The defendants below objected to the admission of this rebutting testimony, but the court overruled the objection and admitted it, whereupon the McAfees excepted.

The charge of the court was as follows: The court instructed the jury that a trespass had been committed by the defendants, "if the jury believe from the testimony that the defendant had a judgment in Mississippi against the
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plaintiff, the defendant would not be authorized to collect said judgment by forcibly removing the property of the plaintiff from the State of Arkansas to the State of Mississippi."

"That in assessing damages the jury had a right to take into consideration all the circumstances;" to which said first charge the counsel for the defendants at the time excepted, before the jury returned from the bar of the court; and to which several matters and things the said defendants, by their said counsel, excepted, and tendered their said bill of exceptions as hereinbefore stated, and before the jury retired from the court, and prayed that the same might be signed and sealed by the court and made part of the record herein; all which is done accordingly.

S. J. GHOLSON. [SEAL.]

The jury found a verdict for the plaintiff and assessed the damages at \$10,613.72.

The cause was argued in this court by *Messrs. Brooke and Volney E. Howard* for the plaintiffs in error, and *Messrs. Snethen and F. P. Stanton* for the defendant in error.

The counsel for the plaintiffs in error contended, that the verdict is manifestly against the testimony. The principle upon which damages are given in an action of trespass is to indemnify the plaintiff for what he has actually suffered, taking into consideration all the circumstances of the case. (*Bateman v. Goodwyn*, 12 Conn., 575.) In this case Crofford in reality sustained no damage, as the property taken was disposed of in discharge of his own debt. "In an action of trover, when the property converted has been sold and the proceeds applied to the payment of the plaintiff's debt, or otherwise to his use, it goes in mitigation of damages." (*Pierce v. Benjamin*, 14 Pick., 356; *Prescott v. Wright*, 6 Mass., 20; *Caldwell v. Eaton*, 5 Mass., 399; 14 Shep., 126.)

Whatever damages Crofford sustained, if any, were the consequences of his own wrong in removing this property beyond the limits of the State of Mississippi, in violation of his agreement with his surety, McAfee. If this verdict is permitted to stand, Crofford [*451 will be suffered to take advantage of his own wrong in having his debt paid, amounting, at that time, to over six thousand dollars, and in addition receive, as a bounty for his dishonesty, the large amount assessed by the jury.

The estimate put upon the negroes by the witness, Parker, is proven to be too great by the result of the sale, they only bringing, at said sale, about half of said estimate. There is no proof or pretense that the sale was not fair. It was made by the sheriff, and is to be presumed to have been made in a legal manner, after due notice given.

The evidence as to the consequential damages to the corn and wood is too loose and indefinite to have received the consideration of the jury. It should have been ruled out by the court.

"Consequential damages are not recoverable in an action of trespass *vi et armis*, for taking away goods." (*Alston v. Huggins*, 2 Const., 688.)

"Opinions of witnesses as to the amount of loss inadmissible." (23 Wend., 425.)

McAfee may not have acted strictly within legal bounds in going to Arkansas, and taking the negroes by force; but when it is recollected

that he was Crofford's surety, that Crofford had deceived and defrauded him by taking the negroes out of the State, thus leaving his surety to suffer, and this, too, in violation of an express agreement, surely Crofford, the original wrong doer, whose criminal acts superinduced the necessity of McAfee's proceedings, cannot be heard to complain.

Crofford recognized the payment and satisfaction of the bank judgment by endeavoring to take advantage of it in defense to a suit brought against him in equity, wherein the lien of this judgment was complained of. The deposition of J. J. Hughes, the cashier of the Bank, proves the suretyship of McAfee.

The record of the proceedings against the bank is wholly irrelevant, and the court erred in admitting it. At the time of the transfer of the judgment to Madison McAfee, the proceeding had not been commenced. No judgment of forfeiture was ever rendered. The other judgments introduced are also irrelevant, and have no bearing whatever on the case. At most they offset one another, and, as far as they are concerned, show but little indebtedness either way.

In cases of this sort, appealing to principles of natural justice more than to strict rules of law, it is conceived that the equity maxim, that the complaining party should come into court with clean hands, applies here as well as in a court of chancery.

It may be said that the bank judgment was satisfied by the payment by McAfee, and that **452*** the transfer to his brother was *there-upon inoperative. Be this as it may, the moral obligation on Crofford remained the same. The attempt to evade the payment of a just debt, and suffer the burden of it to fall on his surety, is the wrong complained of on our part—the wrong that gave occasion to the trespass and its consequences.

The charge of the court is manifestly incorrect. It assumes the fact that a trespass had been committed, and leaves nothing for the jury to determine in this particular. The remainder of the charge—that "if the jury believe, from the testimony, that the defendant had a judgment in Mississippi against the plaintiff, the defendant would not be authorized to collect said judgment by forcibly removing the property of the plaintiff from the State of Arkansas to the State of Mississippi," may be, and doubtless is, a correct proposition of law; but it does not necessarily follow that the existence of the judgment might not have been properly adduced to show that no actual damage had accrued. The manner in which the charge was given was well calculated to impress the jury with the idea that, although they "had a right to take into consideration all the circumstances," yet that the judgment was no circumstance at all worthy of their consideration.

The counsel for the defendant in error contended that the only questions arising upon this record are: first, upon the charge to the jury; and second, as to the several items of proof made by the defendant in error, and excepted to by the plaintiffs.

As to the first of these questions, no authorities can be necessary. There is obviously no error in the instructions of the court to the jury. No bad faith on the part of Crofford,

nor any breach of contract, could have justified the plaintiffs in error in going with an armed band into the State of Arkansas, and taking property by force, in order to subject it to an execution in Mississippi. This was a trespass, and if the judge said so to the jury, he was fully sustained by the proof. But this court has said, "it will not examine the charge of the inferior court to the jury upon mere matters of fact and its commentaries upon the weight of evidence. Observations of that nature are understood to be addressed to the jury merely for their consideration as the ultimate judges of the matters of fact." (*Carver v. Jackson, ex dem. Aitor et al.*, 4 Pet., 80, 81; *Evans v. Eaton*, 7 Wheaton, 426; *Garrard v. Lessee of Reynolds et al.*, 4 How., 123; *Gama et al. v. Stiles*, 14 Pet., 322; *Hyde & Gleason v. Bornem & Co.*, 16 Pet., 169.)

The exceptions to the testimony of the witnesses who proved the trespass, and the damages resulting to the crops and cordwood, were evidently not well taken. All the direct and necessary *consequences of a tres- **453** pass may be given in evidence, to enable the jury to estimate the full amount of damages incurred. (*Dickinson v. Boyle*, 17 Pick., 78.) In this case the court say: "Where the act complained of is admitted to have been done with force, and to constitute a proper ground for an action of trespass *vi et armis*, all the damage to the plaintiff, of which such injurious act was the efficient cause, and for which the plaintiff is entitled to recover in any form, may be recovered in such action, although in point of time such damage did not occur till some time after the act done." (*Johnson v. Courts*, 8 Harris & McH., 510; *Ogden v. Gibbons*, 2 South., 536; *Duncan v. Statecup*, 1 Dev. & Bat., 440; *Hardin et al. v. Kennedy*, 2 McCord, 277; *Damron v. Roache*, 4 Humph., 134; *Wilcox v. Plummer*, 4 Pet., 172, 182; *Barnum v. Vandusen*, 16 Conn., 200.) All the circumstances of aggravation may be proved without minute averment. (*Warfield v. Walter*, 11 G. & J., 80; *Hammatt v. Russ*, 4 Shepl., 171; *Currington v. Taylor*, 11 East, 571; *Keble v. Hickerlingill*, *Id.*, 574. n.; *Id.*, 11 Mod., 74, 130; *Id.*, 3 Salk., 9; 2 Greenl. Ev., sec. 268, a., 254, 270, 272, 635, a.; see note, 2 Greenl., sec. 248, and the authorities there quoted.)

The exception to the statements of Crofford, drawn out upon cross examination, is equally untenable. They were parts of the same conversations which the witness detailed in his examination in chief. But the testimony was not material in any point of view, and could not have influenced the verdict of the jury. (1 Greenl. Ev., sec. 201, and the authorities quoted in the note thereto.)

As to latitude of cross-examination, see 1 Greenl., 449, 450, and notes.

As to immateriality of testimony, *Turner v. Fendall*, 1 Cranch, 131.

Erroneous instructions, if immaterial, not cause of reversal. (*United States v. Wright*, 1 M'Lean, C. C. R., 509; *Forsyth v. Baxter*, 3 Scam., 9.)

Exceptions taken to the records introduced as rebutting testimony—the proceeding by *quo warranto*, and the judgments in favor of *Crofford v. McAfee*. As to the first of these, it

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is certain the Bank of Manchester, at the time of the execution sale of Crofford's negroes, was enjoined by a competent tribunal from making that sale. It was competent to show this fact, not to invalidate the sale, but to show the reckless disposition of the parties, and their contempt of lawful authority. It does not appear what effect this testimony had upon the case, or what instructions the judge gave in regard to it. The jury seem to have deducted the debt of \$6,000, which was paid by the sale of the slaves, from the whole \$454* amount of damages, and given *their verdict for the balance. This appears from the fact that the amount of the verdict is not equal to the value of the slaves actually taken away and sold, as that value was proved by three uncontradicted witnesses, besides the damage to the crop, the wood, and the slaves who took refuge in the swamps. The proof of the injunction could not have operated to prevent this mode of adjustment by the jury; it was admissible evidence only to show the *animus* of the plaintiffs in error; their disregard of the laws of their own State as well as those of Arkansas, throughout the whole of these violent proceedings.

The judgments of *Crofford v. Morgan McAfee* were wholly immaterial to the case, except so far as they tended to palliate the bad faith of Crofford in leaving his security to pay his debt. In this point of view they were admissible as rebutting testimony; feeble and unimportant it may be, but still admissible. (*Harris v. Taylor*, 18 Ala., 324; *Gilpins v. Consequa*, Pet. C. C. R., 85; *Pettibone v. Deringer*, 4 Wash. C. C. R., 215.) Even if the admission of this testimony was erroneous, the court will not reverse, when it is plainly immaterial and inoperative in the case. (*Zacharie & Wife v. Franklin*, 12 Pet., 151.)

Mr. Justice McLean delivered the opinion of the court:

This case is before us on a writ of error to the District Court for the Northern District of Mississippi.

A judgment was obtained in favor of the Commercial Bank of Manchester against James T. Crofford and Morgan McAfee, in the State Court of Tallahatchie County, Mississippi, the 24th of November, 1840, for the sum of \$4,143.93, on which an execution was issued, and levied on sundry slaves of Crofford, who owed the debt. McAfee, the other defendant, being his security, a delivery bond for the property was executed, which was forfeited the 22d of November, 1841, by which forfeiture the bond had the effect of a judgment. On this latter judgment an execution was issued, which was levied on twenty-one negroes owned by Crofford, all of whom, except three, were sold by the sheriff for \$6,152.

Some time after the first levy, it appears that Crofford removed with his slaves across the Mississippi, and settled on a plantation on that river, in Arkansas, not far from his former residence in Mississippi.

A short time before the last levy, Morgan McAfee, with an armed force, in the absence of Crofford, crossed the river, seized, from day to day, twenty-one of the negroes on his plan-

tation, and brought them into Mississippi. The other slaves of Crofford were alarmed and absconded, and were not reclaimed before the lapse of from four to six weeks. The overseer of Crofford *remonstrated, and, [*455 some steps were taken to arrest the proceedings of McAfee, but his force was too strong, and he threatened to kill anyone who should interfere with him in taking off the negroes. For this trespass an action was brought against the plaintiffs in error. In the declaration, it was alleged, that by reason of the trespass, the plaintiff lost the services of thirty negro men and as many women, &c., which, through fear, absconded, besides the number taken by McAfee, and that he was subjected to great expense in reclaiming them; that by taking the slaves, chasing, and frightening the others from his farm and wood yard and from and about the business of the plaintiff, he was greatly damaged, &c. The defendants pleaded not guilty, &c. A verdict for \$10,613 was rendered by the jury, on which a judgment was entered. To reverse that judgment the writ of error was brought.

The exceptions arise out of the rulings of the court and the charge to the jury.

The trespass was proved as charged in the declaration. The party were several days in searching for and arresting the negroes, and all on the plantation not taken were frightened and fled.

The male slaves were employed in cutting cordwood, and supplying Crofford's wood yard. He had, at the time of the trespass, it was proved, from eighteen hundred to two thousand cords of wood cut on the low ground back from the river, which was worth \$200 per cord, and sold at the yard for \$2.50; the hauling cost 50 cents per cord; that the river became swollen by rain, and having no hands to remove the wood to the yard, much of it was carried off by the flood, and what remained, was so injured by being under water as to make it unsalable; that having no hands to attend the crop, the horses, mules, and other stock of the neighborhood, broke into the corn field and destroyed a large part of it; that corn was worth fifty cents a bushel at that time. There were one hundred and twenty acres in corn, which, with proper attention and protection, would have yielded forty bushels to the acre.

The defendant offered in evidence the judgment of the Commercial Bank against Crofford, as principal, and himself as surety, and a receipt for the payment of the judgment, amounting to the sum of \$6,233.38, in mitigation of the damages claimed on account of the trespass, which, though objected to by the plaintiff, was admitted.

The evidence was admissible on two grounds: First, to explain the motive of the plaintiffs in error in committing the trespass, and thereby, in some degree, to mitigate the damages *claimed. Second, to reduce or abate [*456 from the damages the amount paid in discharge of the judgment, not as an offset, but in mitigation of the injury done. This right resulted from the relation between the parties. McAfee was a codefendant with Crofford in the judgment; but he was security only, and he had a right to expect, from the forthcoming bond and

the assurances of Crofford, that the negroes first levied on would be delivered up in satisfaction of the second execution. In an answer in chancery, he alleged that the bank judgment had been satisfied. A stranger could not take the property of his neighbor, have it sold under process, and apply the proceeds in discharging the debts of his neighbor, and then claim the right to have such payments received as a set-off, or in mitigation of the damages done by the trespass.

The plaintiff below then introduced the transcripts of two judgments in the District Court against Morgan McAfee, one in favor of Crofford, the other assigned to him, amounting to \$2,100 and upwards, which, though objected to by the defendants, was admitted by the court. For what purpose this evidence was introduced was not stated; and under such circumstances, if the records of the judgment were admissible for any purpose, the exception to the evidence cannot be sustained.

It was proved, that at New Orleans, before the trespass was committed, McAfee agreed with Crofford to return to Mississippi and make an arrangement with the Bank to give one, two, and three years, for the payment of the judgment against Crofford and himself; and he agreed to credit on said judgment the above judgments against himself.

We think that those judgments were properly admitted as evidence, because they concluded to show that Crofford, in removing with his slaves to Arkansas, was less blamable than charged by the defendant McAfee, as he had grounds to believe that a part of the bank judgment would be paid by McAfee, and that an indulgence of some years would be obtained, for the payment of the balance.

The judgments being admissible on this ground, it is unnecessary to inquire whether they were not evidence to reduce the bank judgment paid by McAfee, under his agreement. This point might have been made, if the court had been requested to instruct the jury that this effect could not be given to the evidence by the jury. The judgments being admissible for the purpose first stated, it is unnecessary to inquire, if it were practicable to do so, which it is not, how the evidence was applied by the jury.

The record of certain proceedings against the **457*** Commercial Bank of Manchester, in the nature of a *quo warranto*, was offered by the plaintiff in evidence, to show that the Bank was enjoined from proceeding to collect debts. This proceeding was had in the Circuit Court of Yazoo County. An injunction was issued as stated. And at November Term, 1846, the court decided on the demurrers filed in favor of the bank, from which decision an appeal was taken to the High Court of Errors and Appeals of the State. The court admitted the evidence, overruling the objections made to it.

These proceedings, it is presumed, were pending in the Court of Appeals at the time the trespass was committed, as the contrary does not appear; but it is not perceived that the evidence could have had any other effect than to rebut the mitigating circumstances relied on by

the defendants. In this view the evidence was admissible.

The loss of the services of the slaves, by the trespass, necessarily resulting from the abduction of a part of them, and driving off the others, are clearly within the rule of damages in the trespass; and we think the loss of the cordwood, as proved, and the injury to the corn crop, were also within it.

It is argued, that unless the inclosure for the protection of the crop was such as the law required, no damages could be allowed for the trespasses charged, and that the owners of the trespassing animals were liable, and consequently the plaintiffs in error were not liable.

Whether there was, at the time, a law in Arkansas regulating inclosures, we have not examined, as it is a matter which can have no influence in the case. The question was fairly submitted to the jury, whether, under the facts and circumstances proved, the injury to the corn crop resulted from the loss of the hands. This was a matter of fact for the jury, whether the fence of the plaintiff was good or bad; if, by reason of the loss of the slaves, the breaches in the inclosure could not be repaired, or the plaintiff was unable to guard his field, as was his custom, was an inquiry for the jury; and in making up their verdict, they must have considered the facts and circumstances connected with this branch of the case.

The same remarks apply to the cordwood. Had the plaintiff not been deprived of his hands, he might have removed, sold, or in some other manner secured, the wood from being floated off by the flood. In regard to the corn and the wood, if the damage was a consequence, which necessarily followed the loss of the hands, the plaintiffs in error were liable. The instructions of the court were general and correct. (5 Phil. Ev., 183, 189; *Barnum v. Vandusen*, 16 Conn. 200; *Carrington v. Taylor*, *11 East, *458 571; 2 Greenleaf, Co., secs. 253, 254, 268, and 270, 272, 335 a.)

The trespass was of an aggravated nature: notwithstanding the mitigating facts set up by the defendants, it was lawless and wholly inexcusable. It was a resort to physical force in defiance of law, and under such circumstances as to endanger life and property. Such a procedure should be reprehended by every good citizen. It gives a high claim to the injured party for exemplary damages.

We think there was no error in the proceedings; consequently the judgment of the District Court is affirmed, with costs.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Mississippi, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and the same is hereby affirmed, with costs and damages at the rate of six per centum per annum.

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CATHARINE HILL, *Plaintiff in Error*,

v.

JOSEPH W. TUCKER, Executor of ABNER ROBINSON, Deceased.

Statute of Limitations does not bar action on judgment against executor in one state, brought against another executor in another state, where original cause barred—Louisiana Code, art. 3505, does not limit suits on non-negotiable paper.

The relations or privity between executors and their testators in Louisiana, do not differ from those which exist at common law.

The interest of an executor in the testator's estate is what the testator gives him; that of an administrator, only that which the law of his appointment enjoins.

Hence, executors in different states are, as regards the creditors of the testator, executors in privity, bearing to the creditors the same responsibilities as if there was only one executor.

Although a judgment obtained against an executor in one state is not conclusive upon an executor in another state, yet it may be admissible in evidence to show that the demand had been carried into judgment, and that the other executors were precluded by it from pleading prescription or the Statute of Limitations upon the original cause of action.

Therefore, where a person appointed executors in Virginia, and also in Louisiana, and the creditors obtained judgments against the Virginia executors, without being able to obtain payment, and then sued the executors in Louisiana, the Virginian judgments were admissible evidence for the above-mentioned purposes.

The law of Louisiana bars, by prescription, all actions brought upon instruments negotiable or transferable by indorsement or delivery, unless such actions are brought within five years. But this does not include due-bills or judgments.

THIS case was brought up by writ of error from the Circuit Court of the United States for the Eastern District of Louisiana. 459*] It was argued in conjunction with the succeeding case of *Goodall v. Tucker*, but the facts being somewhat different, they are reported separately.

On the 6th of December, 1842, Abner Robinson, of the City of Richmond, Virginia, made his last will, and appointed William R. Johnson and Joseph Allen, of Virginia, and Thomas Pugh and Joseph W. Tucker, of Louisiana, his executors.

On the 21st of December, 1842, the will was proved in Virginia, and letters testamentary granted to Johnson and Allen, the executors.

Tucker qualified as executor in Louisiana, but at what time the record did not show.

On the 29th of February, 1848, Catharine Hill filed her petition in the Circuit Court of the United States for the Eastern District of Louisiana against Tucker, as executor.

The proceedings in the Circuit Court, together with the points excepted to, are all stated in the opinion of the court, and need not be repeated.

It was argued in this court by *Messrs. Johnson and Duncan* for the plaintiff in error, and *Mr. Taylor* for the defendant in error.

The points made by the counsel for the plaintiff were the following:

NOTE.—When judgment against executor or administrator is admission of assets. When execution can issue against their individual property. See note to *Dickson v. Wilkinson*, 3 How., 57.

When executors and administrators individually liable. See note to *Taylor v. Benhan*, 5 How., 233.

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1. That the judgments in Virginia were evidence against the defendants, they being co-executors with the defendants in such judgments. (*Stacy v. Thrasher*, 6 How., 58; 1 Salk., 299; 1 Com. Dig., Adm'r. B. 9; 2 Bl. Com., 507; *Dixon's Ex'rs v. Ramsay's Ex'r*, 3 Cra., 319, 1 Cond., 547; 3 Bac. Abr., Ex'rs and Adm'rs, pp. 30, 52.)

2. That if the judgments were not evidence, the plaintiffs were entitled to recover upon the original causes of action, they being proved, and not being barred by the Louisiana law of prescription. Article 3505 of the Civil Law says: "Actions on bills of exchange, notes payable to order or bearer, except bank notes; those of all effects negotiable or transferable by indorsement on delivery, are prescribed by five years, reckoning from the day when these engagements were payable." Article 3517 provides that "a citation served upon one joint debtor, or his acknowledgment of the debt, interrupts prescription with regard to all others, and even their heirs."

In *Goodall's* case the suit was brought on the 29th February, 1828, less than ten years after the bond sued upon matured.

In Louisiana ten years is the limitation, and the law upon the subject is always the law of the forum. (*Lacoste v. Benton*, 3 La. Ann., 220; *Spiller v. Davidson*, 4 Id., 171; *Graves v. Routh*, Adm'r, 4 Id., 127; *Young v. Crossgrove*, Id., 234, 235; *Wheeling v. Preston*, 12 Rel., 141; 2 La. Ann., 315, 646; *Story's Conflict of Laws*, 576.)

In *Hill's* case the same authorities are referred to, and she had a right to sue in her own name, she having been recognized by the District Court as universal legatee, and being assignee of the judgments. (10 Mart., 117; 2 N. Series, 296.)

Mr. Taylor, for the defendant in error:

Upon the trial of the cause, the court decided, as if instructing a jury, these two propositions:

1st. That the Virginia judgment against Joseph Allen and William R. Johnson, executors of the last will and testament of Abner Robinson, appointed and qualified under the will in Virginia, was not evidence against the defendant; and,

2d. That the original cause of action as to the defendant was barred by prescription, and the plaintiff excepted to the two decisions. If there be no error in these decisions, the judgment of the court below must be affirmed.

I. In Louisiana, testamentary executors are merely administrators, in the most limited sense of the term. They have none of the qualities, capacities or rights of executors under the common law. No argument, however extended, would make this clearer than a simple reference to the articles of the Louisiana Code, relating to the administration of estates of decedents under the authority of law. Articles 1091, 1106 to 1123, 1126 to 1148, provide for the appointment of persons to administer the estates of persons dying intestate. Articles 1651 to 1655, 1670, 1671 and 1672, 1659, 1661, 1662, 1663, 1666 to 1668 provide for the appointment of persons to administer the estates of persons who leave testaments, and define their powers. From an examination of these articles, it will be at once apparent that a testamentary executor differs in no respect, so far as to his rights,

powers and duties, from the ordinary administrator. And if this be true, then it is certain that the record in question could not be evidence against the defendant, for, as the learned Story has remarked in his *Conflict of Laws*, sec. 522, "When administrations are granted to different persons, in different states, they are so far deemed independent of each other, that a judgment obtained against one will furnish no right of action against the other, to affect assets received by the latter in virtue of his own administration: for in contemplation of the law there is no privacy between him and the other administrator." Without citing other authorities on this point, I will merely refer to the case of *Stacy v. Thresher*, decided by this court (6 How. 58), in which the doctrine is fully recognized. (See *Deneale v. Stump's Ex'rs*, 8 Pet., 531.) If it be true, as there stated by Chief Justice Marshall, that "it is understood to be settled in Virginia, that no judgment against the executors can bind the heirs, or in any manner affect them," and that "it could not be given in evidence against them," it is not easy to perceive that there was error in this decision.

II. The law of the forum applies as to prescription. (Code of Practice, 13; Story's *Conflict of Laws*, sec. 576, 578; *Leroy v. Crowninshield*, 2 Mason, 151; *Huber v. Steiner*, 29 Eng. C. L. Rep., 308, 2 Bingh. N. C., 202.)

Actions "on all effects negotiable or transferable by indorsement or delivery, are prescribed by five years, reckoning from the day when these engagements were payable." (C. C. of La., 3505.) And this prescription runs "against persons residing out of the State." (C. C., 3506.)

To make our law of prescription applicable, it is necessary that the obligation sued on be one transferable by indorsement or delivery, and the question whether it be in fact so transferable is to be decided by the law of the place where the contract was entered into. (Story's *Conflict of Laws*, sec. 242; Code of Practice of La., 13.) Is the bond sued on negotiable or transferable by indorsement or delivery? This must be determined by the common law, as received and in force in the State of Virginia, where the instrument under consideration was executed.

I will not weary the court by going into an examination of the original effects of assignments of incorporeal rights under the common law, or of the modes of enforcing them. Nor will I give an account of the origin and peculiar character of bills of exchange, growing out of the necessities of trade. It is sufficient for my present purpose, to remark that promissory notes, notwithstanding the exigencies of commerce, did not acquire this peculiar feature—the capacity of being transferred by indorsement or delivery—until it was given to them by the Statute of Anne, when, for the first time under the common law, they were made assignable at law, and were placed on the same footing as bills of exchange. Bonds and other instruments in writing were made assignable in the same manner in Virginia, by statute, in 1748, which was confirmed by the Act of 1786. (1 Rev. Code, 484.) Such bonds as the one sued on became, from the adoption of these statutes in Virginia, transferable by simple indorsement, or by mere delivery. (*Seymour v. Van Slyck*, 8 Wend., 421; *Downing v. Backenstoes*, 8

Caines' R., 136.) And the very point has been determined in Virginia. (*Makies' Ex'rs v. Davis*, 2 Washington, 219; *Drummond v. Crutcher, Id.*, 218.)

*Mr. Justice Wayne delivered the [*402 opinion of the court:

This case was brought up by writ of error from the Circuit Court of the United States for the Eastern District of Louisiana.

It was argued with the case of *Goodall v. Tucker*, but the facts being somewhat different, and the prayers to the court not exactly alike in both cases, it will be necessary to consider them separately.

First, then, as to *Catharine Hill's case*.

She filed a petition in February, 1848, in the Circuit Court of the United States for the Eastern District of Louisiana against Tucker, the executor of Robinson. She was the widow and sole devisee of James P. Wilkinson, who resided in Richmond, Virginia, and after his death intermarried with Hill, by whose authority she prosecuted this suit.

Robinson lived also in Richmond, although his property was chiefly situated in Louisiana. In December, 1842, Robinson died in Richmond, having made a will a few days before his death, and appointed, as executors, William R. Johnson and Joseph Allen, of Virginia, and Thomas Pugh and Joseph W. Tucker, of Louisiana. Johnson and Allen qualified as executors in Virginia, and Tucker in Louisiana.

The causes of action, in the suit brought by Catharine Hill, were the four following, which will be separately noticed under the letters A, B, C, D:

[A] On the 9th of December, 1839, Archer Cheatham made a promissory note, payable ninety days after date, promising to pay to the order of Abner Robinson and Isham Puckett, one thousand dollars, negotiable and payable at the Bank of Virginia. It was indorsed by Robinson and Puckett, and came into the possession of Wilkinson. Not being paid at maturity, it was protested.

In March, 1840, Wilkinson brought an action against the drawers and indorsers in the Circuit Superior Court of Henrico County, Virginia, and recovered a judgment.

In July, 1840, he issued an execution, which, in August, was suspended until further orders. Cheatham and Puckett soon afterwards took the benefit of the Bankrupt Act passed by Congress. Nothing further was done as to this claim until Catharine Hill filed her petition as above stated.

[B] On the 20th of November, 1840, Robinson gave the following due bill:

"\$575. Richmond, November 20, 1840. Due James P. Wilkinson, for value received (viz.: cash loaned) five hundred and seventy five dollars. Given under my hand this day and date as above written. Abner Robinson."

In February, 1843, Wilkinson brought a suit in the Henrico County Court, against [*403 Johnson and Allen, the Virginia executors of Robinson, and in the ensuing June obtained a judgment. A *fi. fa.* was issued, but the return was "no effects found."

[C] On the 19th of August, 1842, Robinson made the following single bill:

"\$200. Richmond, August 19th, 1842. Due

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James P. Wilkinson, two hundred dollars for money borrowed this day, as per check on the Farmers' Bank of Virginia, of the same date, &c. Given under my hand and seal as above, Abner Robinson. (Seal.)"

In February, 1843, Wilkinson brought a suit against Johnson and Allen, upon this bill, and obtained a judgment in the following June. A *fi. fa.* was issued upon this and the same return made as in the preceding cases, viz.: "no effects found."

[D] In October, 1843, one Bolling S. Dandridge brought a suit against Robinson for two hundred dollars, being one year's wages as overseer. After Robinson's death, it was revived against his executors. In August, 1843, Dandridge obtained a judgment, and issued a *fi. fa.*; but the same return was made as above, viz.: "no effects found." On the 1st of February, 1845, Dandridge assigned this judgment and execution to Wilkinson.

Not long after this, Wilkinson died. The record does not show when, but in April, 1846, a succession was opened in Louisiana, upon his estate, and after sundry proceedings in opposition, which it is not material to mention, his widow, Catharine, was recognized as the rightful representative of the estate. But this did not take place until May, 1847. In the mean time she had taken out letters testamentary in Virginia, in August, 1846, and married Hill in December, 1846.

On the 29th of February, 1848, Catharine Hill filed her petition against Tucker, in the Circuit Court of the United States for the Eastern District of Louisiana, claiming the several sums of money mentioned in the four preceding classes.

Tucker filed his answer, alleging "that the judgments set forth were obtained in Virginia, in proceedings to which he, in his capacity of executor, was no party, and that they are therefore not binding on the succession of Robinson in Louisiana. That on one of the obligations, to wit: that made by Cheatham for \$1,000, dated 9th December, 1839, Robinson, if he indorsed at all, was joint indorser with one Puckett, and was in law bound only for one half of the sum. That the actions on the demands upon which these judgments rest, are barred by the prescription of five years."

The cause came up for trial before the court without a jury, in November, 1849, when a judgment was given against Tucker. This was afterwards stricken out and a new trial [464] granted. *Tucker then filed a supplemental answer by way of peremptory exceptions to the petition, as a plea of prescription. It stated, in substance, that as to the judgment for \$1,000 against Robinson, which was rendered during his lifetime, the plea of limitations was interposed; that Allen and Johnson were qualified as executors in Virginia, on the 21st of December, 1842, and that more than five years elapsed between the date of such qualification and the institution of this suit; and that by the Statute of Limitations of the State of Virginia, the claim was barred by the expiration of five years.

In May, 1850, the cause came up for argument a second time before the court. At the trial, the causes of action designated as B, C, and D, were proved by evidence in Virginia, taken under a commission, and records of the

court as to the several judgments were given in evidence. The other facts, above stated, were also proved.

After the evidence was closed the plaintiff asked the court to decide, as if instructing a jury upon the evidence, as follows:

"1st. The testator, Robinson, resided and died in Virginia, leaving a will, which was duly proven in the proper tribunal after his death, in and by which he appointed the defendant and others his executors, and two only of his executors made probate, and qualified in the proper court in Virginia; and if suits were instituted by the plaintiff, and by others who have assigned their judgments and the causes of action on which their judgments were founded to the plaintiff, against the executors of Robinson, who qualified in Virginia, and obtained judgments against those executors in the appropriate courts of Virginia having jurisdiction of such matters; and if upon those judgments executions issued and were returned by the proper officers in substance *nulla bona*; and if the defendant, a citizen of Louisiana, who never qualified as executor in Virginia, is a co-executor of the same estate, who has proved the will in Louisiana, and taken on himself the execution thereof in Louisiana, has in hands ample assets in Louisiana, to pay all debts; and if the evidence fully establishes these facts, that then the judgments so rendered in Virginia, are evidence against the executor in Louisiana in this suit.

2d. That by the laws of Louisiana judgments are assignable; and that upon assigned judgments the assignee can maintain an action in his or her own name therefor.

3d. That under such a will as that of Robinson, produced in this cause, the co-executors, although in different states, that qualified and acted, derived the same powers from the same source over the same estate, and that unlike administrators, they are to such estate of the decedent privies in estate; and the *exem- [*465] plications of the records of the courts of Virginia, duly authenticated, which have been read in this cause, showing judgments against the only executors of Robinson who qualified in Virginia, in the appropriate court of probate of the domicile of the deceased, are evidence against the co-executor who qualified in Louisiana, and holds abundant assets in Louisiana.

4th. That if plaintiff were not entitled to recover against defendant on the production of the records showing the judgments against the co-executors in Virginia, and that those judgments were unsatisfied, because of a lack of assets in the hands of the Virginia executors to satisfy the same, that they would be entitled to recover, on producing the further evidence to prove that those judgments in Virginia were rendered on good and valid, and subsisting and unsatisfied causes of action against the testator, Robinson.

5th. That the plaintiff has produced sufficient proof of the several causes of action on which the judgments read in evidence were founded, to justify a jury in finding for the plaintiff upon those several original causes of action.

6th. That the several causes of action set forth in the petition, independent of the judgments rendered thereon against the co-execu-

tors in Virginia, are not, upon the testimony in this cause, barred by prescription.

7th. That upon all the evidence in this cause a jury might and should find a verdict for the plaintiff.

8th. That the several suits in Virginia, of which the records have been read, operated as a judicial interpellation to stop the running of prescription upon those several demands in favor of the defendant.

And the defendant objected to said several propositions, and the court sustained his objections, and decided all and each of the several propositions against the plaintiff, except the aforesaid proposition, No. 2; and to each of said decisions separately the plaintiff excepted.

And the defendant asked the court to decide—

1st. That no one of the records, read to the court in this cause, showing judgment against his co-executors in Virginia, was evidence against the defendant.

2d. That each and every one of the causes of action, set forth in the petition, and to which evidence had been adduced, was barred as to said defendant by prescription.

3d. That upon the whole evidence offered the plaintiff was not entitled to recover; and that upon the evidence the jury could rightfully, and should, find a verdict for the defendant; to each of which plaintiff objected.

And the court overruled the several objections of plaintiff and *decided as asked by the defendant; and to each of said opinions of the court, the plaintiff excepted."

We cannot concur in the suggestion made in the argument of this case, that the relations or privity between executors and testators in Louisiana differ from such as exist at common law. Louisiana, in her code, without adopting the terms of the civil law, makes the same distinction as is made at common law, between one called upon to administer the estate of an intestate, and one appointed to the office of executor by a testator. The responsibilities of both, as to the manner of settling the estate which they represent, depend upon the law of the State; but the relation between executor and testator is altogether different. The executor's interest in the testator's estate is what the testator gives him. That of an administrator is only that which the law of his appointment enjoins. The testator may make the trust absolute or qualified in respect to his estate. It may be qualified as to the subject matter, the place where the trust shall be discharged, and the time when the executor shall begin and continue to act as such. He may be executor for one or several purposes—for a part of the effects in possession of the testator at the time of his death, or for such as may be in action, if it be only for a debt due. But though the executor's trust or appointment may be limited, or though there are several executors in different jurisdictions, and some of them limited executors, they are, as to the creditors of the testators, executors in privity, bearing to the creditors the same responsibilities as if there was only one executor. The privity arises from their obligations to pay the testator's debts, wherever his effects may be, just as his obligation was to pay them. The executor's interest in the testator's estate is derived from

the will, and vests from the latter's death, whatever may be the form which the law requires to be observed before an executor enters upon the discharge of his functions. When within the same political jurisdiction, however many executors the testator may appoint, all of them may be sued as one executor for the debts of the testator, and they may unite in a suit to recover debts due to their testator, or to recover property out of possession.

All of them, then, having the same privity with each other and to the testator, and the same responsibility to creditors, though they may have been qualified as executors in different sovereignties, an action for a debt due by the testator, against any one of them in that sovereignty where he undertook to act as executor, places all of them in one relation concerning it, and as to the remedies for its recovery: what one may plead to bar a recovery, another may plead; and that which will not bar a recovery against any of them, applies to all of them. Between administrators *deriving their commissions to act [*467 from different political jurisdictions, there is no such privity. This court has treated of this fully in two cases: In the case of *Aspden et al. v. Nixon et al.*, 4 How., 467, and in *Stacy v. Thrasher*, 6 How., 44. We refer to the former, without citing any part of it, but it is full upon the point, and may be instructively read. But we shall cite a passage from *Stacey v. Thrasher* on account of its appropriateness to what has just been said in respect to the want of privity between administrators deriving their powers in different jurisdictions.

"An administrator under grant of administration in one state, stands in none of these relations—of privity—to another administrator in another state. Each is privity to the testator, and would be estopped by a judgment against him, but they have no privity with each other in law or estate. They receive their authority from different sovereignties, and over different property. The authority of each is paramount to the other. Each is administrator to the ordinary from which he receives his commission. Nor does the one come by succession to the other into the trust of the same property, incumbered by the same debts, as in the case of an administrator *de bonis non*, who may truly be said to have an official privity with his predecessor in the same trust, and therefore liable to the same duties." In that case, as a consequence of such reasoning, it was determined that an action of debt will not lie against an administrator in one of the United States, on a judgment obtained against a different administrator of the same intestate, appointed under the authority of another state.

For the same reasons, notwithstanding the privity that there is between executors to a testator, we do not think that a judgment obtained against one of several executors would be conclusive as to the demand against another executor, qualified in a different state from that in which the judgment was rendered. But such a judgment may be admissible in evidence in a suit against an executor in another jurisdiction, for the purpose of showing that the demand had been carried into judgment in another jurisdiction, against one of the testator's executors, and that the

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others were precluded by it from pleading prescription or the Statute of Limitations upon the original cause of action. Such is the case certainly in Louisiana, as may be seen from the case of *Jackon v. Tiernan*, in 15 La. Rep., 485. The Supreme Court of that State, speaking by *Judge Martin*, says, that the plea of prescription cannot prevail in behalf of one joint debtor, if a suit has been brought against another in the Circuit Court of the United States for the District of Maryland; meaning thereby, we presume, if it had been commenced in any "other court in the United States. When, then, the court below rejected, as inadmissible in evidence in this case, the judgment obtained in Virginia against Allen and Johnson, the executors of Robinson in that State, we think it erred, and that it should have been admitted for the purposes mentioned. The court also instructed the jury, that the causes of action in this suit against Tucker, the co-executor of Allen and Johnson, were barred by prescription. In this we think there was error. The article of her code upon which that instruction was given, §505, is in these words: "Actions on bills of exchange, notes payable to order or bearer—except bank notes—those of all effects negotiable or transferable by indorsement or delivery, are prescribed by five years, reckoning from the day when these engagements are payable." It is not applicable to either of the causes of action set out in the plaintiff's petition. It is not so to Cheatham's note, indorsed by Robinson, because, being carried into judgment in Robinson's lifetime, it estops all his executors anywhere, from denying it, and obliges them to pay it out of his assets wherever they may be. So it would be if, instead of executors, they were administrators in different states, as was said in *Stacey and Thrasher's* case, that each administrator is privity to the testator, and would be estopped by a judgment against him. The prescription of Louisiana, also, is not applicable to the due-bill given by Robinson to Wilkinson, for \$575, or to that for \$200 for money borrowed from Wilkinson, neither of them being negotiable by the law of Virginia or by the law of Louisiana, and therefore not within the article of prescription. For the same reason it is not applicable to the judgment obtained by Dandridge for \$200, for over-~~seer's~~ wages due by Robinson, and which was assigned to Wilkinson. In this view of the case, we shall direct the judgment given by the court below to be reversed, and that the case shall be remanded for further proceeding, in conformity with this opinion.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to proceed therein in conformity to the opinion of this court.

Cited—13 How., 470, 471; 1 Cliff., 131, 132.
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*CHARLES P. GOODALL, Plaintiff [*469
in Error,

v.

JOSEPH W. TUCKER, Executor of ABNER
ROBINSON, Deceased.

The principles laid down in the preceding case of *Hill v. Tucker*, again affirmed.

THIS case, like the preceding one, of *Hill v. Tucker*, was brought up by writ of error from the Circuit Court of the United States for the Eastern District of Louisiana.

They were argued together, and different only in their being different plaintiffs. The cause of action in this case is stated in the opinion of the court; and the reader is referred to the report of the preceding case for the arguments of counsel.

Mr. Justice Wayne delivered the opinion of the court:

This cause was tried by the judge without a jury and the legal propositions raised by counsel in the course of the trial were decided by him, to which exceptions were taken, as if they had been instructions to a jury.

The cause of action is the following single bill, which was executed at Richmond in Virginia:

"On demand, we, Abner Robinson, Isham Puckett, and J. P. Wilkinson, promise to pay to Charles P. Goodall, his executors or administrators, the sum of four thousand nine hundred and twenty-six dollars and twenty-seven cents (\$4,926.27) lawful money of these United States, for the faithful performance of which promise we bind ourselves, our heirs, executors, administrators and assigns, as witness our hands and seals, this 6th day of September, 1839.

ABNER ROBINSON, [SEAL.]
ISHAM PUCKETT, [SEAL.]
JAMES P. WILKINSON." [SEAL.]

It may as well be here stated that it was proved upon the trial that Wilkinson and Puckett were sureties, and that the debt had been reduced to \$1,482, with interest from the 1st January, 1846.

In October, 1842, Goodall brought suit in the Henrico County Court against the three obligors. Robinson was too ill to attend to the process, and afterwards died. The suit was prosecuted to judgment against Wilkinson in March, 1843, and abated as to the other defendants.

Execution was awarded upon the judgment and a return made "no effects found."

In February, 1848, Goodall filed his petition against Tucker in the Circuit Court of the United States for Louisiana, alleging the above facts; when the same proceedings took place which are mentioned in the case of *Catharine Hill*.

*There is a good deal of documentary [*470 evidence in the record, which we shall not notice, as it does not in any way affect the decision which should have been given upon the prayers of the plaintiff. (See preceding case of *Hill v. Tucker*.)

Those prayers were, with the defendant, prayers, as follows:

"After the evidence was offered the plaintiff

iff asked the court to decide, as if instructing a jury upon the evidence:

1st. That if the testator Robinson by his will left four executors, that Joseph Allen and W. R. Johnson, citizens of Virginia, were two of those executors; and if they only qualified in Virginia, in the county of the domicil of the testator; and if the plaintiff, upon a valid and subsisting cause of action, instituted suit in the Henrico County Court, in Virginia, against the only executors of the testator who had qualified; and if the plaintiff had obtained judgment regularly in that court, and it was a court of competent jurisdiction to hear and determine said cause; and if the plaintiff, having thus obtained judgment against the only qualified executors of the domicil of the decedent, regularly issued his execution on that judgment, and had thereon a return by the sheriff of *nulla bona*; and if the defendant was also an executor of the same testator appointed by the same will, and as such had taken upon himself the execution of said will according to the laws of Louisiana, where he resided; and if, as executor of Robinson, the defendant has ample estate of his testator in his hands to pay the debts; and if all these facts are proven and established by the evidence, that then the plaintiff is entitled to recover judgment against the defendant for the amount of the judgment against the executors who qualified in Virginia.

2d. That the exemplification of the record and the judgment obtained by the plaintiff against the executors, Allen and Johnson, and the return of *nulla bona* thereon, are evidence against the defendant, a co-executor in Louisiana.

3d. That co-executors, unlike co-administrators, are privies in estate, because they derive the same privities over the same estate from the same will; and that under the will of Robinson, which was read, and the proofs of the qualification which were offered in this case, the plaintiff is entitled to recover against the defendant the amount of the judgment obtained by him against the only acting executors of the domicil of the decedent.

4th. That if the plaintiff is not authorized to recover against the defendant on the mere production of the record of the judgment against his co-executors in Virginia, who alone made probate of the will there, and qualified, that he is entitled to recover, on proving that the original cause of action on which that judgment was founded was a just, valid, and subsisting 471*) demand *against the testator Robinson, and the additional fact that the estate in the hands of the executors of the domicil of the testator in Virginia was exhausted, and that the defendant or co-executor has ample estate in his hands in Louisiana.

5th. That independent of the record of the judgment in Virginia, the plaintiff has a right to recover against the defendant as executor of Robinson, upon the bond filed and proven, the amount of the balance due on that bond.

6th. That the original cause of action on which the judgment in the Henrico County Court is established and proven and a recovery thereon is not barred by the prescriptive laws of Louisiana.

7th. That upon all the evidence offered, the plaintiff is entitled to a judgment in his favor.

8th. That the suit in Virginia against the co-executor was a judicial interpellation which would stop the running of prescription against the demand which was the cause of action in that suit. All of which the court overruled, and the plaintiff excepted.

And upon the facts proven the defendant asked the court to decide: 1st. That the Virginia judgment against the co-executors was not evidence against the defendant; 2d. That the original cause of action on which that judgment was rendered was barred as to the defendant by prescription; and, 3d. That upon the whole evidence the defendant was entitled to judgment in his favor. To all which plaintiff objected, and the court overruled his objections, and gave the decisions as asked by defendant; and to these several opinions plaintiff excepted.

And the defendant objected to each and all of said propositions, and the court sustained severally the objections of defendant, and refused to decide any one of said propositions as asked by the plaintiff. To each of which several opinions and decisions the plaintiff at the time excepted."

The court in sustaining the latter has erred.

We think that all of the prayers for the plaintiff were properly made, and that conjointly they make an issue decidedly in his favor. (See opinion in case of *Hill v. Tucker*.)

We shall not notice them more particularly than to say, that the suit upon the bond in Virginia was a judicial interpellation which stopped the Louisiana prescription from running against the cause of action in that suit and in this suit.

Further the record shows that this suit was brought in Louisiana within the time that its law fixes for prescribing actions upon such a demand.

The judgment is reversed, and the case will be remanded for further proceedings in conformity with this decision.

*ORDER.

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This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to proceed therein in conformity to the opinion of this court.

Cited—13 How., 462.

JEROME B. PILLOW, *Plaintiff in Error*.

v.

TRUMAN ROBERTS.

Arkansas law—seal impressed on paper valid—tax collector's deed evidence of validity of collector's proceeding—entry under, evidence of adverse seisin—five years' possession under invalid tax deed, bars action by true owner.

Where a deed, executed in Wisconsin, and attested by the seal of a court, stamped upon the

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paper, instead of wax or a wafer, was offered in evidence upon a trial in Arkansas, it was properly received.

Where a deed from the sheriff, for land sold at a tax sale, recited an assessment for taxes which remained unpaid; the advertisement of the land, and offering it for sale; its being struck down to the highest bidder, who paid the purchase money and received a certificate; this deed ought to have been received in evidence. The law of Arkansas says, that the deed shall be evidence of the regularity and validity of the sale.

But even if this deed had been sufficient as a proof title, it ought to have been received, in connection with proof of possession, to establish a defense under the Statute of Limitations.

Possession under this deed would have been sufficient proof for adverse possession.

THIS case was brought up by writ of error from the Circuit Court of the United States for the Eastern District of Arkansas.

The circumstances of the case, and the points of law upon which it came up to this court, are fully stated in its opinion.

It was argued by *Messrs. Lawrence and Pike* for the plaintiff in error, and *Mr. Crittenden* for the defendant in error.

Mr. Justice Grier delivered the opinion of the court:

Roberts, the defendant in error, was plaintiff below, in an action of ejectment for 160 acres of land. Pillow, the defendant below, pleaded the general issue, and two special pleas: The first, setting forth a sale of the land in dispute, for taxes more than five years before suit brought: The second, pleading the Statute of Limitation of ten years. These pleas were overruled on special demurrer, as informal and insufficient; and the judgment of the court on this subject is here alleged as error. But as the same matters of defense were afterwards offered to be laid before the jury on the trial of the general issue and overruled by 473*] the court, it will be unnecessary to further notice the pleas; as the defense set up by them, if valid and legal, should have been received and submitted to the jury on the trial. In the action of ejectment (with the exception, perhaps, of a plea to the jurisdiction), any and every defense to the plaintiff's recovery may be given in evidence under the general issue. And as the decision of the court on the bills of exception will reach every question appertaining to the merits of the case, it will be unnecessary to decide whether those merits were sufficiently set forth in the special pleas, to which the defendant was not bound to resort for the purpose of having the benefit of his defense.

On the trial, the plaintiff below gave in evidence a patent for the land in dispute, from the United States to Zimri V. Henry, dated 7th May, 1835; and then offered a deed from said Henry to himself, dated 10th November, 1849. This deed purported to be acknowledged before the clerk of the Circuit Court of Walworth County, in the State of Wisconsin, and was objected to, 1st. Because there was no proof of the identity of the grantor with the patentee

other than the certificate contained in the acknowledgment. 2d. Because the certificate of acknowledgment was not on the same piece of paper that contained the deed, but on a paper attached to it by wafers. And 8d. Because the seal of the Circuit Court authenticating the acknowledgment was an impression stamped on paper, and not "on wax, wafer, or any other adhesive or tenacious substance."

The first two of these grounds of objection have not been urged in this court, and very properly abandoned as untenable. The third has been insisted on, and deserves some more attention. Formerly wax was the most convenient, and the only material used to receive and retain the impression of a seal. Hence it was said: "*Segillum est cera impressa; quia cera, sine impressione, non est segillum.*" But this is not an allegation, that an impression without wax is not a seal. And for this reason courts have held, that an impression made on wafers or other adhesive substance capable of receiving an impression, will come within the definition of "*cera impressa.*" If, then, wax be construed to be merely a general term including within it any substance capable of receiving and retaining the impression of a seal, we cannot perceive why paper, if it have that capacity, should not as well be included in the category. The simple and powerful machine, now used to impress public seals, does not require any soft or adhesive substance to receive or retain their impression. The impression made by such a power on paper is as well defined, as durable, and less likely to be destroyed or defaced by vermin, accident or intention, than that made on *wax. It is the seal *474 which authenticates, and not the substance on which it is impressed; and where the court can recognize its identity, they should not be called upon to analyze the material which exhibits it. In Arkansas, the presence of wax is not necessary to give validity to a seal; and the fact that the public officer in Wisconsin had not thought proper to use it, was sufficient to raise the presumption that such was the law or custom in Wisconsin, till the contrary was proved. It is time that such objections to the validity of seals should cease. The court did not err, therefore, in overruling the objections to the deed offered by the plaintiff.

After the plaintiff had closed his testimony, the defendant offered in evidence two certain deeds from Miller Irwin, sheriff of Phillips County, and assessor and collector of taxes therein, to Richard Davidson, dated on the 22d of October, 1844; one for the north half, and the other for the south half of the quarter section of land now in dispute. On objection, the court refused to permit these deeds to be received, and sealed a bill of exceptions. The defendant then offered the same deeds to Davidson, and in connection therewith, a deed from Davidson to Armstrong, and also a deed from Armstrong to the defendant; and to accompany them with proof of possession by himself and those under whom he claims, for more than ten years, as to the south half of said land, and more than five years as to the whole of it. The plaintiff objected to this evidence. "And it was by the court ruled, that the possession of such deeds, accompanied by possession of the land, was not sufficient to prove such possession."

NOTE.—As to the point that a sheriff's or collector's deed is *prima facie* evidence of the regularity of previous proceedings, this case is distinguished in *Parker v. Overman*, 18 How. 137.

As to the point that color of title under a worthless deed is evidence that the one in possession claims adversely to all the world—followed in *Wright v. Mattison*, 18 How., 50.

sion of the land to be adverse to the plaintiff and his grantor without further proof that the defendant or his grantors claimed adversely; so the court refused to permit any deeds to be read in evidence to the jury."

These bills of exception may be considered together. They present two questions, 1st. Whether, by the law of Arkansas, the deeds offered in evidence (and which were regularly acknowledged and recorded according to law) should have been permitted to go to the jury as evidence of a regular sale of the land mentioned therein for taxes. And 2d. Whether, without regard to their validity as elements of a good legal title *per se*, they should not have been received for the purpose of showing color of title, in connection with possession by the persons claiming under them, for a length of time sufficient by law to bar the entry of plaintiff.

I. In considering these questions, it will not be necessary to set forth at length all the provisions of the revenue laws of Arkansas for compelling the payment of taxes assessed on land. A brief recapitulation of their most **475**] prominent provisions will suffice. These laws make it the duty of the collector, on or before the 15th of September of each year, to make a list of lands assessed to persons non-resident, and the tax due thereon, with a penalty or addition of twenty-five per cent., and to file this list with the county clerk. He is directed, also, to set up a copy of the same at the court house, and to publish it in a newspaper at least four weeks before the first Monday of November, giving notice that unless the taxes shall be paid on or before that day, the land will be sold. On that day, the collector is authorized to offer for sale, at public auction, such tracts or lots of land, or so much of them as will be sufficient to raise the taxes and penalty assessed and unpaid, and to continue the sales from day to day. The purchaser to pay down forthwith the amount of taxes, &c., and receive a certificate describing the land purchased; directing, if necessary, the public surveyor to lay off the part purchased by metes and bounds after one year allowed for redemption. This certificate, which is made assignable, may be presented to the collector, who is authorized to execute and deliver a deed to the holder of it for the land described therein. Then follows the 96th section of the Act, which is as follows:

"The deed so made by the collector shall be acknowledged and recorded as other conveyances of lands, and shall vest in the grantee, his heirs or assigns, a good and valid title both in law and equity, and shall be received in evidence in all courts of this State as a good and valid title in such grantee, his heirs or assigns, and shall be evidence of the regularity and legality of the sale of such lands."

The deeds offered in evidence were regularly acknowledged and recorded. It is not denied that Irwin, the grantor therein, was sheriff, assessor and collector, of taxes in the County of Phillips, as he is described in the deed. The deed for the south half recites an assessment of the same for taxes in 1839, according to law; that the taxes remained unpaid; that the land was regularly advertised and offered for sale on the 5th of November, 1839, by auction; struck down to William Vales, who paid the

purchase money and received a certificate; that the time for redemption having long expired, and Richard Davidson become the assignee or holder of the certificate; therefore the said collector granted, &c., the said south half to said Davidson, his heirs, &c.

The deed for the north half has similar recitals, showing a tax assessed in 1840, a sale in 1841, to John Powell, and a certificate transferred by him to Davidson.

These deeds come within the description of the 96th section. They are made by a collector of the revenue; they are acknowledged and recorded according to law; they purport to be for "land assessed for taxes, and regularly sold according to law; and the law enacts that deeds, so made, shall be evidence not only of the grant by the collector, but of the regularity and legality of the sale of the land described therein.

It is easy, by very ingenious and astute construction, to evade the force of almost any statute, where a court is so disposed. We might say that the expression, "deeds so made by the collector," means deeds made strictly according to the requirements of all the preceding sections of the revenue law, and decide that only deeds first proved to be completely regular and legal can be received in evidence; and thus, by qualifying the whole section by such an enlarged construction of these two words, and disregarding all the others, evade the obvious meaning and intention of the law. For if you must first prove the sale to be regular and legal before the deed can be received, what becomes of the provision that the deed itself shall be evidence of these facts? Such a construction annuls this provision of the law, and renders it superfluous and useless. The evil plainly intended to be remedied by this section of the Act, was the extreme difficulty and almost impossibility of proving that all the very numerous directions of the Revenue Act were fully complied with, antecedent to the sale and conveyance by the collector. Experience had shown, that where such conditions were enforced, a purchaser at tax sales, who had paid his money to the government, and expended his labor on the faith of such titles in improving the land, usually became the victim of his own credulity, and was evicted by the recusant owner or some shrewd speculator. The power of the Legislature to make the deed of a public officer *prima facie* evidence of the regularity of the previous proceedings, cannot be doubted. And the owner who neglects or refuses to pay his taxes or redeem his land has no right to complain of its injustice. If he has paid his taxes, or redeemed his land, he is, no doubt, at liberty to prove it, and thus annul the sale. If he has not, he has no right to complain if he suffers the legal consequences of his own neglect.

The plain and obvious intention of the Legislature is clearly expressed in this 96th section, that the deed made by a collector of taxes, as authorized in the preceding section, when acknowledged and recorded, should be received in evidence as a good and valid title, and that the recitals of the deed showing that it was made in pursuance of a sale for taxes, should be evidence of the regularity and legality of the sale under and by virtue of that Act. The deed

being thus made, *per se*, *prima facie* evidence of a legal sale and a good title, the court were bound to receive it as such. There is nothing on the face of these deeds showing them to be irregular or void. They are each for a different 477*] portion of the tract or quarter section of land, having known boundaries, according to the plan of the public surveys; one being for the south half and the other for the north half of the quarter section; it required no survey to ascertain their respective figure, boundaries, or location.

II. But assuming these deeds to be irregular and worthless, the court erred in refusing to receive them in evidence, in connection with proof of possession in order to establish a defense under the statutes of limitation.

The first section of the Act of Limitations of Arkansas bars the entry of the owner after ten years. And the thirty-fifth section enacts that "all actions against the purchaser, his heirs or assigns, for the recovery of lands sold by any collector of the revenue for the non-payment of taxes, and for lands sold at judicial sales, shall be brought within five years after the date of such sales, and not after."

Statutes of limitation are founded on sound policy. They are statutes of repose, and should not be evaded by a forced construction. The possession which is protected by them must be adverse and hostile to that of the true owner. It is not necessary that he who claims their protection should have a good title, or any title but possession. A wrongful possession, obtained by a forcible ouster of the lawful owner, will amount to a disseisin, and the statute will protect the disseisor. One who enters upon a vacant possession, claiming for himself upon any pretense or color of title, is equally protected with the forcible disseisor. Statutes of limitation would be of little use if they protected those only who could otherwise show an indefeasible title to the land. Hence, color of title, even under a void and worthless deed, has always been received as evidence that the person in possession claims for himself, and of course, adversely to all the world. A person in possession of land, clearing, improving, and building on it, and receiving the profits to his own use, under a claim of title, is not bound to show a forcible ouster of the true owner in order to evade the presumption that his possession is not hostile or adverse to him. Color of title is received in evidence for the purpose of showing the possession to be adverse; and it is difficult to apprehend, why evidence offered and competent to prove that fact, should be rejected till the fact is otherwise proven.

With regard to the five years limitation, we need not inquire whether the Legislature intended that the action should be barred, where the purchaser at the tax sale was not in possession. In this case, possession for more than five years by the purchaser from the collector and those claiming under him, was proved. In order to entitle the defendant to set up the 478*] bar of this statute, *after five years' adverse possession, he had only to show that he and those under whom he claimed held under a deed from a collector of the revenue, of lands sold for the non-payment of taxes. He was not bound to show that all the requisitions of the law had been complied with in order to

make the deed a valid and indefeasible conveyance of the title. If the court should require such proof, before a defendant could have the benefit of this law, it would require him to show that he had no need of the protection of the statute, before he could be entitled to it. Such a construction would annul the Act altogether, which was evidently intended to save the defendant from the difficulty, after such a length of time, of showing the validity of his tax title. The case of *Moore v. Brown*, 11 How., 424, had reference to a deed void on its face, and the consequence of this fact, under the peculiar statutes of Illinois; it furnishes no authority for the decision of the court below in the present case.

The judgment of the Circuit Court is therefore reversed, and a venire de novo ordered.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Arkansas, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to award a *venire facias de novo*, and to proceed therewith in conformity to the opinion of this court.

Rev'g—Hemp., 624.
Cited—18 How., 57, 141; 21 How., 340; 3 Woods., 221.

THE UNITED STATES, *Plaintiffs in Error.* v.

ANDREW HODGE, JR., AND LEVI
PIERCE.

Evidence—Treasury transcripts of postmaster's quarterly returns not containing items claimed and disallowed, are admissible in action on his official bond.

In a suit upon a postmaster's bond, when treasury transcripts are offered in evidence, it is not necessary that they should contain the statements of credits claimed by the postmaster, and disallowed, in whole or in part, by the officers of the government.

Nor is it a reason for rejecting the transcripts as evidence, that the items charged in the account, as balances of quarterly returns, did not purport, on the face of said accounts, to be balances acknowledged by the postmaster, nor were supported by proper vouchers; but merely purported to be the balances of said quarterly returns, as audited and adjusted by the officers of the government. The objection applied, if at all, to the accuracy of the accounts, and not to their admission as evidence.

The basis of an action against a postmaster is his bond and its breaches; and not the transcripts nor the quarterly returns, which are made evidence by the statute.

THIS case was brought up by writ of error from the Circuit Court of the United States for the Eastern District of Louisiana.

NOTE.—*Liability of sureties on official and other bonds and for debts.* See note to U. S. v. Giles, 9 Cranch, 212, and note to Postmaster-Gen. v. Early, 12 Wheat., 136.

479*] *It was the same case which was twice previously before the court, as reported in 3 How., 584, and 6 How., 279.

The facts and points of law are set forth in the opinion of the court.

It was argued by *Mr. Crittenden* (Attorney-General) for the plaintiffs in error, and *Messrs. Johnson and May* for the defendants in error.

The arguments of the counsel were so connected with an examination of, and reference to the accounts, which were very voluminous, that it would be difficult to present an abstract of them.

Mr. Justice Daniel delivered the opinion of the court:

This case comes before us upon a writ of error to the Circuit Court of the United States for the Eastern District of Louisiana.

The plaintiffs in error instituted in the Circuit Court an action at law against the defendants, to recover the sum of twenty five thousand dollars, the penalty of a bond executed by those defendants with *W. H. Ker*, and by which the obligors bound themselves jointly and severally for the faithful performance by *Ker*, of the duties of postmaster at New Orleans. The amount claimed by the United States, upon the statement of the account of the postmaster, at the Treasury Department, was, on the 18th of August, 1839, \$70,126.72, nearly three times the penalty of the bond.

This cause was first tried in the Circuit Court in February, 1848, when, under a charge from the judge, the jury found a verdict for the defendants. A writ of error was sued out to the judgment of the court, but was afterwards dismissed here for the irregularity that it was signed by the clerk of the court and not by the judge. (*Vide* 3 How., 584.) Upon a new writ of error, the case was brought up to this court, was heard upon exceptions to the rulings of the judge, when the decision of the Circuit Court was reversed, and the cause remanded for trial upon a *certior facias de novo*. (6 How., 279.)

In pursuance of the mandate of this court, the cause coming on to be finally heard in the Circuit Court on the 8th of May, 1851, the judge refused to allow any of the statements of the accounts with the postmaster or any of the transcripts from the Postoffice Department, relating to the accounts of the postmaster, or any of the monthly returns of that officer which were offered in evidence by the plaintiffs to be read to the jury, but excluded the whole of them; whereupon the jury found a verdict for the defendants. The case is now before us upon 480*] exceptions* to the rulings of the judge, and which exceptions are as follows:

"Be it remembered, that on the trial of this case, the attorney of the United States, after having read in evidence the bond sued on, offered in evidence the following certified transcripts of statement of accounts, copies of quarterly returns of *W. H. Ker*, late postmaster, and of the other papers pertaining to the account of the said postmaster, hereto annexed; to the introduction of which, as evidence, the defendants, by their counsel, objected, and the court sustained the objection, and refused to allow the said transcripts, or

any of them, to be read in evidence to the jury; to which opinion and decision of the court, in excluding said evidence, the attorney of the United States excepts, and prays that this bill of exceptions may be signed, sealed, and made matter of record, which is done accordingly.

THEO. H. McCaleb, U. S. Judge. [SEAL.]
By consent of the counsel of the United States, the court here states the grounds upon which it rejected the transcripts above mentioned as follows:

"1st. That the said statement of accounts, between the United States and said *W. H. Ker* [were] as audited and adjusted only, and did not purport to contain the statement of credits claimed by him, and disallowed in whole or in part by the officers of the government.

"2d. That the items charged to the said *W. H. Ker* in said accounts, prior to the year 1836, as balances of quarterly returns, do not purport on the face of said accounts to be balances acknowledged by him, nor are they supported by any proper vouchers, but merely purport to be the balances of said quarterly returns, as audited and adjusted by the officers of the government.

"3d. That the quarterly returns were not the basis of the action, and under the law could not be admitted as evidence before the jury, except as vouchers to sustain the account, [which] having been rejected by the court, the quarterly returns could not be given in evidence without it.

THEO. H. McCaleb, U. S. Judge."

In order to test the accuracy of the decision by which the competency and legal effect of the transcripts were passed upon by the court, and by which they were ruled out at the trial, some reference will be proper to the statutes by which those documents have been authorized and directed, and the mode of their application prescribed in the prosecution of claims on behalf of the government. By the 8th section of the Act of Congress for the re-organization of the Postoffice Department, passed on the 2d of July, 1836 (*vide* Stat. at Large, Vol. V., p. 81), it is provided, "that there shall [481 be appointed by the President, with the advice and consent of the Senate, an Auditor of the Treasury for the Postoffice Department, whose duty it shall be to receive all accounts arising in said Department, or relative thereto, to audit and settle the same, and to certify their balances to the Postmaster-General. He shall keep and preserve all accounts, with the vouchers, after settlement; he shall promptly report to the Postmaster-General all delinquencies of postmasters in paying over the proceeds of their offices, and shall close the accounts of the department quarterly, and transmit to the Secretary of the Treasury quarterly statements of the receipts and expenditures."

By section 15th, of the same Statute (Vol. V., p. 82), it is further provided, "that copies of the quarterly returns of postmasters, and of any papers pertaining to the accounts in the office of the Auditor for the Postoffice Department, certified by him under his seal of office, shall be admitted as evidence in the courts of the United States; and in every case of delinquency of any postmaster or contractor, in which suit may be brought, the said auditor shall forward to the Attorney of the United

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States, certified copies of all papers in his office tending to sustain the claim; and in every such case a statement of the account, certified as aforesaid, shall be admitted as evidence; and the court trying the cause shall be thereupon authorized to give judgment and award execution, subject to the provisions of the 38th section of the Act to reduce into one, the several Acts establishing the Postoffice Department approved March 8d, 1825." The 38th section of the Act of 1825, here referred to, relates exclusively to the conditions on which the court may grant a continuance to defendants, beyond the return term, in suits against them. The 15th section of the Act of 1836 goes on further to declare, "that no claim for a credit shall be allowed upon the trial, but such as shall have been presented to the said auditor, and by him disallowed in whole or in part, unless it shall be proved to the satisfaction of the court that the defendant is at the time of the trial in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting to the said auditor by some unavoidable accident."

In the case before us there were exhibited, on the trial below, two general accounts or transcripts from the Auditor for the Postoffice Department with the postmaster Ker. By the former of these accounts, the balance against the postmaster was stated at \$93,847.78; by the latter the balance was reduced to the sum of \$70,126.96. The difference in these amounts is explained by the facts, that at the time at which the first statement was made, the postmaster had failed to make his quarterly returns [482*] as *required by law, from the 1st of July to the 15th of November, 1839; and in consequence of that failure had been charged, in pursuance of the 32d section of the Act of Congress of 1825, with double the estimated amount of postages receivable during that interval. Subsequently to this statement, the postmaster having rendered his account for the interval above mentioned, the actual amount due from him was charged against him in lieu of the duplicated estimate of receipts, and the balance against him thereby reduced to the sum of \$70,126.96. The transcript of the statement thus corrected, was certified to the Circuit Court on the 11th of May, 1842, before the trial of the cause.

In addition to these general transcripts, there were certified by the auditor, and tendered in evidence by the United States, copies of the quarterly accounts or returns rendered by the postmaster from the quarter ending on the 30th of September, 1836, before the execution of his official bond sued on, up to the period of his removal; and on each of these quarterly returns or accounts the corrections or disallowances are noted. Proof is found in the record of notice to the postmaster of all these corrections in his returns and the balances claimed on each of these returns, as corrected, were afterwards carried into the auditor's general statements, of which transcripts were furnished and offered in evidence at the trial. It would seem difficult to discover a plausible reason for the exclusion by the judge at circuit of the transcripts offered in evidence, as incompetent or irrelevant to the issue before him; and equal-

ly so to reconcile the reason assigned by his honor with the conclusion to which it has led him. In the first place, the language of the Act of Congress is express and imperative, that the "Auditor of the Treasury for the Postoffice Department shall receive all accounts arising in the department relative thereto, and audit and settle the same, and certify their balances to the Postmaster-General." (Vide sec. 8th of the Act of 1836.) And again, section 15th of the same Act: "In every case of delinquency of any postmaster or contractor in which suit may be brought, the said auditor shall forward to the Attorney of the United States, certified copies of all papers in his office tending to sustain the claim, and in every such case, a statement of the account, certified as aforesaid, shall be admitted as evidence, and the court trying the cause shall be thereupon authorized to give judgment and award execution," &c. The competency of a statement by the auditor of all or any accounts with postmasters and contractors in suits against them, cannot, then, be questioned; the accuracy of such statements as to detail, is a wholly different matter, and is to be questioned or contested in the mode prescribed by other provisions of the *stat. [*483] ute. The only qualification ever made of the principle above laid down, if indeed it can be properly considered a qualification, is to be found in the decisions of this court in the cases of *The United States v. Buford*, 8 Pet., 29, and the *United States v. Jones*, 8 Pet., 375, in which it has been ruled, that transcripts from the Treasury should not amount to proof of facts not coming within the regular relation existing between the department and persons with respect to whom such facts may have transpired; but this exception or qualification cannot apply to transactions falling strictly within the relation subsisting between the government and its agents, or rather it goes to affirm the operation of the statute in reference to such transactions. The utmost latitude which could be given to the decisions above mentioned, could not extend them to the entire character of the transcripts certified from the department as evidence; but must limit their effect to any portions or items of those transcripts which should be irregular, and not within the language or import of the statute, nor within the regular operations of the department.

The first reason assigned by the judge below for excluding the entire transcript is, that they were presented as accounts between the United States and the postmaster Ker, as audited and adjusted only, and did not purport to contain the statement of credits claimed by him and disallowed in whole or in part by the officers of government. The obvious answer to this objection is, that the omission complained of did not render those documents any the less transcripts certified by the officer, nor destroy their competency as evidence under the statute. The objection, if it comprise either force or plausibility, is one strictly applicable to the completeness or sufficiency of the documents offered, and not to their competency or legality. An objection to the transcripts from the department, founded on the facts that they are only a statement and adjustment of the accounts between the United States and the postmaster, without containing the credits claimed and disallowed,

is precisely an objection based upon the conformity of those documents with the law; for, by the 8th section of the Act of 1836, the auditor is directed to receive all accounts arising in the department or relative thereto, to audit and settle the same, and to certify the balances therein to the Postmaster-General—and we may seek in vain for any provision in the statute which prescribes a particular form of stating the accounts or directing a list of the items not admitted by the department, but rejected as illegal, to be made parts of that general account, or transcript. A different proceeding would seem to have been the contemplation of the Legislature, if we can gather its intention from the *484** mode pointed out for preferring *and establishing credits, which, if denied and rejected by the government, it would seem strange to require should, by the act of that government which denied their existence, be held forth as a part of its own view of the transaction. But, as already observed, the reason assigned by the Judge of the Circuit Court for ruling out the transcripts is one which could apply, in any view, only to the sufficiency or strength of the proof, and not to the competency or relevancy thereof. That reason, too, is directly in conflict with the 15th section of the Act of 1836, which explicitly declares, irrespective of their force or efficiency, "that copies of the quarterly returns of postmasters, and of any papers pertaining to the accounts in the office of the auditor of the Postoffice Department, certified by him under the seal of his office, shall be admitted as evidence in the courts of the United States; and in every case of delinquency by any postmaster or contractor, in which suits may be brought, the said auditor shall forward to the Attorney of the United States, certified copies of all papers in his office, tending to sustain the claim, and in every such case a statement of the account, certified as aforesaid, shall be admitted as evidence." Under this ample provision of the statute not only the statements of accounts, but certified copies of every paper in the department pertaining to such accounts, are made competent evidence in the courts of the United States.

It will be observed, in this case, that in the certified transcripts from the department, every credit allowed to the postmaster upon the settlement of his account is given, and appears upon the face of the transcripts, so that the defendants have received the full benefit of all such credits; and indeed the opinion of the judge below is not founded on the withholding of any of these credits from the postmaster, but it rests exclusively upon the fact of the absence from the face of the transcripts or general accounts of the alleged credits, whose correctness, or legal existence even, was denied by the government, but which the defendant was still at liberty to assert in the mode prescribed by the statute. What obligation there could be upon the government to embody and to present to the court, claims whose existence it repudiated and denied, we are unable to perceive. The language of the statute contains no such requisition, and none such appears to fall within the meaning or objects of the law. Upon each of the quarterly returns of the postmaster the corrections made at the department are noted in a separate column, annexed thereto for the

sole purpose of inserting those corrections; the balances, as corrected, were thence transferred to the general accounts or transcripts, and the postmaster was informed of the corrections made, with the view to his sustaining the rejected *items by proofs, if in his power [**485*] to do so. The quarterly returns themselves remaining as to all the items they contained, precisely as made by the postmaster himself.

The question of the admissibility and competency of transcripts like those ruled out by the judge in the court below, has, in several instances received the examination of this court, and their competency and legality as evidence, in cases like the present, have been established upon the fullest consideration. In the case of *Hoyt v. The United States*, 10 Howard, 109, this question was raised, and in the investigation of it by this court, the cases of *The United States v. Buford*, 3 Pet., 29; *The United States v. Jones*, 8 Pet., 375, and *The United States v. Eckford's Executors*, 1 How., 250, were all examined and compared. It is true that the cases above mentioned did not arise upon the statute regulating the Postoffice Department, but they involved the construction of the Act of March 3d, 1797, the import of which, and indeed the language thereof, *mutatis mutandis*, are identical with those of the Act of 1836, regulating the Postoffice Department. (*Vide Stat. at Large*, 512.) In the case of *Hoyt v. The United States*, the law is thus expounded by this court: "The counsel for the plaintiffs (*The United States*), in the court below, produced on the trial four treasury transcripts, containing a statement of the accounts of the plaintiff in error with the government, for the whole period of his term, and which resulted in the balance above stated. These transcripts were objected to as not competent evidence against the defendant of the balance therein found due, within the meaning of the Act of Congress providing for this species of proof. The second section of the Act provides that in every case of delinquency where a suit has been brought, a transcript from the books and proceedings of the Treasury, certified by the register and authenticated under the seal of the department, shall be admitted as evidence, upon which the court is authorized to give judgment." This court further proceeds: "In the case before us the several items of account in the transcripts arise out of the official transactions of the defendant as collector, with the Treasury Department, and were founded upon his quarterly returns and other accounts rendered in pursuance of law and the instructions of the Treasury. They were substantial copies of these quarterly returns revised and corrected by the accounting officer, as they were received, and with copies of which the defendant had been furnished, in the usual course of the department; they present a mutual account of debit and credit arising out of the official dealings with the government in the collection of the revenue. We can hardly conceive of a case, therefore, coming more directly within the Act of Congress as expounded by the cases referred to." The court then deduces the *following conclusions: "As [**486*] a general rule, therefore, every item of the account that can be the subject of litigation at the trial on the production of a transcript, must have been a matter of dispute at the Treasury

Department, and of course presenting nothing new or unexpected to the parties. The court is of opinion, therefore, that the several treasury transcripts offered in evidence were properly admitted." We think, therefore, that the objection of the judge of the court below to the transcript offered in evidence, viz.: that it did not contain on its face, as credits, items which were never admitted as credits, but were denied and rejected as such, was justified neither by the statute, nor by reason, nor custom in the statement of accounts.

The second cause assigned by the judge below for his rejection of the transcripts from the jury, is likewise one which applies, if at all, to the accuracy of the items in the account, and not to the competency of the entire transcripts as documents certified and attested in the mode prescribed by the Act of Congress. The objection on the part of the judge, if it can be apprehended, seems to be this: that the quarterly returns of the postmaster, entering into and forming parts of the general transcripts, having been corrected at the department, the balances produced by such corrections cannot be regarded as the acknowledged amounts due by the postmaster, but, on the contrary, are the balances stated as due on said quarterly returns as audited and adjusted by the officers of the government. As we have already said, this objection applies entirely to the correctness of the items contained in the general account as stated, and cannot change the character of the transcripts as certified statements of the accounts audited and adjusted at the department, and as directed to be certified by the provisions of the statute. Moreover, these quarterly returns, which, so far as they go, are certainly admissions of the postmaster, are in no wise changed or affected, except by the disallowance of particular items, and by that very disallowance the officer is put in the position, and notified to sustain, if he can, his claims by legal proof. If he fail to do this, it can certainly furnish no reason why every other item of indebtedment, admitted to be correct by both parties, should be withheld. We can perceive, then, no force in the second cause assigned by the judge below for the rejection of the transcripts.

The third cause assigned by the judge for rejecting the evidence tendered by the plaintiffs, has less of plausibility to sustain it than either which precedes it; and may be disposed of in a few words. This last cause begins with the affirmation, that the quarterly returns were not the basis of the action; next, it asserts that these returns could not, under the law, be admitted as evidence to the jury, except as [487*] vouchers to sustain the account; *and then the conclusion attempted from these positions is, that the account, being rejected by the court, the quarterly returns could not be given in evidence without it. A somewhat curious example of assumption is given in this argument of the court, and of deduction in the conclusion as drawn therefrom. In the first place, it may be observed that neither the transcripts nor the quarterly returns, certified from the department, constituted, properly speaking, the basis of the action against the defendants—that basis is found in the official bond of the postmaster and his sureties, and in the acts or delinquencies of the officer. The proof of those

delinquencies consisted in part as ordered by the statute, of the general transcripts, and of the quarterly returns certified and attested as that statute directed; they were both made evidence, and ought to have been so received, to avail as far as they regularly and properly might upon the issue made between the government and the defendants. They both came within the literal descriptions in the statute of the "copies of quarterly returns of postmasters and of any papers pertaining to the accounts in the office of the Auditor of the Postoffice Department, which, when certified by him under his seal of office, shall be admitted in evidence in the courts of the United States." But the trenchant argument of the court below is simply this: I have cut off a portion of this statutory evidence, by the former part of my opinion, the residue shall be subjected to a like operation. We think that the decision of the Circuit Court, as a whole, and in the detail, as set forth by that court, is erroneous, and should be, as the same is hereby reversed; and we do remand this cause to the Circuit Court, to be again tried, subject to the principles laid down in this opinion.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and the same is hereby reversed; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to award a *venire facias de novo*, and to proceed therewith in conformity to the opinion of this court.

S. C., 6 How., 279.
Cited—McAll. 245, 246, 250.

*CORNELIUS W. LAWRENCE. [*488
Plaintiff in Error,

v.

JOHN CASWELL AND SOLOMON T.
CASWELL.

Tariff Act—Leakage on brandy not allowed—ad valorem duty.

By the Tariff of 1846, the duty of one hundred per cent., *ad valorem*, upon brandy, ought to be charged only upon the quantity actually imported, and not on the contents stated in the invoices.

Duties illegally exacted are those which are paid under protest, and where there is an appeal to the judicial tribunals.

The Revenue Act of 1799 (1 Stat. at Large, 672) directed that an allowance of two per cent. for leakage should be made on the quantity of liquors which were subject to duty by the gallon. Where brandy was subjected to a duty *ad valorem*, it was no longer within the provisions of this Act, and the allowance of two per cent. ceased.

THIS case was brought up by writ of error from the Circuit Court of the United States for the Southern District of New York.

NOTE.—Return of duties paid under protest. Action to recover back. Protest, *hinc* made and its effect. See note to Greeley v. Thompson, 10 How., 225.

It was a suit brought by John Caswell and Solomon T. Caswell, merchants of New York, against Lawrence, the collector, to recover an excess of duties upon brandy, paid under protest. The whole case is set forth in the bill of exceptions, which was as follows:

Bill of Exceptions :

The counsel for the plaintiffs, after proving that the plaintiffs were partners, engaged in trade and commerce in the City of New York, further to maintain the issue on their part, gave in evidence divers warehouse entries, and withdrawal entries, and calculations of duties thereon, invoices, and gaugers' returns of certain importations of brandy, made by the plaintiffs into the port of New York, by the several vessels in the table or statement, hereinafter set forth, particularly mentioned; which said several vessels arrived in the said port of New York at the respective dates, also in said table or statement mentioned; in and by which said documents it appeared that said several importations of brandy were, on the arrival thereof, respectively deposited in the public stores in said port of New York, in pursuance of the Act of Congress establishing a warehousing system, approved August 6th, 1846; that upon the gauging of said several importations of brandy by the United States gaugers, made at the time of the arrival thereof respectively, the actual contents of each of said importations were found to be less than the contents stated in the invoices thereof respectively; the difference in each case between such invoice contents, and the actual contents as ascertained by the said gaugers, being specified in the said table or statement; that the said goods so imported were afterwards, from time to time, withdrawn from such public stores, and duties paid thereon by the plaintiffs to the defendant, as collector of the port of New York, who demanded, as such duties, under schedule A of the Tariff Act of July 30, 1846, one hundred per centum *ad valorem* upon the cost of the contents of said importations as such contents were stated in the invoices thereof respectively, amounting in the whole, as also appears in said table, to the sum of \$41,658; which said duties, so exacted, were paid by the plaintiffs to the said defendants as such collector, under protest in writing (indorsed on the withdrawal entries), against the payment thereof, the said plaintiffs claiming that the duties should be computed not upon the said invoice contents of said importations, but upon the actual contents thereof, as shown by the aforesaid gaugers' returns, after deducting from the actual contents shown by such returns the allowance of two per centum thereon, directed by the 59th section of the Revenue Collection Act of March 2, 1799.

The following is the form of the protests referred to, and they were all alike:

"We claim deduction for all deficiency from the quantity shipped; also two per cent. allowance for leakage as heretofore customary, and protest against the collector exacting the whole amount of the invoice.

JOHN CASWELL & Co."

The counsel for the said plaintiffs also proved that the duties so as aforesaid paid to and received by the said defendant, as such

collector, were by him duly paid, at the time of the receipt thereof, into the Treasury of the United States.

The table, or statement, above referred to, contained also a specification of the excess of duty alleged by the plaintiffs to have been exacted by the defendant as such collector, upon each of the said several importations, amounting, in the aggregate, to the sum of \$1,609; the said table, or statement, being in the words and figures following.

(The table is omitted, as not being necessary to be inserted.)

The plaintiffs' counsel then proved, that under the Act of March, 1799, and from the passage of said Act until the Tariff Act of July 30, 1846, took effect, it was the uniform practice in the New York custom house, upon the entry of such importations of liquors subject to duties, to proceed as follows:

1st. The United States gaugers, after ascertaining the capacity of each cask, deducted the "outs," or number of gallons deficient, and, from the actual contents thus ascertained, made a further deduction of two per cent. on such actual contents for the allowance of leakage, directed by the 59th section of said Act of March 2, 1799, and made a return to the collector, exhibiting the result.

2d. The duties were then calculated and exacted upon the "net dutiable quantity" [*490 so exhibited by the gaugers' return, and upon that quantity only, and without regard to any statement of quantity in the invoice.

To this evidence the counsel for the defendant objected, in due season, as inadmissible; but His Honor, the presiding judge, then and there overruled the said objection, and decided that such evidence was admissible; to which ruling and decision of the said judge, the counsel for the said defendant then and there excepted.

The plaintiffs' counsel claimed to recover against the defendant the sum of \$1,609, above stated, and interest thereon to the day of trial, amounting in the whole to \$2,089.85.

The counsel for the plaintiffs there rested.

The counsel for the defendant then insisted that the only allowances which could be considered in this case for deficiencies in said brandy, had been provided for by Acts of Congress, and had already been made at the custom house, and that by law the plaintiffs were not entitled to recover; and he prayed the court so to charge the jury.

But the court charged the jury that the United States were only entitled to collect duties upon the importations in question upon the quantity remaining, after deducting from the actual contents ascertained and exhibited by the gaugers' returns the aforesaid allowance of two per cent. for leakage; and that the plaintiffs were therefore entitled to recover the amount so as aforesaid claimed by them.

To which charge of his honor the judge, and to every part thereof, the defendant's counsel then and there excepted.

The jury thereupon found a verdict for the plaintiffs for the sum of \$2,089.85 damages and six cents costs.

And because the prayer of the said defendant, by their said counsel, and the several rulings and decisions, and instructions and charge

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of the said judge, and the several exceptions taken to the same, do not appear by the record of the verdict aforesaid, the defendants have caused the same to be written on this bill of exceptions, to be annexed to such record, and have prayed the said judge to set his hand and seal to the same.

Whereupon the said Samuel R. Betts, the judge before whom the said issues were tried, and the said exceptions taken, has hereunto set his hand and seal, the 6th day of February, in the year of our Lord 1852.

SAMUEL R. BETTS. [L. S.]

Upon this exception, the case came up to this court, and was argued by *Mr. Crittenden* (Attorney-General) for the plaintiff in error, and *Mr. Butler* for the defendants in error.

491*] *Mr. Crittenden*, for plaintiff in error:

I. (First point omitted.)

II. In the cases of *Marriott v. Brune*, and *The United States v. Southmayd*, 9 How., 619, 637, cases of drainage of sugars in the course of the voyage from the place of production, this court held that the duties were to be assessed on the actual quantity or weight which arrived in the United States; and the same rule would seem to be applicable to the case of brandy.

The further question in this case, however, is, whether importers of brandy are entitled to the additional allowance of two per cent. on the actual quantity imported, which the court below directed to be made. This allowance is claimed under the 59th section of the Collection Act of 1799, 1 Stat. at Large, 672, which is as follows: "That there shall be an allowance of two per cent. for leakage on the quantity which shall appear by the gauge to be contained in any cask of liquors subject to duty by the gallon; and ten per cent. on all beer, ale, and porter in bottles; and five per cent. on all other liquors in bottles, to be deducted from the invoice quantity in lieu of breakage; or it shall be lawful to compute the duties on the actual quantity to be ascertained by tale, at the option of the importer, to be made at the time of entry."

The late *Mr. Justice Woodbury*, in delivering the opinion of the court in the sugar cases, above cited, refers to the above section of the Act of 1799, and says: "The former cases referred to for illustration rest on their peculiar principles, and allowances in them are made by positive provisions in Acts of Congress, even though the quantity and weight of the real article meant to be imported, should arrive here. Because, well knowing that the whole is not likely to arrive, and being able to fix by a general average the ordinary loss in those cases with sufficient exactness, the matter has been legislated on expressly."

The learned judge referred to these instances merely as illustrations; and it will not be here contended that the dutiable quantity of brandy in the present case is the invoice quantity, less the allowance of two per cent.; for the court will observe that the section enacts that the two per cent. is to be allowed "on the quantity which shall appear by the gauge." But, on the part of the United States, it is contended that the allowance cannot be made on importations of brandy under the *ad valorem* tariff of

1846, because the operation of the section is limited and confined to cases of specific tariffs. The law has so commanded; the words are express and positive. The allowance is to be made on liquors "subject to duty by the gallon."

Besides, the claim for the allowance cannot be maintained under the Act of 1846, because it is repugnant to the principle *of that [*492] Act. Thus this court has held, that imports cover only what is brought within our limits and goes into the consumption of the country. Now, as by the Act the duties upon these imports are to be assessed at so much per cent. upon the foreign value, how can it be said that they are so assessed upon that value if the whole quantity actually imported is not taken into account?

Mr. Secretary Walker, in a Treasury Circular of 30th January, 1847 (1 Mayo, 391), seems to have considered the 59th section of the Act of 1799 in force, and directed the allowance therein mentioned to be continued. Subsequently, however, by a circular of the 24th March, 1847, he seems to have reconsidered the subject, and instructed the collectors as contended for in this paper. (1 Mayo, 386.) The importations in this case were made during the time this circular was in force. (See, also, another circular, of 31st December, 1847, *vide*, Allowances; 1 Mayo, 405.)

It is therefore submitted, on behalf of the United States, that the claim for the allowance of two per cent. on the quantity ascertained by the gauge, is not sanctioned by law, and the jury ought to have been so instructed.

Mr. Butler, for defendants in error:

1. Upon the facts proved upon the trial, the plaintiffs in the court below were at least entitled to recover back the amount of duties exacted by the collector upon the differences between the invoice contents and the actual contents of the several importations of brandy mentioned in the record.

(a) The cases of *Marriott v. Brune*, 9 How., 619, and *The United States v. Southmayd*, *Id.*, 637, decide —

1st. That *ad valorem* duties, under the Act of 1846, should be assessed, not upon the quantity which appears by the invoice to have been shipped, but only on the quantity which actually arrives in our ports; and,

2d. That the proviso in the 8th section, "that under no circumstances shall the duty be assessed upon an amount less than the invoice value," is not in hostility with the above construction, because the proviso refers only to the price and not to the quantity.

(b) In respect to the point now under consideration, there is no ground whatever for distinguishing the present case from the cases in 9 How., above referred to.

II. The plaintiffs in the court below were entitled to the further deduction of two per cent. on the actual contents of the importations in question, as ascertained and exhibited by the gaugers' returns, for the allowance of leakage directed by the 59th *section of the [*493] Revenue Collection Act of March 2d, 1799 (1 Stat. at Large, 672).

1st. By the very words of the section, "that there be an allowance of two per cent. for leakage on the quantity which shall appear by

the gauge to be contained in any cask of liquors subject to duty by the gallon," this allowance is to be computed and made upon the actual contents ascertained by the gauger.

2d. This allowance of two per cent., as manifestly appears by the words quoted, was not intended to cover leakage on the voyage of importation, but to cover that which will occur after the arrival of the liquor, and before its actual sale by the importer.

(a) Leakage on the voyage was already provided for by requiring the actual contents at the port of importation, to be ascertained by the United States gauger.

(b.) In commercial language, "leakage" is an allowance granted to importers of liquors for the waste the goods are supposed to receive by keeping after their arrival and before their sale. (*McCulloch's Commercial Dictionary*, title "Leakage," and title "Warehousing System," Eng. ed. of 1884, p. 1223.)

(c.) The 59th section of the Act of 1799, (following in this respect the 86th section of the Act of 1790, 1 Stat. at Large, 166), conforms to this commercial sense by directing the allowance in question to be made on the quantity which shall appear by the gauge to have arrived in the United States.

See, in connection with this section, the following sections of the same Act: sec. 21 (p. 642), as to the duties of the surveyor. Also, secs. 37 to 43 (pp. 655, 660), as to entry, inspection and landing of liquors. Also Act of April 20th, 1818 (3 Stat. at Large, 469), "providing for the deposit of wines and distilled spirits in public warehouses."

3d. The 59th section of the Act of 1799 is not repealed by anything contained in the Tariff Act of 1846; but the importers of liquors are still entitled to the allowance given thereby.

(a.) There is no express repeal of sec. 59 in the Act of 1846.

(b.) Repeals by implication are not favored, and are only allowed when the provisions of the old law are plainly repugnant to those of the new. (6 Bacon's Abr., title Statute, D., p. 373; *Dwarris on Statutes*, pp. 673, 674; *Wood v. The United States*, 16 Pet., 362, 363.)

(c.) The only part of the 59th section of the Act of 1799 which is claimed to be repugnant to the Act of 1846 is the clause which directs the allowance of two per cent. to be made on "liquors subject to duty by the gallon," which, it has been suggested, renders the section inapplicable to liquors imported under a law subjecting them to an *ad valorem* rate of duty.

4th. The repugnancy suggested is only apparent, and not sufficient to work the repeal of this part of the law of 1799.

(a.) There is nothing in the change from a specific duty to an *ad valorem* duty on liquors, which should abrogate the allowance of two per cent. directed by the Act of 1799.

(b.) If this allowance was just and proper under specific duties, it is also equally just and proper under *ad valorem* duties.

(c.) If this allowance be not made, the importer may, under the Act of 1846, be subjected to a higher duty upon liquors than that prescribed by the pre-existing Tariff Act of August 30th, 1842, contrary to the main object of the Act of 1846, which, as expressed in its title, was to "reduce the duty on imports."

5th. The Act of 1846 contains several provisions strongly implying an intention in its framers to retain allowances of this nature given by pre-existing laws.

(a.) The fourth section expressly provides "that in all cases in which the invoice or entry shall not contain the weight or quantity or measure of goods, wares or merchandise now weighed or measured or gauged, the same shall be weighed, gauged or measured at the expense of the owner, agent or consignee."

(b.) The eighth section requires the collectors, in the particular case therein mentioned, to cause the dutiable value to be estimated and ascertained, as well as to be appraised, "in accordance with the provisions of the existing laws."

(c.) These enactments refer to and retain in force, among other provisions contained in the prior laws, the 59th section of the Act of 1799, above referred to.

See report of Secretary Walker to House of Representatives, dated Dec. 30th, 1846 (Exec. Docs. of H. of R., No. 25, 2d Sess. 29th Cong.), showing it still necessary, notwithstanding the change in the mode of assessing duties, to employ weighers, gaugers and measurers. (Pages 2, 4, 5, 9; *Treas. Cir.*, Nov. 25th, 1846, pp. 176 to 182.)

6th. The Warehousing Act of August 6th, 1846 (9 Stat. at Large, 58), extends the principle of the Act of April 2d, 1818, in relation to the deposit of liquors in public warehouses, to all imported goods.

This Act being passed contemporaneously with the Tariff Act of July 20th, 1845, the two should be construed together as parts of one system; and the allowances made by the Act of 1799 in respect to liquors deposited in the public stores under the Act of 1818, must be deemed applicable to liquors deposited under the Warehousing Act of 1846.

7th. The foregoing view has in effect been acquiesced in by the Treasury Department, and established by this court.

(a.) It was deliberately and distinctly adopted and promulgated *by the Treasury *495 Department in its instructions to collectors issued immediately after the Tariff Act of 1846 took effect. See instructions to the Collector of New Orleans, under date of 30th January, 1847, given at length in 9 How., 620.

(b.) This instruction was afterwards modified by the department, but the principle on which it proceeded was established as correct by the decisions of this court in *Marriot v. Brune*, 9 How., 619, and *The United States v. Southmayd*, *Id.*, 637.

(c.) In those cases the court decided that the *ad valorem* duties under the Act of 1846 should be assessed on the quantity which actually arrives in our ports. The "quantity" of liquors can be reckoned only by the measure—the number of gallons. To take duty on the "quantity" imported is therefore to take duty on the number of gallons imported. Liquors being subject to duty by the "quantity" or number of gallons, are therefore "subject to duty by the gallon." The difference between previous laws and the Act of 1846 is, that under previous laws liquors were "subject to duty by the gallon," without regard to the value of the gallon; while under the Act of 1846 they are

still "subject to duty by the gallon," but according also to the value of the gallon. This is a difference merely of form and not of substance, and cannot work a repeal of the former law.

(d.) The decisions of the court in 9 Howard do, therefore, control and dispose of this point, as well as the former one: and such was, at first, admitted by the Treasury Department to be its legitimate effect. (See Treasury Circulars of July 5th, 1850, August 10th, 1850, and June 14th, 1851.)

Mr. Chief Justice Taney delivered the opinion of the court:

This is an action brought by the defendants in error against the collector of the port of New York, to recover certain sums of money alleged to have been illegally exacted as duties.

The defendants in error are merchants of New York, and imported a large quantity of brandy in the years 1847 and 1848, which were deposited in the public stores, under the Warehousing Act of 1846. Upon gauging these several importations, at the time of their arrival, the contents were found to be less than the quantity stated in the several invoices.

As the brandy was from time to time withdrawn by the importers, the collector demanded the duty of one hundred per cent. *ad valorem* upon the whole invoice quantity, and it was paid by the importers under protest.

The importers claimed in their protest that the duties should be computed upon the actual contents, as shown by the gauger's returns, after deducting two per cent. from such contents. And the court was of opinion, and so 496* directed the jury, that this was *the correct mode of ascertaining the duties; and a verdict was accordingly rendered and judgment given for the amount overcharged. This writ of error is brought to revise that judgment.

Two questions arise in the case: 1st, whether the duty ought to be computed on the quantity stated in the invoices, or on the contents as ascertained by the gauger's returns; and 2d, whether the two per cent. ought to have been deducted for leakage.

As relates to the first question, it is substantially the same with that decided by the court in the case of *Marriott v. Brune*, 9 How., 619. The duty of one hundred per cent. *ad valorem* was chargeable on the quantity of brandy actually imported, and not on the contents stated in the invoices. This overcharge was therefore illegally exacted, and the defendants in error were entitled to recover back the amount. The judgment of the Circuit Court is in this respect correct.

But it is proper to say, in order that the opinion of the court may not be misunderstood, that when we speak of duties illegally exacted, the court mean to confine the opinion to cases like the present, in which the duty demanded was paid under protest, stating specially the ground of objection. Where no such protest is made, the duties are not illegally exacted in the legal sense of the term. For the law has confided to the Secretary of the Treasury the power of deciding in the first instance upon the amount of duties due on the importation. And if the party acquiesces, and does not by his protest appeal to the judicial tribunals, the

duty paid is not illegally exacted, but is paid in obedience to the decision of the tribunal to which the law has confided the power of deciding the question.

Money is often paid under the decision of an inferior court, without appeal, upon the construction of a law which is afterwards, in some other case in a higher and superior court, determined to have been an erroneous construction. But money thus paid is not illegally exacted. Nor are duties illegally exacted where they are paid under the decision of the collector, sanctioned by the Secretary of the Treasury, and without appealing from that decision to the judicial tribunals by a proper and legal protest. Nor are they within the principle decided by the court in the case before us.

We proceed to the second point—that is, to the claim of a further deduction of two per cent.

The Revenue Collection Act of 1799, c. 22, sec. 59, under which it is claimed, provides, "That there shall be an allowance of two per cent. for leakage on the quantity which shall appear by the gauge to be contained in any cask of liquors subject to duty by the gallon."

*At the time this law passed, brandy [*497 and sundry kinds of wine were subject to, a specific duty upon the gallon; but various other wines were charged with an *ad valorem* duty, not to exceed in amount a certain rate per gallon, specified in the law. And as the two per cent. deduction was made to depend on the character of the duty, and not upon the nature of the liquor imported, the brandy and wines which then paid a duty by the gallon, were entitled to it—but the wines which paid an *ad valorem* duty were not entitled. The right to the allowance did not depend upon the fact that the importation consisted of brandy or wines of a particular description, but upon the duty to which the article was subject. If it was charged by the gallon, this deduction was to be made, but otherwise if charged *ad valorem*. Afterwards, by the Act of May 18, 1800, the *ad valorem* duties, which were before charged on certain kinds of wine, were changed to specific duties; and all wines were charged with duty by the gallon. And from the passage of this Act until the Act of 1846, all importations of liquors of any description paid a specific duty. This will account for the usage in the custom house to allow the deduction on all liquors, as stated in the record. For, when the *ad valorem* duty on certain wines was changed to a duty by the gallon, these wines, like brandy and other wines, came within the provision in the Act of 1799, and consequently were entitled to the two per cent. deduction.

So, also, when the Act of 1846 changed the duty upon brandy from a specific one upon the gallon, to a duty *ad valorem*, it was no longer within the provision of the Act of 1799, and consequently no longer entitled to the deduction of two per cent. The provision in the Act of 1799 is not repealed; but brandy is not now within it, because it is not subject to a duty by the gallon.

It is said there is the same reason for allowing this deduction for loss by leakage, whether the duty is *ad valorem* or specific; and that it would be unjust to make any discrimination between them. But, without stopping to in-

quire whether this argument is well founded or not, or whether sufficient reasons may not be assigned for the difference, it is sufficient for the court to say, that the law makes the distinction. And it is not within the province of the Treasury Department or the court to decide upon the reasonableness or unreasonableness of the tariff which it is evident Congress intended to impose. The words of the law are plain. And since brandies do not pay a duty by the gallon, they are not entitled to the deduction of two per cent.

The judgment of the Circuit Court must therefore be reversed, with costs, and a mandate issued directing it to proceed to judgment upon the principles stated in this opinion.

498*] *ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of New York, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to award a *venire facias de novo*, and to proceed therein in conformity to the opinion of this court.

Cited—24 How., 526; 7 Wall., 127, 128; 2 Blatchf., 500, 510, 551; 3 Blatchf., 397; 10 Blatchf., 246, 534; 1 Cuit., 117; 4 Cliff., 100.

JUAN BAUTISTA JECKER, LUIS JECKER, THOMAS DE LA TORRE, GEIDERO DE LA TORRE, AND JOSE E. FERNANDEZ, Merchants, trading under the Name and Style of JECKER, TORRE & COMPANY, *Appellants*,

v.

JOHN B. MONTGOMERY.

AND JOHN B. MONTGOMERY, *Appellant*,

v.

JUAN BAUTISTA JECKER, LUIS JECKER, THOMAS DE LA TORRE, GEIDERO DE LA TORRE, AND JOSE E. FERNANDEZ, Merchants, trading under the Name and Style of JECKER, TORRE & COMPANY.

Prize Court—neither President nor inferior of fice can establish—When captor excused from sending into U. S. port, and for making sale at once—Subsequent proceedings for adjudication ordered—if no excuse appear or captor refuse or neglect to proceed, capture becomes trespass.

NOTE.—Commission of captors, when inquirable into. In war, domicile of owner determines character of goods, whether hostile or neutral. See note to *The Mary and Susan*, 1 Wheat., 46, and note to *The Frances*, 8 Cranch, 335.

Damages in case of illegal capture. See note to *The Amiable Nancy*, 3 Wheat., 546.

Prize taken in violation of neutrality. Salvage for neutral vessels, capture. See note to *The Star*, 3 Wheat., 87.

Seizures, when warranted. See note to *The Apollon*, 9 Wheat., 302.

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During the war with Mexico, the *Admittance*, an American vessel, was seized in a port of California, by the commander of a vessel of war of the United States, upon suspicion of trading with the enemy. She was condemned as a lawful prize by the chaplain belonging to one of the vessels of war upon that station, who had been authorized by the President of the United States to exercise admiralty jurisdiction in cases of capture.

The owners of the cargo filed a libel against the captain of the vessel of war, in the Admiralty Court for the District of Columbia. Being carried to the Circuit Court, it was decided:

1. That the condemnation in California was invalid as a defense for the captors.

2. That the answer of the captors, having averred sufficient probable cause for the seizure of the cargo, and the libelants having demurred to this answer, upon the ground that the District Court had no right to adjudicate, because the property had not been brought within its jurisdiction, the demurrer was overruled, and judgment was entered against the libelants.

The judgment of the Circuit Court, upon the first point, was correct, and upon the second point, erroneous.

The Prize Court established in California was not authorized by the laws of the United States or the laws of nations.

The grounds alleged for the seizure of the vessel and cargo in the answer, viz.: that the vessel sailed from New Orleans with the design of trading with the enemy, and did, in fact, hold illegal intercourse with them, are sufficient to subject both to condemnation, if they are supported by testimony.

And if they were liable to capture and condemnation, the reasons assigned in the answer for not bringing them into a port of the United States and libeling them for condemnation, viz.: that it was impossible do so consistently with the public interests, are sufficient, if supported by proof, to justify the captors in selling vessel and cargo in California, and to exempt them from damages on that account.

*The Admiralty Court in the district had [*499 jurisdiction of the case, and it was the duty of the court to order the captors to institute proceedings in that court, to condemn the property as prize, by a day to be named in the order; and in default thereof, to be proceeded against upon the libel for an unlawful seizure.

The Admiralty Court, in the District of Columbia, had jurisdiction of such a libel for condemnation, although the property was not brought within its jurisdiction; and, if they found it liable to condemnation, might proceed to condemn it, although it was not brought within the custody or control of the court.

The necessity of proceeding to condemn as prize, does not arise from any difference between the Instance Court and the Prize Court, as known in England. The same court here possesses the instance and prize jurisdiction. But because the property of the neutral is not divested by the capture, but by the condemnation in a prize court; and it is not divested until condemnation; although, when condemned, the condemnation relates back to the capture.

As this libel is for the restitution of the property or the proceeds, probable cause of seizure is no defense. It is a good defense against a claim for damages, when the property has been restored, or lost after seizure without the fault of the captor. But, while the property or proceeds is withheld by the captor, and claimed as prize, probable cause of seizure is no defense.

The Circuit Court, therefore, erred in deciding that probable cause of seizure was a good defense.

THESE were appeals from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington.

The facts are fully stated in the opinion of the court.

The cases were argued together by *Messrs. Coxe and Nelson* for Jecker, Torre & Company, and by *Messrs. Key and Johnson* for Captain Montgomery.

The arguments on both sides took a wide range, and it is impossible to insert the entire views of the case taken by the respective coun-

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2d. The following are given as those bearing upon what appears to be the principal points:

The arguments were divided into two heads:

1st. The ground of defense taken in the answer of the respondent, that the property had been carried into the port of Monterey, a town in California, then occupied by the American forces, within the limits of Mexico, and there had been regularly proceeded against and condemned as prize of war, by a court exercising at that place admiralty jurisdiction.

The libelants demurred to this plea or defense, and both the District and Circuit Courts sustained the demurrer; and from this decision the respondent appealed. The arguments of the counsel upon this branch of the case, although of an interesting character, are omitted for want of room.

The second demurrer was also to a part of the answer, and was as follows:

"The libelants, as to so much of the answer of the respondent, filed in this case, as alleges and sets up any act or thing on the part of the captain and crew of the said ship Admittance, or any of omission or commission of any sort [500*] or kind, as a justification *of the said seizure of said ship or her cargo as lawful prize of war, or which might amount to probable cause of said seizure, demurs to the same; and for cause of demurrer avers and says, that this court in this cause has no rightful jurisdiction or authority to examine or adjudicate upon any question of prize, or of probable cause of capture as prize of war, but that the same belongs exclusively to the courts of the United States exercising prize jurisdiction, and having within its jurisdiction and control the property so seized or captured as prize, which this court has not; and in consequence of the tortious and illegal acts of said respondent, as alleged and set forth in said libel, cannot have.

Wherefore, and for other causes, these libelants do demur to so much of said answer as is above set forth.

"COXE, Advocate and Proctor for Libelants."

This demurrer was also sustained by the District Court, but the judgment was reversed by the Circuit Court, and from this decision the libelants appealed.

Upon this point the argument of the counsel for the libelants was as follows:

The respondent, however, insists that he has in this action a right to show—

1. An actual and sufficient case of prize of war, as a bar to the remedy asked in the libel.

2. Probable cause of seizure, as a bar to the action.

1st. This is a civil suit to recover back property originally belonging to libelants, of which they have been forcibly divested by defendants, under whose authority it has been sold and converted into money. Can the party in such a suit aver legal cause of capture and condemnation as prize without producing a valid decree of condemnation as prize by a court of competent jurisdiction?

If he can, then this singular anomaly and most dangerous precedent will be exhibited, that a captor may disregard the injunctions of the law, and his own paramount duty; omit to bring his prize into court; to institute prize proceedings; but may retain the property in his own hands, or at his pleasure convert it into

money; and when called upon to answer in a civil suit, set up as a defense an original cause of condemnation.

It will scarcely be doubted that the jurisdiction of the Prize Courts, in cases of prize, is exclusive. The nature and extent of this jurisdiction, as it exists in England, are distinctively given by Lord Mansfield in *Lindo v. Rodney*, Dougl., 618. (1 Kent, 858; Conkl., 354; Dunl. Ad. Pr., 26; 12 Wheat., 1, 11.) In every respect it differs from the ordinary Court of Admiralty. "The manner of proceeding is totally different, the whole system of litigation [*501 and jurisprudence in the Prize Court is peculiar to itself; it is no more like the Court of Admiralty than it is to any court in Westminster Hall." See particularly the language of Lord Mansfield, p. 616.

The claimant of the property cannot himself institute prize proceedings. They must always be had in the name of the government, to whom all prizes *prima facie* belong. The only remedy the captured has is by monition, a proceeding *in personam* to compel the captors to perform their duty.

The ordinary Court of Admiralty has no more authority to condemn a prize than a court of common law; and should the doctrine asserted for this defendant prevail, these singular results must inevitably follow—

1st. The captors can never acquire any legal right to the property, unless by a decree of a prize court. This is, throughout, recognized in *Home v. Camden*, in 1 H. Bl., 476; 4 T. R., 382; and especially in 2 H. Bl., 541, 542, in the unanimous opinion of the twelve judges.

2d. The United States can assert no right, for its right depends also upon a sentence of condemnation, which alone can divest the former title.

3d. The original proprietor is forbidden by this doctrine from asserting his title.

The only party in whom the law recognizes a title, is forbidden to assert it, and the government and the sub-officers and crew of the capturing vessel, have no rights cognizable in a court. This property, therefore, on this doctrine, must remain in the hands of the present defendant, subject to no responsibility.

The only mode of avoiding these absurd consequences is to enforce the law as above stated. (2 Wheat., Appx., 9.) When a ship is captured, it is the duty of the captors to send her into some convenient port for adjudication. Citing *The Huldah*, and other cases; *The Mentor*, 1 Rob., 151; *The Susanna*, 6 Rob., 48.

In *The Madonna del Burso*, 4 Rob., 171, Sir W. Scott says: "However justifiable the seizure may have been, the first obligation which the seizer has to discharge, is that of accounting why he did not institute proceedings against the vessel and cargo immediately; and unless he can exculpate himself with respect to delay in this matter, he is guilty of no inconsiderable breach of duty. It would be highly injurious to the commerce of other countries, and disgraceful to the jurisprudence of this, if any persons, commissioned or non-commissioned, could lay their hands upon valuable ships and cargoes in our harbors, and keep their hands upon them without bringing such an act to judicial notice in any manner for the space of three or four months."

502*] ***A belligerent nation which is in the exercise of these rights of war, is bound to find tribunals for the regulation of them; tribunals clear in their authority, as well as pure in their administration; and if from causes of private internal policy, arising out of the peculiar relation of the component parts of the belligerent State, difficulties arise, the neutral is not to be prejudiced on that account; he has a right to speedy and unobstructed justice, and has nothing to do with such difficulties created by questions of domestic constitution." (*Id.*, 177.)

This view furnishes an answer to the suggestion of the necessity of creating and resorting to such a court as was erected in California. So, in page 147, will be found an equally decisive answer to the suggestion of counsel, that the master of the Admittance appeared before the Alcalde at Monterey. These libelants were not present, nor had the captain any authority to represent them; and he, as Sir W. Scott says, "only followed where he was led."

In the case of *The St. Juan Baptista*, 5 Rob., 33, the prize was brought into England on the 12th of August, and proceedings were instituted on the 12th September, and the court held that it was bound to require a satisfactory cause for this delay. "Grievous," says Sir W. Scott, "would be the injury to neutral trade, and highly disgraceful to the honor of our country, if captors could bring in ships at their own fancy, and detain them any length of time without bringing the matter to the cognizance of a court of justice. In the present instance this first and fundamental duty has not been performed." "Persons venturing to take out a commission of war must instruct themselves in their own duty, and if any inconvenience arises from their neglect, the neutral claimant is not to suffer." In the case at bar, no prize proceedings have to this day been instituted; this fundamental duty, as Sir W. Scott calls it, has been wholly neglected. The property has never been brought within the United States—another fundamental duty. The papers and documents on board have never been transmitted to any district court, a peremptory requisition of the law is thus disregarded. It is intimated they are in the possession of the Navy Department. How did the captors procure them from the pseudo court at Monterey, and under what authority are they lodged in the Navy Department? The property no longer remains specifically; it has been converted into money, and no prize court can now proceed to adjudication.

In *The Wilhelmsberg*, 5 Rob., 143, the same learned judge, observing upon the duty of the captor to send his prize to some convenient port, says that "in that consideration the convenience of the claimant, in proceeding to ad-
503*] judication, is (among) *one of the first things to which the attention of the captor ought to be addressed." "He considered that the port selected in that case was not such a port, a place where the captor cannot get advice, much less can the claimant learn in what manner to proceed, or where to resort for justice."

If such was the character of that port, what shall be said of Monterey, a place not within the jurisdiction of any court of the United

States? A port of the very enemy with whom we were at war; occupied, it is true, so far as their guns could reach, by an American force; where no tribunal existed which could direct its process, or exercise jurisdiction; no judge responsible for the performance of judicial function; where the protecting arm and supervising power of the Circuit Court or Supreme Court could not reach; where no counsel could be found competent to give correct advice. How infinitely further from the shadow of right than in the case of *The Wilhelmsberg*, already cited, or that of *The Lively*, 1 Gall., 315, where the court condemned the captor for carrying the property captured in the neighborhood of Machias River, to Salem. *The Lively* was a case in which the claimants had filed a libel for restitution, as here, and in which a motion to proceed to adjudication issued against the captors, who accordingly libeled the property as prize. It was not attempted there, as here, to bar the relief sought in the Instance Court by setting up a lawful cause for condemnation as prize of war, or a probable cause to justify the seizure. Before that learned court no such ground of defense would be offered or admitted. There it was the well-known law, that the Prize Court could only alone adjudicate upon these questions.

Had the captured property been brought within the jurisdiction of the District Court, having power to proceed as in a prize case, and such proceedings had been commenced, the claimant might have proceeded by petition in that court to compel the captors to proceed to adjudication. Such was the course in the case of *The William*, 4 Rob., 214. When, however, the property is beyond the jurisdiction of the Prize Court, so that no prize jurisdiction can be exercised, then a motion issues from the instance side of the court, proceeding personally against the captors, commanding them to perform the duty enjoined on them by law, or to restore the property.

It must be borne in mind, that in this case no claim is presented for vindictive damages; the captor is not sought to be molested for his acts of wrong, or for his omission to perform a duty. The simple demand is, that, having seized our property: having failed to perform the fundamental duty imposed on him by law; having failed to show his right to capture; having omitted to permit us to assert our rights and maintain our innocence in the *only court having jurisdiction to do [**504** cide the question of prize, he shall restore the property specifically; or if he has put it out of his power by any means of doing this, then that he shall respond in value. Our proceeding is more nearly assimilated to the common law actions of trover or replevin than of trespass. The issue presented is simply of a right to property. If the property belongs to libelants, they are entitled to a decree of restitution; if that property has been devastated, and the right now belongs to the defendant, he is entitled to judgment.

This conclusion cannot be avoided by adopting a principle asserted by the learned counsel for the respondent, viz.: that condemnation as prize is not necessary to vest the title to the property captured, in the captors. He asserts that a forfeiture attaches *in rem*, when the of-

fense is committed, and the property is instantly devastated.

(The counsel then proceeded to comment upon this position, and concluded as follows.)

If in this proceeding, the question of prize cannot be raised, or decided; if the court cannot proceed to condemn, and therefore will not permit defendant, collaterally and incidentally, to avail himself of such a ground of defense, as little ground is there for the analogous defense upon which the circuit court seems to have rested that portion of the decree from which we have appealed, viz.: that the pleadings disclose a case of probable cause of capture which justified the seizure and bars this action.

This point, it is believed, was not argued in the court below, but was gratuitously taken by the learned judges themselves, the chief judge not sitting in the cause.

It is apprehended, that in deciding this to be a bar to the action, the whole principle of the law as to probable cause has been lost sight of. Probable cause is recognized as a justifiable ground of seizure, either as prize *jure belli*, or for a statute forfeiture. In the first class of cases, where the capture has been made as prize of war, the general principles of the law of nations provides this defense; where made for an alleged forfeiture under a statute, such protection must be conferred by statute, or it is not available. But whether in the one case or the other, these principles are believed to be incontrovertible and universal.

1. The question of probable cause belongs exclusively to the court which has jurisdiction to condemn or to decree forfeiture.

2. It can be adjudged in that court only in a proceeding to obtain condemnation.

3. Only in such court, after a decree refusing condemnation and directing restitution.

505*] *4. The only legal operation of a certificate of probable cause is to bar a recovery of damages for an unlawful seizure.

The general principles which govern cases of this character are embodied in our statute book. (1 Stat. at Large, 696, 123.) The 89th sec. of the Act of March 2, 1799, provides for cases of seizures under the collection laws, and enacts that "when any prosecution shall be commenced on account of the seizure of any ship or vessel, goods, &c., and judgment shall be given for the claimant or claimants; if it shall appear to the court before whom such prosecution shall be tried, that there was a reasonable cause of seizure, the said court shall cause a proper certificate or entry to be made thereof; and in such case, the claimant or claimants shall not be entitled to costs, nor shall the person who made the seizure, or the prosecutor, be liable to action, suit or judgment, on account of such seizure and prosecution." Similar provisions may be found in other statutes inflicting forfeitures.

The Act of June 26, 1812 (2 Stat. at Large, 750, c. 107), concerning letters of marque, prizes, and prize goods, in its 6th section, provides "that before breaking bulk of any vessel which shall be captured as aforesaid, or other disposal or conversion thereof, or of any article which shall be found on board the same, such captured vessel, goods or effects, shall be brought into some port of the United States,

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and shall be proceeded against before a competent tribunal; and after condemnation and forfeiture thereof, shall belong to the owners and captors thereof, and be distributed as aforesaid; and in the case of all captured vessels, goods and effects, which shall be brought within the jurisdiction of the United States, the District Courts of the United States shall have exclusive original jurisdiction thereof, as in civil cases of admiralty and maritime jurisdiction; and the said courts, or the courts being courts of the United States, into which said cases shall be removed, and in which they shall be finally decided, shall and may decree restitution in whole or in part, when the capture shall have been made without just cause; and if made without probable cause, or otherwise unreasonable, may order and decree damages and costs to the party injured."

These provisions embody the correct doctrine of the law relating to probable cause; and it is confidently asserted that no case can be produced in which even a certificate of probable cause, given by a court exercising exclusive jurisdiction, was ever thought to present a bar to a claim for restitution of property.

The argument of the counsel for the respondent, viz.: the competency of the court in California, is omitted.

Upon the question presented by the second demurrer, viz.: "Can the respondent [*506] defend himself in this suit by the matters and things stated in his answer?" a part of the argument of the counsel was as follows:

It is contended, by the learned counsel for the libelants, that the respondent cannot defend himself in this suit by showing any "act or thing on the part of the captain or crew of the ship Admittance; or any act of omission or commission of any sort or kind as a justification of the said seizure of said ship or her cargo, as lawful prize of war, or which might amount to probable cause for said seizure, etc."

It is thought this position cannot be maintained; it indicates a fear upon the part of the libelants, themselves admitted wrong-doers, to meet the respondent upon fair ground, the merits of the case. They ask for heavy damages, and at the same time admit that they accrued by reason of their own illegal acts.

What is there in the nature of this suit that should exclude the defense set up by the respondent? What is the injury complained of? It is, as stated in the libel, that the respondent, "without any lawful cause or probable cause of suspicion," seized and took possession of the ship Admittance, her cargo, and papers, and that the same were not brought nor sent within the jurisdiction of any court of the United States for adjudication; and that the libelants "have been, for more than a twelvemonth, deprived of the use, possession, management, and control of the said property;" and that the same has been "illegally sold and disposed of." The remedy pursued, is a proceeding instituted to compel the respondent to bring in the property, and proceed to adjudication, or in default thereof, that restitution in value should be decreed against him. It is a very common proceeding in the admiralty courts, and by looking into its nature and object, it will be perceived that the defense contended for is necessarily granted. It will be found that the mere fail-

ure of a captor to proceed to adjudication, is not enough to entitle a claimant to restitution in value, but that the court will look back to the original cause of seizure, and if the claimant has violated any law which rendered his property liable to condemnation, restitution in value will not be decreed.

Various authorities are cited to show that the distinction between the prize and instance side of the district courts, as courts of admiralty, has an important bearing on this question.

It is stated, in the argument of the learned counsel, that "this is a suit instituted on the instance side of the admiralty for an alleged marine trespass," and also, "that it is not a suit for damages." I would ask what is a decree of restitution in value, but a decree of damages for a marine trespass? And is the respondent, merely because the proceedings are instituted 507*] on the "instance side of the admiralty, to be ousted of his defense, and not to be permitted to show that no trespass was committed.

What is a tort of which a court of admiralty has jurisdiction? (*Vide* Conkling's United States Admiralty, p. 21, where Judge Story enumerates the different injuries redressed by a court of admiralty; see, also, p. 334, 336, note a.) The passages referred to describe the various injuries for which legal redress can be obtained, and point out the particular remedies; and yet there is nothing like a claim for damages because the property was not condemned; but they refer to the legality or illegality of the seizure; and in the last reference it is said, "if no proceeding is instituted, as is sometimes the case when the captor himself has become convinced of the invalidity of the capture, or the captured property has been lost by recapture or otherwise, the injured party may, in such case, himself become the primary actor, by calling on the captor to proceed to adjudication, and at the same time invoking the justice of the court to award damages, if the capture shall be adjudged to have been tortious;" not because the captor had not proceeded to adjudication.

In Wheaton on Captures, p. 280, sec. 18, the same redress is pointed out. "If the captors omit or delay to proceed to the adjudication of the property, any person claiming an interest in the captured property may maintain a motion against them, citing them to proceed to adjudication; which, if they do not do, or show cause why the property should be condemned, it will be restored to the claimants proving an interest therein; and this process is often resorted to when the property is lost or destroyed through the fault or negligence of the captors, in order to obtain a compensation in damages for the unjust seizure and detention."

In 2 Wheat., App., p. 11, it is said: "If the captors unjustifiably neglect to proceed to adjudication, the court will, in case of restitution, decree demurrage against them," and cites *The Madonna del Burso*, 4 Rob., 169; *The Corrier Maratimo*, 1 Rob., 287; *The Peacock*, 4 Rob., 185; *The Anna Catherina*, 6 Rob., 10.

Hence, whenever a restitution in value is decreed, it is upon the ground that there would have been a restitution of the property valued, and no case cited by the learned counsel controverts this position.

(The counsel then proceeded to comment

upon the following cases: *The Lucy*, 3 Rob., 208; *The Huldah*, 3 Rob., 235; *The Madonna del Burso*, 4 Rob., 169; *The St. Juan Baptista*, 5 Rob., 33; *The Wilhelmsberg*, 5 Rob., 143; *The Lively*, 1 Gallison, 315; *The Felicity*, 2 Dodson, 381; *The Rover*, 2 Gallison, 239.)

Various Acts of Congress have been referred to, to show that it is the duty of a captor to bring in captured property, and proceed to adjudication. *This general principle, [*508 it has been before stated, is admitted. It is not contended, in behalf of respondent, that a captor may, at his pleasure, under any circumstances, disregard the injunctions of the law, omit to bring his prize into court, convert it into money, and retain it in his own hands. The maintenance of such principles is not necessary to his defense in this suit.

But I would ask, is a veil to be thrown over the conduct of the libelants or their agents? Is the fact to be kept out of view, that the master of the Admittance sailed from New Orleans with the intent to trade with the enemy, and did in fact trade with the enemy? Will this court aid an unworthy claimant? "It is a good moral and legal principle, that a man must come into a court of justice with clean hands, and that the law will not lend its aid to a person setting up a violation of law on the face of his claim." (Wheat. on Captures, 225.)

The Anna Maria, 2 Wheat., 328. Chief Justice Marshall says: "To sustain the claim of the libelants, the first point to be established is the fairness of the voyage."

The Gran Para, 7 Wheat., 483. "A claim founded on piracy, or any other act, which, in the general estimation of mankind, is held to be illegal or immoral, might, I presume, be rejected in any court on that ground alone." And is not the present claim founded on an illegal act? The demurrer admits the illegal act, and yet the claim is for restitution.

The Bello Corrunes, 8 Wheat., 169. "But can a citizen of this country, who has violated its laws, ever be recognized in our courts as a legal claimant of the fruits of his own wrong?"

It will be perceived, by referring to the answer of the respondent, and the amendment to the answer, that the seizure may be justified on two grounds: first, a trading with the enemy; and, second, that it was the property of the enemy. (*The Rugen*, 1 Wheat., 74.) It is important, in the view now about to be taken, to ascertain the national character of the libelants. The libel states they were neutrals, some of them subjects of the Queen of Spain, and the others subjects of France. This is denied by the answer, which avers that they were resident merchants of Mexico, conducting there a commercial establishment—a fact beyond dispute. "If a person has a residence in a hostile country, and conducts a commercial establishment there, notwithstanding his place of birth, he will be considered as an enemy in regard to his commercial operations." (1 Kent, 74, 75.)

Then the libelants must be considered as beligerents, and this must be taken as admitted by the demurrer.

Was condemnation necessary to divest the libelants of the property?

*In *Gelston v. Hoyt*, 3 Wheat., it [*509 was decided that a forfeiture attached in rem

at the moment the offense was committed, and the property was instantly devastated, so that no action could be maintained for the subsequent seizure. This, it is said, was a case of a statute forfeiture, and has no analogy to the question under consideration; but it is submitted that it has an important bearing, inasmuch as it shows that whatever may be the subsequent conduct of a captor, an action cannot be maintained against him.

The Mars, 1 Gallison, 192.¹ In this case it will be found, that upon principles of common law the following propositions were discussed by Judge Story:

1. What is the interest or right which attaches to the government in forfeitures of property, before any act done to vindicate its claims?

2. What is the operation of such act, done to vindicate its claim, as to the offender and as to strangers?

And the conclusions he arrived at were—

1st. "That an absolute property vested in the United States when actual seizure was made."

2d. "That, as against the offender or his representatives, upon seizure, the title, by operation of law, relates back to the time of the offense, so as to avoid all mesne acts."

Then, upon the authority of this case, it is submitted that the libelants were absolutely devastated of their property upon the commission of the offense. A captor may destroy property. (1 Kent, 104.) "Sometimes circumstances will not permit property captured at sea to be sent into port, and the captors in such cases may either destroy it or permit the original owner to ransom it."

There are decisions to the effect that it requires a sentence of condemnation to change the property, but this applies to a neutral purchaser; as in the case of *The Flad Oyen*, 1 Rob., 117, the substance of which decision was, that the owner could have restitution of his property from a neutral vendee, unless it had been condemned to the captors; and the reason of this is obvious, the neutral purchaser can only take that which his condition of neutrality permits him to take; and when he takes the property without condemnation from the captors, he occupies the position of a captor, which is inconsistent with his neutrality.

In *Goss v. Withers*, 2 Burr., 694, Lord Mansfield says, "the property is not changed so as 510*] to bar the owner, in favor of a vendee, or recaptor, till there has been a sentence of condemnation," intimating that it is changed without condemnation so as to bar the owner in a claim against the captor.

In 1 Kent, 101, it is said: "When a prize is taken at sea, it must be brought with due care into some convenient port for adjudication by a competent court; though strictly speaking, as between the belligerent parties, the title passes and is vested when the capture is complete; and this question never arises but between the original owner and a neutral purchasing from the captor, and between the original owner and a recaptor."

The Adventure, 8 Cranch, 226. The Adventure was an English ship, seized by the French.

1.—This case more particularly applies to the first ground of seizure—"trading with the enemy."

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The French captors made a donation of her to the crew of an American brig, who brought her into Norfolk, and claimed her as their property, acquired by the donation of the captors. *Mr. Justice Johnson*, in delivering the opinion of this court, says: "As between the belligerents, the capture undoubtedly produces a complete devastation of property."

Admitting the principle supposed to be decided in the case of *Price v. Noble*, 4 Taunt., 123, to be correct, that the property was not changed, because there was a *spes recuperandi*, it would not affect this case, the property having been brought *infra presidia*; and this may be also observed of the reference to 15 Vin. Abr., 51.

In the case of *Camden v. Home*, 6 Bro. P.C., 2 H. B., the statute expressly vested the right in the captor after adjudication.

On these grounds it is submitted that condemnation was not necessary to devastate the libelants of their property.

It is urged, in behalf of the libelants, that the government has asserted and can assert no rights here; and if the defense is held available, it will place the "whole proceeds of this valuable cargo in the pocket of the respondent." What will or will not go into the pocket of the respondent, is a question not pertinent to the issues presented by the record; but, it may be observed, that one half of the property in question, if lawful prize, belongs to the government; and upon the institution of this suit it asserted its rights so far as to employ counsel for the respondent.

By directions from the Navy Department, the proceeds of the sale of the ship and cargo were not distributed, but were sent into the United States, and placed in the Treasury, where they now are, a circumstance which, it is believed, was known to the libelants; and if they had thought proper to institute proceedings calling on the respondent to bring in the proceeds, they would have been forthcoming. The property has not been "illegally [*511 or unjustifiably" converted, and under the authority of the case of *The Eole*, 6 Rob., 224, the proceeds are entitled to the privilege of prize property, and subject to the judgment of the court.

There is not a single circumstance connected with this seizure which can justify the imputation of misconduct. For reasons, which were conclusive in the mind of the respondent, he directed an officer to board and seize the Admittance. Upon the examination of her papers, it was at once seen that his reasons were well founded. The deceptive clearance, the erasures upon the bills of lading, the false entries in the log book, the position of the ship on the coast of Mexico when she had cleared for Honolulu, were all circumstances indicating guilt. The subsequent testimony of the mate of the Admittance, that she had been sailing under false colors, answering private signals given from various points on the shore, receiving and answering written communications, her name on the stern concealed with canvas, the captain expressly avowing his intention of discharging his cargo at some port or place in possession of the enemy, and expressing a fear of falling in with an American man-of-war, affords the most conclusive evi-

dence, that to have acted otherwise, the respondent would have been justly chargeable with a violation of his duty.

The condition of the ship, the want of stores, and his inability to furnish a prize crew, rendered it impossible to send her into any port of the United States: a state of things which had been contemplated by the instructions he received from his superior in command. He therefore proceeded to Monterey, and libeled the ship in the aforementioned court, which he had every reason to believe was a competent tribunal. The papers of the Admittance were then filed, and finally transmitted to the Navy Department, copies of which have been furnished the counsel of the libelants, and they are referred to and make a part of the respondent's answer.

There are two grounds, either of which, if it is competent for this court to consider, as the case is presented, must be conclusive against the libelants.

1st. What authority have the libelants to appear and claim an interest in the cargo? They were belligerents. The libel states that the cargo "was purchased by order of Messrs. Rubio, Brothers & Co., subjects of the Queen of Spain; the bills of lading were made out in their name, and were subsequently indorsed and transferred to the libelants;" that "the cargo was shipped at New Orleans in October, 1846." The answer avers that Messrs. Rubio, Brothers & Co. were also belligerents; a fact which cannot be denied. Then, how could **512*** they acquire property "by a purchase at New Orleans during the war? Was a right of property ever vested in either Rubio, Brothers & Co. or the libelants? (*Vide* 1 Kent, 67, and the authorities there cited.)

2d. Does not the intervention of peace bar the claimants. "Captured property remains in the same condition in which the treaty finds it, and it is tacitly conceded to the possessor. The intervention of peace cures all defects of title." (1 Kent, ch. 5. 111; ch. 8. 169.)

The Schooner Sophie, 6 Rob., 138. Sir William Scott says: "I am of opinion that the title of the former owner is completely barred by the intervention of peace, which has the effect of quieting all titles of possession arising from the war," and this was decided in a cause where the captured vessel claimed had not been condemned.

Upon these views, the respondent prays that so much of the judgment of the Circuit Court as sustains the first demurrer, may be reversed, and that the residue of said judgment may be affirmed with costs.

Mr. Chief Justice Taney delivered the opinion of the court:

This case arises upon the capture of the ship Admittance during the late war with Mexico, by the United States sloop of war Portsmouth, commanded by Captain Montgomery.

The Admittance was an American vessel, and after war was declared, sailed from New Orleans, with a valuable cargo, shipped at that place. She cleared out for Honolulu, in the Sandwich Islands; and was found by the Portsmouth at Saint Jose on the coast of California, trading, as it is alleged, with the enemy.

Before this capture was made, a prize court had been established at Monterey, in California, by the military officer, exercising the functions of Governor of that province, which had been taken possession of by the American forces. A chaplain, belonging to one of the ships of war on that station, was appointed Alcalde of Monterey, and authorized to exercise admiralty jurisdiction in cases of capture. The court was established at the request of Commodore Biddle, the naval commander on that station, and sanctioned by the President of the United States, upon the ground that prize crews could not be spared from the squadron to bring captured vessels into a port of the United States. And the officers of the squadron were ordered to carry their prizes to Monterey, and libel them for condemnation in the court above mentioned, instead of sending them to the United States.

In pursuance of this order the Admittance was carried to Monterey, and condemned by the court as lawful prize; and the vessel and cargo sold under this sentence. The seizure at Saint Jose was made on the 7th of ***513** April, 1847, and the ship and cargo condemned on the 1st of June, in the same year.

The order of the President, authorizing the establishment of the court, required that the proceeds, arising from the sale of prizes, should not be distributed, until a copy of the record was sent to the Navy Department, and orders in relation to the prize money received from the Secretary. No order appears to have been given in this case, and it would be presumed, from the pleadings, that it is still in the custody of the commander of the Portsmouth. It has, however, been stated in the argument, and we understand is admitted, that the money was sent to the United States, and placed in the custody of the Treasury Department, where it still remains. But it is not material in this case to inquire, whether it is still in possession of Captain Montgomery, or in the custody of the Secretary of the Treasury. It could not, in either case, affect the decision. This is the case as it appears on the record, and admissions in the argument. It comes before the court on the following pleadings:

The claimants, on the 6th of June, 1848, filed a libel in the Admiralty Court for the District of Columbia, against the captor, stating that they were the owners of the cargo of the Admittance; that they were subjects of Spain, and neutrals in the war between this country and Mexico; that the Admittance sailed on a lawful voyage; that the vessel and cargo were seized at Saint Jose by Captain Montgomery as prize of war, without any lawful or probable cause; that the vessel and cargo were not brought to the United States, nor proceeded against as prize of war in any court having jurisdiction to adjudicate upon the lawfulness of the capture; but were unlawfully sold and disposed of by Captain Montgomery, who thereby had put it out of his power to proceed to any lawful adjudication upon the legality of the capture, and had thus made himself a trespasser *ab initio*, independently of any lawful or probable cause for the original seizure. They pray, therefore, that he may be compelled to bring the cargo within the jurisdiction of the court, or of some other court of the United States, and in-

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stitute proceedings against the property, and show that there was lawful or probable cause for the seizure, and have the same adjudicated upon by some court of the United States having full jurisdiction in the matter; and that restitution of the goods or the value thereof may be awarded to the libelants, with damages for the unlawful seizure.

Captain Montgomery appeared and answered, and admitted that, as commander of the United States ship Portsmouth, he seized and took the Admittance at Saint Jose as lawful prize; and justifies the seizure upon the ground that [514*] she sailed from *New Orleans with the design of trading with the enemy; that she did in fact hold illegal intercourse with them, and discharged a part of her cargo at Saint Jose. And the respondent exhibits with his answer, and as a part of it, sundry papers received from Peter Peterson, the master of the Admittance, together with her log-book and the deposition of her mate.

The respondent further states that it was impossible for him, consistently with the public interest, to send the Admittance to any port of the United States; and that he carried her before the Prize Court hereinbefore mentioned, at Monterey, where she was condemned with her cargo as lawful prize; and exhibits the proceedings of that court as a part of his answer, and relies on this condemnation as a bar to the present proceedings on behalf of the claimants.

To this answer the libelants put in two demurrers.

1. To so much of the answer as relies upon the condemnation at Monterey as a bar.

2. To so much of the answer as relies upon the acts of the captain and crew of the Admittance as a justification for the seizure of the ship or cargo as lawful prize of war, or furnishing probable cause for seizure; and as the ground for this demurrer, avers that the Admiralty Court for the District of Columbia had no jurisdiction to adjudicate upon the question of prizes or probable cause of seizure, as the property was not within its control, and could not be brought within it in consequence of the sale in California. The respondent joined in these demurrers.

After these issues in law had been joined, the respondent, by leave of the court, amended his answer, averring in the amendment that the libelants, at the time of the shipment at New Orleans and at the time of the seizure, were domiciled in Mexico and conducting a commercial establishment in that country; and also, that the libelants were the owners of only a small portion of the cargo. But there is no replication to this amendment, nor is it embraced in the issues of law made by the demurrers. The omission to dispose of it, however, forms no objection to this appeal, as the judgment of the Circuit Court was final, and disposed of the whole case, independently of these new allegations.

In this state of the pleadings, a decree was entered in the District Court sustaining both of the demurrers, and directing the respondent to bring the cargo within the jurisdiction of some District Court of the United States, and institute proceedings against it as a prize of war, on or before the day mentioned in the decree; and

that in default thereof the libelants should recover its value.

This decree was entered *pro forma* in order to bring the case *before the Circuit [*515] Court, to which the respondent accordingly appealed. And upon the argument in the last-mentioned court, the first demurrer was sustained, and the decree of the District Court in that respect affirmed; but so much of the decree as sustained the demurrer to the answer of the respondent, averring sufficient probable cause for the seizure of the cargo, was reversed, and a final decree upon that ground rendered against the libelants.

From this decree both parties have appealed to this court.

In relation to the proceedings in the court at Monterey which is the subject of the first demurrer, the decision of the Circuit Court is correct.

All captures *jure belli* are for the benefit of the sovereign under whose authority they are made; and the validity of the seizure and the question of prize or no prize can be determined in his own courts only, upon which he has conferred jurisdiction to try the question. And under the Constitution of the United States the judicial power of the general government is vested in one Supreme Court, and in such inferior courts as Congress shall from time to time ordain and establish. Every court of the United States, therefore, must derive its jurisdiction and judicial authority from the Constitution or the laws of the United States. And neither the President nor any military officer can establish a court in a conquered country, and authorize it to decide upon the rights of the United States, or of individuals in prize cases, nor to administer the laws of nations.

The courts, established or sanctioned in Mexico during the war by the commanders of the American forces, were nothing more than the agents of the military power, to assist it in preserving order in the conquered territory, and to protect the inhabitants in their persons and property while it was occupied by the American arms. They were subject to the military power, and their decisions under its control, whenever the commanding officer thought proper to interfere. They were not courts of the United States, and had no right to adjudicate upon a question of prize or no prize. And the sentence of condemnation in the court at Monterey is a nullity, and can have no effect upon the rights of any party.

The second demurrer denies the authority of the District Court to adjudicate, because the property had not been brought within its jurisdiction. But that proposition cannot be maintained; and a Prize Court, when a proper case is made for its interposition, will proceed to adjudicate and condemn the captured property or award restitution, although it is not actually in the control of the court. It may always proceed *in rem* whenever the prize or proceeds of the prize can be traced to the hands of any person whatever.

*As a general rule, it is the duty of [*516] the captor to bring it within the jurisdiction of a Prize Court of the nation to which he belongs, and to institute proceedings to have it condemned. This is required by the Act of Congress in cases of capture by ships of war of the

United States; and this Act merely enforces the performance of a duty imposed upon the captor by the law of nations, which in all civilized countries secures to the captured a trial in a court of competent jurisdiction before he can finally be deprived of his property.

But there are cases where, from existing circumstances, the captor may be excused from the performance of this duty, and may sell or otherwise dispose of the property before condemnation. And where the commander of a national ship cannot, without weakening inconveniently the force under his command, spare a sufficient prize crew to man the captured vessel; or where the orders of his government prohibit him from doing so, he may lawfully sell or otherwise dispose of the captured property in a foreign country; and may afterwards proceed to adjudication in a court of the United States. (4 Cr., 293; 7 *Id.*, 423; 2 Gall., 368; 2 Wheat., App., 11, 16; 1 Kent's Com., 359; 6 Rob., 133, 194, 229, 257.)

But if no sufficient cause is shown to justify the sale, and the conduct of the captor has been unjust and oppressive, the court may refuse to adjudicate upon the validity of the capture and award restitution and damages against the captor; although the seizure as prize was originally lawful, or made upon probable cause.

And the same rule prevails where the sale was justifiable, and the captor has delayed, for an unreasonable time, to institute proceedings to condemn it. Upon a libel filed by the captured, as for a marine trespass, the court will refuse to award a monition to proceed to adjudication on the question of prize or no prize, but will treat the captor as a wrong-doer from the beginning.

But in the case before us, sufficient cause for capture and condemnation is stated in the answer; and the reason assigned therein is a full justification for not sending the Admittance and her cargo to the United States. And as to the delay, he had reasonable ground for believing that no further proceedings were necessary after the condemnation at Monterey. The court had been constituted with the sanction of the Executive Department of the government, under whose orders he was acting; and it had condemned the vessel and cargo as prize, and ordered them to be sold. And if, as seems to be conceded in the argument, the proceeds were paid over to the government to await its further orders, and still remains in its hands, certainly no laches or neglect of duty in any respect can be imputed to the respondent.

§17*] *Inasmuch, therefore, as the answer alleges a sufficient cause for selling the property before condemnation, and also for not proceeding against it in a court of competent jurisdiction, the respondent has forfeited none of the rights which he acquired by the capture. And, as the District Court had jurisdiction, the second demurrer ought to have been overruled, and an order passed directing Captain Montgomery to institute proceedings by a certain day to condemn the property (giving him reasonable time); and that upon his failure to comply with the order, the court should proceed on the libel filed against him for a marine trespass, and award such damages as the

libelants might show themselves entitled to demand.

The necessity of proceeding to condemnation as prize, does not arise from any distinction between the Instance Court of Admiralty and the Prize Court. In England, they are different courts; and although the jurisdiction of each of them is always exercised by the same person, yet he holds the offices by different commissions. But, under the Constitution of the United States, the Instance Court of Admiralty and the Prize Court of Admiralty are the same court, acting under one commission. Still, however, the property cannot be condemned as prize, upon this libel; nor would its dismissal be equivalent to a condemnation, nor recognized as such in foreign courts. The libelants allege that the goods were neutral, and not liable to capture; and their right to them cannot be divested until there is a sentence of condemnation against them as prize of war. And, as that sentence cannot be pronounced in the present form of the proceeding, it becomes necessary to proceed in the prize jurisdiction of the court, where the property may be condemned or acquitted by the sentence of the court, and the whole controversy be finally settled. (4 Cr., 241; *Rose v. Himely*, 2 Wheat. App., 41, 42; 1 Kent's Com., 101, 102; 6 Rob., 48; 3 *Id.*, 192; 2 Gall., 368; 2 *Id.*, 240.)

But the Circuit Court erred in giving final judgment against the libelants, upon the ground that the answer showed probable grounds for the seizure. The question of probable cause is not presented in the present stage of the proceedings, and cannot arise until the validity of the capture is determined. If it turn out, upon the final hearing upon the question of prize or no prize, that the vessel and cargo were liable to capture and condemnation, it would necessarily follow that there was not only probable cause, but good and sufficient cause, for the seizure. And if, on the contrary, it should be found that they were not liable to capture, as prize of war, the libelants would be entitled to restitution, or the value in damages, although the strongest probabilities appeared against them at the time of the seizure. Probable cause or not becomes material only where restitution is awarded, and *the **[518]** libelants claim additional damages for the injury and expenses sustained from the seizure and detention. It applies only to these additional damages; and however strong the grounds of suspicion may have been, it is no bar to restitution, if the claimant can show that the goods which he claims belonged to him, were neutral, and that nothing had been done that subjected them to capture and condemnation.

The judgment of the Circuit Court must therefore be reversed, and a mandate awarded, directing the case to be remanded to the District Court, to be there proceeded in according to the rules and principles stated in this opinion.

The appeal on the part of the respondent is dismissed. The decision upon the matter in controversy was in his favor, and the question of law decided against him on the first demurrer, was open for argument upon the appeal of the libelants. There was no ground, therefore, for this appeal.

Order in Jecker et al. v. Montgomery.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, for further proceedings to be had therein in conformity to the opinion of this court.

Order in Montgomery v. Jecker et al.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that this cause be, and the same is hereby dismissed, with costs.

Rev'g 1 Curt., 286.

S. C., 18 How., 111.

Cited—18 How., 111, 124; 20 How., 328; 5 Wall., 69, 408; 9 Wall., 133; Blatchf. Pr., 8, 90, 121, 127, 143, 173, 231; 1 Curt., 289, 273.

THE STATE OF PENNSYLVANIA, Com-
plainant,

v.

THE WHEELING AND BELMONT
BRIDGE COMPANY, WILLIAM OT-
TERSON, AND GEORGE CROFT.

Ohio River is a public highway—Virginia law authorizing bridge across the Ohio at Wheeling, without a draw, unconstitutional—bridge is a nuisance, being an obstruction to navigation—injunction granted for its removal or elevation.

The State of Pennsylvania having constructed lines of canal and railroad, and other means of travel and transportation, which would be injured in their revenues by the obstruction in the River Ohio, created by a bridge at Wheeling, has a sufficiently direct interest to sustain an application to this court, in the exercise of original jurisdiction, for an injunction to remove the obstruction. The remedy at law would be incomplete.

It is admitted that the federal courts have no jurisdiction of common law offenses, and that there is no abstract, pervading principle, of the common law of the Union under which this court can take jurisdiction; and that the case under consideration is subject to the same rules of action as if the suit had been commenced in the Circuit Court for the District of Virginia.

But chancery jurisdiction is conferred on the courts of the United States by the Constitution, under certain limitations; and, under these limitations, the usages of the High Court of Chancery, in England, which have been adopted as rules by this court, furnish the chancery law which is exercised in all the States, and even in those where no state chancery system exists.

Under this system, where relief can be given by the English chancery, similar relief may be given by the courts of the Union.

NOTE.—When an injunction will be granted against a nuisance. See note to *Irwin v. Dixon*, 9 How., 10.

Legislation authorizing bridges upon navigable rivers. The extent and effect of the decision of this case, explained *Silliman v. Hudson Riv. Br. Co.*, 4 Blatchf., 365.

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An indictment against a bridge, as a nuisance, by the United States, could not be sustained; but a proceeding against it, on the ground of a private and irreparable injury, may be sustained, at the instance of an individual or a corporation, either in the Federal or State Courts.

In case of nuisance, if the obstruction be unlawful and the injury irreparable, by a suit at common law, the injured party may claim the extraordinary protection of a court of chancery.

The Ohio is a navigable stream, subject to the commercial power of Congress, which has been exercised over it; and, if the Act of Virginia authorized the structure of the bridge, so as to obstruct navigation, it would afford no justification to the Bridge Company.

Congress has sanctioned the compact made between Virginia and Kentucky, viz.: "That the use and navigation of the River Ohio, so far as the Territory of Virginia or Kentucky is concerned, shall be free and common to the citizens of the United States." This compact is obligatory, and can be carried out by this court.

Where there is a private injury from a public nuisance, a court of equity will interfere by injunction.

In this case, the bridge is a nuisance. This is shown by measuring the height of the bridge, and of the water, and of the chimneys of the boats. The report of the commissioner, appointed by this court to ascertain these facts, is equivalent to the verdict of the jury.

The report of the commissioner adverted to and commented upon; the extent of injury sustained by the boats explained; and the importance shown of maintaining the navigation of the river.

If a structure be declared to be a nuisance, there is no room for a calculation and comparison between the injuries and benefits which it produces.

Therefore, unless there be an elevation of the lowest parts of the bridge for three hundred feet over the channel of the river—not less than one hundred and eleven feet from the low water mark, the flooring of the bridge descending from the termini of the elevation at the rate of four feet in the hundred—or some other plan shall be adopted which shall relieve the navigation from obstruction, on or before the first of February next—the bridge must be abated.

(In consequence of the intimation above alluded to, viz.: "that some other plan might be adopted" than elevating the bridge, the court, at the request of the counsel for the Bridge Company, referred the matter to an engineer. After receiving his report, the court decided as follows):

The Bridge Company may, upon their own responsibility, try whether the western channel can be improved and made passable, by means of a draw, so as to afford a safe and unobstructed navigation for the largest class of boats, having chimneys eighty feet high, when they cannot pass under the suspension bridge. This is to be done, if at all, before the first Monday of February next, on which day the plaintiff may move the court on the subject of the decree.

THIS was a case upon the equity side of this court, in the exercise of original jurisdiction.

It is noticed in 9 Howard, 647, and again in 11 Howard, 528.

In 9 Howard, a statement is given of the contents of the bill *and answer, and of [*520 the proceedings in the case, up to the time of its reference to a commissioner, for the purpose of taking further proofs upon the points therein stated. The reader is referred to that volume for these proceedings.

In that report it is mentioned that a notice of the arguments of counsel was deferred until the final decision of the case.

That final decision having taken place at this term, it is proper now to note as briefly as possible the grounds assumed by the respective counsel.

The points made and authorities cited by the counsel for the plaintiff, were the following, viz.:

1. That the Ohio River is a public highway

of commerce, which, under the Constitution of the United States, has been regulated by Congress. (Journal of Congress, Vol. IV., 637, 638; Ordinance of 1787, art. 4; Act of Congress admitting Kentucky, 1 Stat. at Large, 189; Virginia Act of Assembly, 18 Dec., 1789, Rev. Code, 1819, 57; Acts of Congress for enrolling and licensing ships or vessels to be employed in the coasting trade, and for regulating the same, 1 Stat. at Large, 305; Act of Congress authorizing duties to be paid at ports on the Ohio, 4 Stat. at Large, 480; Act of Congress to improve the navigation of the Ohio River, 4 Stat. at Large, 32; Acts of Congress providing for inspection, &c., of steamboats, 5 Stat. at Large, 304; Committee Report No. 672, in the House of Representatives, 24th Congress; Report No. 993, 25th Congress, on a bridge at Wheeling; Report No. 79, 28th Congress, 1st session, on a bridge at Wheeling; Pennsylvania Resolutions, Vol. XXIX., Pa. Laws, 487, on a bridge at Wheeling; Pennsylvania Resolutions, Vol. XXXI., Pa. Laws, 591, on the Wheeling Bridge; 42 Ohio Laws, 269; *Green v. Biddle*, 8 Wheat, 1; Gordon's Digest, 15, 27, 176, 191, 325, 343, 428; 2 Madison Papers, 599, 602, 606, 614, 623, 627, 677; Resolutions of General Assembly of Virginia, November, 1786; Resolution offered by delegates from North Carolina, in Congress, September, 1788, relative to the navigation of the Mississippi, Journal of Congress, 1788; Resolution of Congress, on the same subject, September, 1788, Journal of Congress, 1788; 2 Madison Papers, 678; Act providing for sale of Public Land, 1 Stat. at Large, 464, sec. 6; Lyman's American Diplomacy, 300, 303, 310, 311, 315; Report on Commerce and Navigation, December 31, 1849.)

2. That free navigation of the Ohio River, as a common highway, having been established by regulations of Congress, and by compact between the states, it cannot lawfully be obstructed by force of any state authority or legislation. (Constitution of the United States, art. 1, sec. 8, clauses 2, 4, 17; sec. 9, clause 5; §21*] *sec. 10, clause 2; art. 6, 1st clause; *Gibbons v. Ogden*, 9 Wheat., 1; *Brown v. State of Maryland*, 12 Wheaton, 419; *Wilson v. Black Bird Creek Marsh Co.*, 2 Peters, 245; *Charles River Bridge v. Warren Bridge*, 11 Peters, 540, 542, 604; *Norris v. Boston*, 7 Howard's United States Rep., 283; *Groves v. Slaughter*, 15 Peters, 506; *Houston v. Moore*, 5 Wheaton, 22; *Worcester v. Georgia*, 6 Peters, 515; *Spooner v. McConnell*, 1 McLean's Rep., 359; *United States v. New Bedford Bridge*, 1 Wood. & M., 401, and authorities there cited; *Corfield v. Coryell*, 4 Wash. C. C., 379; *Holmes v. Jennison*, 14 Pet., 540; *Livingston v. North R. S. B. Co.*, 3 Cow., 713.)

3. That inasmuch as the Wheeling Bridge has been found by the commissioner's report to be an obstruction to the free navigation of the Ohio River, it is a public nuisance that may be abated by a court of equity on complaint of an injured party. (Hargrave's Tract, *De Jure Maris*, 9, 22, 35, 87; 3 Thomas's Co. Lit., 4; 2 Story's Equity, secs. 920, 921, 924; Eden on Injunctions, 157, 158, 160, 161, 222, 228; Drewry on Injunctions, 237, 240, 249, 294; *City of Georgetown v. Alexandria Canal Co.*, 12 Peters, 91; *Blakemore v. Glumorganshire Canal*

Co., 1 Myl. & Keen, 164; 1 McLean, 359; 8 McLean, 226; 1 Wood. & M., 401; Shelford on Railways, 428, 445, and cases there cited; *Robinson v. Lord Byron*, 1 Bro. C. C., 588; *Lane v. Newdigate*, 10 Vesey, 192; *Spencer v. London and Birmingham Railway Co.*, 1 Railway C., 170; *Attorney-General v. Manchester Railway*, 1 Railway C., 436; *North of England Railway v. Clarence Railway*, 1 Coll. C. C., 521; Angell on Water-courses, 201, 208, 209, 213; *Attorney-General v. Burrigge*, 10 Price, 350; *Attorney-General v. Parmeter*, Id., 378; *Attorney-General v. Johnson*, 2 Wils. Ch. R., 87; *Attorney-General v. Forbes*, 2 Myl. & Craig, 123; *Attorney-General v. The Cohoes Co.*, 6 Paige, Ch., 133; *Spencer v. The Railway Co.*, 8 Simons, 193; *Corning v. Lloverre*, 6 Johns. Ch., 439; *Boston Water Power Co. v. Boston & W. Railroad*, 16 Pick., 525; *Barrow v. Richards*, 8 Paige, Ch., 351; *Livingston v. Mayor of New York*, 8 Wend., 99; *Bush v. Warren*, Prec. Ch., 530; 2 Story's Equity, p. 252; 2 Ans., 603; 2 Starkie's Rep., 448; United States Const., arts. 8, sec. 1, 2; Walford on Railways, 408; Shelford on Railways, 430; 1 Railway Cases, 68, 576; 2 Railway Cases, 380; 2 Younge & Coll., 611; *Attorney-General v. Utica Ins. Co.*, 2 Johns. Ch. Rep., 379; 1 Baldwin, 205; 1 Swanston, 250; 1 Mylne & Keen, 164; 8 Howard's United States Rep., 229; *Pennsylvania v. Wheeling Bridge*, before Judge Grier, Pamphlet Reports.)

4. That for an injury to a state, she may maintain a suit in a court of competent jurisdiction. (*King of France v. Morris*, *3 §522 Yeates, 251; *King of Spain v. Oliver*, Peters's C. C. R., 276; *Nabob of The Carnatic v. East India Co.*, 1 Ves., Jr., 382; *Don Diego v. Jolyfe*, Hobart, 86; *Colombian Government v. Rothschild*, 1 Sim., 94; *Duke of Brunswick v. King of Hanover*, 6 Beav., 1; Story's Equity Pl., sec. 55; *Rhode Island v. Massachusetts*, 12 Pet., 720; 4 How., 592; Vattel, book 3, chap. 6, secs. 22, 23, 49, 50, 60, 65, 71; Wheaton's International Law, 81, 82; Lieber's Political Ethics, 2, 5, 48, book 2, 196; Whewell's Elements, 2, 5, 849; *Mayor of New Orleans v. The United States*, 10 Peters, 672; *New Jersey v. Wilson*, 7 Cranch, 164; United States Constitution, art. 3.)

5. That the equitable powers of the Supreme Court of the United States are adequate to grant relief against a public nuisance, and where a state is a party to the suit, that court has original jurisdiction. (United States Const., art. 3, secs. 1, 2; *City of Georgetown v. Alexandria Canal*, 12 Peters, 91; Story's Commentaries, 570; Federalist, No. 80; *Osborn v. Bank of United States*, 9 Wheaton, 839; *Bank of United States v. Planters' Bank*, 9 Wheat., 904.)

The following extract contains the views of Mr. Stanton, one of the counsel for the complainant:

It is my design to present, as briefly as I can, the grounds on which the State of Pennsylvania prosecutes this suit and claims relief of this court. That purpose will be served by the discussion of a single proposition which will embrace all the points made, viz.:

That the Ohio River is a highway of commerce leading to and from the ports of Pennsylvania, regulated by Congress; unlawfully obstructed by the Wheeling Bridge, to the

injury of the State of Pennsylvania; and therefore that the bridge ought to be abated by decree of this court at her suit.

The first branch of this proposition, that the Ohio River is a highway of commerce, will not be disputed; for it is a geographical and statistical fact recognized by every department of the government of which this court would take judicial notice; and by their answer the defendants admit that this highway is navigated in steamboats by citizens of the State of Pennsylvania, and connects with her ports. The boundary of six states, its waters draining a large territory of four other states, flowing in a southwest direction from the Alleghany Mountains to the Mississippi, presenting to the navigator a broad and placid stream one thousand miles in length, more free from dangers and obstructions than any other navigable river in the world, it is apparent that the regulation [523*] of this river would claim the "earnest attention of statesmen. Accordingly we find that when the possession of this river and the territory through which it flowed had been secured by independence and peace with Great Britain, the sagacious statesmen of that day speedily turned their attention to the regulation of the western rivers, and the commerce they foresaw must soon flow along their course.

On the 12th day of May, 1786, on the motion of Mr. Grayson, of Virginia, the following resolution was adopted:

"Resolved, That the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, be, and they are hereby declared to be common highways; and be forever free, as well to the inhabitants of said territory as to the citizens of the United States and those of any other states that may be admitted into the confederation, without any tax, impost, or duty therefor." (Journal of Congress, 1786, p. 687.)

Soon after this, all questions as to the title of the territory northwest of the Ohio being secured by compromise and cession of the claims of the several States, an ordinance for its regulation was adopted by Congress. This was the ordinance of 13th July, 1787, since become so famous in connection with another question. The 4th article, last clause, of this ordinance, contains a regulation in the same words as the resolution of Mr. Grayson. A similar condition has been imposed on the admission into the Union of every state bordering upon these waters. It is denied by the defendants that Virginia assented to this provision of the ordinance. But this can make no difference, for it is nevertheless a regulation of commerce by Congress, as has been decided by this court (3 How. 229), and at all events it overthrows the authority claimed by these defendants under the legislation of Ohio.

In 1789, Virginia, being in possession of a large territory northeast of the Ohio, now constituting the State of Kentucky, desired to have it admitted into the Union as a separate and independent state. For this purpose, her General Assembly, on the 18th December, 1789, passed an Act providing for its erection as an independent state upon certain terms and conditions, among which were the following:

"That the use and navigation of the River Ohio, so far the territory of the proposed state, or

the territory that shall remain within the limits of this Commonwealth lies thereon, shall be free and common to the citizens of the United States." (Virginia Rev. Code, 1818, p. 59.)

To this Act the assent of Congress was given (1 Stat. at Large, 64), and it became a compact between Virginia and the "other states" [524*] of the Union. Freedom being thus established by Congress and the concurrent action of Virginia, as the regulation of the river channel, its commerce was still further regulated by the Act of Congress of 1807, attaching the Ohio River to the collection district of Mississippi, and appointing surveyors for the ports of Pittsburgh, Marietta, Cincinnati, and Louisville. (1 Stat. at Large, 464.)

The growing commerce of this region in 1824 received further attention from the general government by a large appropriation to improve the navigation of the Ohio River; and from that period until now annual appropriations have been made to improve its navigation and remove obstructions. This commerce being carried on by steamboats, the regulation of these vessels, in 1838, received the attention of Congress. The Act of 7th of July, 1838, provided specially for their license and enrollment, for the appointment of an inspector of their boilers, engines and machinery, prescribing the duties of the officers, and enforcing severe penalties in case of injury to persons or property. (5 Stat. at Large, 804.)

Thus it appears that the constitutional power of Congress to regulate commerce on the Ohio River, belonging exclusively to that branch of the general government, has been fully exercised upon every subject susceptible of regulation. This power has been exerted upon the channel, and whatever passes through it—upon the stream and upon its bed, upon the vessel, its navigator, and whatever it transports, upon its engine, machinery, cargo, passengers, officers and crew; nay, that it has extended to the very subject now under consideration; and that Congress, by express and repeated action, has prohibited the erection of a bridge at Wheeling. I shall proceed now to show.

In 1836, petitions to Congress praying for the construction of a bridge at Wheeling were laid before that body. They were backed by resolutions of the State of Ohio instructing her senators and requesting her representatives to use their exertions to obtain that object. Accompanying them were statements and representations of similar import to the grounds now urged in favor of the Wheeling bridge. The importance of such structure as a link connecting the disjointed fragments of the Cumberland Road; the great advantage to commerce, and to the general government in the time of war, of such facility for crossing the Ohio River; the obstructions of ice and driftwood and the evils of the ferry; the inconvenience of delay in transporting the mails; all these were held up in bold relief, and represented in glowing and exaggerated colors. With the petitions were presented various communications from Mr. Ellet, the engineer by [525*] whom this bridge has been erected, urging the necessity and practicability of the undertaking, and presenting plans for its accomplishment. A favorable report was procured from the Committee on Roads and Canals, which undertook

to answer the objection urged against bridging the Ohio. From this report it appears that the main, and indeed the only important objection was that now insisted on by the State of Pennsylvania; the obstruction which such an erection would be likely to occasion to steamboats. In answer to this objection it was insisted then, as now, that high chimneys were unnecessary; and that the few boats likely to be obstructed might, with proper machinery, accommodate themselves to the exigency, and that their convenience should yield to the public benefits of a bridge. But Congress thought otherwise, and the plan was rejected. (House Reports, 1st sess. 24th Cong., No. 132.)

At the next session of the same Congress the subject was again brought forward; the same plan proposed; the same views presented; the same arguments urged. The project was again opposed in Congress on the ground of its injury to navigation, and as is evident from the committee's report, was on that ground alone defeated. (House Reports, 2d sess. 24th Cong., 672.)

Still insisting upon a bridge at Wheeling, the 25th Congress had the subject presented in a report of the Committee on Roads and Canals, on the 27th of June, 1838. In the meantime an exploration and survey had been made, under the direction of the War Department, by Messrs. Sanders and Dutton, two skillful and distinguished engineers in the government service. They presented a plan for a suspension bridge across the Ohio River, having for its basis a strict regard to the rights of navigation, and providing that no obstruction should be offered to the passage of the highest steamboat chimney on the highest floods. Their plan proposed a space of five hundred feet in width and the height of the highest chimney then known; and in order to provide for any change or improvement in steamboats, the floor of the bridge was to be movable so as to allow the passage of boats. (Report of Messrs. Sanders and Dutton, House Documents, 25th Congress, June, 1838, No. 993.) The cost was estimated at \$400,000. A plan by Mr. Ellet was also submitted for a bridge, the same elevation, seven hundred feet in width. But the same objections being urged, were found to be insuperable, and the plan was rejected.

It is further to be remarked that among the documents of this session was a surrender by the City of Wheeling of its streets for the purposes of a bridge, and by Zane of any portion [526*] of the island for purposes of embankment. And yet an excuse now given for not erecting the bridge higher is the alleged damage to the streets, and the amount Zane would charge for embankment on the island, which is set down at the moderate estimate of \$20,000. These rights were then freely granted for the bridge; and it was not until a later day that the cheap expedient was resorted to of saving private property by the encroachment on public rights on a navigable river.

In December, 1843, another series of resolutions was procured from the Ohio Legislature; and armed therewith, those interested in making Wheeling the head of navigation, again appeared before Congress. But Pennsylvania had become awakened to her interests, and the danger becoming imminent, she instructed her

senators and representatives to oppose the erection of the proposed bridge across the Ohio. Her resolutions pointed to the specific objections now urged: The obstruction to the free use of the Ohio River; the injury to commerce, trade, and manufactures, building of ships, war steamers, and other vessels, by placing a barrier in the passage to the Gulf; the interfering with steamboats, in high water, trading with the Western and Southern States; and claimed the use of the Ohio River as a great thoroughfare. They were in these words:

"Whereas, application has been made to Congress of the United States for an appropriation to aid in the erection of a bridge across the Ohio River at Wheeling, Virginia, the construction of which might materially obstruct the free use and navigation of said river above that point, and injuriously affect the commerce of the City of Pittsburgh and all that district of Pennsylvania lying west of the Alleghany Mountains, by arresting the building of war steamers and other vessels of the great western manufacturing and commercial emporium of this State, by placing a barrier to their passage to the Gulf of Mexico, besides seriously interfering with the free navigation of the Ohio River by steamboats and other vessels engaged in the trade of the Western and Southern States during high stages of water: Therefore,

"Resolved, by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, That our Senators in Congress are hereby instructed, and our Representatives requested, to vote against any appropriation by the national Legislature to the object above stated, and oppose every proposition for the erection of a bridge at Wheeling or at any other point on the Ohio River, or any project that would result in increasing the obstacles already existing to the free navigation and use of that great thoroughfare of this Commonwealth.

"Resolved, That the Governor be [*527 requested to transmit a copy of the foregoing preamble and resolution to each member of the Pennsylvania delegation in Congress.

JAMES ROSS SNOWDEN,

Speaker of the House of Rep.

WILLIAM BIGLER,

Speaker of the Senate.

Approved 26th January, 1844.

DAVID R. PORTER."

These resolutions were immediately laid before Congress, and referred in the House to the Committee on Roads and Canals, on which was Mr. Steenrod, a member from Wheeling. (House Doc., 28th Cong., No. 79.)

Here, then, the question was brought before Congress in the most solemn and imposing form. Two sovereign States appeared at the bar of Congress, one urging and the other opposing the bridge.

At this crisis a bill had already been reported by that committee making an appropriation for a bridge at Wheeling, and containing this clause, "that the bridge shall be so constructed as to admit at all times, without obstruction or delay, of the safe and easy passage of steamboats of the largest dimensions."

On the twenty-ninth day of January Mr. Steenrod presented a report, not contesting the rights of Pennsylvania, nor the injury she

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must suffer from an obstruction at Wheeling, but claiming that a bridge could be erected across the Ohio, at Wheeling, without obstructing the use and navigation of the river according to the provisions of the bill. With this report was submitted a plan by Mr. Ellet for such a bridge, stating that he had, since the date of his former plan, examined the localities, and "would recommend a radical change of plan for the Wheeling Bridge, and leave the river entirely unobstructed." (House Rep., 28th Cong., No. 79.)

It appears, moreover, that the plan proposed was in some respects similar to that afterwards adopted and executed by the same engineer. It was a single span across the river, at an elevation of ninety feet above low water. But it was not then disclosed that such elevation was to be only for one hundred feet in width; that the channel was to be cut across by an inclined plane so as to obstruct a public navigable river. The specific objection was then urged as now, that ninety feet above low water would not admit the passage of steamboats with tall chimneys. It was then answered as it is now, that such height was unnecessary, that few boats only used such chimneys; that they ought to be provided with hinges and machinery for lowering; that detention would be only for a short space; that the river was impassable by 528* reason of ice; that the mails *were delayed, and in short, every possible argument that has been, or can be presented in favor of this bridge was, in a report by the member from that district, pressed upon Congress. It was all to no purpose. The rights of Pennsylvania, and her interests of navigation, were deemed paramount, and the constitutional obligation to preserve the Ohio River as a free and common highway was held to be inviolable.

Now, the regulation of commerce consists as much in negative as positive action. (*Mr. Justice McLean, Passenger Cases, 7 Howard, 289.*)

Supposing, therefore, the Ohio River to be exclusively within the Territory of Virginia, on both banks, and from its head to its mouth, and that she might authorize bridges over it, yet that power is subordinate to the constitutional authority of Congress over commerce. And if Congress, in the exercise of its power, has manifested a negative policy hostile to bridges over the Ohio, any conflicting exercise of state authority would be void. And yet, in their answer, this hostile policy of Congress is the confessed motive for procuring their charter from the State of Virginia. Nay, more, its purpose is admitted to be that which the power granted to Congress by the 3d clause, 8th article of the Constitution, was especially intended to prevent, the acquisition by states, for their citizens, of commercial advantages by separate legislation.

"The addition of territory and of settlement on the Pacific Ocean, and the increasing population and commerce of that coast, have recently given new importance to the subject; the change in federal policy and legislation as to bridges and other works of internal improvement has made it incumbent upon the States, by separate legislation, to consult and promote their own and the general welfare and prosperity." (Original Answer, p. 24.)

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The defendants' allusion to the Pacific settlements and commerce is of deep significance, and indicates the result to be expected, if states may thwart and override the constitutional provision, and by separate legislation consult their own and the general welfare. It has been well remarked, that in such event the Constitution would be a rope of sand.

It is manifest, therefore, that the only constitutional power that could in any event authorize this bridge, had been invoked and that by its negative action, potentially as by express enactment, this structure was prohibited.

Commerce, on the Ohio, being thus regulated by Congress, and that regulation including all the subjects of navigation, its vehicle, and those engaged in its management, it follows that any act or erection, in any way affecting the subjects thus regulated, whether by individuals or State governments, is unlawful. *In the great case of *Gibbons v. Ogden*, [529 9 Wheaton, 1, this court decided that the power to regulate commerce included navigation, and when exercised by that body, any conflicting state regulation, no matter for what purpose or extent, adopted was void. In the subsequent case of *Wilson v. The Black Bird Creek Marsh Company*, 2 Peters, 245, it was held that any exercise of this power by Congress excluded and controlled all state action.

Subsequent cases have illustrated these principles, applying them to all action, direct or indirect, of individuals or states interfering with congressional regulations of foreign and domestic commerce. In the passenger cases, *Norris v. Boston*, and *Smith v. Turner*, Pamph. Rep., p. 85, Chief Justice Taney remarks: "It has always been admitted, in the discussion upon this clause of the Constitution, art. 8, sec. 8, that the power to regulate commerce includes navigation and ships and crews, because they are the ordinary means of commercial intercourse." In the same cases, *Mr. Justice Daniel* observes: "The power to regulate commerce includes the regulation of the vessel as well as the cargo, and the manner of using the vessel in that commerce." (*Id.*, p. 131.)

In those cases the following propositions were among others maintained:

"That the power to regulate commerce, foreign and between the States, was vested exclusively in Congress." (*Mr. Justice McLean, 7 Howard, 400.*)

"That the power in Congress to regulate commerce with foreign nations, and among the several States, includes navigation upon the high seas, and in the bays, harbors, lakes and navigable waters within the United States, and any law by a state, in any way affecting the right of navigation, or subjecting the exercise of the right to a condition, is contrary to the aforesaid grant." (*Mr. Justice Wayne, Id.*, 414.)

"That Congress has regulated commerce, and intercourse with foreign nations, and between the several States, by willing that it shall be free; and it is, therefore, not left to the direction of each state in the Union, either to refuse a right of passage to persons or property through her territory or to exact a duty for permission to exercise it." (*Mr. Justice Catron and Mr. Justice Grier, Id.*, 464.)

The principle of these decisions has been illustrated and enforced by a long series of cases, cited in the brief, and to which it is sufficient for me to refer. (See cases cited in brief.) Hence it follows that the bridge, erected by the defendants over the channel of the Ohio River, if it obstructs, interferes with or in anywise regulates navigation, is an unlawful obstruction, no **530*** matter by what charter or state enactments it may be authorized or sanctioned. I proceed to demonstrate that it does obstruct navigation, and conflicts with every regulation prescribed by Congress for that river.

At Wheeling, the channel between Zane's Island and the main Virginia shore is one thousand and ten feet wide. Through this strait, fifty millions in value of property, and over three hundred thousand passengers are accustomed to pass safely and without impediment, in steamboats to and from Pittsburg. Through it, the rice, cotton and sugar of the Southern States; the bacon, flour, tobacco, and various products of the Western States; the furs, peltries, minerals, and products of the Northwestern region are transported to an Eastern market; and by the same channel foreign and domestic merchandise and manufactures find their way to their millions of consumers in that vast region. Baffled in the project of diverting this commerce from Pittsburg, by making Wheeling the head of navigation, under the sanction of Congress, resort was had to state authority, where Pennsylvania had no voice, and where her remonstrance could not be heard.

On the 19th of March, 1847, a charter for the erection of a wire suspension bridge was obtained from the General Assembly of Virginia, under color of which, but in violation of the most important of its express provisions, the defendants proceeded to erect their bridge in the manner represented in the diagram now exhibited to the court.

An inspection of that diagram exhibits the fact that the only material variation between the bridge erected, and that proposed to and rejected by Congress, in 1844, consists in a particular, whereby nine hundred feet of the river channel is wholly cut off for purposes of navigation. When the engineer, by whom this structure was erected, proposed to throw a single span across the channel, ninety feet above low water, no one could have imagined that elevation applied to only one hundred feet in width of the water's surface; and that by an inclined plane stretching across the channel the residue was to be cut off. And yet such is this erection. The highest point in the bridge above low water level is ninety-two feet one and a half inches: from that point it deflects four feet in every hundred, being at the western abutment only sixty-two feet above that level. Taking the highest point as a center of the highest space, one hundred feet wide, it is at its extremities only ninety feet above water.

This elevation, moreover, is above the low water level of the Ohio, viz.: eighteen inches in the channel. But this level exists, for a short season only, of the year; the height of water **531*** varying forty five feet between the extremes of high and low water mark. The tables in the record exhibit the height of water at Wheeling, each day, for the period of the last ten years. From them we gather—

1st. That the usual spring and fall floods, in March and December, attain the height of thirty-eight feet.

2d. That floods, ranging from twenty to thirty-eight feet, have occurred in the months of January, February, March, April, May, June, July, November and December, nine several months in the year.

3d. That the duration of these floods varies from two to ten days.

Regard to those facts has always been deemed of vital importance in the consideration of bridging navigable waters. Thus the wire suspension bridge over the Menai Straits, swings clear one hundred feet above high water; the Tweed Bridge is the same elevation; the Freyburg Bridge spans the channel at an elevation of one hundred and twenty-seven feet above high water (Sanders' Report); and on a late occasion of erecting a railway bridge over the Menai Straits, the Lords of Admiralty required the structure to be one hundred feet above high water, the whole width (2,800 feet) of the channel. Quarterly Review, October, 1849. Stern adherence to this requisition led to the most brilliant achievement of science since the days of Sir Isaac Newton. While the Conway Tubular Bridge will stand as a monument of genius, overcoming natural obstacles to accommodate navigation, the Wheeling bridge hangs an obstruction to navigation, copied, by its engineer, from the miserable expedient of a South American Indian, its original inventor.

With utter disregard to the principles of science and the exigencies of commerce, low water level is taken as the basis of elevation for the Wheeling Bridge, and upon usual floods only a space one hundred feet in width by fifty in height is allowed for the passage of vessels ascending and descending the Ohio River—through that space the commerce of the most navigable river in the world is compelled to stoop and dodge in high floods.

The extent of departure from the principles of art, the engagements of the parties, and the obligations of law, will be seen in the following considerations:

1st. It is an ordinary wire suspension bridge, which, over a channel like the Ohio, is condemned by one of the most distinguished engineers of this country, whose opinion, from his official employment as superintendent of the improvements of navigation on the Western waters, is entitled to great weight.

"I have no hesitation in giving the opinion that ordinary wire suspension bridges **532** are not well adapted to the bridging of the Ohio; and in view of the excessive ranges, from extreme low to extreme high water, ranging as they do, from thirty-five to sixty-five feet at different points, I am persuaded that none but truss frame bridges, with suitable draws at one or both extremities, or at suitable intermediate points, are properly adapted to bridging the Ohio. Hence, I am decidedly of opinion that wire suspension bridges are neither expedient nor applicable in bridging the Ohio, or any other of the main navigable rivers of the West, liable as they all are to excessive changes in the elevation of their surfaces and the depth of their floods." (Col. Long's Deposition, pp. 139, 140.)

2d. It is an inclined plane thrown across a

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swift stream of ever-varying surface, the current setting west towards the lowest point of the bridge, rocks fringing the highest point on the east, with nothing to mark the depth below, or the space above the surface, no two points at the same level, and nothing to guide the navigator in the perils that thus beset him. This inclined plane is placed so low as on spring floods to leave a clear headway of only fifty feet by one hundred in a natural channel one thousand and ten feet wide, over the whole of which vessels have hitherto been accustomed at all hours, in all weather, to pass safely, but where now the obscurity of fog and darkness, the force of the current, or accident in the complicated machinery of a steamboat, expose it to shipwreck.

3d. It not only forbids all advance or improvement in the size and dimensions of vessels, but forces them back ten years, making the dimensions of the Louisville Bridge and the condition imposed by the falls of the Ohio, the standard of steamboat architecture and navigation.

That in these respects, also, such a bridge is against all example and rule, I shall now proceed to show, by the highest authority in the science of engineering.

"Among the considerations that should be held up to view, in throwing bridges across the Ohio, it may be stated that the bridge shall offer no serious obstruction to the navigation of the river, by steamboats or other craft, according to existing peculiarities of such boats or craft, and to sound considerations of probable improvement in the size and character of such boats and craft." (Col. J. J. Abert, Chief of Top. Bureau, Record, p. 124.)

"In selecting a plan for a bridge over the east branch (of the Ohio at Wheeling), full regard must be had to the interests of the navigation of the Ohio, which require that the bridge should offer no obstruction to the passage of steamboats or other craft, which run or may hereafter navigate that river." (Report 533*) on *Wheeling Bridge to the War Dept. by Lieuts. Sanders and Dutton, House Rep., 25th Cong., 1 Sess., No. 908.)

"The bridge shall be so constructed as to admit, at all times, without obstruction or delay, of the safe and easy passage of steamboats of the largest dimensions." (Bill making an appropriation for a bridge at Wheeling; reported by the Committee on Roads and Canals; House Report, 28th Cong., 1st Session, No. 79.)

Telford's Wire Suspension Bridge, over the Menai Straits, leaves a clear level waterway five hundred feet wide. The Freyburg Bridge leaves a clear waterway eight hundred feet wide. (Ellet's Letter, House Rep., 24th Cong., No. 672.)

The English Lords of Admiralty required the Conway Bridge to give a clear waterway one hundred feet above high water over the whole width of the channel, 2,800 feet. (Oct. Quarterly Review, 1849, p. 218.) In his first plan for a bridge at Wheeling, submitted to Congress, Mr. Ellet proposed a clear waterway 700 feet wide. (House Rep., 24th Cong., No. 672.) In his last plan, he proposed a clear waterway over the whole width of the channel, and to leave the river entirely unobstructed. (Ellet's Letter, Dec. 29, 1848, House Rep., 28th Congress, 1st. Session, No. 79.)

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Influenced, doubtless, by these rules and examples, the Virginia Legislature provided in the charter of this bridge:

"If the said bridge, mentioned in the eighth section of this Act, shall be so erected as to obstruct the navigation of the Ohio River, in the usual manner of such steamboats and other crafts as are now commonly accustomed to navigate the same, when the river shall be as high as the highest floods heretofore known, then, unless, upon such obstruction being found to exist, such obstruction shall be immediately removed or remedied, the said last-mentioned bridge may be treated as a public nuisance, and abated accordingly."

When this charter was accepted the defendants and their engineer thereby admitted the propriety of its requisitions, and engaged to comply with them. It was a part of their contract, with which they were bound to comply. (*Agar v. Regent's Canal, Coop.*, 77; *Blackmore v. Glamorganshire Canal*, 1 Myl. & K., 164.) In total disregard of all this, the defendants have erected their bridge on the novel plan of their engineer—undertaking to divide inconveniences with commerce on a public river, imposing expense, danger and delay; razeing its vessels and averaging its floods.

"It is fair to make a division of these inconveniences, and I would therefore provide for a passage of fifty feet, and a flood of thirty-five; and if occasion should require it, allow one or two *of these boats to lie by for a few [*534 hours." (Ellet's Letter, House Reports, 28th Congress, No. 79, p. 4.)

Vessels navigating the Ohio are propelled by the agency of wind or steam, and with the dimensions of the bridge or channel thus ascertained, it remains only to examine the result upon these vessels.

At a single glance it is apparent that ships and sea-going vessels, requiring, as they do, over twelve feet draught and ninety feet above the water, are wholly excluded from navigating the Ohio above Wheeling. By the evidence, it is shown that from the port of Pittsburgh ships have been cleared for foreign ports, laden with domestic products. Revenue and war vessels have been constructed there for the general government, and a large and prosperous business in ship building and naval architecture is springing up. The bridge at Wheeling necessarily involves the total destruction of this business, and the exclusion of such vessels and their commerce from the ports of Pennsylvania. Upon steam vessels the exclusion operates with but little less injury.

The diagrams now exhibited to the court represent the figure and dimensions of the Ohio steam vessels. Two classes are spoken of. The first being large and swift packets plying between Pittsburgh and Cincinnati. The second class comprising transient vessels and those which, in the course of their business, pass through the Louisville Canal.

The first class average in length two hundred and thirty feet; they are over fifty feet wide; their pilot house stands forty-eight feet above the surface of the water, and they require for free passage upwards of seventy feet space. It is apparent, then, that to the passage of these vessels the bridge offers a total obstruction whenever the water exceeds twenty feet in

height. And this, it has already been shown, is liable to occur in nine several months of the year, and continue from two to ten days at a time. Four times, since this court commenced its session, they have been obstructed. The second class of boats are one hundred and eighty feet in length, forty-nine feet wide, with pilot house forty-seven feet above the water, and chimneys over sixty feet high.

Upon the spring and fall floods, ranging from thirty to thirty-eight feet, the passage of these boats will also be prevented. It is said this class are provided with machinery for lowering a portion of their chimneys. And so they are; but the proof exhibits that this machinery has been resorted to as an expedient in order to avoid the obstruction of the Ohio falls, by passing through the canal at Louisville. And it is insisted by these defendants that all boats passing to and from Pittsburgh shall be **535*** subject to "the same condition; imposing upon navigation between Wheeling and Pittsburgh the disadvantages of a great natural obstacle like the falls of Louisville.

Different opinions have been expressed by witnesses on the subject of lowering chimneys. A few observations in connection with the draughts now before the court, will here be made.

Two plans of lowering are described. By the first, a few joints of chimney at the top, turning on a hinge, are lowered sufficiently to pass through the Louisville Bridge. But this mode is confined, as evidently it must be, to cases where a short piece of small diameter and light weight is to be lowered. Yet, even in these cases, it is spoken of as being a troublesome, expensive and dangerous duty. Hinges have broken and chimneys fallen and crushed the decks; officers and men on the deck are exposed to danger at night in windy and stormy weather. The packet chimneys, weighing from 2,500 to 8,000 pounds, and five feet in diameter, require a different management. For lowering these, the only mode suggested is by the use of hinges at the hurricane deck. Let us consider, then, the condition of one of these packets in effecting its passage on high water.

Through the Louisville Canal, boats pass slowly with steam and fire down, with no opposing currents and no skill required to direct their course. The whole force, skill and attention of officers and crew, may there be devoted to lowering the chimneys. But boats descend the Ohio River at the rate of from fifteen to twenty miles per hour; and upon a current running between Zane's Island and the Virginia shore at the rate of five to eight miles an hour, which shortly above the bridge, sets strongly out from the main shore to the island, thus inclining boats to the lower part of the bridge. (See depositions of Duval and others.)

The boats, moreover, usually arrive at the bridge in the night season. When, therefore, their chimneys are to be lowered, supposing it even possible by mechanical contrivances and skill, the task is to be accomplished under the most formidable dangers. Upon a slippery deck, over boilers of steam and fiery furnace, contending with wind and current, the boat must be guided through a narrow space of one hundred feet in width, while huge chimneys,

three tons in weight, are to be lowered to the deck. It is plain that any accident, under these circumstances, involves hazard and destruction to life and property, exposing officers, passengers and crew to disaster and death in the most appalling form. Numerous instances of casualties are spoken of by the witnesses, that have happened on the small boats passing bridges on the Monongahela and in the Louisville Canal. What, then, is to be apprehended at the Wheeling Bridge on the Ohio River, if the packets are to be subjected to such condition? Upon the *evidence in this case, there is no room [***536** to doubt the consequences that must ensue.

With these general observations, I proceed to examine the evidence in detail. In the original answer it is admitted that there are boats that cannot pass the bridge. The first supplemental answer admits that there are six boats, the owners of which refuse to remodel their chimneys, so as to enable them, in case of a freshet, to pass under the bridge. In their memorial of January 1st, 1849, "calling upon the Legislature of the State so to amend their charter as to sanction by law the height fixed by the board of managers," it is admitted that on a rise of thirty feet, a few of the larger class of boats "will be compelled" to lower their chimneys. On a rise of twenty-five feet, still fewer boats will be compelled to do so. On a flood of twenty feet, from five to six boats "will be required to lower their chimneys." It is also confessed that the requisition imposes "little trouble" and a "small additional expense."

The fact being thus confessed by the defendants, that the bridge will arrest the passage of boats, impose the condition of "remodeling their chimneys," exact the duty of lowering them in order to pass, and incur by this requisition trouble and expense, the right comes in question.

That no state could grant authority so to interfere with vessels, regulated and licensed pursuant to the Acts of Congress, and navigating a river over which Congress had extended its protection as to boats, commerce and bridges, has already been shown. That Virginia neither assumed nor delegated such authority by their charter, appears from its terms. That the defendants knew they had no lawful authority, is proved by their calling on the Legislature to amend their charter and sanction by law the height of their bridge.

But several grounds of justification, or rather excuse, are urged. That the only boats obstructed by the bridge have unusually high chimneys, and "belong to Pittsburgh, the rival of Wheeling in commerce and manufactures." That the height of steamboat chimneys has been increased since the date of the bridge charter. That the boats obstructed are few in number. That the obstruction seldom happens, and only for short periods. That the height of the chimney is unnecessary; or if necessary, may be lowered to pass the bridge.

To each of these points of defense, the evidence furnishes a specific and conclusive answer.

(Mr. Stanton then entered into a critical examination of the evidence and proceeded.)

Without pursuing this branch of the subject further, it is evident that a more serious obstruction to the navigation of the *Ohio, [***537**

by steam vessels as well as ships, could not have been devised by the art of man. And, upon the authorities already adduced, it is manifest that the charter under which the defendants claim, if it authorized such erection, being a state enactment, which, in its operation, prescribes regulations for commerce conflicting with those of Congress, such charter is against the Constitution of the United States, and is absolutely void. And all considerations, as to the practicability of changing and adapting the structure and machinery of steamboats, so as to pass the bridge, are wholly unavailing to the defendants, for Congress, having regulated these vessels, appointed an inspector, prescribed their machinery, and the duties of officers and crew, and granted them a license to navigate the river, no individual nor state has any authority to require a change of such machinery, nor impose the performance of any duty, nor for a single moment direct or arrest their course; and hence it follows that as this is undertaken and accomplished by the Wheeling Bridge, it is an unlawful obstruction of navigation on the Ohio River.

The injury resulting to the State of Pennsylvania from this unlawful obstruction is of the utmost magnitude. Occupying a central position resting eastward on the Atlantic, north on the Lakes, flanking on the Ohio, by it she is connected with the Gulf and the vast regions of the West and South. She thus enjoys a position for foreign and domestic commerce more favorable than any other in the Union. From the earliest period these advantages were cultivated, she became a navigating State; the energies and enterprise of her people were devoted to navigation and commerce. By her own canals connecting the lakes and the Atlantic with the Ohio, she possesses channels for water transportation, more important than can be possessed by any state on the continent. By steamboats navigating the Ohio she has intercourse with all the States lying west and south of her; and by the same highway, commerce with foreign nations, passing through the Gulf and the Mississippi, reaches her gates, to be transported eastward through the channels she has opened. Across this thoroughfare, within fifty miles of her border, the Wheeling Bridge interposes its barrier. By it her communication with New Orleans, St. Louis, Cincinnati, and all the region west and south of her, is intercepted; and the commerce flowing between them and her public works is interrupted, exposed to danger, delay, and is at times wholly cut off. The admission by defendants, that obstruction of the Ohio River, from any cause, would injuriously affect her public works, is evidently true; and equally plain is it that such obstruction must injuriously affect every interest that a state can possess, or that she is bound 538* to cherish and defend. This injury may be considered in respect,

1st. To the persons and property of her citizens.

2d. To her sovereignty and eminent domain.

3d. To her ports.

4th. To the revenue of her public works.

(We must pass over the discussion of the first three of these points, and proceed to the last.)

To the public works of Pennsylvania, the in-

jury occasioned by this obstruction is deep and lasting. The products of the South and West, and of the Pacific coast, are brought in steamboats along the Ohio to the western end of her canals at Pittsburg, thence to be transported through them to Philadelphia, for an eastern and foreign market. Foreign merchandise and eastern manufactures, received at Philadelphia, are transported by the same channel to Pittsburg, thence to be carried south and west, to their destination, in steamboats along the Ohio. If these vessels and their commerce are liable to be stopped within a short distance as they approach the canals, and subject to expense, delay, and danger, to reach them, the same consequences to ensue on their voyage departing, the value of these works must be destroyed. This result is confessed by the defendants to be a necessary consequence of obstruction to the Ohio River from any cause.

"They have no doubt that the navigation of the Ohio River is important to the works above referred to, and that the value thereof would be affected injuriously, if from any cause the passage of steamboats from the City of Pittsburg, downwards, were obstructed or impeded." (2d Supplemental Answer, Record, p. 42.)

That the passage of steamboats to and from Pittsburg is obstructed and impeded by the Wheeling Bridge, has also been shown by the admissions already quoted.

... "Six boats, the owners of which refuse to remodel their chimneys so as to enable them, in case of a freshet, to pass under the bridge, belong to Pittsburg, the rival of Wheeling in commerce and manufactures." (Supplemental Answer, Record, p. 41.)

"A few of the larger class of boats at such a stage (thirty feet) of water, will be compelled to lower their chimneys." (Mem. to Virginia Legislature, Record, p. 56.)

It has been seen that the six boats referred to are the carriers, between Pittsburg and Cincinnati, of three fourths of the trade and travel transported by the Pennsylvania Canal.

The large class spoken of, are the carriers from New Orleans and St. Louis. Too large for the canal, these boats can reach Pittsburg and depart only on high water. Too large for the bridge, they can pass Wheeling only on low water. They are thus excluded from Pittsburg by a natural obstruction at Louisville, one *portion of the year, and for the re- (*539) mainder by an artificial obstruction at Wheeling. To surmount both obstructions the same condition is imposed—"compelled to lower their chimneys."

By their own confession, then, the defendants, with their cables stretched over the channel, produce the same result as if rocks were sunk in its bed. Between the Pennsylvania Canal and Louisville, a distance of seven hundred miles, no obstruction has hitherto existed. Between Pittsburg and Cincinnati, with which one half of her commerce is transacted, this artificial obstruction, equal to the Louisville falls, is placed within fifty miles of her borders, interposing between her ports and every other to which her commerce extends. Nay, more—to remove obstructions in the Ohio, Congress, at the solicitation of the Pennsylvania Legislature, has appropriated many millions of dollars (4 U. S. Stat., 32), and within twelve months be-

fore this bridge was commenced, one hundred and thirty thousand two hundred dollars were expended for that purpose between Wheeling and Pittsburg. (Col. Albert's Deposition, p. 126.)

Thus it appears that while Congress has been expending public money in improving navigation, the defendants have spent their own in obstructing it, with much more effectual purpose.

From the admissions of the defendants as to the obstruction created by their bridge, and its injury to the property of Pennsylvania, attention may now be turned to the other evidence on the same subject.

Report of the Board of Canal Commissioners.

"The board fully concur in the views expressed by the collector as to the injurious effects which the construction of the bridge at Wheeling must necessarily produce upon the revenues of the Commonwealth, derived from the main line of her public works. If the representation be true that the bridge referred to prevents the passage of the large class of steamboats, which can only run in times of high water, then the State ought to take every legal step to procure the removal of the obstruction. It is unnecessary for the board to present to the senate any argument to prove that such an impediment to the free navigation of the Ohio will materially affect the interests of Pennsylvania." (Record, p. 421.)

Report of the State Treasurer.

"It becomes by duty to call your attention to the bridge lately constructed across the River Ohio at Wheeling; threatening, as it does, to interfere with the business and enterprise of Pittsburg, whose commercial prosperity is so **540** essential to the productiveness of our main line of canal. Should the price of freights to and from Pittsburg, by the river, be enhanced in the smallest degree by destroying the competition between the large and small boats, it will result injuriously to the business of the canal, and prejudicial to the enterprise of a city whose manufacturing wealth and commerce are too valuable to the State to be jeopardized." (State Treasurer's Annual Report, p. 12.)

"Annual receipts of main line. \$1,238,720.05." (*Id.*, p. 50.)

The views thus expressed by the public officers of Pennsylvania and of the general government, are sustained by the knowledge and experience of business men.

(Mr. Stanton proceeded to comment on other testimony, and then contended that the bridge might have been constructed so as not to obstruct navigation. He then examined the value of the bridge as a means of transit from shore to shore, and afterwards the right of the State to sue in her corporate capacity, for injuries operating immediately upon the persons, property, and business of the citizens of Pennsylvania; and also for those which operate directly upon the State.)

The right to relief at her own suit being shown, its form remains to be mentioned. Abatement by injunction is prayed. And for these reasons: Abatement is a remedy which the law allows persons injured by a nuisance to administer for their own relief; but to avoid strife

and contention that thence might ensue, courts of equity have assumed jurisdiction to administer that specific remedy.

The grounds of equitable jurisdiction for abatement by injunction, are precisely those occupied herein by the State.

"The ground," says *Mr. Justice Story*, "for this jurisdiction in cases of purpresture, as well as nuisance, undoubtedly is their ability to give a more complete and perfect remedy than is allowable at law, in order to prevent irreparable mischief, and also to suppress oppressive and vexatious litigation. In the first place they can interpose, as the courts of law cannot, to restrain and prevent such nuisances threatened or in progress, as well as those already existing. In the next place, by a perpetual injunction the remedy is made complete through all future time. Whereas an information or indictment at the common law can dispose only of the existing nuisance, and for future acts new prosecutions must be brought. In the next place, the remedial justice in equity may be prompt and immediate before irreparable mischief is done; whereas at law nothing can be done except after trial and upon the award of judgment." (2 Story's Equity, 208; see, also, cases cited in the brief.)

Obstruction of water-courses are cases calling for this remedial interposition of courts of equity. (2 Story's Equity, 206.)

"It needs no argument to show that **[541]** the injury in question, as it is great in magnitude, is also most clearly within the class of what are known as irreparable injuries. In the first place, being an injury to trade, the full extent of injury cannot be measured in damages, any more than in cases of nuisance to health, it can be ascertained how many months or weeks or hours life may be shortened. In the second place, it is unceasing and without end. While the water flows and the bridge stands the injury continues. The mischief is not only irreparable, but the litigation to which it must lead would be vexatious in the last degree. The strife and contention that must follow, are also of the most serious character.

It is the specific penalty prescribed by the charter, the terms upon which the defendants obtained permission to erect their bridge, the agreement entered into. That Virginia has since chosen for herself to waive that penalty, can make no difference as to the equities of other parties. This remedy is still in the charter: "If the bridge shall be so erected as to obstruct navigation, the said bridge may be treated as a public nuisance and abated accordingly." (Charter of Wheeling Bridge.)

It is said that before injunction a trial at law should be awarded. But trials at law are awarded only where facts are contested; and cases of nuisance are excepted from the benefit even of this rule. "If the thing sought to be prohibited is in itself a nuisance, the court will interfere to stay irreparable mischief, without waiting the result of a trial." (Shelford on Railways, 431.) But what facts are here to be ascertained? The highway, the obstruction, the injury, are confessed on the record. The whole defense rests simply upon legal exceptions, leaving no fact to be tried.

The Acts of Pennsylvania authorizing bridges within her own territory are urged in defense.

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To this it is sufficient to remark, that the equitable doctrine of set-off has never been applied to cases of nuisance. And if it were, the bridges on the Alleghany and Monongahela are not a fair equivalent for the navigation of the Ohio, Mississippi, and their branches, cut off by the Wheeling bridge. When complaint is made or injury shown from these bridges, then will be time to show their defense. With this case, and the matters here involved, they have nothing to do.

The State is also charged with laches—standing by and witnessing without objection the defendants expend their money. This is a strange charge, when it is remembered that Pennsylvania met these defendants in Congress, and there urged her specific objections, resisted and defeated a bill for the erection of **542*** the bridge that had been introduced by the member from Wheeling, before her remonstrance reached Washington.

She could not follow them into the Legislature of Virginia. And if she had done so, her rights were sufficiently guarded by the 14th section of their charter. Its violation was not to be presumed. But when it became manifest that, in defiance of its provisions, the river was about to be obstructed, the law officer of the State, her Attorney General, promptly appealed to this tribunal. What charge of laches could be more unfounded? Pending these proceedings, in the fancied belief that an advantage would be gained thereby, the work was hurried on to its completion. Warning was given, by the learned judge before whom the motion was made, that no equity would be thus gained, but that if found a nuisance the bridge must be abated. And this was made one of the grounds for then denying the motion. (*Judge Grier's Opinion.*) Abatement is the only remedy that can save the public works of Pennsylvania from irreparable injury. It is the condition upon which the defendants in their own wrong obstructed this highway, and it is the penalty pronounced by Virginia for infringing the rights of navigation.

These rights Pennsylvania might protect by abatement of this nuisance by her own act. But the Constitution established this tribunal as one of dignity, wherein a state might sue and obtain redress by due course of law. Its powers and duties are defined in No. 80 of the Federalist, and in the Constitution by terms of the most wide and general signification, extending to "all those cases which involve the peace of the confederacy, whether they relate to the intercourse between the United States and foreign nations, or between the States themselves." Comment upon these terms from me would be superfluous. They embrace the very case now before the court, than which none can be conceived more directly or deeply involving the peace of the confederacy. It presents no question of abstract rights, but one of actual existing vested rights, essential to the existence of the State and the welfare of her people. Her rights of commerce extending between the several States; the right of navigation upon a public river; the use of a highway upon which the value of internal improvements, costing over forty millions of dollars, depends.

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Upon these considerations the State of Pennsylvania prosecutes this suit. Declaring it to be consistent with her character to seek a peaceful remedy, her Legislature, by unanimous vote in both branches, adopted the following resolutions, in obedience to which I now appear before this court:

"Be it resolved, by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly *met [**543**—That the free and uninterrupted navigation of the Ohio River as a common highway, is a right belonging to the citizens of Pennsylvania, which being essential to the prosperity of the State, it is the duty of the Commonwealth to assert and defend.

"That the proceedings in behalf of said State, instituted by her Attorney General in the Supreme Court of the United States, and now pending therein, against the Wheeling and Belmont Bridge Company, to abate the nuisance occasioned by their bridge lately erected across said river, be prosecuted to final judgment, decree and execution for abatement of said nuisance."

Having thus presented my proposition in its various branches, I feel that it is not needful for me to urge upon this court the important considerations which necessarily arise from the case, considerations effecting not only life and property to an immeasurable extent, but vast commerce, essential state rights, and the peace of the confederacy. They will present themselves to the court with more force than I could urge them. I know not, sir, that it becomes me to say more in this behalf. This only I will add:

In 1765 a distinguished son of Pennsylvania, Dr. Rittenhouse, first conceived the plan of her great works, connecting the waters of the Lakes and the Atlantic with the Ohio River. Seventy years elapsed before the resources of the State were equal to such an undertaking. But once commenced, it was accomplished. While all other works tending to the same object halted east of the Alleghanies, Pennsylvania forced her way through; thus opening a cheap, easy and secure water transportation from the Gulf and the Rocky Mountains to the Atlantic seaboard. But no sooner had this mighty work been completed, and its revenues commenced to replenish the exhausted treasury of the State, and a prosperous commerce to re-imburse her citizens for their heavy taxation, than the flagitious scheme is undertaken to cut her off from the Ohio by a bridge at Wheeling, within fifty miles of her borders.

When, to prevent so great a wrong, she appeals to the Supreme Court; the work is hurried on; and pending her application for an injunction, iron cables are stretched across the channel of a navigable river, interrupting vessels arriving and departing from the ports of Pennsylvania. And before she can be heard in this tribunal, her vessels are stopped on a public highway, their cargo and passengers discharged at Wheeling, and Pennsylvania ports shut up. For less injuries than these, states have been heretofore prompt to redress their own wrongs, and have rushed swiftly to war. Even under our government, in *defense of [**544** commercial rights, supposed to be invaded by congressional enactment, the banner of disunion

has been unfurled in the South. In the North and East, bordering states, asserting navigation privileges, have resorted to acts of retortion and confiscation, until at length civil war was ready to burst forth on their borders and range along their coasts. At a later day, the western States of Ohio and Michigan, on a mere boundary question, arrayed their military forces against each other, under command of their respective governors. And now, on a mere abstract question, state is seen arrayed against state, with threats and warlike aspect.

To these, what a contrast and example does Pennsylvania this day present. Threatened in her dearest rights, she makes no appeal to force.

When the foundations of this government were laid, and this tribunal established as its corner stone, Pennsylvania was there. She knew that the chief object of the Constitution was to substitute the law of reason for the law of force; and her abiding confidence in its efficacy for every exigency has never been shaken. Her commerce obstructed on a public river, her ports shut up; she comes this day at the head of no armed squadrons, with no blustering enactments of state sovereignty, with no threatenings of disunion upon her lips. As becomes the keystone of the federal arch, she seeks first a peaceful remedy. She appears as an humble suitor before civil judges, sitting upon their judgment seat, surrounded by no armed janizaries, by no imperial guards; but in the exercise of their constitutional functions, clothed with an authority more potent, in her estimation, than an army with banners. She asks them to protect a right, deemed the most inestimable among all nations, belonging to her by the law of nature and of nations; guaranteed by the Constitution and the laws of Congress, for the improvement of which millions of her treasure have been lavished, and upon which the welfare of her people depends. She asks them, by simple injunction, to prevent a local corporation from violating, under color of state authority, a right that a world in arms could not wrest from her. How far the wholesome influence of this example may depend upon the decree herein to be rendered, the learned members of this court, better than I am, are able to judge.

The counsel for the defendants, in the brief which they filed, made the following points:

The questions which arise in the cause may be classed under four distinct heads:

I. Those which relate to the regularity of the proceedings in this cause.

545*] *II. Those relating to the original jurisdiction of the Supreme Court, in the case presented by record.

III. Those of a political character, arising out of the alleged interference with the free navigation of the Ohio River, and the supposed regulation of commerce between the States, and preference of one port over another.

IV. Those involving the law in regard to nuisances, and the principles on which a court of equity will interpose, by injunction, to grant relief

I. Under this head the defendants will insist—

1st. That the order made by Judge Grier, on the 1st day of August, 1849, was not war-

ranted by practice in courts of equity. That he had no power to do more than grant or refuse the injunction, and that the case has been improperly docketed.

2d. They will insist, that as the defendants have expressly denied under oath that this suit has been instituted by the State of Pennsylvania, but that it is in fact the suit of sundry citizens of Pittsburg who have undertaken to use the name of that State for the purpose of giving a colorable jurisdiction to this court over the case, without the authority first obtained of the Legislature or executive of Pennsylvania; and as the plaintiffs have failed to produce any evidence to show that the proper authorities of Pennsylvania have authorized the institution of the suit, the court should either dismiss it or award a rule against plaintiff's attorney to show by what authority it has been instituted. (*Maxfield's Lessee v. Levy*, 4 Dall., 330.)

3d. The original bill being fatally defective was not amendable, the office of an amendment being not to make a new case, but to correct or improve a bill which contained grounds of equitable relief. (*McMahon v. Fawcett*, 2 Rand., 537.)

II. Under this head defendants will insist, that if the suit has been regularly docketed and instituted by the direction of the proper authorities of the State of Pennsylvania, the bills of the plaintiff do not disclose a case properly cognizable in this court. They show no such interest on the part of the State of Pennsylvania in the matter in controversy as would make her a competent plaintiff in this court. She should show, on the face of her bill, a direct and immediate interest in the State of Pennsylvania, in her corporate capacity. A remote consequential injury will not do; injury to her citizens is not sufficient; they are competent plaintiffs, and can seek their own redress.

2d. The alleged injury to the public works of Pennsylvania, and through them to her revenues, is remote, contingent and speculative. The bridge is in another State, and not within fifty miles of any of her improvements. If it should prove detrimental to them by the greater facilities which it might afford for crossing the river at Wheeling, and the induce- [*546 ments which it might hold out to trade and travel to seek that point, it would be a case of *damnum absque injuria*.

3d. The allegation of injury to the ship builders of Pennsylvania is obnoxious to the objections taken to the original bill; the injury is not to the State, but to her citizens, and it is indirect and consequential.

4th. If there be injury to the public, it is not to the Pennsylvania public, but to the great public of the Union. If it interferes with and regulates commerce, it is the commerce of the Union, and not of Pennsylvania; and the government of the Union alone can redress it by a proceeding in behalf of the United States, at the instance of her Attorney General. (*Commonwealth v. Charlestown*, 1 Pick., 184; see *Mitford*, Eq. Pl., 210; *Story*, Eq. Pl., secs. 503-510; *Pinet v. Lindsey*, 3 Dall., 411; *Bowne v. Arbuckle*, 4 Dall., 338 and note 2; *New York v. Connecticut*, 4 Dall., 8; *United States v. Peters*, 5 Cranch, 115; *McNutt v.*

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Bland, 2 How., 9, opinion of Daniel, J., and cases reviewed by him; *Bank of Kentucky v. Wister*, 2 Pet., 318; *Georgetown v. Alexandria Canal*, 12 Pet., 91; *United States Bank v. Planters' Bank of Georgia*, 9 Wheat., 904; *Bingham v. Cabot*, 8 Dall., 382; *Turner v. Bank of North America*, 4 Dall., 8; *McCormick v. Sullicant*, 10 Wheat., 199; *Fisher v. Cockrell*, 5 Pet., 248; *Reed v. Marsh*, 13 Pet., 153; 1 Kent's Com., 344, and cases cited; *Waring v. Clarke*, 5 How., 468; *Rhode Island v. Massachusetts*, 12 Pet., 657; *Spooner v. McConnell*, 1 McLean, 338, 359; *Rogers v. Linn*, 2 McLean, 126; 8 Cow., 146.)

III. The charter was granted for great public objects, and intended to advance and facilitate commerce between the States, and the safe, speedy, and certain transmission of the mails between the eastern and western sections of the Union, and therefore commends itself to the favorable regard of the government, to which is confided the power and the duty of regulating that species of commerce. The duty of the government of the United States is quite as imperative to protect and regulate the trade across, as up and down, the channels of navigable streams.

The privilege of navigating the river is not paramount to, but only co-equal with, the privilege of crossing it. The bridge is not a regulator of commerce in any other sense than a railroad or a ferry would be. (*Gibbons v. Ogden*, 9 Wheat., 203; *People v. Saratoga and Bos. Co.*, 15 Wend., 134; *Thompson v. People*, 23 Wend., 552; *Coryfield v. Coryell*, 4 Wash. C. R., 378; *Norris v. Boston*, and *Smith v. Turner*, 7 How., 283; *Houston v. Moore*, 5 Wheat., 48; *Commonwealth v. New Bedford B. Co.*, 1 Wood. & M., 423; *Wilson v. Black Bird Creek Marsh Co.*, 2 Peters, 250.)

547*] *IV. The case stated is not one for relief, even at law, and much less in equity, by injunction:

1. The bridge is not a nuisance.

2. The injury is not direct, inevitable and irreparable; on the contrary, by complainant's own showing, it is remote, contingent and susceptible of compensation in damages.

3. Nor is it peculiar and exclusive, either to the citizens or to the State of Pennsylvania.

4. The course of Pennsylvania, in chartering and constructing bridges over navigable waters within her limits, and in remaining passive until the whole capital of the company had been expended, should induce the court, even if that case were in other respects a proper one for relief, to withhold its aid under the peculiar circumstances of this case. (Story, Eq., sec. 950, a & b; *Eden on Injunctions*, 162; *Bonaparte v. Camden & Amboy R. R. Co.*, 1 Bald. C. C. R., 218; *Attorney-General v. Cleaver*, 18 Vesey, 219, and authorities cited; *Earl Ripon v. Hobart*, 1 Coop. Select Cases, 333; Story, Eq., sec. 922-925, and cases cited; *Pierce v. Dart*, 7 Cow., 609; *Lansing v. Smith*, 8 Cow., 146; *Semple v. London and Birmingham R. R. Co.*, 1 Railw. Cases, 159; *Butler v. Kent*, 19 Johns., 223; *Laws of Pennsylvania*, 1846, 309; *Pulmer v. Chynahoga County*, 3 McLean, 226; *Jones v. Royal Canal Co.*, 2 Molloy, 319; *Williams v. The Earl of Jersey*, 1 Craig & Phil., 96; *Pelcher v. Hart*, 1 Humph. Tenn. Rep., 524; *Rex v. Russel*, 13 Com. L. R., HOWARD 13.

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After the argument of the cause, the court passed the interlocutory order which is reported in 9 How., 657.

The coming in of the report of the commissioner is mentioned in 11 How., 529, together with the order of court passed thereon. That report was a printed volume of more than seven hundred pages, accompanied by numerous engravings, and including a great mass of evidence upon geographical, statistical and scientific points. It is very difficult to give an abstract of it, but the attempt must be made.

"The questions referred to the commissioner to report upon, were the following, viz.: whether the suspension bridge, mentioned in the pleadings in this cause, erected over the Ohio River at the City of Wheeling, by the defendants, is or is not an obstruction to the free navigation of the Ohio River, at the place where such bridge is erected across the same, by vessels propelled by steam or sails, engaged, or which may be engaged, in the commerce or navigation of said river; and if it is such an obstruction, *what change or alteration, if [*548 any, can be made, consistent with the continuance of the bridge across the said river, that will remove the obstruction to the free navigation by such vessels engaged in the commerce and navigation of such river; and also to report the proofs which should be produced before me by the respective parties; with power to appoint a clerk to assist in the execution of the order of reference; and also with power, if I should deem it necessary, to appoint a competent engineer, whose duty it should be, under my directions and instructions, as such commissioner, to take the measurement of said bridge, its appendages and appurtenances, and the localities connected therewith, and make a report to me upon the same."

The report commenced with a general examination of suspension bridges, with their adaptation to the passage of railroad cars. Upon this subject the commissioner expressed himself as follows:

"My opinion, therefore, is, that if the Wheeling bridge, in its present form, is not permitted to stand, the idea that it can be so altered in its reconstruction as to adapt it to the purposes of ordinary railroad transit, should not be entertained, and should not be permitted to affect the decision of the question of the practicability of altering or reconstructing such bridge, so as to obtain a revenue therefrom, which might be of sufficient importance to the stockholders of the Bridge Company to induce them to contribute means to enable the corporation to rebuild the bridge."

The report then contained an account of the commercial statistics of the Ohio River, with the velocity of its current, its floods, &c. The bridge was described as follows:

"The length of the bridge is 980 feet between the faces of the two abutments; and 1,010 feet between the centers of the towers, at each end, which support the cables upon which the flooring of the bridge is suspended. The eastern towers, to the top of the saddles, are

153½ feet high above the level of zero of the water gauge which indicates the depth of water upon the Wheeling bar; and the western towers are 182½ feet.

"The deflection of the catenary below the top of the saddles of the eastern towers, on the 26th of October, 1850, when the temperature of the atmosphere was 44° of Fahrenheit, was 68 feet 5 inches. And the point of its greatest deflection was 544 feet and 7 inches from the center of the eastern towers. The deflection would probably be about 15 inches less at the temperature of zero of Fahrenheit, and about 15 inches more at a temperature of 90° above. The temperature of the atmosphere, at the time the measurement was made, was at about a medium between the extreme cold of winter and the greatest heat of summer, and therefore gives the mean deflection.

549*] "The ascent of the flooring of the bridge at the east end, for 172½ feet from the center of the tower, rises on a grade of 1.28 feet to the 100; and for 40 feet further it rises on a grade of 0.625 of a foot to the hundred feet. From thence it descends on a grade of 0.925 of a foot to the hundred, for 40 feet; and from thence to the center of the western tower, on a grade of 4.08 feet to every hundred feet.

"At the highest part of the bridge, for the distance of about 56 feet in width, there is a clear headway, for the passage of steamboats with their chimneys standing, of 92 feet above zero of the Wheeling water gauge; or 91 feet above extreme low water. This headway commences about 174 feet from the top of the face of the eastern abutment, and terminates 750 feet from the same point in the western abutment. But this space of 56 feet in width is not over part of the river at extreme low water.

"The bank of the river, under the eastern extremity of the 56 feet space, is 10.21 feet higher than the level of zero of the Wheeling gauge; and under the western extremity, the height of the bank above zero of the gauge, is 3.81 feet. And it is only 22 inches below zero of the gauge at a point 100 feet further west. The water upon the Wheeling bar must therefore be about 4 feet deep to bring the easterly edge of the stream to a point under the western extremity of the 56 feet. And it must be more than 15 feet deep upon the bar to enable a steamboat drawing 5 feet to avail itself of the 91 feet of clear headway above low water mark, for the whole width of 56 feet.

"It follows, from this statement of the facts, that a steamboat drawing five feet, and whose chimneys are 79½ feet high, or over, can never pass under the apex of the bridge, at any stage of the water, without lowering her chimneys. And boats drawing 4 feet and having chimneys as high as 86 feet, can never pass under any part of the bridge, without lowering, even in stages of water between 4 and 12 feet high on the Wheeling bar. This is in accordance with the testimony, which shows that the Cincinnati, whose chimneys, according to the measurement of the engineer, were but 84.7 feet high, had to lower them to pass under the bridge, even in the lowest stages of the water upon which she ran."

Upon the question whether or not the bridge was an obstruction to sailing vessels, the commissioner reported as follows:

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"I therefore decide and report that the suspension bridge at Wheeling, mentioned in the order of reference, is not an obstruction of the free navigation of the Ohio River, at the place where it is erected over the same, by any vessels propelled by sails, which have been engaged in the commerce or navigation of the river *since such bridge was erected, or [*550 which will probably be engaged in such navigation and commerce at any future time during the existence of such bridge."

Upon that branch of the question which related to the bridge being an obstruction to steamboats, the report contained a description of the boats and the height of the chimneys of some of them; and came to the following conclusion:

"A great number of witnesses have been examined on both sides in reference to the question whether the process of lowering such chimneys as are carried upon the Pittsburg and Cincinnati packets, and others of the largest class of boats which navigate the waters of the Ohio, is not attended with injury to the chimneys, delay to the boats, and danger to the limbs and lives of the passengers, or of the officers and crew.

"So far as the question depends upon opinion merely, there is a very great conflict in the testimony of the witnesses. But when we examine the facts testified to by them, I think there is a decided preponderance of testimony in favor of the affirmative of the question.

"Even with the smaller and shorter chimneys, on the boats which pass through the Louisville and Portland Canal, where the boats proceed very slowly, and lower and raise their chimneys at leisure, accidents frequently occur to the chimneys; though, from the nature of the navigation through the canal, the process of raising and lowering does not produce much delay there, in ordinary cases. It is easy to perceive, that if the four, five or six rings, let down upon boats that pass the canal, should fall and break from their hinges, as they sometimes do, the lives of the passengers and crew, or of some of them, would necessarily be endangered.

"The very elevated as well as large chimneys used upon the Pittsburg and Cincinnati packets, and other boats of that class, cannot, certainly, with any facility or safety, be lowered by hinges at the tops. They are, therefore, obliged to lower them at the hurricane deck, by the means of a derrick. The weight of the parts of the two chimneys which must be let down, upon these large boats, is estimated by the witnesses to be from three to four tons. This enormous weight hanging over the cabin, or rather over the berths of the passengers, in the process of lowering, would probably prove disastrous in the extreme, if by any accident the chimneys should come down by the run; which is very likely to occur, from the carelessness or stupidity of the green hands that the owners and officers of Western boats are so often obliged to employ."

The report then discussed the increased danger in lowering the chimneys, resulting from the velocity of the river; and then *ex- [*531 amined the question whether such high chimneys were necessary for obtaining the maximum of speed. The conclusion arrived at was.

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that they were necessary. Upon this general branch of the question the commissioner reported as follows:

"It would be a great injury to commerce and to the community to have the benefit of a fair competition, between river navigation and railroad transit, destroyed by any unnecessary obstruction of either. And if railroads can be carried across our large Western rivers, without impairing the navigation, it is proper that it should be done. Certainly, if this beautiful and beneficial structure, which has been thrown across the eastern branch of the Ohio at Wheeling, at so much cost, can remain as it is, without injury to the commerce and navigation of the river, no one should desire its removal or alteration.

But, upon a full examination of the subject, or rather such an examination as I have been enabled to give it, in a limited time, and without the aid of counsel, I have arrived at the conclusion, and do accordingly decide and report, that the Wheeling Suspension Bridge, referred to in the pleadings and proofs in this cause, is an obstruction of the free navigation of the Ohio, at the place where it is erected across the same, by vessels propelled by steam, which are now engaged in the commerce and navigation of that river, and by such vessels as will undoubtedly be engaged in such navigation and commerce hereafter, at that place; while such bridge is permitted to remain without very material alterations."

The commissioner then proceeded to discuss the question, whether the bridge could be so altered as not to impede the free navigation of the river by steamboats; and examined eight different plans for effecting this object. The result was thus stated:

"I therefore conclude that it is practicable to alter the construction of the present bridge, so that it will not be an obstruction to the free navigation of the Ohio, consistent with the continuance of the bridge across the river at the place where it is now erected.

And I further decide and report that the change, or alteration, which can and should be made, in the construction and existing condition of the bridge, to remove the obstruction which now exists to the free navigation of the river at that place, by steamboats, is to raise the suspension cables, and the flooring of the bridge, in such a manner as to give a level headway, at least three hundred feet wide, over a convenient part of the channel of the river, of not less than one hundred and twenty feet above the level of zero on the Wheeling water gauge; and below the lowest projections of the flooring of the bridge, and the greatest deflections of the suspension cables, at a medium temperature of the atmosphere.

It will be seen that, in fixing this elevation for the altered bridge, I have made no provision for a greater amount of headway should the future wants of travel and commerce upon this part of the river require it. But I have adopted this height as being ample for the present demands of steamboat navigation, and upon the supposition that the dimensions of the boats running on the Ohio, from places above the bridge, and the heights of their chimneys, have about reached their maximum, for convenient running, or for profit.

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It is true, some of the boats running below the falls are a little longer, and have more breadth of beam, than any of the Pittsburgh and Cincinnati packets, and have chimneys a few feet higher. But they have also a greater depth of hold and draw more water; and are not, therefore, so well adapted to the navigation of the upper part of the Ohio, where the river is narrow, and the channel more sinuous.

Possibly, if the contemplated improvement at the falls of the Ohio should be made, boats of a larger class and with taller chimneys might be found profitable, in carrying on a direct trade between Pittsburgh and New Orleans, or between the former place and St. Louis. But as that event is still in the womb of time, and may never have birth, I have not deemed it necessary to make any further provision for it, than an elevation of the bridge to the height of one hundred and twenty feet, above the level of zero on the Wheeling gauge, will give them.

Many of my calculations in this report were made very hurriedly; but the engineer, at my request, has examined them all, since the draft of the report was prepared, and has not discovered any errors in them. I have reason to believe, therefore, that they are all correct.

R. HYDE WALWORTH, Com."

To this report exceptions were filed both upon the part of the complainant and respondent. On the part of the State of Pennsylvania the exceptions were as follows:

Complainant's Exceptions.

And now comes the complainant, by his counsel; and as to the report of the special commissioner, Hon. R. H. Walworth, herein made at the last term, the said complainant excepts as follows:

1. To so much of said report, on page 30, as decides that the suspension bridge, at Wheeling, is not an obstruction of the free navigation of the Ohio River at the place where it is erected over the same, by any vessels propelled by sails, which have been engaged in the commerce or navigation of the river since such bridge was erected, or which will probably be engaged in such navigation and commerce, at any future time during the existence of such bridge; and also, in the particulars, that said report does not provide for a headway for ships and sea-going vessels propelled by sails; and complainant prays that the court will decree that adequate provision shall be made for the passage of steamships and sailing vessels with their masts standing.

2. The complainant also excepts to said report in the particular, that the change in the construction and existing condition of said bridge, which, in page 53 of said report, the commissioner decides should be made to remove the obstruction to the free navigation of the river by steamboats, will not be sufficient to remove said obstruction, because the obstruction aforesaid cannot be removed without raising the bridge to the elevation of at least one hundred and forty-five feet above the level of zero on the water gauge, and also because the width of a level headway of three hundred feet is not sufficient, but the same ought to be the whole width of the river channel at that

place; and also, because no necessity is shown for any obstruction to the navigation, by any bridge at that point, nor is such bridge authorized, or could be lawfully authorized by any state enactment. Complainant prays that the court may decree accordingly.

3. The complainant also excepts to said report, in the particular, that in fixing the elevation for the altered bridge, in page 53 of said report, no provision is made for a greater amount of headway, should the future wants of travel and commerce of this part of the river require it.

Complainant prays that no bridge be allowed across said channel; or if any be allowed, that the elevation of such bridge be fixed by the decree of this court at not less than one hundred and forty-five feet above the level of zero, on the Wheeling water gauge, across the whole width of the channel at that place.

4. In all other respects, except the particulars thereof above excepted to, the complainant prays that the report of the commissioner aforesaid be established and confirmed; and that in the particulars herein excepted to, the report be corrected by the decree of this court, so as to abate the obstruction to the navigation of the Ohio River, created by the defendants by their suspension bridge, and to preserve the free navigation of the said river, as prayed for in the original and supplemental bills of complainant; and that a final decree be entered, as justice and the rights of your complainant may require.

C. DARRAGH,
SHALER & STANTON,
ROBERT J. WALKER,
For Complainant.

Defendants' Exceptions.

554*] *The defendants except to the proceedings and report of the commissioner, the Hon. R. H. Walworth, under the order of reference made in this cause, at the December Term, 1849, as follows:

1. That the commissioner made an order for the parties to appear before him, with their witnesses, at Wheeling, on the 15th July, 1850, without any application for such order from the counsel of either party, but with information from the counsel of the defendants that they could not then be prepared to take the testimony which they desired to take there. Moreover, his immediate adjournment on the 15th July, 1850, to a place several miles from Wheeling, and from the Ohio River, caused so much inconvenience and expense in the production of witnesses at that time, as to constrain the defendants to defer the examination of many of them until a future opportunity; which opportunity was afterwards denied to them. Whereby, and by the course pursued by the commissioner afterwards, as mentioned in the next exception, the defendants were prevented from taking the greater part of the testimony which they desired to take at Wheeling.

2. That the commissioner, in his report, has expressed opinions upon the questions on which he was directed to take proofs, without first having taken all the proofs which the counsel for the defendants saw fit to produce before him, and without reporting those proofs particularly. That, "as a general rule," he refused to receive or to report any testimony produced by the counsel for the defendants, unless

he, the commissioner, considered it relevant to the subject on which the court had directed testimony to be taken by him, if objected to by the opposite counsel; and actually excluded evidence which was relevant, in some instances, which appear in his report; besides establishing rules of decision which prevented the production of all testimony of like tendency to that which was rejected; and,

That, on the 4th day of December, 1850, in the unavoidable absence of the regular counsel of the defendants (occasioned by sickness), the commissioner refused to keep open his proceedings, at Wheeling, until the defendants could have had the presence and advice of that counsel, in relation to the further production of testimony; refused to grant the defendants further time for completing their proofs, and even refused to report to the court the affidavit on which the application for delay was grounded; notwithstanding, it appears by his report that the defendants finally (being without counsel) asked for a delay of only two days, until the expected arrival of their counsel, and nothing was done, or to be done by the commissioner, in the cause, until the fifth day after. [*555 wards, at Pittsburgh. And from that time forward, the commissioner denied to the defendants the opportunity and time, which reasonably they ought to have had, to complete the taking of their testimony before him, though he had repeatedly been informed by their counsel that they desired to produce further proofs at Wheeling, Philadelphia and elsewhere. (See Rep., pp. 645, &c.)

3. That the commissioner, knowing that the defendants desired to avail themselves of the expiration of the time limited for making his report, to apply to the court for some explanation or modification of the order of reference, so as thereafter to prevent a repetition of the injustice which, as they considered, had been done to them by the commissioner, did, on or about the 1st of December, 1850, privately apply to the court for an order extending the time for his proceedings, confirming what he might have done after the expiration of the time previously limited, and making no other change in the terms of the order of reference. And the commissioner suffered the defendants and their counsel to take their course in ignorance that any such application had been made, and then refused to make such a special report as would have enabled them to make a more regular application. (See Rep., pp. 645, 648.)

4. That the commissioner, in his report, argues to prove that wire suspension bridges are not adapted to the uses of railroads; which opinion or argument, is not only incorrect, but is on a subject not referred to him, and it can only tend to prejudice the defense improperly. (See Rep., pp. 17, 20.)

5. That the commissioner reports that "the Wheeling Suspension Bridge, referred to in the pleadings and proofs in this cause, is an obstruction of the free navigation of the Ohio River, at the place where it is erected across the same, by vessels propelled by steam, which are now engaged in the commerce of that river, and by such vessels as will undoubtedly be engaged in such commerce hereafter, at that place, while such bridge is permitted to remain without material alterations." Whereas, it appears

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by the evidence in the cause, that the said bridge is not such an obstruction. (See Rep., p. 45.)

6. That the commissioner reports that a change or alteration of said bridge can and should be made by raising the suspension cables and flooring, so as to give a level headway at least three hundred feet wide, over a convenient part of the channel of the river, of not less than 120 feet above the level of zero, on the Wheeling water gauge, and below the lowest projections of the flooring of the bridge and the greatest deflections of the suspension cables, at a medium temperature of the atmosphere. (Rep., p. 58.)

550*] 7. That the commissioner has decided the questions referred to him upon the assumption that, if any steamboats navigating the Ohio, however few, can attain an increase of speed, however slight, by using the tallest chimneys, where such increase of speed is beneficial to travel and commerce, in however small a degree, those steamboats are entitled to the benefit of such increase, in opposition to the claims of all who require the use of a bridge; whatever may be the extent of mischief resulting from the want of a bridge, or from its extreme elevation. (See Rep., p. 45.)

8. That the commissioner refused to receive or report any testimony tending to show the amount of inconvenience or injury which the public would suffer by the want of a bridge such as the one above mentioned, now standing at Wheeling. And, on the other hand, he has admitted much testimony, offered by the complainant, to show the magnitude of the present and prospective commerce on the river, and while expressing, in his report, an opinion favorable to the utility of the tallest chimneys used by any boat on that part of the river, has omitted all reference to the testimony tending to show in how small or great a degree, if at all, a reduction of the height of those chimneys, to the usual standard, would impair their supposed utility, and what proportion of the boats navigating, or likely to navigate the river, do now, or probably will, use chimneys of the extreme height which he considers useful.

9. That the commissioner appointed Edwin F. Johnson, an engineer, to make the measurements of the bridge, &c., and retained him in that position after he became aware that the said Johnson was the brother-in-law of one of the counsel for complainant, residing at Pittsburgh; and until that fact had been discovered and formally alleged by the counsel for the defendants, and long after the commissioner must have discovered that the said Johnson was unfit for that position; and the said commissioner proposes to allow the said Johnson pay and expenses as such engineer, though he failed to perform his duties as such, and was much more diligent in serving the interests of the complainant in the cause.

10. That the said commissioner unnecessarily increased the expenses incurred under the order of reference to an enormous extent.

11. That the commissioner has returned the report of the engineer with his own, without permitting the parties to have an opportunity of inspecting it before the commissioner closed the taking of testimony.

12. The defendants not only except to such

parts of the report and proceedings of the commissioner, as are above pointed out, but they insist on their exceptions, taken before [*557 the commissioner, and reported by him with the testimony.

ALEX. H. H. STUART,
REVERDY JOHNSON,

Attorneys for Defendants.

These exceptions were fully argued upon both sides; but the great length to which this report must necessarily be protracted, forbids any notice of the arguments of the respective counsel.

Mr. Justice McLean delivered the opinion of the court:

This bill was filed in the clerk's office of this court, in July, 1849. It charged that the defendants, under color of an Act of the Legislature of Virginia, but in direct violation of its terms, were engaged in the construction of a bridge across the Ohio River, at Wheeling, which would obstruct its navigation, to and from the ports of Pennsylvania, by steamboats and other craft which navigate the same. That the State of Pennsylvania owns certain valuable public works, canals and railways, constructed at great expense as channels of commerce, for the transportation of passengers and goods, from which a large revenue, as tolls, was received by the State. That these works terminate on the Ohio River, and were constructed with direct reference to its free navigation; the goods and passengers transported on these lines were conveyed in steamboats, on the Ohio River; and the Wheeling bridge would so obstruct the navigation of that river, as to cut off and direct trade and business from the public works of Pennsylvania, impair and diminish the tolls and revenue of the State, and render its improvements useless. The bill prayed an injunction against the erection of the bridge, as a public nuisance, and for general relief.

In August, 1849, a supplemental bill was filed, stating that after notice the defendants continued to prosecute their work, and were engaged in stretching iron cables across the channel of the river, which would obstruct its navigation, and it prayed that these cables might be abated.

At the December Term of this court, 1849, another supplemental bill was filed, representing that defendants had completed the erection of the bridge, and that it had obstructed the passage of steamboats carrying freight and passengers to and from the ports of Pennsylvania; that it also hindered the passage of steamships and sea-going vessels, which were accustomed to be constructed at the ports of Pennsylvania, and would injure and destroy the trade and business of ship and boat building, which was carried on by the citizens of Pittsburgh, and it prayed an abatement of the bridge as a public nuisance, and for general relief.

In their answers the defendants allege the exclusive sovereignty of Virginia, over [*558 the Ohio River, and set forth the Act authorizing the erection of the bridge. And they object to the application for an injunction and the relief prayed for, that the persons injured might have remedy in the courts of Virginia;

that the State of Pennsylvania had no corporate capacity to institute this suit in the Supreme Court, to vindicate the rights of her citizens; that the State is only a nominal party, whose name was, without proper authority, used by individuals; that the bridge is a connecting link of a great public highway, as important as the navigation of the Ohio River; that Pennsylvania had set the example of authorizing bridges across the Ohio; that certain engineers of the United States had recommended a wire suspension bridge at Wheeling, and gave as their opinion that "by an elevation of ninety feet, every imaginable danger of obstructing the navigation would be avoided;" that certain reports of committees in Congress recognized the necessity of a bridge at Wheeling, and recommended an appropriation for that purpose; that the headway for steamers left by the bridge is amply sufficient, forty-seven feet above the water, for all useful purposes; and if sufficient draught cannot be had at that height, blowers might be added; that chimneys might have hinges on them, so as to be lowered without much inconvenience; that the bridge will not be an appreciable inconvenience to the average class of boats; that the bridge will not diminish or destroy trade between Pittsburg and other ports, or do irreparable injury to the citizens of Pennsylvania.

The answer admits that the State of Pennsylvania has expended large sums of money in the construction of public improvements, terminating at Pittsburg and Beaver; that a great amount of freight and a large number of passengers do pass over said works, and that a large amount of toll to the State is derived therefrom; that the navigation of the Ohio River is important to the works above referred to, and that the value thereof would be affected injuriously if from any cause the passage of steamboats from the City of Pittsburg downwards were obstructed or impeded. But they deny that their bridge or the cables will have any such effect, or that it can in truth be called a nuisance.

To the actual obstruction occasioned by the bridge, as charged in the second supplemental bill, they set up an amendatory and explanatory Act of the Virginia Legislature, passed 11th of January, 1850, declaring the height of ninety feet at the eastern abutment, ninety-three and a half feet at the highest point, and sixty-two feet at the western abutment, above the low water level of the Ohio River, to be of lawful height, and in conformity with the intent and meaning of the 19th section of the charter.

559*] *At December Term, 1849, the question of jurisdiction was argued on both sides, and it was sustained by the entry of an order of reference to the Hon. R. H. Walworth, as special commissioner to take testimony and report—

1. Whether the bridge is, or is not, an obstruction of the free navigation of the Ohio River, by vessels propelled by steam or sails, engaged, or which may be engaged, in the commerce or navigation of said river.

2. If an obstruction be made to appear, what change or alteration in the construction and existing condition of the said bridge, if any, can be made, consistent with the continuance of

the same across said river, that will remove the obstruction to the free navigation.

At the ensuing term, near its close, the commissioner made his report, together with the report of the engineer employed, and the evidence taken before him, deciding.

1. That the bridge is not an obstruction to the free navigation of the Ohio by any vessels propelled by sails.

2. That the bridge is an obstruction of the free navigation of the Ohio by vessels propelled by steam.

3. That the change or alteration which can and should be made in the construction and existing condition of the bridge is, to raise the cables and flooring in such manner as to give a level headway, at least three hundred feet wide, over a convenient part of the channel, of not less than one hundred and twenty feet above the level of zero on the Wheeling water gauge.

To this report several exceptions were taken, by the counsel on both sides.

As this is the exercise of original jurisdiction by this court, on the ground that the State of Pennsylvania is a party, it is important to ascertain whether such a case is made out as to entitle the State to assume this attitude. In the second section of the third article of the Constitution, it is declared that the Supreme Court shall have original jurisdiction in a case where a state shall be a party.

In this case the State of Pennsylvania is not a party in virtue of its sovereignty. It does not come here to protect the rights of its citizens. The sovereign powers of a state are adequate to the protection of its own citizens, and no other jurisdiction can be exercised over them, or in their behalf, except in a few specified cases. Nor can the State prosecute this suit on the ground of any remote or contingent interest in itself. It assumes and claims, not an abstract right, but a direct interest in the controversy, and that the power of this court can redress its wrongs and save it from irreparable injury. If such a case be made out, the jurisdiction may be sustained.

*When a state enters into a copartnership, or becomes a stockholder in a bank, or other corporation, its sovereignty is not involved in the business, but it stands and is treated as other stockholders or partners. And so in the present case, the rights asserted and relief prayed are considered as in no respect different from those of an individual. From the dignity of the State, the Constitution gives to it the right to bring an original suit in this court. And this is the only privilege, if the right be established, which the State of Pennsylvania can claim in the present case.

It is objected, in the first place, that there is no evidence that the State of Pennsylvania has consented to the prosecution of this suit in its own name.

This would seem to be answered by the fact that the proceedings were instituted by the Attorney General of the State. He is its legal representative, and the court cannot presume, without proof, against his authority. In January, 1850, the following declaration passed unanimously by both branches of the Pennsylvania Legislature: "Whereas the navigation of the River Ohio has been, and is now obstructed by bridges erected across its channel,

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between Zane's Island and the main Virginia and Ohio shores, so that steamboats and other water crafts hitherto accustomed to navigate said river, are hindered in their passage to and from the port of Pittsburg, and other ports in the State of Pennsylvania, and the trade and commerce and business of this Commonwealth interrupted, the revenue of her public works diminished and impaired, and steamboats, owned and navigated by citizens of this State, bound to and from her ports, are subjected to labor, expense and delay, with hazard to life and property: by reason whereof the said bridges are a common and public nuisance, injurious to the State of Pennsylvania and her citizens, therefore be it resolved, &c.,

2. That the proceedings in behalf of said State, instituted by her Attorney General in the Supreme Court of the United States, and now pending therein against the Wheeling and Belmont Bridge Company to abate the nuisance occasioned by their bridge lately erected across the Ohio, be prosecuted to final judgment, decree, and execution, for abatement of said nuisance."

On a question of disputed boundary between two states, although the inquiry of the court is limited to the establishment of a common line, yet the exercise of sovereign authority, over more or less territory, may depend upon the decision. This gives great dignity and importance to such a controversy, and renders necessary a broader view than on a question as to the mere right of property. But in the present *561* case, the State of Pennsylvania claims nothing connected with the exercise of its sovereignty. It asks from the court a protection of its property, on the same ground and to the same extent as a corporation or individual may ask it. And it becomes an important question whether such facts are shown, as to require the extraordinary interposition of this court.

Relief in this form is given, as it cannot be given adequately in any other. The injury complained of, in the language of the books, must be irreparable by a suit at law for damages. It is matter of history, as well as in proof, that Pennsylvania, for many years past, has been engaged in making extensive improvements by canals, railroads and turnpikes, many of them extending from Eastern Pennsylvania to Pittsburg, by which the transportation of goods and passengers is greatly facilitated; and that a large portion of the goods and passengers thus transported are conveyed to and from Pittsburg on the Ohio River.

On the 18th of December, 1789, an Act was passed by Virginia, consenting to the erection of the State of Kentucky out of its territory, on certain conditions, among which are the following: "That the use and navigation of the River Ohio, so far as the territory of the proposed State, or the territory that shall remain within the limits of this Commonwealth lies thereon, shall be free and common to the citizens of the United States." (Virg. Revised Code, 1819, p. 19.) To this Act the assent of Congress was given. (1 Stat. at Large, 189.)

That the Ohio River is navigable, is a historical fact, which all courts may recognize. For many years the commerce upon it has been regulated by Congress, under the commercial power, by establishing ports, requiring vessels

which navigate it to take out licenses, and to observe certain rules for the safety of their passengers and cargoes. Appropriations by Congress have been frequently made, to remove obstructions to navigation from its channel.

It appears that Pennsylvania has constructed a combined line of canal and railroad from Pittsburg and Alleghany cities to the City of Philadelphia, a distance of about four hundred miles, at an expense of about sixteen millions of dollars, all of which are owned by the State. There is also a railroad from Pittsburg to Harrisburg which will soon be completed, at an expense of some eight or ten millions of dollars. There is also a slack-water navigation from Pittsburg to Brownsville, and up the Yaughegany to West Newton, and there are other lines of communication between Pittsburg and the East, which are owned in whole or in part by the State, and from which it derives revenue.

And the witnesses generally say, that any obstruction on the Ohio River, to the free passage of steamboats, must affect injuriously the revenue from the above public *562* works, as it would divert the transportation of goods and passengers from the lines to and from Pittsburg to the northern lines through New York. Whilst the witnesses differ as to the amount of such an injury, they generally agree in saying, that any serious obstruction on the Ohio would diminish the trade and lessen the revenue of the State. The value of the goods to and from Pittsburg, transported on the above lines of communication, is estimated at from forty to fifty millions annually. And it is shown that the commerce on the Ohio, to and from Pittsburg, amounts to about the same sum.

If the bridge be such an obstruction to the navigation of the Ohio as to change, to any considerable extent, the line of transportation through Pennsylvania to the northern route through New York, or to a more southern route, an injury is done to the State of Pennsylvania, as the principal proprietor of the lines of communication, by canal and railroad, from Philadelphia to Pittsburg. And this injury is of a character for which an action at law could afford no adequate redress. It is of daily occurrence, and would require numerous, if not daily prosecutions, for the wrong done; and from the nature of that wrong, the compensation could not be measured or ascertained with any degree of precision. The effect would be, if not to reduce the tolls on these lines of transportation, to prevent their increase with the increasing business of the country.

If the obstruction complained of be an injury, it would be difficult to state a stronger case for the extraordinary interposition of a court of chancery. In no case could a remedy be more hopeless by an action at common law. The structure complained of is permanent, and so are the public works sought to be protected. The injury, if there be one, is as permanent as the work from which it proceeds, and as are the works affected by it. And whatever injury there may now be, will become greater in proportion to the increase of population and the commercial developments of the country. And in a country like this, where there would seem to be no limit to its progress, the injury complained

of would be far greater in its effects than under less prosperous circumstances.

As we are now considering the obstruction of the bridge, not as to the relief prayed for, but as to the form of the remedy adopted by the complainant, we are brought to the conclusion, as before announced by this court to the parties, that there is made out a *prima facie* case for the exercise of jurisdiction. The witnesses who testify to the obstruction are numerous, and the weight of their testimony is not impaired by the impeachment of their credit, or a denial of the facts stated by them.

563*] *But is objected, if not as a matter going to the jurisdiction, as fatal to any further action in the case, that there are no statutory provisions to guide the court, either by the State of Virginia or by Congress. It is said that there is no common law of the Union on which the procedure can be founded; that the common law of Virginia is subject to its legislative action, and that the bridge, having been constructed under its authority, it can in no sense be considered a nuisance. That whatever shall be done within the limits of a state, is subject to its laws, written or unwritten, unless it be a violation of the Constitution or of some Act of Congress.

It is admitted that the federal courts have no jurisdiction of common law offenses, and that there is no abstract pervading principle of the common law of the Union under which we can take jurisdiction. And it is admitted that the case under consideration is subject to the same rules of action as if the suit had been commenced in the Circuit Court for the District of Virginia.

In the second section of the third article of the Constitution it is declared, "the judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority."

Chancery jurisdiction is conferred on the courts of the United States with the limitation "that suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law." The rules of the High Court of Chancery of England have been adopted by the courts of the United States. And there is no other limitation to the exercise of a chancery jurisdiction by these courts, except the value of the matter in controversy, the residence or character of the parties, or a claim which arises under a law of the United States, and which has been decided against in a state court.

In exercising this jurisdiction, the courts of the Union are not limited by the chancery system adopted by any state, and they exercise their functions in a state where no court of chancery has been established. The usages of the High Court of Chancery in England, whenever the jurisdiction is exercised, govern the proceedings. This may be said to be the common law of chancery, and since the organization of the government it has been observed.

In *Robinson v. Campbell*, 3 Wheat., 222, it is said: "The court, therefore, think that, to effectuate the purposes of the Legislature, the

remedies in the courts of the United States are to be, at common law or in equity, not according to the practice of state courts, but [*564 according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles."

This principle is not controverted by what is laid down in the case of *Wheaton & Donaldson v. Peters*, 8 Pet., 658. In that case the court says: "It is clear there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent states, each of which may have its local usages, customs, and common law. There is no principle which pervades the Union, and has the authority of law, that is not embodied in the Constitution or laws of the Union. The common law could be made a part of our federal system only by legislative adoption. When, therefore, a common law right is inserted, we must look to the state in which the controversy originated." The inquiry, in that case, was, whether a copy right existed by common law in the State of Pennsylvania. But, in the case above cited from 3 Wheaton, the court spoke of the remedy. By the Act of Congress of 1828, proceedings at law, in the courts of the United States, are required to conform to the modes of proceeding in the state courts; but there is no such provision in regard to courts of chancery.

Under this system, where relief can be given by the English chancery, similar relief may be given by the courts of the Union.

An indictment at common law could not be sustained in the federal courts by the United States, against the bridge as a nuisance, as no such procedure has been authorized by Congress. But a proceeding, on the ground of a private and an irreparable injury, may be sustained against it by an individual or a corporation. Such a proceeding is common to the federal courts, and also to the courts of the State. The injury makes the obstruction a private nuisance to the injured party; and the doctrine of nuisance applies to the case where the jurisdiction is made out, the same as in a public prosecution. If the obstruction be unlawful, and the injury irreparable, by a suit at common law, the injured party may claim the extraordinary protection of a court of chancery.

Such a proceeding is as common and as free from difficulty as an ordinary injunction bill, against a proceeding at law, or to stay waste or trespass. The powers of a court of chancery are as well adapted, and as effectual for relief in the case of a private nuisance, as in either of the cases named. And in regard to the exercise of these powers, it is of no importance whether the eastern channel, over which the bridge is thrown, is wholly within the limits of the State of Virginia. The Ohio being a navigable stream, subject to the commercial power of Congress, and over which that power has been exerted; if the river be within the State of Virginia, the commerce upon it, which extends to other states, is not within its jurisdiction; consequently, if the Act of Virginia authorized the structure of the bridge, so as to obstruct navigation, it could afford no justification to the Bridge Company.

The Act of Virginia under which the bridge

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was built, with scrupulous care, guarded the rights of navigation. In the 19th section, it is declared, "That if the said bridge shall be so constructed as to injure the navigation of the said river, the said bridge shall be treated as a public nuisance, and shall be liable to abatement, upon the same principles and in the same manner that other public nuisances are." And, in the Act of the 19th of March, 1847, to revive the first Act, it is declared, in the 14th section, "that if the bridge shall be so erected as to obstruct the navigation of the Ohio River, in the usual manner, by such steamboats and other craft as are now commonly accustomed to navigate the same, when the river shall be as high as the highest floods hereinbefore known, then, unless, upon such obstruction being found to exist, such obstruction shall be immediately removed or remedied, the said last-mentioned bridge may be treated as a public nuisance, and abated accordingly."

This is a full recognition of the public right on this great highway, and the grant to the Bridge Company was made subject to that right.

It is objected that there is no Act of Congress prohibiting obstructions on the Ohio River, and that until there shall be such a regulation, a state, in the construction of bridges, has a right to exercise its own discretion on the subject.

Congress have not declared in terms that a state, by the construction of bridges, or otherwise, shall not obstruct the navigation of the Ohio, but they have regulated navigation upon it, as before remarked, by licensing vessels, establishing ports of entry, imposing duties upon masters and other officers of boats, and inflicting severe penalties for neglect of those duties, by which damage to life or property has resulted. And they have expressly sanctioned the compact made by Virginia with Kentucky, at the time of its admission into the Union, "that the use and navigation of the River Ohio, so far as the territory of the proposed State, or the territory that shall remain within the limits of this Commonwealth lies thereon, shall be free and common to the citizens of the United States." Now, an obstructed navigation cannot be said to be free. It was, no doubt, in view of this compact, that in the charter for the bridge, it was required to be so elevated as 500* not, at the greatest height of the water, to obstruct navigation. Any individual may abate a public nuisance. (5 Bac. Abr., 797; 2 Roll. Abr., 144, 145; 9 Co., 54; Hawk. P. C., 75, sec. 12.)

This compact, by the sanction of Congress, has become a law of the Union. What further legislation can be desired for judicial action? In the case of *Green et al. v. Biddle*, 8 Wheat., 1, this court held that a law of the State of Kentucky, which was in violation of this compact between Virginia and Kentucky, was void; and they say this court has authority to declare a state law unconstitutional, upon the ground of its impairing the obligation of a compact between different states of the Union.

The case of *Wilson v. The Black Bird Creek Marsh Company*, 2 Pet., 250, is different in principle from the case before us. A dam was built over a creek to drain a marsh, required by the unhealthiness it produced. It was a

small creek, made navigable by the flowing of the tide. The Chief Justice said it was a matter of doubt, whether the small creeks, which the tide makes navigable a short distance, are within the general commercial regulation; and that in such cases of doubt, it would be better for the court to follow the lead of Congress. Congress have led in regulating commerce on the Ohio, which brings the case within the rule above laid down. The facts of the two cases, therefore, instead of being alike, are altogether different.

No state law can hinder or obstruct the free use of a license granted under an Act of Congress. Nor can any state violate the compact, sanctioned as it has been by obstructing the navigation of the river. More than this is not necessary to give a civil remedy for an injury done by an obstruction. Congress might punish such an act criminally, but until they shall so provide, an indictment will not lie in the courts of the United States for an obstruction which is a public nuisance. But a public nuisance is also a private nuisance, where a special and an irremediable mischief is done to an individual.

In the case of *The City of Georgetown v. The Alexandria Co.*, 12 Peters, 98, this court say: "The Court of Equity, also, pursuing the analogy of the law, that a party may maintain a private action for special damages, even in case of a public nuisance, will now take jurisdiction in case of a public nuisance, at the instance of a private person, where he is in imminent danger of suffering a special injury, for which, under the circumstances of the case, the law would not afford an adequate remedy." Where no special damage is alleged, an individual could not prosecute in his own name for a public nuisance. This doctrine is laid down in *Conning et al. v. Lowerre*, 6 Johns. Ch., 439. *In that case the injunction was granted. [567 ed, and the Chancellor said, "that here was a special grievance to the plaintiffs, affecting the enjoyment of their property and the value of it. The obstruction was not only a common or public nuisance, but worked a special injury to the plaintiffs."

Chancellor Kent, in the 3d volume of his Commentaries, 411, says: "The common law, while it acknowledged and protected the right of the owners of the adjacent lands to the soil and water of the river, rendered that right subordinate to the public convenience, and all erections and impediments made by the owners, to the obstruction of the free use of the river as a highway for boats and rafts are deemed nuisances."

In *Simpson v. Smith*, 8 Simons, 272, it was held that injury to the plaintiff's trade was sufficient to give jurisdiction against a public nuisance, and that it was not necessary to use, in such a prosecution, the name of the Attorney-General. And this was on a bill for the discontinuance of works already erected.

It is said, "the question of nuisance, or not, must, in cases of doubt, be tried by a jury." (2 Story's Eq., 202.) In this respect the question is similar to an application for the protection of a patent. Where the right has been long enjoyed, or is clear of doubt, chancery will interfere without a trial at law. *Mr. Justice Story* says (*Id.*, 203): "A court of equity

will not only interfere upon the information of the Attorney General, but also upon the application of private parties, directly affected by the nuisance; whereas, at law, in many cases the remedy is, or may be, solely through the instrumentality of the Attorney-General."

In the same volume, p. 204, it is said: "In regard to private nuisances the interference of courts of equity, by way of injunction, is undoubtedly founded upon the ground of restraining irreparable mischief, or of suppressing oppressive and interminable litigation, or of preventing multiplicity of suits." (Mit. Eq. Pl., by Jeremy, 144, 145; Eden on Injunctions, ch. 11, 231, 238.)

"There must be such an injury as from its nature is not susceptible of being adequately compensated by damages at law, or such as, from its continuance or permanent mischief, must occasion a constantly recurring grievance, which cannot otherwise be prevented than by an injunction." "Formerly, indeed, courts of equity were extremely reluctant to interfere at all, even in regard to repeated trespasses. But now there is not the slightest hesitation, if the acts done, or threatened to be done to the property, would be ruinous or irreparable." (2 Story's Eq., 207.)

In *Ripon v. Hobart*, 3 Mylne & Keen, 169, Lord Brougham says: "If the thing sought to be prohibited is in itself a nuisance, the court will interfere to stay irreparable mischief without [*568] waiting for the result of a trial; and will, according to the circumstances, direct an issue or allow an action," &c. Lord Eldon, in the case of *Attorney-General v. Cleaver*, 18 Ves., 218, appeared to think that there was no instance of an injunction to restrain a nuisance without trial. But in this he was clearly wrong.

The fact that the bridge constitutes a nuisance is ascertained by measurement. The height of the bridge, of the water, and of the chimneys of steamboats, are the principal facts to be ascertained. If the obstruction exists, it is a nuisance. To ascertain this a jury is not necessary. It is shown in the report, by a mathematical demonstration. And the other matters, connected with the case, as to the benefit of high chimneys, lowering of them in passing under the bridge, and shortening chimneys, are matters of science and experience, better ascertained by a report than by a verdict. And the same may be said of the statistics which are in the case.

The object of the suit was, not the recovery of damages, but to enjoin the defendants from building the bridge which would injure the plaintiff. If the bridge be a material obstruction to the navigation of the Ohio, it is not denied that the plaintiff would be injured. The ground of defense taken and maintained is, that the bridge is not a material obstruction to commerce on the river. On this point there is no doubt. A jury, in such a case, could give no aid to the court, nor security to the parties. Having had notice of an application for an injunction, before the defendants had thrown any obstruction over the river, they cannot claim that their position is strengthened by the completion of the bridge.

But it is said, the bridge constitutes no serious obstruction to the navigation of the Ohio;

that only seven steamboats, of two hundred and thirty which ply upon the river as high as Pittsburgh, are obstructed; and that arises from the height of their chimneys, which might be lowered at a small expense, in passing under the bridge; that by the introduction of blowers, the chimneys might be shortened without lessening the speed of the boats; that the goods and passengers which are conveyed on the public lines of communication, between Pittsburgh and Philadelphia, could be as well conveyed on boats of lower chimneys, and consequently the State, as proprietor of those lines, if at all injured, is injured so inconsiderably as not to lay the foundation of this procedure; that none of the packets or the other boats on the river are owned by the State of Pennsylvania.

That the bridge constitutes an obstruction, is shown by the report of the commissioner, the answer of defendants, the proof in the case, and by the admission in the argument of the counsel for the defendants. The report of the commissioner is considered, *as to the fact [*569] of the obstruction and the extent of it, of the same force as the verdict of a jury. The report having been the result of the most arduous and scientific investigation of the facts, is entitled to the full weight of a verdict. (2 Railway Cases, 330.) The fact of obstruction was a plain and practical question, but it was connected with other matters involving questions of science, which were to be settled on the opinion of experts; and a report being fairly made, the court will, generally, assume it as a basis of action, unless it shall be shown to have been made under improper influences, or through a mistake of facts. (1 Railway Cases, 576; Shelford on Railways, 430.)

In his report the commissioner says: "The boats running in that line, and passing the site of the present suspension bridge, in 1849, previous to the time when the first cables were thrown across the eastern branch of the Ohio, at Wheeling, were the Clipper, No. 2; the Hibernia, No. 2; the Brilliant; the Messenger, No. 2; the Isaac Newton; the New England, No. 2; and the Monongahela.

"The Clipper, No. 2, came out in March, 1846, was 215 feet long, and had chimneys 64 feet high. The Hibernia, No. 2, came out in 1847. She was 225 feet long, and her chimneys were 72½ feet high from the water. The Brilliant came out in February, 1848, was 227 feet long, and had chimneys 71 feet high. The Messenger, No. 2, came out in the winter or spring of 1849, was 242 feet long, and has chimneys 76½ feet high. The Isaac Newton was 182 feet long, and had chimneys only 63½ feet high. The New England, No. 2, was 223 feet long, and her chimneys were 65½ feet high. "The dimensions and height of the chimneys of the Monongahela," the commissioner says. "I have not been able to ascertain from the evidence."

"There were also two other regular packets running past Wheeling in the spring and summer of 1849, previous to the erection of the bridge; the two Telegraphs, running as regular packets between Pittsburgh and Louisville. The chimneys of the Telegraph, No. 1, were 80 feet high, and those of the other Telegraph were 79 feet 9 inches high.

"Not more than two or three of these nine

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packets had their chimneys prepared for lowering at the close of the navigation in the summer of 1849. And of the five largest only one of them could have gotten under the bridge on a twenty feet stage of water with the chimneys standing; and that one, the *Brilliant*, could not have gotten under when the water was more than twenty-one feet upon the Wheeling bar. And neither of the two telegraphs could have gotten under the bridge at a thirteen feet stage of the water with their chimneys standing." 570*] "If the bridge," says the commissioner, "had been erected in 1847, therefore, and those nine packets had then been running, two of them could not have gotten under the bridge for nearly three months, when the water was thirteen feet and over; two of them would have been unable to get under for thirty-three days, when the water on the bar was twenty feet and over; another, the *Brilliant*, from nineteen to twenty-five days, when the water was twenty nine feet and over; and the other four as much as ten days, when the water was twenty-nine feet and over—unless they had lowered or cut off their chimneys."

"The passage of three of the Pittsburg and Cincinnati packets, which were running on the Ohio before the erection of the bridge, had been actually stopped or obstructed by such bridge previous to the order of reference in this cause: the *Messenger*, No. 2, the *Hibernia*, No. 2, and the *Brilliant*.

"The first of these boats arrived at the bridge on the 10th of November, 1849, on her downward passage, upon a twenty feet stage of water, and had to cut off her chimneys before she could pass the bridge. She was detained there about seven hours, but I believe she did not lose her trip or passengers. She was subsequently detained at the bridge seven hours, and was obliged to cut off her chimneys a second time.

"On the 11th of November, 1849, the *Hibernia*, No. 2, reached the bridge on her upward trip. They attempted to get her under the bridge by sinking her deeper in the water with coal ballast. But, in attempting to pass the bridge, the top of one of her chimneys caught upon a projection from the under side of one of the flooring timbers, and injured the chimney so that it had to be taken down and repaired. The boat was detained thirty-two hours at Wheeling on that occasion; and was obliged to hire another boat to take her passengers on to Pittsburg, except such of them as preferred to cross the mountains by the way of Cumberland.

"On the 18th of the same month the passage of the *Hibernia*, No. 2, was again obstructed by the bridge on her downward passage; by which she lost an entire trip. Finding she could not get under the bridge in time to save her trip, she transferred her freight and passengers to another boat, and returned to Pittsburg. And the passage of the same boat was again obstructed by the bridge in coming up the river last spring. On that occasion she arrived at Wheeling between nine and ten o'clock in the morning, and finding she could not get under the bridge she gave up the trip, and landed her passengers, who proceeded east by way of Cumberland.

"The *Brilliant* was obstructed by the bridge 571*] on her passage *up on the 18th December 18.

ber, 1849, and had to wait until her chimneys could be cut off to enable her to pass under the bridge. The chimneys were cut off at great risk to the lives of those who were engaged in the operation; and the boat passed under the bridge and proceeded to Pittsburg after a detention of four or five hours.

"In the winter and spring subsequent to the erection of the bridge, the *Buckeye State*, the *Keystone State*, and the *Cincinnati*, three new packets, were brought into the Pittsburg and Cincinnati lines, in the places of the *New England*, No. 2, the *Isaac Newton*, and the *Monongahela*. They were all of much larger dimensions and had much taller chimneys than the old boats for which they were substituted, and their chimneys were hinged and rigged for lowering." The chimneys of the *Buckeye State* were 74 feet 8 inches high, those of the *Keystone* 77 feet 5 inches, and those of the *Cincinnati* 84 feet 7 inches.

"Two accidents have occurred to those new boats in passing under the bridge since they came out. The *Keystone State*, on her downward passage, the 4th of March last, in attempting to pass under the apex of the bridge upon a thirteen and a quarter feet stage of water, could not get near enough to the Wheeling shore to pass under the apex of the bridge. And in attempting to drop down about twenty feet further west, one of the chimneys struck the bridge and tore away all the guys or fastenings of both chimneys, except one guy rod; broke the westerly chimney in two; broke off the hinge from the other chimney, and tore up some portions of the hurricane deck to which the guy rods were fastened. And if the remaining guy rod had given way, both chimneys, weighing together about four tons, would have fallen down."

A somewhat similar accident, it seems from the report, occurred to the *Cincinnati*, in October, 1850.

On the practicability and safety of lowering the chimneys a great number of witnesses were examined. And the commissioner says, although there was great conflict in the testimony as respects the danger to the limbs and lives of the passengers in the operation, yet, he says, when the facts sworn to are examined, there is a decided preponderance against the safety of lowering the chimneys. And he remarks, "The very elevated as well as large chimneys used upon the Cincinnati and Pittsburg packets, and other boats of that class, cannot certainly with any facility or safety be lowered by hinges at the tops. They are therefore obliged to lower them at the hurricane deck, by means of a derrick. The weight of the parts of the two chimneys which must be let down upon those large boats is estimated by the witnesses to be from three to four tons. This *enor- [572 mous weight hanging over the cabin, or rather over the berths of passengers, in process of lowering, would probably prove disastrous in the extreme if by any accident the chimneys should come down by the run; which is very likely to occur, from the carelessness or stupidity of the green hands that the owners and officers of western boats are so often obliged to employ."

And if to the difficulties stated in the report there be added the darkness of the night, a

snow storm, or the falling rain congealing on the roof of the boat and covering it with ice, and a high wind, which generally is experienced in a storm, it would be impracticable, while the boat was proceeding at the rate of ten or twelve miles an hour, to lower the chimneys; and this must be done or the boat must land. During this operation, the pilot, on whom the safety of the boat and the lives of the passengers in a great degree depend, must, from his position, be in imminent danger.

The expense of lowering the chimneys, if practicable and safe, would constitute no inconsiderable item. The time lost in raising and lowering chimneys is variously estimated by the witnesses at from one to three hours. Take the minimum of such estimate, and, according to the calculation of Colonel Long, the expense of the boat amounts to \$8.33 per hour. Each packet will have to lower its chimneys every time it passes under the bridge, which will be, ordinarily, sixty times a season, amounting to the sum of \$499.80, a charge on each packet. To this may be added the apparatus for lowering the chimneys, estimated at \$400, which, with its repairs, may be estimated at \$100 per annum during the life of the boat, which averages five years. And it is in proof that stationary chimneys will last five years, but if subject to be lowered they will only last half that time. The cost of chimneys for a boat is stated at \$1,000, which may be considered as an increased expense to each boat of \$200 per annum. These sums added together make a total of \$799.80, which sum multiplied by seven, the number of the packets, make the sum of \$5,598.60 which the owners of these packets must necessarily pay as an annual tax, by reason of the obstruction of the bridge, if they run their boats and lower their chimneys.

But it is contended that the difficulty of passing under the bridge may be obviated by shortening the height of the chimneys without lessening materially the speed of the boat.

That high chimneys increase the speed of the boat is proved in the case practically and scientifically.

Professors Renwick, Byrne, and Locke say, that by a law of nature the force or velocity of **573*** a draft depends upon the height of the chimney; the force and velocity being measured by the difference in the weight between the column of air within the chimney and an outside column of equal height and diameter; so that a reduction of the height of the chimney involves a diminution of that force with which nature supplies air to combine with fuel for combustion; and by consequence there follows a diminution of heat developed in the furnace, of steam generated in the boiler, and of power by which the wheel is moved and the boat propelled.

The commissioner, in his report, says, "the deduction of science also shows that the draft is increased by elongating the chimneys." In this question economy of fuel is not the object to be attained, but the greatest practicable speed consistent with safety. And this is attained, where there is no defect in the furnace, by the combustion of the largest amount of fuel. Forty-three bushels of bituminous coal are consumed per hour by each of the Pittsburgh packets.

The commissioner says: "In relation to the question whether chimneys as high as those now in use upon the Pittsburgh and Cincinnati packets, and some of the larger boats on the Ohio, are necessary for obtaining the maximum of speed desirable in the navigation of the river, there is a diversity of opinion among the witnesses, especially among those who are not acquainted with the scientific principles of chimney draft in reference to the combustion of fuel for the generation of steam. But I think there is a great preponderance of the testimony even of that class of witnesses in favor of the necessity of very high chimneys upon the large Ohio steamboats."

And he further remarks: "Rejecting the deductions of science on the subject, the teachings of experience show, that as boats upon the Ohio have been gradually improved in their dimensions, from time to time, and the height of their chimneys increased, they have been enabled to run with greater speed, to the evident advantage of commerce and of travel upon the rivers. And the fact that several different projects, for procuring artificial draft, such as blowers, as an available substitute for the draft of tall chimneys, have been tried upon the western waters and have failed and been abandoned, is very strong evidence in favor of the necessity of natural draft for the combustion of wood and bituminous coal upon the steamboats navigating the Ohio."

There is no better evidence of utility, than the progress made in the structure of steamboats and of the machinery by which they are propelled. Men who are engaged in navigation learn by experience and adopt that which will be most conducive to their own interests.

*It appears, from the statement of **[*574]** Scowden, an engineer, that the chimneys of the first boat, called the Cincinnati, were 84 feet high from the surface of the water when light, and about 74 feet high from the center of the flues. Her chimneys were shortened 8 feet, and it diminished her speed up stream from a mile to a mile and a half per hour. Captain Hazlep states that, adding 8 feet to the chimney of the Telegraph, in 1849, increased her speed about half a mile an hour up stream. And by Captain Duval, that the Clipper's chimney being cut off 8 feet, in order to pass the Wheeling Bridge, reduced her speed about three hours between Cincinnati and Pittsburgh. And it may be fairly inferred, that a reduction of 20 feet would reduce the speed between Cincinnati and Pittsburgh about four hours.

According to this estimate, the cost of the boat per hour being, as above stated, \$8.33, if there should be an average loss of four hours in each trip, it would amount to \$33.32. This sum multiplied by sixty, the average number of trips each season, would amount to the sum of \$1,999.20, and this being multiplied by seven, the number of the packets, would make the sum of \$13,994.40, an annual loss by the owners of the packets, by reducing the height of their chimneys, so as to pass under the bridge at the different stages of the water.

But it is said these seven packets are the only boats obstructed by the bridge of the two hundred and thirty which ply upon the Ohio, and run to Pittsburgh.

The transportation of goods and passengers

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by these packets will show their relative importance, as instruments of commerce, between Cincinnati and Pittsburgh. From the evidence, it appears that they convey about one half of the goods in value and three fourths of the passengers, between those cities. Taking the Keystone State as a criterion, each packet transports annually thirty thousand nine hundred and sixty tons of freight, and twelve thousand passengers. The line was established in 1844, and it appears from the proof, that since that time it has transported between the above cities, nearly a million of passengers.

It is in proof that the life of these packets averages five years, when their places in the line must be supplied by new boats. If to their original cost of construction, there be added the expense of running them for five years, adding nothing for repairs or accidents, a total sum will be expended of \$1,680,000. This amount of capital is appropriated every five years in running this line of packets. The structure of the bridge cost less than one eighth of that sum.

The speed of these boats, their excellent accommodations, and their general good management, recommend them to the public, as is shown by the large amount of goods and passengers they convey. And any change in their structure, or in the production of the propelling power, which shall impede their progress, would not only impose upon their proprietors a most onerous tax, but it would greatly lessen their profits, by reducing the amount of freight and passengers. And no part of the amount would, probably, pass to other boats on the river, but to the northern or southern lines, where greater expedition is given.

In the report of the commissioner, a statement is made of the stages of water, at Wheeling, for twelve years, beginning on the 10th of March, 1838, and ending on the 9th of the same month, 1850.

The highest part of the bridge, by actual measurement from the ground, is 91.31 feet. This elevation is only at a single point, two hundred and eighty-four feet from the face of the eastern abutment. From the apex it deflects east and west, being at the distance of forty feet westward only 89.48 feet above the ground, and at the same distance east only 89.77 feet above the ground. The chimneys on the seven packets require a space of about thirty feet in width to pass under the bridge within the eighty feet allowed, and the depth of water and a sufficient headway, must be deducted, to show the height of the bridge for the passage of boats. The headway required, as appears from the report of the engineer, should be between the tops of the chimneys and the lowest parts of the bridge, from two to three feet. This would reduce the space, say two feet and a half to 87.27 feet.

In the twelve years above stated, the water was at the stage of twenty-one feet and over, two hundred and nineteen days; consequently no boat, whose chimneys were 66½ feet high, could have passed under the bridge. Twenty-one feet of water are substituted for twenty feet in the table reported, that statement allowing a foot of water below the measurement. The water, in the above period, was twenty-six feet and over, eighty-three days, during which time

no boat could have passed under the bridge whose chimneys were sixty-two feet high. The water was twenty-eight feet and over, fifty-five days during the twelve years, which would have prevented a boat from passing under the bridge, whose chimneys were sixty feet high. Within the same period, the water was sixteen feet and over, five hundred and thirty-four days; consequently boats, whose chimneys were seventy-two feet high, during that whole time could not have passed under the bridge.

In his report, the commissioner says: "The bridge is nine hundred and eighty feet between the bases of the two abutments. At the highest point of the bridge, for the distance of about fifty-six feet in width, there is a clear headway, for the passage of steamboats with their 576 chimneys standing, of ninety-one feet above extreme low water. But this space of fifty six feet in width is not over any part of the river at extreme low water. The water upon the Wheeling bar must be about four feet deep, to bring the easterly edge of the stream under the western extremity of the fifty-six feet. And it must be more than fifteen feet deep upon the bar to enable a steamboat, drawing five feet, to avail itself of the ninety-one feet headway above low water mark, for the whole width of fifty-six feet."

"It follows, from this statement of facts, that a steamboat, drawing five feet of water, and whose chimneys are 79½ feet high or over, can never pass under the apex of the bridge, at any stage of the water, without lowering her chimneys."

From the data referred to, the defendants' counsel contend that in a few years, at most, there will be a concentration of railroads at Wheeling, and at other places on the Ohio, connecting the Eastern with the Western country, which, from their speed and safety, must take from the river the passengers and a considerable portion of the freight now transported in steamboats. That these roads, crossing the Ohio River, will reach the commercial ports of the interior, and diffuse a larger amount of commerce than that which is now transported on the Ohio. And it is intimated that the Wheeling Bridge may be used by the railroad cars; but it is clearly proved that the bridge is not calculated for such a transportation.

However numerous these roads may be, there can be no doubt that, like similar roads in other parts of the country, their cars will be loaded with freight and passengers. But it may not follow that the Ohio and our other rivers will be deserted, or their business reduced. We have an extent of river coast, counting both shores, exceeding twenty-five thousand miles, through countries the most fertile on the globe. This is a greater distance than the combined railways of the world. That our railroads, as avenues of commerce, may develop our resources in a greater degree than is now anticipated, must be the desire of everyone. But the great thoroughfares, provided by a beneficent Providence, should neither be neglected nor abandoned. They will still remain the great arteries of commerce.

Past experience teaches us, that however the facilities of commerce may be multiplied, her tracks will be filled with productions which en-

rich the country and add to the comforts and enjoyments of its rapidly increasing population. The rewards of labor will give an irresistible impulse to enterprise which must secure to our country a prosperity unequalled in history. Our internal commerce is more than three times as great as our foreign, and the increased lines of [577*] intercourse will cause both *rapidly to advance. The protection of the river commerce is by no means hostile to any other. The multiplication of commercial facilities will, in the same proportion, increase the articles of trade.

If viaducts must be thrown over the Ohio for the contemplated railroads, and bridges for the accommodation of the numerous and rising cities upon the banks of the river, it is of the highest importance that they should not be so built as materially to obstruct its commerce. If the obstructions which have been demonstrated to result from the Wheeling Bridge, are to be multiplied as these crossways are needed, our beautiful rivers will, in a great measure, be abandoned. An experience of forty years shows how much may be done in the structure of steamboats, in the improvement of their machinery, and the propelling power, to increase the speed and the comfort of that mode of transportation, under a continued reduction of expense. But if the limit of advance, in this respect, has already been passed, and a retrograde movement is necessary, by rejecting the improvements recommended by ingenuity and experience, we close our eyes to one great source of our prosperity. What would the West now have been if steam had not been introduced upon our rivers, and their navigation had not remained free? Without an outlet for the products of a prolific soil and the instruments of mechanical ingenuity, the country could have made but little advance.

It is said that the interest of commerce requires navigable waters to be crossed, and that in such a case the inquiry should be, whether the benefit conferred upon commerce by the cross route, is not greater than the injury done. In the case of *The King v. Sir John Morris*, 1 Barn. & Adol., 441, it was held, that the injury cannot be balanced against the benefits secured. And in the case of *The King v. George Henry Ward*, 4 Ad. & El., 384, it was held, where the jury found that an embankment complained of was a nuisance, but that the inconvenience was counterbalanced by the public benefit arising from the alteration, it amounted to a verdict of guilty.

If the obstruction be slight, as a draw in a bridge, which would be safe and convenient for the passage of vessels, it would not be regarded as a nuisance, where proper attention is given to raise the draw on the approach of vessels. Of this character is the complaint of the plaintiff against the bridge, that it obstructs sea vessels built at Pittsburg. Sails cannot be used to advantage on the Ohio or the Mississippi, consequently there can be no necessity of raising the masts until it becomes necessary to hoist the sails. Such vessels float down the river or are towed by steam vessels.

[578*] *It is true the injury done to the State of Pennsylvania may seem to be small, when compared to the magnitude of this subject. It applies to all our rivers, and affects annually a transportation of many millions of passengers

and a commerce worth not less than six hundred millions of dollars. It would be as unwise as it is unlawful to fetter, in any respect, this vast commerce.

In all the charters, granted for the construction of bridges over navigable waters, it is believed all the States, not excepting Virginia, have provided that their navigation should not be obstructed.

The Bridge Company had legal notice of the institution of the suit, and of the application for an injunction to stay their proceedings, before their cables were thrown across the river. This should have induced them to suspend, for a time, their great work, alike creditable to the enterprise of their citizens, and the genius and science of the engineer who planned the bridge and superintended its construction. It is a matter of regret that, by the prosecution and completion of the bridge, they have incurred a high responsibility.

For the reasons and facts stated, we think that the bridge obstructs the navigation of the Ohio, and that the State of Pennsylvania has been, and will be, injured in her public works, in such manner as not only to authorize the bringing of this suit, but to entitle her to the relief prayed.

Believing, from the estimates in the case, that the obstruction to the navigation of the river may be removed by elevating the bridge, at an expense which, when added to the original cost, will leave a reasonable profit to the stockholders, on the entire capital expended, we have endeavored to ascertain the lowest point of elevation which will secure this object. And, on a full view of the evidence, we are brought to the conclusion, that an elevation of the lowest parts of the bridge for three hundred feet over the channel of the river, not less than one hundred and eleven feet from the low water mark will be sufficient—the flooring of the bridge descending from the termini of the elevation, at the rate of four feet in the hundred; this will give a level headway for boats of three hundred feet in width, and will enable those whose chimneys are eighty feet high to pass under the bridge when the water is thirty feet deep from the ground, leaving the tops of the chimneys two feet below the lowest parts of the bridge. If this or some other plan shall not be adopted which shall relieve the navigation from obstruction, on or before the 1st day of February next, the bridge must be abated.

We do not deem it necessary to provide against the floods, which seldom occur, and which, when at the highest, overwhelm the lower parts of our cities and towns on the banks of the Ohio, and necessarily suspend, for a short time, business upon the river.

Mr. Chief Justice Taney, dissenting:

As this is a case of much importance to the parties and the public, and I do not concur in the judgment of the court, it is my duty to express my opinion. I shall do so as briefly as I can.

The first question to be decided is, whether this bridge is a public nuisance or not, which this court has a right to abate. The State of Pennsylvania, it is true, complains of an interruption to her canals, in which, in her character

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as a State, she has a proprietary interest, analogous to that of an individual owner. She seeks redress for this injury. But she proceeds upon the ground that the bridge is a public nuisance, from which the State receives a particular injury to its property beyond that which the public in general sustain. And the foundation of her claim, as stated in the bill, is, that the bridge is an unlawful obstruction to the navigation of a public river, and therefore a public nuisance. The immense mass of testimony contained in this record, is directed almost altogether to that point. In order, therefore, to maintain the bill, it is incumbent upon the State to show that this bridge is a public nuisance. And, if it is a public nuisance, it must be because it is a violation of some law which this court has a right to administer.

In examining this question, it must be borne in mind that, although the suit is brought in this court, the law of the case and the rights of the parties are the same as if it had been brought in the circuit court of Virginia, in which the bridge is situated. Pennsylvania, as a State, has the right to sue in this court. But a suit here merely changes the forum, and does not change the law of the case or the rights of the parties. And if, in the circuit court of the United States, sitting in Virginia, this bridge could not be adjudged a nuisance, and abated as such, neither can it be done in this court. The State, in this controversy, has the same rights as an individual, and nothing more. And the court is bound to administer to the State here the same law that would be administered to an individual suitor, suing for a like cause, in a circuit court of the United States, sitting in the State where the bridge is erected.

Assuming, then, that it does obstruct a public navigable river, and would, at common law, be a public nuisance, I proceed to inquire whether this court is authorized to declare it to be such, and order it to be abated.

The Ohio being a public navigable stream, Congress have undoubtedly the power to regulate [580*] late commerce upon it. They *have the right to prohibit obstructions to its navigation; to declare any such obstruction a public nuisance; to direct the mode of proceeding in the courts of the United States to remove it; and to punish anyone who may erect or maintain it; or it may declare what degree or description of obstruction shall be a public nuisance: as, for example, the height of a bridge over the river, or the distance to which a wharf may be extended into its navigable waters.

But this power has not been exercised. There is no law of the United States declaring an obstruction in the Ohio or any other navigable river, to be a public nuisance, and directing it to be abated as such. Nor is there any Act of Congress regulating the height of bridges over the river. We can derive no jurisdiction, therefore, upon this subject, from any law of the United States; and if we exercise it we must derive our authority from some other source.

But we cannot derive it from the common law. For it has been settled, since the beginning of this government, that the courts of the United States, as such, have no common law jurisdiction, civil or criminal, unless con-

ferred upon them by Act of Congress. It is true that the courts of the United States, when sitting in a state, administer the common law, where it has been adopted by the state. But it is administered as the law of the state, under the authority and direction of the Act of Congress, which makes the laws of the state the rule of decision in a court of the United States, when sitting in the state, provided such laws are not contrary to the Constitution, laws, or treaties of the United States. We cannot, under the rule of decision thus prescribed, adjudge this bridge to be a nuisance, although it may obstruct the navigation of the river, unless it is a nuisance by the common law, as adopted in Virginia and modified by its statutes. But this bridge was built under the authority of a statute of the State. The structure, in its present form, has been sanctioned by the Legislature. It is therefore no offense against the laws of the State: and a circuit court of the United States, sitting in the State and governed by its laws, when not in conflict with the Constitution or laws of the United States, or treaties, could not order it to be abated as a public nuisance; and this court has no higher power over this subject, either at law or in equity, nor any other rule to guide it, than a circuit court sitting in Virginia. And as the bridge is not a nuisance by the laws of that State, and there is no Act of Congress making the obstruction of a public river an offense against the United States, and we have no common law to which the court may resort for jurisdiction, I do not understand by what law, or under what authority, this court can adjudge it to be a public nuisance and proceed to *abate it, either upon a proceeding in [*581] chancery or by a process at law.

If it is a public nuisance, it is an offense either against the United States or the State of Virginia, for which the persons who erected or who continue it are liable to be indicted. For we need go no further than Blackstone's Commentaries (4 Bl. Com., 167) for proof that the unauthorized obstruction of a navigable river is an offense, and may be punished in a criminal proceeding by indictment. Can the parties who built or continue this bridge be indicted for it as an offense against the public? This appears to me to be the true test. We are inquiring whether there is any law which the court has the power to administer, under which this bridge may be adjudged a public nuisance or purpresture. If there is, then the persons who erected it may be punished in a criminal proceeding.

For if it is a public nuisance or purpresture, it is an offense against the sovereignty whose laws have been violated. Could they be indicted for an offense against the United States? This will hardly be contended for, as common law offenses cannot be punished in its courts, unless they are declared offenses by Act of Congress. And as we have no such Act of Congress, it is clear that an indictment charging the obstruction as an offense, against the United States, could not be maintained. It is equally clear, that an indictment, charging it as an offense against the State, could not be supported, for the law of the State sanctions its construction. It may be asked, in reply to this view of the subject, is this great river, then, liable to

be obstructed by bridges whenever the States, through whose territories it passes, choose to authorize them? And are the inhabitants above the obstructions to be shut out from its navigation, and without redress? The argument *ad inconvenienti* would be entitled to great consideration if there was any foundation for it, although it would not alter the law. But this opinion leads to no such result. For I have already said that Congress have the power to declare the obstruction of a navigable stream an offense against the United States, and to authorize the courts of the United States to abate it as a nuisance; and any law of a state to the contrary would be unconstitutional and void.

If, therefore, there be an evil, it may easily be corrected by the legislative authority of the general government. But if Congress have not thought proper, or do not think proper, to exercise this power, and public mischief has arisen, or may arise from it, it does not follow that the judicial power of the United States may step in and supply what the legislative authority has omitted to perform. It does not by any means follow that the judicial power may declare an obstruction in or over a navigable **582*** stream, *an offense against the United States before the legislative power has forbidden it, and conferred authority upon the courts to punish or remove it.

Undoubtedly this court has original jurisdiction when a state is a party. But it cannot exercise that jurisdiction without some law prescribing the mode of proceeding, the rule of decision, and the evidence by which the right in dispute is to be tried. The unskillful and careless manner in which a steamboat is navigated may impede the passage of other vessels, and sometimes endanger their safety; yet if Pennsylvania sued here for any injury arising from this cause, we could exercise no jurisdiction and give no redress unless there was some law to guide us. And when a case of this kind is not embraced in any law of the United States, we always resort to the established usages of navigation on the river, and the laws of the state in whose jurisdiction the injury was sustained.

The cases in which the court has taken jurisdiction in questions of boundary between states, stand on different ground. The original jurisdiction was conferred by the Constitution. The evidence upon which the right in controversy must be decided, depended upon the laws and usages of nations in disputes of that kind. Congress had no power over the subject. It could neither give nor take away the right of either party, nor prescribe the evidence by which it was to be tried. All that Congress was required to do, or could do, was to authorize the court to issue the proper process to bring the parties before it, and to conduct the proceedings to final judgment. This was admitted on all hands to be necessary before the court could exercise the jurisdiction which the Constitution had conferred. And in the case of *New Jersey v. New York*, 5 Pet., 287, 288, it was held that the Acts of 1789 and 1792 had clothed the court with the necessary power.

The rule as to navigable waters is this: Every independent nation has the exclusive

jurisdiction over the navigable waters lying within its territorial limits. It has the right to regulate commerce upon them, and to determine what bridges may be built over them, or piers or wharves extended into them. And an erection authorized by the Legislature cannot be a nuisance, public or private. This was the situation of the old States prior to the adoption of the Constitution. Each was then an independent sovereign state. But by the Constitution of the United States, they surrendered to the general government the power to regulate commerce. And thus, while they retain their absolute territorial jurisdiction over their navigable waters in all other respects, Congress may forbid the erection of any structure in a navigable stream, which it deems an obstruction to commerce, *and may declare it **[*583]** a nuisance, and direct it to be removed. But all the original authority of the State over the river remains subject to that limitation. For otherwise, until Congress thought proper to legislate, navigation on the river would be under no control. Boats might be run down with impunity, and obstructions of every kind erected in or over it, which the State could not prevent or punish.

The bridge in question is entirely within the Territory of Virginia. Prior to the adoption of the Constitution of the United States, she had an unquestionable right to authorize its erection. She still possesses the same control over the river, subject to the power of Congress, so far as concerns the regulation of commerce. The United States and Virginia are the only sovereignties which can exercise any power over the river where the bridge is erected. Virginia has authorized it, and Congress have acquiesced in it. Congress have made no regulation declaring such a structure unlawful, or authorizing any judicial proceeding against it. If Congress, to whom the power is granted to regulate commerce, have acquiesced, how can the court, to whom the power is not granted, undertake to regulate it, and declare this bridge an unlawful obstruction, and the law of Virginia unconstitutional and void? With all my respect for my brethren, I think it is an error, and I had almost said, a grave one.

If it should be said that the compact between Virginia and Kentucky makes the river free independently of the Constitution, the answer is obvious. The compact does not deprive Virginia of the power to regulate the police of the river, or to authorize bridges or piers, or other structures in it. Such a compact between states has always been construed to mean nothing more than that the river shall be as free to the citizens or subjects for which the other party contracts, as it is to the citizens or subjects of the state in which it is situated. But if this compact or any compact should be construed to prohibit the erection of the bridge, the proceeding should be to enforce the observance of the compact. If erected in violation of a compact, it is still not a nuisance, because there is no law prohibiting it. It would be a breach of contract by the State, and the remedy in a very different mode of proceeding.

This compact between Virginia and Kentucky, in relation to the navigation of the Ohio, was one of the articles of agreement under which Virginia consented that Kentucky should

become a separate state. Kentucky could not become a separate state without the consent of Congress. But the Act of Congress, which gave that assent, makes no reference whatever to the terms of the agreement between the States. It does not make the United States a party to them, nor guarantee their execution. 584*] It simply declares its consent that the District of Kentucky should, on the 1st of June, 1793, become a State, according to its actual boundaries, on the 18th of December, 1789. The Act of Congress is in 1 Stat. at Large, 189, and contains no allusion whatever, direct or indirect, to the navigation of the Ohio. It leaves the compact as it was; that is, a compact between the two States, and nothing more, and to be enforced by a proceeding upon it. Nor is there any difference in the rights of navigation between the rivers and bays of the Atlantic States and those of the West. The old and the new States in this respect stand upon an equal footing. It was so decided in this court in the case of *Pollard v. Hagan*, 3 How., 212, and that decision has been sanctioned in subsequent cases, to which it is not now necessary to refer.

The complainant, however, insists that the law of the United States for enrolling and licensing coasting vessels, gives to the vessel so enrolled and licensed, the right to navigate the river free from obstructions: that this law, therefore, by necessary implication, forbids the erection of the bridge which obstructs the navigation, and consequently defines the rights of the parties. And if a vessel is obstructed, the law is violated, and the injured party entitled to his remedy, and to have the obstruction removed. The case of *Gibbons v. Ogden* is relied on to support this proposition.

This brings up the question, whether the law of Virginia, sanctioning the erection of this bridge, is or is not repugnant to the Constitution or laws of the United States. Is it repugnant to the clause of the Constitution which gives Congress the power to regulate commerce? Or to any law passed under it? If it is not, then the structure complained of, being within the territory of the State, and authorized by its Legislature, cannot be a public nuisance or a private nuisance in the eye of the law. Nor has anyone a right to complain of it as an unlawful obstruction in his way; nor to maintain a suit at law or in equity for any inconvenience or loss he may sustain from it. Assuming that we may exercise jurisdiction on the ground that the complainant claims a right under the above-mentioned Act of Congress, neither the point nor the principles decided in *Gibbons v. Ogden* have, in my judgment, any application to the case before us. In that case, the Legislature of New York passed a law granting to certain persons the exclusive privilege of navigating all the waters within the jurisdiction of that State with boats moved by fire or steam; and authorizing the Chancellor of the State to restrain by injunction any person whatever from navigating these waters with boats of that description. The complainant claimed under the grantees of the monopoly, 585*] and sought *by his bill to restrain the respondents from navigating the waters embraced in it. And this court held, and correctly held, that the law of the State was un-

constitutional; that a vessel enrolled and licensed for the coasting trade, under an Act of Congress, had a right to navigate any of the navigable waters of the United States; and that no state had a right to forbid it.

There was no question in that case as to the authority of a court of the United States to declare an obstruction in a river, which a state had authorized, to be a public nuisance, and treat it as an offense against the United States. The waters in question were navigable, and free from impediments of that description; and the boats of the parties who claimed the exclusive privilege were daily passing over them. The only question in the case was, whether all vessels, enrolled and licensed by Congress, had not the right to pass over the same waters as freely as the vessels of the monopolists. The court said they had; that they had an equal right with the complainant to use the navigable waters of New York. But the court do not say that an obstruction placed in the water, which renders navigation inconvenient or hazardous, is a violation of the Act for licensing and enrolling coasting vessels, or in conflict with it; nor do they say that this Act of Congress confers on the court the power to adjudge it a nuisance, and order it to be abated. There was no such question before the court. It was not in the case, nor was the attention of the court in any way called to it by the argument.

Now, in this case, Virginia has passed no law giving exclusive privileges to navigate the Ohio River through her territory. If the bridge is an obstruction, her own citizens, engaged in the navigation of the Ohio, are equally disabled from passing as the citizens of any other state. The question, therefore, on which this case must turn, did not arise in *Gibbons v. Ogden*. But it did arise, and was expressly decided in the case of *Wilson v. The Black Bird Creek Marsh Company*, 2 Pet., 245. It was the point in the case. A dam across a navigable creek had been authorized by the Legislature of Delaware, as this bridge has been authorized by the Legislature of Virginia. It stopped a navigable creek, and as the court said, must be supposed to abridge the rights of those who were accustomed to use it. So this bridge is supposed to impede the navigation of the Ohio, and abridge the rights of those accustomed to use it. Yet, in the case referred to, the court said, that as Congress, in the execution of its power to regulate commerce, had passed no law to control state legislation over these small navigable creeks, the law of Delaware was not repugnant to the Constitution, not being in conflict with any law of Congress. It will be remembered *that the Act of Congress [586 for enrolling and licensing vessels, under which *Gibbons v. Ogden* was decided, was still in force, but was regarded by the court as inapplicable to the obstruction occasioned by the dam. The result of these two cases is this: The Act of Congress gives to vessels enrolled and licensed under it the right to navigate the public waters wherever they find them navigable; and any state law prohibiting it is unconstitutional and void. And upon this ground, the judgment of the State Court of New York, which had decided otherwise, was reversed. But this Act of Congress has no application to an obstruction created by a dam across the navigable wa-

ter, and without further legislation by Congress, the law of Delaware, which authorized the dam, was constitutional and valid. And upon that ground, the judgment of the State Court of Delaware, which sanctioned the obstruction, was affirmed. I can see no difference in principle between the last-mentioned case and the case at bar. There has been no further legislation by Congress on that subject since that case was decided. And as the principle is the same, the decision should be the same; and the case of *Wilson v. The Black Bird Creek Marsh Company* should, in my opinion, govern this.

It can hardly be supposed that the circumstance that a port of entry is established on the Ohio River, above the bridge, distinguishes this case from the one referred to. The right which the Act of Congress gives to vessels enrolled and licensed for the coasting trade, is certainly not confined to the navigation between ports of entry. They have the right to enter any navigable creek or river which may suit their convenience, or the business and employment in which they are engaged. And any state law which forbids them to do so, or attempts to confine the right to particular persons, is unconstitutional. Any vessel enrolled and licensed had a right to proceed up Black Bird Creek as far as she found navigable water; and her right was as perfect as if a port of entry had been established at the head of navigation. Nor can the size of the creek, or the small number of vessels that used it, as compared with the Ohio, make any difference between the cases. It was the right that was in question; and that right was the same whether the navigable water was narrow or wide, or used only by a single vessel, or frequented by hundreds.

The case of *Wilson v. The Black Bird Creek Marsh Co.* is entitled to the more weight, because it was decided after the case of *Gibbons v. Ogden*, which appears, by the report, to have been recalled to the attention of the court, and relied upon in the argument; and the opinion in the last case was delivered by the same learned judge who delivered the elaborate opinion ⁵⁸⁷ in the former one. It shows that he, and the learned court in which he presided, did not consider the principles on which *Gibbons v. Ogden* was decided applicable to a case where an obstruction was placed in a navigable water, impeding, generally, the passage of vessels; and were of opinion that the courts of the United States had no jurisdiction which would authorize them to remove or abate it, or treat it as unlawful, without further legislation by Congress. I think it more safe to follow their own construction of their own opinion in *Gibbons v. Ogden*, than to look for a new one.

Indeed, apart from any decisions on the subject, I cannot perceive how the mere grant of power to the Legislative Department of the government to regulate commerce can give to the judicial branch the power to declare what shall, and what shall not be regarded as an unlawful obstruction; how high a bridge must be above the stream, and how far a wharf may be extended into the water, when we have no regulation of Congress to guide us. Nor do I see how we can order a bridge or a wharf to be removed, unless it is in violation of some law which we are authorized to administer. In

taking jurisdiction, as the law now stands, we must exercise a broad and undefinable discretion, without any certain and safe rule to guide us. And such a discretion, when men of science differ, when we are to consider the amount and value of trade, and the number of travelers on and across the stream, the interests of communities and states sometimes supposed to be conflicting, and the proper height and form of steamboat chimneys, such a discretion appears to me much more appropriately to belong to the Legislature than to the Judiciary.

Besides, I think there is an insuperable objection to this proceeding in equity even if this bridge should be regarded as a nuisance, public or private. And it appears to me to be settled law in England, as well as in this country, that chancery will not interfere by injunction where the evidence is conflicting and the injury doubtful. I do not speak of informations in chancery where the Attorney-General is a party, for this is not a proceeding of that kind. But I speak of cases between individual parties, like the present one. And the rule above stated, when there is a conflict of testimony, will be found in 2 Story's Com., page 201 to 207, where the subject is fully examined, and the cases which have been decided referred to. And a case where there is more conflict in the testimony of men of high character and undoubted skill and knowledge could hardly be imagined, than is presented in the record before us; nor a case where the injury is more doubtful. For, after the experience of two years, we see how small the loss has been compared with the immense trade and the multitude of steamboats, which, during that time, have passed under it.

Neither can the jurisdiction of a court of chancery be supported upon the ground that the injury is immediate and irreparable, or that any serious embarrassments lie in the way of an action at law. The injury, after two years' experience, has not been found serious enough to lessen the navigation and commerce of the river. On the contrary, they have been continually increasing since this bridge was built. And if it be an injury for which the party is entitled to a remedy, he has a plain and adequate remedy at law; and therefore, upon general principles of equity, and more especially under the express provisions of the Act of 1789, he has no right to come into chancery for relief. And if an action at law were brought by the State in the Circuit Court of the United States, sitting in Virginia, the proceeding at law would be as free from embarrassment and difficulty as any action at law for any injury for which the law gives a remedy. And there is no reason to suppose that the respondents are not able to answer to any amount of damage, which, upon the evidence in this case, the State of Pennsylvania might recover against them.

If it should be said that as the Legislature of Virginia have sanctioned the erection of this bridge, prejudices in favor of it might be supposed to influence the jury, the answer is obvious. The law would be decided by the Circuit Court, subject to the revision and control of this court; and we are bound to presume that a jury, in a Circuit Court of the United States,

would do equal justice between citizens of their own state, and another state or its citizens. The constitution and laws so presume. And, certainly, this court would never act upon any apprehension that justice would not be done, by a jury in any state, when summoned and impaneled according to the laws of the United States. And still less could it be induced to assume extraordinary and unusual powers from fears or suspicions of that kind.

But Pennsylvania has the right to sue in this court, or in the Circuit Court, at her election. She has the same right to sue here in an action at law as she has to file her bill in equity. And in an action at law brought here by *The State of Georgia v. Brailsford et al.*, 3 Dall., 1, the case was tried by a jury in the same manner as if the suit had been brought in the Circuit Court. And the jury, brought here to try this case, would be altogether free from suspicion of bias or prejudice.

It may be said that such a proceeding here would embarrass and retard the business of this court, and would be expensive and onerous to the complainant, as the witnesses must **589** be brought from a distance and detained here for a considerable time. This is true. But if the State sues in this court, instead of the Circuit Court, it does so by its own choice. And if the remedy at law in the forum selected is embarrassing and expensive, it has no right to complain of what is the necessary consequence of its own act; nor to go into equity to avoid difficulties at law, which arise from the nature of the forum to which the State voluntarily resorts; and, certainly no inconvenience to the court could alter the law, nor give it equity jurisdiction where the law has denied it. In the language of the Act of Congress, Pennsylvania has in this case a plain and adequate remedy at law, and has no right, therefore, to come to the equity jurisdiction of the court, until her legal right has been established.

Indeed, this case, in my view of it, pushes the jurisdiction of chancery further than has heretofore been done in England or in this country.

The bridge has been erected and completed without any previous injunction to restrain the respondents from proceeding in the work. It is charged to be a public nuisance. But Pennsylvania has no right to proceed against it solely on that account. She proceeds, and is entitled to proceed, only for the private and particular injury to her property which this public nuisance has occasioned. If the court order it to be demolished, it is not to protect the public or any portion of the community who may be supposed to be injured by it. For the government, which represents the public, and is charged with its interests, is not before the court; and has not complained of this structure, nor sought to have it removed. Pennsylvania is the only party asking for relief; and her damage, as proved in the record, is a trivial loss of some few dollars in tolls; and the mere possibility of an annual future loss to some small amount, concerning which the testimony is vague and inconclusive, and at best but conjectural. She has no concern with the obstruction to boats with high chimneys, nor with the amount of trade from Pittsburgh, or any other place, further than such evidence tends

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to show the bridge to be a public nuisance. The owners of steamboats, and the persons engaged in commerce are not parties to this suit, and the State of Pennsylvania has no right to prosecute for them. She must not only show that boats with high chimneys are more profitable to the owners, and better for commerce, than those with lower ones, but she must also show that the necessity of reducing them will lessen the profits of her canals. I see no proof in the record by any means sufficient to establish that fact. And we are called upon to demolish a structure which costs more than \$200,000 to save the State of Pennsylvania from this speculative, questionable, and at most, inconsiderable loss. It seems to me that if the power and jurisdiction of this court were clear, and supported by precedents, yet, this court, upon settled principles of equity jurisprudence, would refuse to destroy property of so much value, and which the public, by its proper officer, does not charge to be a nuisance, merely to guard against the possibility of an inconsiderable loss by the State. It is precisely one of those cases in which the court would, at all events, require the party to establish his right at law before he comes into equity, or to make the Attorney-General a party, and give the public an opportunity of being heard where its interest is so deeply involved.

I do not doubt the power of the Court of Chancery to abate a public nuisance, upon an information in chancery, to which the Attorney-General is a party. But even in a case of that kind there must be danger of irreparable mischief before the tardiness of the law can reach it. This is the doctrine of this court in the case of *The City of Georgetown v. The Alexandria Canal Company*, 12 Pet., 98. But such a case is not now before us. The Attorney-General is not a party. Pennsylvania sues as an individual for a private right. And in a case of this description I am not aware of any case entitled to be regarded as an authority in this court, where chancery ever interfered by injunction except by way of prevention, that is, to stay the contemplated structure, until it could be decided, in a proceeding to which the public was a party, whether it was a public nuisance or not. We must be careful not to confound cases of public nuisance with merely private ones. For, in the former, the public have an interest to abate it if a nuisance, and to protect it if it is not, and therefore have a right to be heard, whether the trial be in equity or at law.

This was evidently the opinion of this court in the case of *The City of Georgetown v. The Alexandria Canal Company*, and of Lord Eldon in the case of *Crowder v. Tinkler*, 19 Ves., 616, therein cited, with approbation. In the last-mentioned case, where the court interfered for prevention, and not to abate a structure already completed, the chancellor placed the injunction upon the ground that the nuisance about to be erected would be attended with extreme probability of irreparable injury to the property of the plaintiffs, including also danger to their existence. And that this was clearly established in that case before he awarded the injunction. Such is the rule upon this subject which has been sanctioned by this court. Cer-

tainly no one of the material circumstances which existed in *Crowder v. Tinkler* can be found in this. And if the principles decided here in the case of *The City of Georgetown v. 591** *The Alexandria Canal Company*, *are recognized as the law of this court, I can see no foundation for the injunction in the case before us. For it not only has none of the circumstances in it, upon which the injunction was granted in *Crowder v. Tinkler*, but in that case, strongly as it appealed to the preventive power of the Court of Chancery, the court merely suspended the erection until the question of public nuisance or not could be tried by a jury upon an indictment. It did not grant a perpetual injunction, and still less did it order what had already been constructed to be abated or removed.

So far I have considered the case upon the assumption that the bridge, upon common law principles, might, upon the evidence, be determined to be a nuisance. And admitting that to be the case, I think, for the reasons above stated, that in the absence of any legislation upon the subject by Congress, this proceeding cannot be maintained. I shall, therefore, very briefly express my opinion on the evidence.

I am by no means prepared to say that this bridge would be a public nuisance even at common law. The evidence of the degree in which it obstructs navigation is exceedingly voluminous, and it is impossible to go fully into an examination of its comparative weight, in a manner that would do justice to the subject, without making this opinion itself a volume. It is sufficient to say, that in all questions of this kind, the general convenience and interest of the public in the travel and trade across the river, as well as on its waters, must be taken into consideration. For whether it is a public nuisance or not, depends upon whether it is or is not injurious to the public. The cases in the state courts, and in the circuit courts of the United States, referred to in the argument, which I shall not stop here to examine, in my opinion maintain this doctrine. And upon principle, independently of adjudications, it cannot be otherwise. A structure which promotes the convenience of the public, cannot be a nuisance to it. And the public, whose interests are to be looked to in this case, is not the public of any particular town or district of country, or state or states, but the great public of the whole Union. Taking this view of the question, and looking to the testimony as set forth in the record, and more especially to that unerring test, *experience*, which the lapse of time has afforded, I am convinced that the detriment and inconvenience to the commerce and travel on the river, is small and occasional only, while the advantages which the public derives from the passage over are great and constant. And if the courts of the United States had common law jurisdiction, and the question was legally before us to determine whether this bridge was a public nuisance or not, I am of opinion that it is not; and that 592*] *the advantages which the great body of the people of the United States reap from it, outweigh the disadvantages and inconvenience sustained by the commerce and navigation of the river.

Moreover, the jurisdiction exercised in this case is new and without precedent in this court. Bridges have been erected over many navigable rivers, and built so near the water that vessels can pass only through a draw. Such bridges are unquestionably obstructions, and impede navigation. For where the vessels are propelled by sails, and the wind is unfavorable, they are often detained not only for hours, but for days. The courts of the United States have never exercised jurisdiction over any of these obstructions, nor declared them to be nuisances. I should be unwilling, in a case like this, to exercise this high and delicate power without precedents to support me in analogous cases. The demolition of this bridge would occasion a heavy loss to the parties, and much inconvenience to a large portion of the community. The United States are not parties to this proceeding, and the particular injury sustained by the complainant is exceedingly small. And it is solely for the protection of her small, remote, contingent and speculative interest in tolls, that this bridge is pulled down. For it must be remembered, that although we see in the testimony that injuries are alleged to have been suffered by others, yet the State of Pennsylvania is the only party to this proceeding, the only one who appears in this court as complainant, and her particular loss is the only ground on which jurisdiction is claimed, and the only injury which the court is called on to redress; or has a right to consider in this proceeding.

The testimony, too, is conflicting; men of eminence and skill, and well qualified to speak on the subject, differing widely in their testimony. And I am the more unwilling to assume this questionable jurisdiction, because the legislative department of the general government has undoubted power over the whole subject, and may regulate the height of bridges over the Ohio, and of the chimneys of steamboats when passing under them, and may, while it guards the rights of navigation in the stream, at the same time protect the rights of passage and travel over it. That department of the government has better means, too, of obtaining information, than the narrow scope of judicial proceedings can afford. It may adopt regulations by which courts of justice may be guided in an inquiry like this with some degree of certainty, instead of leaving them to the undefined discretion which must now be exercised in every case that may be brought before us, without being able to lay down any certain rule by which this discretion may be limited. It is too near the confines of legislation; and I think the court ought not to assume it.

*Entertaining this opinion, I must, [*593 with all the respect I feel for the judgment of my brethren, with whom it is my misfortune to differ, enter my dissent.

Mr. Justice Daniel, dissenting:

In entering upon the consideration of the case before us, the mind is at once impressed with the belief that there never has been, that there perhaps never can be brought before this tribunal, for its decision, a case of higher importance or of deeper interest than the present. The subjects which it presses upon our examination, nay, upon which the judgment of this

court has been demanded, and has inevitably determined, are nothing less than—

1st. The jurisdiction or authority of this court, under one of the heads of Original Jurisdiction, enumerated in the Constitution.

2d. The correct interpretation of the power of commercial regulation vested in the federal government, either exerted simply as such by that government, or as affecting the power of internal improvement in the States.

3d. The policy or influence of particular regulations with respect to commerce, as these may tend to restrict it within circumscribed channels, or to promote its general activity and diffusion, by facilities operating a reasonable and just equality of right, of competition, and advantage to all.

4th. The character of the proceeding complained of as a nuisance, the regularity of the proposed mode of redress, and the right of the complainant to claim the interference asked for in any mode.

The magnitude of these topics would seem, in some degree, to excuse, in treating them, the hazard of prolixity; and at any rate, lying as they do in the direct path to the proper survey of this case, they cannot with propriety be overstepped, without pausing upon their examination.

When, at a former period, this cause was before this court, the several topics just enumerated were cursorily adverted to by me as necessarily involved in its adjudication; and the course then adopted by the court was formally objected to, because that course seemed a premature and foregone conclusion upon facts and legal positions entering essentially into the nature of the controversy; facts and legal positions not then maturely examined and ascertained, as the order of the court at that time made, necessarily implies; and which could not, according to established precedent, and the highest adjudications, be properly investigated in the mode proposed. The subsequent proceedings upon the order of the court at the 594*] January Term, 1850, have greatly strengthened the objections assigned by me on that occasion. These proceedings have, at an almost incalculable expense to the parties, brought hither an immense mass of matter, much of which on the one hand is not within the inquiries directed by the court, whilst on the other, inquiries strictly pertinent seem to have been wholly excluded. It has placed before us a long and very learned report, to be sure, in part upon subjects entirely *dehors* the order of the court, and in other aspects of the same report (I speak it with all respect for the highly intelligent and respectable author of that report), palpably opposed, in my opinion, to the rational and just preponderance of the facts stated by the witnesses: a report, in fine, which leaves in all its weight and force, the mischief of withdrawing the trial of the question of nuisance from its proper forum, in which the witnesses could have been confronted and cross-examined; and imposes upon the court the task of passing upon the credibility of those whom they have never heard nor seen. Even in matters of minor concernment, I have always been unwilling, whenever the credibility of witnesses was to be tested, to interpose between such persons and the scrutiny of a jury, awakened, as

it is sure to be, by the vigilance of the advocate; where the essential rights and interests of great communities are at stake, I never will do so, unless constrained by irresistible authority.

Recurring now to the first head of inquiry, I contend that the complainant can have no standing here, on the ground that this court cannot, as is shown, both upon the face of the pleadings and upon the proofs, take jurisdiction of this cause. If this court can take cognizance of the cause before us, it must be in virtue of the 2d section of the 3d article of the Constitution, which declares that "in all cases affecting ambassadors, other public ministers and counsels, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction." There is no other provision of the Constitution under which original cognizance of this cause by the Supreme Court can be assumed. Now, to arrive at the just interpretation of this clause of the Constitution, as fixing that position or interest of the State as a party, which alone creates original jurisdiction in the Supreme Court, it is necessary to settle the import of the word "party," as connected with legal or equitable proceedings. By all correct legal intendment, this term "party" is applicable only to persons sustaining a direct or real interest or right in any pending litigation; an interest or right immediately affected or bound by the issues such litigation involves. This term cannot be extended to persons who may be arbitrarily and irregularly named in proceedings either at law or in equity, the very description of whose relation to the case shall evince a total absence of legal or equitable claims upon the subject of litigation; [*595 a total absence, too, of reciprocal duty or obligation with reference to those whose property and whose possession and enjoyment of that property, are sought to be affected. Whilst courts of justice, therefore, will enforce the convening of all whose interest can properly be adjudged, they will repel and even rebuke attempts to assail, or even to canvass, the rights and interests of others, by those who in effect concede the want of a legal or equitable title in themselves. Courts of justice take no cognizance of imperfect rights, or such as may be termed merely moral or incidental, as distinguishable from legal or equitable, even when the existence of the former may be clearly shown. In this controversy, the State of Pennsylvania, admitted to have no property in or title to the River Ohio within the limits of Virginia, and no property in or title to the steamboats which ply upon that river, is confessedly made use of as a mean, under the shelter of her name, of redressing grievances, which, if they ever had existence, are injuries to her citizens and to individuals, and the proper and efficient remedy for which is to be found at the suit of those citizens in the courts of the State or of the United States. The alleged right of Pennsylvania to sue in this case, for a diminution of profits from her canals and other works of internal improvement within her own territory, and many miles remote from the Wheeling Bridge, had it not been cast into shade by a still greater extravagance disclosed by the record (her right of ship navigation with top-gallant royals all standing), might have awakened some surprise; but even this tamer and

less lofty pretension should fail of the end it has been designed to effect, for it cannot be pretended, and is not even intimated in the pleadings in this cause, that those canals and other public works have been obstructed or rendered in any respect less fitted for transportation, or in any way impaired by the erection of the Wheeling Bridge beyond her territory, and within that of a separate and independent State. And if the mere rivalry of works of internal improvement in other states, by holding out the temptation of greater despatch, greater safety, or any other inducement to preference for those works over the Pennsylvania canals, be a wrong, and a ground for jurisdiction here, the argument and the rule sought to be deduced therefrom should operate equally. The State of Virginia, who is constructing a railroad from the seaboard to the Ohio River at Point Pleasant, much farther down that river than either Pittsburgh or Wheeling, and at the cost of the longest tunnel in the world, piercing the base of the Blue Ridge Mountain, should have the right by original suit in this court against the canal companies of Pennsylvania, or against that State herself, to recover compensation for diverting any portion of the commerce which might seek the ocean by this shortest transit to the mouths of her canals on the Ohio, or to the City of Pittsburgh; and on the like principle, the State of Pennsylvania has a just cause of action against the Baltimore & Ohio Railroad, for intercepting at Wheeling the commerce which might otherwise be constrained to seek the City of Pittsburgh. The State of Pennsylvania cannot be a party to this suit on the grounds stated in the bills filed in her name, for the reason, still more cogent than any yet assigned, viz.: that to permit this, would be to render the clause in the Constitution, relied on in her behalf, utterly useless, and even ridiculous; would destroy every restriction intended by the enumeration of instances of original jurisdiction; and would confound this clause with another provision of the Constitution, designed to cover cases precisely like the one now before the court. If in all instances in which the citizens of one state have cause of action against a citizen or a corporation of a different state, the action can be prosecuted in the name of the state in which the claimant resides, although no peculiar or legal right or cause of action can be shown in such state sustaining the character of a private suitor, then the restriction as to cases of original jurisdiction is entirely abolished; the defending party, too, must be entitled to the same right of substitution, and all suits between citizens of different states might, by this process, be transformed into suits between states, or suits to which states are parties; cases of original jurisdiction in this court. That provision of the Constitution designed to embrace controversies between citizens of different states is thus annulled, and the jurisdiction of the district and circuit courts transferred, as falling within its original cognizance, to the Supreme Court. Such, to my apprehension, appears to be the inevitable result of asserting what are essentially and clearly private rights or interests, in the name of a state, or the prosecution of remote, contingent, and imperfect interests not amounting to property, though claimed on be-

half of a state. I conclude, therefore, that to constitute a state a party in that sense which brings her within the meaning of the Constitution, and indeed within the import of the term "party" to a cause by all correct legal intendment, there must be averred and proved on her behalf, a certain and direct interest, or an injury, or a right of property—a perfect right—a right which a court of justice can define, adjudge and enforce; and that on the part of the State of Pennsylvania no such right having been averred even, much less established in proof, nothing is shown which can maintain the jurisdiction of this court in this cause. The shadowy pretext of an interest or injury, from the nature of things not susceptible of calculation or estimate, can never be the foundation of a right, legal or equitable. And, indeed, so far as any light can be reflected by facts on this pretended or incidental interest of Pennsylvania, resulting from any supposed effect upon the tolls on her canals, an actual increase instead of a diminution of those tolls since the erection of the Wheeling Bridge, is proved.

Passing from this subject of jurisdiction, and supposing it for the present to be vested here, I proceed to examine the pretensions of the complainant, as being deducible from, and as guaranteed by, the power delegated to Congress to regulate commerce between the several States. The existence of that power, in its fullest extent, and for every purpose for which it has been delegated to Congress, need not be questioned, in order to expose and to repel the pretensions advanced for the complainant. On the contrary, the assertion of that power in its greatest latitude, so far as it was ever contemplated by those who gave it, or so far as it can be exercised for useful purposes, carries with it necessarily the condemnation of those pretensions. The power to regulate commerce was given to the federal government, whose functions and objects were designed to be general and co-extensive with the entire confederacy, because its duties embrace the equal rights and interests of all the members of the confederacy, and as a mean of the widest diffusion of commercial facilities and intercourse within the powers vested by the Constitution. It cannot be rationally concluded, that by a provision palpably intended to protect commerce from unequal or invidious restrictions, the power was given to Congress to advance so far towards restriction or monopoly as to limit commerce to particular channels; thereby crippling or wholly preventing its diffusion and activity, and by the same process, conferring upon particular points or sections of the country, arbitrary and unjust advantages, and riveting upon all those portions affected by such a procedure, loss and even ruin. Admitting, then, that Congress had made any regulation affecting the subjects of this controversy (and it will hereafter be shown that they have not done so); admitting, moreover, that their acts or regulations might fall within the broad language of the power vested by the Constitution, it remains still a just and fair inquiry, whether those acts which are arbitrary or oppressive, which defeat the great ends for which the power, thus perverted, may have been within the legitimate scope of the powers alleged in excuse for their performance.

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In other words, whether Congress, as a regulation of commerce, would be justifiable in breaking down works of internal improvement within the States, though calculated in their character and tendencies for the diffusion of commerce, and by such destruction limit commerce to particular local points or interest. Com-598*) mon *sense and common justice would promptly answer in the negative, and would decide that a rational and proper, nay, the only rational and proper exercise of the regulating power in Congress, demands the promotion and protection of such modes and facilities of commercial intercourse (so far as Congress have this power), as will insure equality to all, and the widest diffusion of commercial advantage. Surely, then, in the absence of all action on the part of Congress, this court should imply no policy or design in that body to fetter or cripple great interests which they are charged with the power and duty to protect. But Congress have enacted no regulation whatever in relation to the subject of this controversy; they have not said that bridges should nowhere be erected over the River Ohio, or, if erected, what should be their elevation above the water; neither have they declared, upon scientific calculations or upon experiments, or on any data, what shall be the height of the chimneys of steamboats on that river, nor to what degrees, either from their own calculations of improvement in speed, or from fancy or local rivalry, the owners or masters of steamboats on that river may elongate the chimneys of those steamboats. Upon all these matters Congress have thus far been perfectly silent.

Admitting, then, that the State of Pennsylvania can be regularly before us in the character of a party in interest, this controversy presents to us, in truth, simply a comparison between the will and the acts of the parties thereto, and an appeal to this court, in the absence of all action by Congress—by some rule which it must deduce from the common law of nuisance, to decide upon the comparative merits or demerits of the parties—to decide whether the benefits produced by the Wheeling Bridge to the surrounding country, and by its connection with extended lines of travel and commerce, can save it from the character of a nuisance. Or whether its interference, in certain stages of water, with the chimneys of seven steamboats, owned by private individuals, the height of whose chimneys is a subject of much contrariety of opinion, both amongst scientific men and practical builders and captains of steamboats—can so constitute it a public nuisance, and a cause of such direct injury to the legal rights and interests of Pennsylvania, as to justify its abatement by this court. In the absence of all action by Congress in relation to this matter, in the only legitimate mode in which Congress could affect it, viz.: by commercial regulation, or by some express statutory declaration, the act of one of these parties in the prosecution of their interests must claim intrinsically equal authority with the acts of the other, except so far as they may have some common arbiter by whom both may be controlled. In this case, that arbiter would seem to be either the local sovereignty (the State of 599*) *Virginia), within whose territory the alleged nuisance is situated, or the United

States, through some enactment for the regulation of commerce; but neither of these authorities is invoked in this controversy. We have here a suit in the name of Pennsylvania, occupying the position of every private suitor, asking the action of this court upon general common law jurisdiction over the subject of nuisances, which jurisdiction the courts of the United States do not possess. Nor is it enough to draw within our cognizance the subject of this cause, to affirm merely the competency of Congress to legislate upon it, and to refer its decision, if they choose, to the federal courts. I ask upon what foundation the courts of the United States, limited and circumscribed as they are by the Constitution, and by the laws which have created them and defined their jurisdiction, can, upon any speculations of public policy, assume to themselves the authority and functions of the Legislative Department of the government, alone clothed with those functions by the Constitution and laws, and undertake, of their mere will, to supply the omissions of that department? Is it either in the language or theory of the Constitution, that this court shall exercise such an auxiliary or rather guardian and paramount authority? Cannot the Legislative Department of the government be intrusted with the fulfillment of its peculiar duties? Such an act as this court has been called upon to reform: such an act as it has just announced as its own, is, in my opinion, virtually an act of legislation, or, in stricter propriety (I say it not in an offensive sense), an act of usurpation. To rest our authority to adjudicate this matter on the naked proposition just stated, would be to reject the doctrine by this court heretofore most expressly ruled. The case of *Wilson v. The Black Bird Creek Marsh Company*, 2 Peters, 245, seems to be conclusive upon this point. This case presented an instance of an absolute obstruction by a dam of a water-course navigable by vessels of considerable size, and in which the tide ebbed and flowed. The person who undertook to destroy or injure the dam constructed across this navigable water, was the master of a vessel regularly licensed and enrolled according to the navigation laws of the United States; and being sued for a trespass committed in breaking or injuring the dam, he pleaded, in justification of his act, the character of the navigable water as a public and common highway, for all the citizens of the particular State, and of the United States, to sail, pass, and repass over, through and upon, at all times of the year, at their own free will and pleasure. Upon comparing this case with the one before us, it is impossible not to perceive that in many of their capital features they are strikingly similar—may, indeed, be regarded as identical. In the *former [*600 case, as in this, the water-course said to be obstructed was a navigable water; in that case, as in this, the *locus in quo* was within the jurisdiction of a State, and the alleged obstruction, in each instance, an act of state legislation in exercising the power of internal improvement; in each instance, the right of passage to the extent and in the manner claimed, freely and at will *usque ad cælum*, was in virtue solely of license and enrollment, according to the navigation laws of the United States. Now, what



said this court upon the foregoing state of the pleadings and evidence? "If Congress," said they, "had passed any act which bore upon the case; any act in execution of the power to regulate commerce, the object of which was to control state legislation, over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the middle and Southern States, we should feel not much difficulty in saying, that a state law, coming in conflict with such act, would be void. But Congress has passed no such act. The repugnancy of the State law to the Constitution, is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several States; a power which has not been so exercised as to affect the question. We do not think that the Act empowering the Black Bird Creek Marsh Company to place a dam across the creek, can, under the circumstances of the case, be repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject." This decision at once puts to flight the pretext for interference here to protect and enforce the duties and functions of Congress, and equally exposes the fallacy that the grant of a coasting license, of a mere certificate of the domicile of the vessel bearing it, of evidence *prima facie*, of her capacity or tonnage, or of her exemption from suspicion of smuggling or piracy, is a regulation of commerce over every inch of the waters over which, in her various excursions, she may pass. Just as cogent and tenable is the argument, if argument it deserves to be called, which affirms that the establishment of Pittsburg as a port of entry, its mere designation as a point at which merchandise may be landed subject to the revenue laws of the United States, is a positive declaration by Congress, prescribing the modes of the transportation of such merchandise thither, and defining what shall be held to be an interference with such transportation. Equally, or rather more unsound and untrue, is the position, that by the same designation of Pittsburg, Congress have declared that vessels propelled by wind or steam, vessels of the greatest capacity, carrying masts or chimneys of illimitable height, shall navigate a river whose ordinary regimen, to adopt a term in this record, scarcely affords a channel [601*] not broad or deep enough for the tacking of a shallop, and for long periods of a few inches only in depth. This attempt, from the mere designation of a port of entry, to bring home to Congress the absurdities the argument implies, would ascribe to them a practical wisdom much upon a parallel with that of the despot who attempted to confine the Hellespont in fetters, or of him who forbade the approach to him of the ocean tide. But Congress have in truth enacted nothing in relation to the particular subject in issue in this controversy; and we have seen, in the explicit declaration of this court, in the case from 2 Peters, that not only must there be some positive enactment by Congress, but an enactment "the object of which was to control state legislation over those navigable creeks into which the tide flows." But again: it has been asserted, in justification of the power claimed by the majority of the court,

that Congress, by adopting the Act of the Virginia Legislature, of December 18th, 1789, authorizing the erection of Kentucky into a State, have fully regulated the navigation of the Ohio River. And how is this position sustained by fact? By the 7th section of her Act of 1789, Virginia declares, that so far as her own territory and that of the proposed State shall extend upon the Ohio, the navigation of that river shall be free for all the citizens of the United States. Congress, by an Act passed February 4th, 1791, containing two sections only (*vide* 1 Stat. at Large, 189), consents, by the 1st section, to the proffer of Virginia of the creation of the new State; and, by the 2d section, declares, that on the 1st day of June following, the new State, by the name of Kentucky, shall be admitted a member of the Union. These two sections comprise the entire action of Congress, from which the position that has been asserted by the majority of the court is deduced. Let us try the integrity of this position by reducing it to the form of a syllogism. The major of that syllogism will consist of the fact that Virginia, by her law of 1789, has agreed that she and the newly proposed State will permit the navigation of the Ohio within their respective limits, to all citizens of the United States. Its minor is this: that Congress have assented to the permission so declared; the conclusion attempted to be deduced is, *ergo* Congress by that assent have completely regulated the navigation of the Ohio, and by inevitable implication ordained that bridges shall never be thrown across that river, except in absolute subordination to the interests or the will of the owners of steamboats upon that river. This may possibly be logic, irrefragable logic; and the failure to comprehend its consistency may arise from the infirmity of my own perceptions; but I cannot help suspecting, that an acumen, far surpassing any to which I will lay claim, would be puzzled to reconcile this process with the laws of induction, [602 as prescribed by Watts, by Duncan, or by Kames.

The next inquiry naturally arising in this case, an inquiry inseparably connected with the alleged obstruction by the Wheeling Bridge, as constituting it a nuisance or otherwise, an inquiry equal in magnitude of interest with any other involved, relates to the policy and effects of commercial regulations, as these may tend either to the restriction of commerce within particular channels, or to supplying auxiliaries for its prosecution, or for the promotion of its activity and diffusion by increased facilities, operating a just equality of right and competition and advantage to all. And here it may be premised, that throughout the discussion of this cause, a reigning fallacy has been assumed and urged upon the court, a fallacy which, if successful, may subvert the grasping pretensions of the plaintiff, but which, by an enlightened view of this case, must be condemned as destructive to the extended commercial prosperity of the country. The error assumed as the basis of the plaintiff's pretensions is this: that commerce can be prosecuted with advantage to the country, only by the channels of rivers, and in all the country intersected by the western rivers, only through the agency of

steamboats; and hence is attempted the deduction in favor of the paramount privileges of steamboats, and the right claimed for this species of commercial vehicles for exemption from any limit upon the interests or the fancies of those who may own or manage them. It has been a curious and somewhat amusing incident, in the argument of this cause, that whenever any restraint upon the management of steamboats (on the Ohio) was intimated (as necessary for the protection of other essential rights, both public and private), the fixed reply of the advocate in opposition has been, that commerce demands these peculiar privileges in the owners and masters of steamboats. An obvious and stricter propriety of argument would have suggested for that reply the following language: Steamboat proprietors, local monopoly, and the peculiar views of interest, real or imaginary, of the plaintiff, supply the true origin and character of the pretensions here urged; commerce, enlightened, extended, fair, equal, prosperous and beneficial, condemns all such pretensions; she demands that freedom, fairness, competition and equality, which are the true and only true causes of her prosperity; and which the equalizing power vested by the Constitution was designed to insure.

Commerce, in its infancy, is of necessity chiefly confined to the channels of water-courses. Weakness, poverty, or the absence of art or science, are unable, in the earlier stages of society, to supply more eligible or efficient modes for its prosecution, or to overcome the difficulties attendant on transportation off the **603**] *water. Hence we see the rude essays of commerce commencing with the raft, the canoe, or the bateau; but as wealth and population, science and art advance, we trace her operations to the magnificent ship or steamboat; each adapted to its proper theater. Does not this very progress, and the advantages which are their concomitants, glaringly expose the folly and injustice of all attempts at the restriction of commerce to particular localities, or to particular interests, or means of circulation? Are her operations to be confined to a passage up and down the channels of water-courses, impracticable for navigation for protracted periods, and whose capacity is always dependent on the contributions of the clouds, *aviditas celi aut nimius imber*? Would not such a narrow policy be a proclamation to commerce, inhibiting her advancement; and to the hundreds of thousands situated without her permitted track, that the wealth, the luxuries, and comforts of civilization and improvement, if to be enjoyed by them at all, are to be obtained only at far greater expense and labor, and in an inferior degree, than they are enjoyed by more favored classes? These positions are strikingly illustrated by the experience of our own times, and indeed of a very brief space. Thus, notwithstanding the high improvement in navigation by steam and by sails, which seems to have carried it to its greatest perfection, we see the railroad in situations where no deficiency of water and no artificial or natural obstruction to vessels exist, or are complained of, stretching its parallel course with the track of the vessel, tying together as it were, in close contiguity, and connecting, in habit and sympathy and interest, remote sections of our ex-

tended country, which, for any aid that the navigation on our rivers could afford, must ever remain morally and physically remote. The obvious superiority of the railroad, from its unequalled speed, its greater safety, its exemption from dependence upon wind or on depth of water, but above all, its power of linking together the distant and extended regions interposed between the rivers of the country, spaces which navigation never can approach, must give it a decided preference, in many respects, to every other commercial facility, and cause it to penetrate, longitudinally and latitudinally, *longe et late*, the entire surface of the country, unless arrested in its progress by the fiat of this court; for, once let it be proclaimed that the rivers of this country shall, under no circumstances of advantage to the country, be spanned by bridges, at the trivial inconvenience and cost of adapting to their elevation the chimneys of a few steamboats, even if the height of those chimneys had been clearly shown to be necessary, or certainly advantageous (a problem nowhere solved in this record); let this, I say, be proclaimed, and the effect above mentioned is *at once [**604** accomplished; the rapidly increasing and beneficial system of railroad communication is broken up, and a system of narrow local monopoly and inequality sustained. Whether these things shall now be done; whether, for these purposes, the citizens of this country shall be restrained in their social and business relations, and so restrained under the abused and perverted name of commerce—are the questions which this court have been called on to decide, and which, in my view, they have affirmatively ruled. They are questions too grave, too pregnant with vital consequences, to have been decided upon the speculations of any one man living.

It was with the view, doubtless, of giving plausibility to the conclusion of the commissioner, or to the strange idea sought to be enforced in the argument for the complainant, that commerce signified only a passage up and down the Ohio, that so large a portion of the commissioner's report is taken up in treating, in learned phrase, of the dynamic and static capabilities of the Wheeling Bridge: or, translated into plain English, the capability of that bridge to sustain heavy bodies in motion and at rest. It does not seem very easy to reconcile this part of the report with the order appointing the commissioner, and prescribing his duties. That order directed the commissioner to ascertain and report whether the Wheeling Bridge was, in his opinion, an obstruction to commerce upon the Ohio; and in the event that he should so regard it, to suggest any alterations by which such obstruction might be remedied. The dynamic or static capabilities of the bridge, introduced to our notice with some parade of learning, whether it could support any weight, either in motion or at rest, were subjects altogether *dehors* the order of this court, and without the warrant and powers of the commissioner. And this difficulty is in no degree lessened by the fact, disclosed in the record, that whilst the commissioner wandered beyond his commission to pronounce upon the capabilities of the bridge for railroad transit, he rejected all the evidence, tendered by the

defendants, to prove the usefulness and importance of the bridge, either to the local population or as a public and commercial facility. This irregularity in the commissioner is of no small significance, as it betrays a bias on his part, however honest, which led him to throw the weight of his opinion against the usefulness of the bridge; a fact entering essentially into its character, as being a nuisance or otherwise, and to withhold from this court evidence by which the value of his opinion might have been tested with precision. This same irregularity should have had its effect in warning this court to scrutinize the opinions of the commissioner on matters falling regularly within the scope of his commission. The evidence received,* and that rejected on this particular point, were, perhaps, both inadmissible under the terms of the order of this court; but surely it should have been either wholly admitted or rejected on both sides.

And this brings me to the last branch of inquiry, which I have proposed to treat, namely: The character of the erection complained of; the regularity of the mode of redress proposed, and the right of the complainant to claim the interference asked for in any mode. First, then, can the Wheeling Bridge, according to any correct acceptance of the term, be regarded as a nuisance? This inquiry is answered by the solution of another, which is simply this: is that bridge injurious to the rights and interests of the public, or of individuals, beyond the benefits that its erection confers on both? Common sense and consistency assure us, that to pronounce that to be a wrong and an injury which is in reality beneficial, involves a plain absurdity; and the language of legal definition fully sustains this conclusion of common sense; for, according to such definition, there must be the hurt, the *nocumentum*, the *commune nocumentum*, the injury to the public right, to constitute it a public nuisance; for, admitting the fact of injury by any act, still if, in its origin, character and extent, it is essentially private, it may be trespass or some other form of injury, but not the public offense of nuisance. This position implies no denial of the right to show a private injury resulting from a public nuisance; it insists only upon the necessity of showing where special or private injury is alleged as flowing from a nuisance, that nuisance in reality exists. This forces back upon us the inquiries into the nature of the offense of nuisance; and when ascertained, against what public authority it has been committed. I have said, that upon the plainest principles of common sense, no act in reference to the public, by which a public benefit is conferred, can be denominated a nuisance; and I insist that the rules and conclusions of the law are in accordance with this proposition. These are forcibly stated in the case of *The King v. Russell*, 6 Barn. & Cress., particularly by Bayley, J., beginning at page 593 of the volume. That was the case of an indictment for a nuisance by the erection, in the River Tyne, of a peculiar wharf or staging, called giers or staiths, for the purpose of loading coal on board ships in the Newcastle trade. The questions before the King's Bench arose upon the charge of Bayley, J., who tried the case at *nisi prius*, where his charge concluded in the following terms: "Thus, gen-

tlemen, I apprehend I have pointed out to you the true ground on which your verdict is to be founded. If you think this (that is, the wharf or staith) is placed not on a reasonable part of the river, that it does an unnecessary damage to the navigation, or that this is not of any public benefit, or that the public benefit resulting from it is not equal to the public inconvenience arising from it, then you will find a verdict for the crown; if on these points you are of a different opinion, then for the defendants." This charge of Sir John Bayley was sustained in bank. The reasoning in support of that charge by that able judge, is given more at length than can be conveniently inserted here; but it presents a commentary upon this question so lucid, so entirely conclusive, that I cannot forbear to extract a portion of it, as illustrating, much better than I have power to do, the doctrines for which I contend. "I submitted," says Sir John Bayley (page 594), "to the consideration of the jury, that if, by means of these staiths, an article of great public use found its way to the public at a lower price, and in a better state than it otherwise would, I thought these were circumstances of public benefit, and points they might take into their consideration upon that head; and upon the best attention that I have been able to give the subject, I am bound to say I continue of that opinion. The right of the public upon the waters of a port or navigable river is not confined to the purposes of passage; trade and commerce are the chief objects, and the right of passage is chiefly subservient thereto. Unless there are facilities for loading and unloading of shipping and landing, much of the public benefit of a port is lost. In the infancy of a port, when it is first applied to the purposes of trade and commerce, unless the water by the shore be deep, the articles must be shipped in shallow water from the shore, and landed in shallow water on the shore. Breakage, and pilferage, and waste, besides the expense of boating, are some of the concomitants of such a mode. As trade advances, the inconvenience and mischief of this mode are superseded by the erection of wharves and quays, and what is perhaps an improved species of loading wharf, a staith. But upon what principle can the erection of a wharf or staith be supported? It narrows the right of passage. It occupies a space where boats before had navigated. It turns part of the waterway into solid ground; but it advances some of the purposes of a port, its trade and commerce. Is there any other legal principle upon which they can be allowed? Make an erection for pleasure, for whim, for caprice, and if it interfere in the least degree with the public right of passage, it is a nuisance. Erect it for the purposes of trade and commerce, and keep it applied to the purposes of trade and commerce, and subject to the guards with which this case was presented to the jury, the interests of commerce give it protection, and it is a justifiable erection, and not a nuisance." In accordance with this doctrine, has the law been propounded by the Supreme Court of New York, in the case of *The People v. The Rensselaer and Saratoga Railroad Company*, [*607 reported in the 15th of Wendell, page 113. That was a prosecution against the company for placing abutments and piers in the bed of

the Hudson River, and erecting a bridge across it, being a public navigable river. In delivering the opinion of the court, the law of the case is thus stated by Savage, *Chief Justice*, pp. 132, 133, of the volume above mentioned: "I think I may safely say, that the power exists somewhere to erect bridges over waters which are navigable, if the wants of society require them, provided such bridges do not essentially injure the navigation of the waters they cross. Such power certainly did exist in the State Legislatures before the delegation of power to the federal government by the federal Constitution. It is not pretended that such a power has been delegated to the general government, or is conveyed under the power to regulate commerce and navigation; it remains, then, in the state Legislatures, or it exists nowhere. It does exist, because it has not been surrendered any further than such surrender may be qualifiedly implied; that is, the power to erect bridges over navigable streams must be so far surrendered as may be necessary for a free navigation upon those streams. By a free navigation must not be understood a navigation free from such partial obstacles and impediments as the best interests of society may render necessary."

In conformity with the doctrines above quoted, and in support of the views here contended for, I might confidently appeal to the language of the judge, by whom the decision of this court has just been announced, on another occasion most explicitly and emphatically declared. Thus, in the case of *Palmer v. The Commissioners of Cayuga County*, which was an application for an injunction to prevent the construction of a draw bridge over the Cayuga River, upon the ground that it would obstruct the navigation of the river, that judge, in refusing the application, announces the following, as I conceive, unanswerable conclusions: "A toll charged for the improvement of the navigation, would not be a tax for the use of the river in its natural state, but for the increased commercial facilities. A draw bridge across a navigable water is not an obstruction. As this would not be a work connected with the navigation of the river, no toll, it is supposed, could be charged for the passage of boats. But the obstruction would be only momentary, to raise the draw; and as such a work may be very important in the general intercourse of the community, no doubt is entertained, as to the power of the State to make the bridge. It is one of those general powers possessed by a state, for the public convenience, and may be exercised, provided it does not infringe upon the federal powers." These positions require no comment from me; they commend themselves by their obvious propriety and reasonableness. I would simply remark, in connection with these positions, and as warranted by them, that any obstruction by the Wheeling Bridge is of course contingent and not certain; that even were it certain, under the present elevation of the bridge, this difficulty might be prevented at a comparatively small expense and inconvenience by lowering, when necessary, the chimneys of a few steamboats for the purpose of safe and speedy passage; that this operation, like the raising of a draw, would be only momentary; and as, to use the language of the judge, the Wheeling Bridge

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"may be a work of great importance in a general intercourse, no doubt, is entertained, as to the power of the State to make the bridge." It will be admitted, I presume, that the Ohio can claim no higher privileges than those appertaining to other navigable rivers.

It follows, then, from these adjudications, not less than from the principles of common sense, that the conclusion, nuisance or no nuisance, is dependent solely upon the character of the act complained of as being noxious or beneficial to the public, and that the ascertainment of that character, where it is doubtful upon the circumstances, or where it is positively denied, is regularly an investigation of fact to be made and settled, except under circumstances of peculiar urgency, by the established proceeding of the common law in relation to all questions of fact, a trial by jury. This is the doctrine of Lord Hale in reference to this very subject of obstructions in navigable waters, as quoted from his Treatise *De Portibus*, where it is said by that venerable judge, "the case of building into the water where ships or vessels might formerly have ridden, whether it be nuisance or not nuisance, is a question of fact." I will not here deny, nor is it necessary in any view to deny, that a court of equity will prevent by injunction the creation of a private injury in the nature of a nuisance, or the continuation of such an injury in a case proper for its jurisdiction. Thus, where an individual or private person is about to perform an act, or has performed an act which is palpably and notoriously in its character a nuisance, from which private and irreparable injury will ensue to others, or has accrued to others, and will continue, a court of equity, upon the admitted or notorious character of the act from which the private injury is shown to proceed, and from the irreparable character of that injury, will interpose by injunction to relieve the party injured. Such is the principle ruled by Lord Eldon in the case of *The Attorney-General v. Cleaver*, 18 Vesey, 211, which was upon an information by private persons for private injury, though in the name of the Attorney-General; and by the same judge in the case of *Crowder v. Tinkler*, in the 19 (*609 Vesey, 616. Such, also, I understand to be the rule laid down by this court in the case of *The City of Georgetown v. The Alexandria Canal Company*. These cases all proceed upon the grounds of the ascertained character of the act complained of on the one hand, and of the private and irreparable nature of the injury shown on the other. This is as far, it is believed, as the Courts of Equity have ever proceeded. They have never said, that where the act complained of was dubious in its character, as being a nuisance or otherwise, and where that fact was a matter of contestation, they would assume jurisdiction *a priori*, or without sending the question of nuisance to be tried at law, but have ruled the reverse of this; and in the cases just quoted from Vesey, Lord Eldon declared that he would not decide those cases until the equivocal or contested fact was settled at law. Again, it is ruled in the cases above quoted, and in many others which might be adduced, that although the courts of equity will, in order to prevent irreparable private injury, interpose by way of injunction, that

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where the abatement of a public nuisance is the purpose in view, as that is an offense against the government, the Attorney-General must be a party to any proceeding for such a purpose. In this case the act complained of, if a nuisance, is a public nuisance, and is so denominated upon the record, and by the decision of the majority. Its character, however, as a nuisance in any sense is denied; and much testimony has been taken by both parties upon this contested question. The interests of Pennsylvania, who stands here in the relation of a private suitor, and the alleged injury to her private interests, are the sole foundation on which she has sought here the abatement of what she has asserted to be a public nuisance. And without the participation of any representative of the sovereignty either of the State or the federal government, without the agency of the Attorney-General of the State, or of the United States, without the reference to a jury of any of the contested facts of this case, this court, in the professed exercise of original equity jurisdiction, upon affidavits, and upon the opinion of a single individual, who has been, by this court, constituted the arbitrator of all questions of public policy, of law, of science and of art, and of the competency and credibility of all the testimony in the case, have decided upon the act complained of with reference to its influence upon the rights and powers both of the United States and of the local sovereignty; upon the rights and interests of the complainant in the matter in controversy, and upon the extent of the injury, if any, done to those interests. They have, upon the same grounds, and in the like absence of the legal representative of either the State or federal sovereignty, directed a great public **610** work, disapproved by neither of those sovereignties, and by one of them expressly authorized and approved, to be, in effect, demolished.

I do not deem it necessary, if it were practicable, to examine here, in detail, the cumbrous mass of statement and speculation heaped together on this record. Such a task is not requisite in order to test the accuracy of the decision pronounced in this case, or to sustain the objections to which that decision is believed to be palpably obnoxious; both these objects appear to me to be attained by regarding the character of the case as described by the plaintiff herself, and the nature and manner of the proceeding adopted by the court as a remedy for the case so presented. I will give, succinctly, however, the results to which, in my view, the court should have been led by the facts of the case, and to which an industrious examination, at least, of the testimony, has conducted my mind. Before this, however, I must be permitted to point out a striking inconsistency between the alleged ground of jurisdiction in this cause, as set forth in the pleadings, and the conclusion to which the court has been carried, and the reasons they have assigned for their conclusion. It will be remembered, that the ground of jurisdiction insisted upon in this case, is the injury alleged to have been done to the State of Pennsylvania, as a private suitor—her peculiar interest alone and none other—for none other could give jurisdiction to this court under the Constitution; yet nothing is more obvious, than that the whole argument of the court is

founded upon the injury inflicted by the bridge upon the owners of certain steam packets, and upon the trade of Pittsburgh. Calculations are gone into, at length, to show what number of passengers and what amount of freight are carried by these particular packets; how much they would lose by being deprived of this business, or by being subjected to the inconvenience and cost of lowering their chimneys, and how much the business of Pittsburgh would be injured by the obstruction complained of. Thus the true character of this cause is betrayed in the very argument and conclusions of the court. The name and alleged interests of Pennsylvania, as a private suitor, are used to draw to this court jurisdiction of this cause; but no sooner is that jurisdiction allowed in the name of Pennsylvania, than she, and any peculiar or corporate interests she was said to possess, are at once lost sight of, and those of the steamboat owners, and the local interests of Pittsburgh alone are enforced.

The results above alluded to are as follows: 1st. That the conflicting opinions of those who have been called, as men of science, to testify in this cause, establish nothing conclusively, much less ascertain the theory contended for, that, for purposes of economy, of **611** rapid combustion of fuel, or for the generation and escape of steam, and extraordinary height of chimney is necessary; but leave it doubtful whether the elongation of chimneys beyond a certain altitude is not calculated to retard the escape of heated air and smoke, and also to cause inconvenience and danger to the boats that carry them. 2d. That, amongst the practical men, consisting of those who have experience in constructing boats and boilers, and other steamboat machinery, and also in commanding steamboats on the western rivers and elsewhere, the preponderance, for several reasons mentioned by them, is against the extraordinary height of chimneys. 3d. That the cost incident to such a construction of chimneys (supposing this great altitude to be advantageous), as to admit of their being lowered, and the delay and hazard of lowering them, are subjects of minor import; have been greatly exaggerated in the statements of some of the witnesses, and should not be weighed in competition with an important public improvement, itself a valuable and necessary commercial facility, and cannot convert such a work into a public nuisance, or, in any correct sense, an obstruction to navigation. 4th. That the commissioner erred in yielding to speculation and theory, rather than to practical knowledge and experience, and to the statements of witnesses, in some instances, whose local position was calculated, though it may have been honestly and unconsciously, to influence their feelings and their judgments. With regard to the right of the plaintiff to ask the abatement of the Wheeling Bridge, as a nuisance, by any mode of proceeding, I will here add another remark, which has in some degree been anticipated in preceding views in this opinion; and it is this: A nuisance, to exist at all, and emphatically a public nuisance, must be an offense against the public, or more properly against the government or sovereignty within whose jurisdiction it is committed. In the case before us, that sovereignty and that jurisdiction reside either in the

Commonwealth of Virginia or in the federal government. If in the former, she has expressly sanctioned the act complained of; consequently, no nuisance has been committed with respect to her. If the sovereignty and jurisdiction be in the United States, it is a limited and delegated sovereignty, to be exerted in the modes and to the extent which the delegating power has prescribed. There can be no other in the government of the United States—none resulting from the principles of the common law, as inherent in an original and perfect sovereignty. There then can be no nuisance with respect to the United States, except what Congress shall, in the exercise of some constitutional power, declare to be such; and Congress have not declared an act like that here complained of [612*] to be a *nuisance. Upon the whole case, then, believing that Pennsylvania cannot maintain this suit, as a party, by any just interpretation of the 2d section of the 3d article of the Constitution, vesting this court with original jurisdiction: Believing that the power which the majority of the court have assumed cannot, in this case, be correctly derived to them from the competency of Congress to regulate commerce between the several States: Believing that the question of nuisance or no nuisance is intrinsically a question of fact, which, when contested, ought to be tried at law upon the circumstances of each case, and that, before the ascertainment of that fact, a court of equity cannot take cognizance either for enjoining or abating an act alleged, but not proven, to be nuisance: Seeing that the Commonwealth of Virginia, within whose territory and jurisdiction the Wheeling Bridge has been erected, has authorized and approved the erection of that bridge; and the United States, under the pretext of whose authority this suit has been instituted, have by no act of theirs forbidden its erection, and do not now claim to have it abated: my opinion, upon the best lights I have been able to bring to this case, is, that the bill of the complainant should be dismissed. From these convictions, and from the sense I entertain of the almost incalculable importance of the decision of the majority of the court in this case, I find myself constrained solemnly to dissent from that decision.

Motion for Another Reference.

On the above opinion being pronounced, and the two dissenting opinions, *Mr. Johnson*, of counsel for defendants, suggested to the court that the engineer of the bridge had informed him that the obstruction to the navigation of the Ohio might be avoided by making a draw in the suspension bridge, or in some other manner, far less expensive to the Bridge Company, and equally convenient to the public, than by elevating the bridge, as required in the opinion.

On this suggestion, the court observed that, as they were desirous of having the obstruction removed in a manner that shall be most convenient and least expensive to the Bridge Company, they requested the counsel to file, in writing, his suggestions, and give notice to the other side, that both parties may be heard in regard to them.

In pursuance of the above suggestion from the court, the counsel for the Bridge Company

filed their suggestions in writing, and an argument took place. Afterwards, *Mr. Justice McLean* delivered the following opinion of the court:

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In pursuance of the intimation of the court, the counsel for the defendants filed, in writing, five plans for the removal of the obstruction to navigation occasioned by the bridge.

1. To elevate it, as required by the opinion of the court.

2. To remove the wooden bridge over the western channel of the river.

3. To remove the flooring of the suspension bridge, so that the tallest chimneys may pass under the cables.

4. To construct a draw in the wooden bridge over the western channel.

5. To make a draw in the suspension bridge.

It is objected by the complainant's counsel that, after a case has been argued upon the evidence, and the opinion of the court pronounced, it is not within any known rules of chancery proceeding to hear additional evidence, with the view of modifying, in any respect, the decree. That some of the plans now proposed were not embraced by the pleadings or evidence in the case, and that the effect must be to open the case for additional evidence and a new argument.

The bill alleged the bridge to be an obstruction to the navigation of the Ohio, and prayed that it might be abated as a nuisance. The answer denied that it was an obstruction to navigation.

The commissioner was directed to inquire, "if an obstruction be made to appear, what change or alteration in the construction and existing condition of the said bridge, if any, can be made, consistent with the continuance of the same across said river, that will remove the obstruction to the free navigation."

In the opinion of the court, the bridge is an obstruction to the navigation of the river, and they held that an elevation of it one hundred and eleven feet from low water mark, the width of three hundred feet across the channel of the river, would remove the obstruction. Except the elevation of the bridge, no mode was proposed by the commissioner for the removal of the obstruction. His instructions limited him to a "change or alteration in the bridge," which should effectuate that object. Several of the plans now proposed, were not within the scope of his inquiry, and of course were not embraced by his report.

In giving relief, the court are not bound to abate the nuisance, as prayed for in the bill, nor to adopt the report of the commissioner, if the obstruction can be removed and the public right maintained with less expense to the Bridge Company. This is a matter within the judgment of the court, and does not necessarily constitute a part of the pleadings.

*It is suggested that the elevation of [614 the bridge, as required in the opinion of the court, must result in its abatement, as the stockholders have not the pecuniary means of elevating it. Whatever may be the consequences to the stockholders, a great public right cannot be made subservient to their interests. Subject to that right, the court will regard and protect their interests.

The second plan, which proposed to remove the bridge over the western channel of the river, we shall refer to the engineer who acted under the commissioner, and who is familiar with all the facts, and having his surveys before him, can give promptly to the court the information they desire.

To remove the flooring of the bridge, as proposed in the third plan, leaving the cables in their present position, seems to have no other practical result than the sale of the cables.

The third and fourth plans propose to construct a draw for the passage of boats, in the suspension or the western bridge.

Draws are common in bridges across arms of the sea where the tide ebbs and flows, for the passage of sea vessels, and also in bridges over rivers with a sluggish current; but we entertain great doubts whether a draw in either of the bridges, as proposed, can be constructed so as to afford "a convenient and safe passage" for the steamboats that ply upon the Ohio. Some of them are about two hundred and fifty feet long, and from fifty to sixty feet in width. The current in the Ohio, at high water, is from five to six miles an hour. A steamboat, to be under the command of the helm, must have a pressure of steam, which, with the current, would give it a considerable velocity in passing the draw, and any deviation from the direct line by the wind, the eddies and currents of the river, in high water, might throw the boat against the bridge on either side. This might be fatal to the boat and to the lives of its passengers; and the danger would be greatly increased by attempting to pass the draw at night, especially when the weather is unfavorable to navigation.

Jonathan Knight, an engineer called by the defendants, before the commissioner, said, "my opinion is, decidedly, it would be better to pass under (the bridge), by lowering chimneys, than to have a draw; that it would be less dangerous and take less time." And he further states, "where there is a draw, the space is necessarily contracted, and, it might strike on the one side or the other, or the wind might be adverse."

The report of the commissioner contains a report of Charles Ellet, "on a railway suspension bridge across the Connecticut (River) at Middletown," in which he says, "the flooring (of the bridge) is to be placed one hundred and forty feet above the river, and the navigation left entirely unobstructed." And he recommends "a high level to avoid" "the injury to 615*] the public consequent *on delays at the draw." In the same report he observes, "no party would now be so idle as to ask to place a draw bridge across the Ohio or Mississippi; no law could be obtained for such an obstruction, and nothing is hazarded by the assertion that such a nuisance would be immediately overthrown, if placed there under the color of any law. The bridges that are established on those streams, must be placed high enough to clear the steamboats, and must leave the channel open."

We shall direct the decree drawn up in pursuance of the opinion of the court, which affords to the stockholders of the bridge the alternative of elevating it, and thereby removing the obstruction to the navigation of the river, to be filed but not recorded, until the en-

gineer or the commissioner shall report upon the second, third, fourth and fifth plans proposed by defendants' counsel. Notwithstanding the above intimations in regard to a draw, we are desirous of having the report of a practical and scientific engineer on that subject, as well as in relation to the other plans.

It is therefore ordered, that the clerk of this court transmit to William J. McAlpine, Esquire, a copy of this opinion, with a request that he make a report to this court, on or before the second Monday of May next,

1st. Whether a draw can be constructed in the suspension bridge, that shall afford a safe and convenient passage for the largest class of steamboats which ply to Pittsburgh, having chimneys eighty feet high at a depth of water thirty feet from the ground, and if such a draw be practicable, that he give a particular description in what manner and of what dimensions it must be constructed.

2d. Whether such a draw may be constructed in the wooden bridge over the western channel of the river.

3d. Whether the removal of the western bridge will open an unobstructed channel for the packets which now pass Wheeling, having chimneys eighty feet high, at all times when they shall not be able to pass under the suspension bridge.

4th. Whether the removal of the flooring of the bridge, as proposed, will enable packets to pass having chimneys eighty feet high.

In obedience to this order of the court, Mr. McAlpine filed the following report:

To the Honorable Roger B. Taney, Chief Justice; John McLean, James M. Wayne, John Catron, John McKinley, Peter V. Daniel, Samuel Nelson, Robert C. Grier, and Benjamin R. Curtis, Associate Justices of the Supreme Court of the United States.

In pursuance of the order of the Supreme Court of the United States, dated the [*616 first day of March, 1852, a copy of which has been furnished by the clerk of the said court, dated the third day of March, 1852. I, William J. McAlpine, do make the following report on the several matters directed in the said order, as follows:

1st. Whether a draw can be constructed in the suspension bridge that shall afford a safe and convenient passage for the largest class of steamboats which ply to Pittsburgh, having chimneys eighty feet high, at a depth of water thirty feet from the ground; and if such a draw be practicable, that he give a particular description in what manner, and of what dimensions, it must be constructed.

2d. Whether such a draw may be constructed in the wooden bridge over the western channel of the river.

3d. Whether the removal of the western bridge will open an unobstructed channel for the packets which now pass Wheeling, having chimneys eighty feet high, at all times, when they shall not be able to pass under the suspension bridge.

4th. Whether the removal of the flooring of the bridge, as proposed, will enable packets to pass having chimneys eighty feet high.

The largest class of steamboats which ply to Pittsburgh are the daily packets, which are from

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fty-four to fifty-eight feet in width, and from two hundred and fifteen to two hundred and sixty-four feet in length.

In a direct channel, with a moderate current, and in favorable weather, a draw of one hundred feet in width would, with skillful navigation, be sufficient for the safe and convenient passage of such vessels.

In the high stages of water in the Ohio River at Wheeling, the velocity of the current is from five to six miles an hour. A steamboat, in passing down the river, must have an additional velocity to keep her under the command of the helm, so that she must pass the draw with a velocity of from eight to ten miles per hour; and this speed would be less than the ordinary velocity of the vessel in other parts of the river.

In stormy weather, with the wind blowing across the current of the river, it would be difficult for a steamboat, of the size above stated, to pass without considerably more allowance than would be provided for in a draw of one hundred feet in width.

At such times, the danger of passing the draw at night would be much increased, and it would be necessary to maintain lights on each side of the draw to guide the pilots in the proper direction to pass it.

Under the ordinary circumstances of high water, a draw of at least one hundred and fifty **617*** feet in width would be necessary, *and one of two hundred feet in width to pass at night with safety.

In dark, stormy nights, and with a rapid current in the river, the hazard of a passage would be so great that vessels would probably be laid by, rather than risk the dangers of the passage of a draw of less than three hundred feet in width.

From the accompanying drawing of the present suspension bridge at Wheeling, it will be seen that a draw cannot be placed in the eastern end of the bridge which will give a clear passageway, beneath the cables, for steamboats having chimneys eighty feet high, at a depth of water thirty feet above the ground, of one hundred feet in width.

At the western end of the bridge, adjoining the western abutment, a draw may be placed, which will give a passage for such vessels in a thirty feet stage of water, of nearly one hundred feet in width.

In reply, therefore, to the first question of the court, I have to state, that a draw of sufficient width for the safe and convenient passage of steamboats of the dimensions stated, cannot be constructed in the present bridge.

In a five feet stage of water, such a vessel would have a space of ninety-six feet in width, adjoining the eastern shore, to pass beneath the flooring of the present bridge, and in a six feet stage a width of one hundred and twelve feet.

At any stage of water higher than six feet, the width of passage would be reduced in consequence of the steep inclination of the eastern bank of the river.

In a five feet stage of water, vessels drawing four feet would strike the bed of the river on the western shore, at a point eight hundred and eighty feet from the face of the eastern abutment.

A steamboat with a chimney eighty feet high

would (allowing two feet for clearance), on a five feet stage of water, in extremely warm weather, clear the cable at a point six hundred and seventy-one feet from the face of the eastern abutment, which leaves a clear passageway of two hundred and nine feet in width.

In a six feet stage of water, the vessel would strike the bed of the river at nine hundred feet, and the chimney would clear at six hundred and eighty-five feet; which leaves a clear passage of two hundred and fifteen feet in width.

In a seven feet stage of water, the vessel would strike the bed at nine hundred and eighteen feet, and the chimney would clear at six hundred and ninety-seven feet, leaving a passageway of two hundred and twenty-one feet in width.

In an eight feet stage of water, the vessel would strike the bed *of the river at ***618** nine hundred and twenty-two feet, and the chimney would clear at seven hundred and nine feet, leaving a passage of two hundred and thirteen feet.

In a nine feet stage of water, the vessel would strike the bed of the river at nine hundred and twenty-six feet, and the chimney would clear at seven hundred and nineteen feet, leaving a passage of two hundred and seven feet.

In a ten feet stage of water, the vessel would strike the bed of the river at nine hundred and thirty feet, and the chimney would clear at seven hundred and twenty-nine feet, leaving a passage of two hundred and one feet.

In an eleven feet stage of water, the vessel would strike the bed of the river at nine hundred and thirty-four feet, and the chimney would clear at seven hundred and thirty-five feet, leaving a passage of one hundred and ninety-five feet.

In a twelve feet stage of water, the vessel would strike the bed of the river at nine hundred and thirty-eight feet, and the chimney would clear at seven hundred and forty-nine feet, leaving a passage of one hundred and eighty-nine feet.

In a thirteen feet stage of water, the vessel would strike the bed of the river at nine hundred and forty-two feet, and the chimney would clear at seven hundred and fifty-nine feet, leaving a passage of one hundred and eighty-three feet.

From the accompanying chart, it will be seen that the shoal which makes into the river from the west shore above the bridge, would render it difficult for a vessel to enter the draw on a six feet stage of water, unless its eastern end were located at least three hundred feet from the western abutment, and then the passageway under the bridge, clear of the bottom of the river and cable, would be two hundred and fifteen feet in width.

It is necessary that the draw should be arranged for this stage of water, because a vessel could not then pass under the flooring of the eastern end of the bridge, with a sufficient width of clear space.

For each foot that the water rises, the passageway is thrown about ten feet to the west, and its width is diminished about six feet.

In an eighteen feet stage of water, the chimney would clear the cables at a point seven hundred and eighty-three feet from the face of the eastern abutment, which would leave a

clear space of one hundred and ninety-three feet in width.

In a thirty feet stage, the chimney would clear at eight hundred and sixty-six feet, leaving a space of one hundred and ten feet.

The draw would, therefore, require to be made at least three hundred feet long, from the face of the western abutment, to allow the **619*** passage of steamboats of the dimensions stated, in the several stages of water, from six to thirty feet in depth.

It is, in my opinion, impracticable to construct so large a draw in a suspension bridge, because from its flexible character, and the constant change of position of its cables, which would be caused by the movement of a mass of so great weight as the draw, it would not admit of the adaptation of machinery for its movement.

A draw of this length might be constructed in the Wheeling Suspension Bridge, by erecting a pier in the river at the eastern end of the draw, and carrying the cables over the top of it, in the manner suggested by Colonel Long, in his testimony before the commissioner, and suspending the draw from a strong permanent bridge, elevated on the top of the new pier and abutment of the present bridge, similar to the tubular bridges recently constructed across the Conway and Menai straits, in Great Britain. The cost of constructing such a draw, and of the necessary alterations of the bridge, would exceed the cost of elevating it to the height stated in the order of the court.

The inconvenience of the approach to a draw placed in this position, and the uncertainty of its successful operation and maintenance under all circumstances of weather, exposed to winds, and with its machinery liable to be deranged by frost, or by the accidental encounter with passing vessels, render the utility of the plan, in my opinion, so doubtful, that any further detail of its arrangement is deemed unnecessary.

A draw can be constructed in the wooden bridge over the western channel of the river, which will, under ordinary circumstances, offer a safe and convenient passage for the largest class of steamboats which ply to Pittsburgh. This bridge consists of three spans, each of two hundred feet in length. A drawing is herewith sent, which exhibits a plan of a draw placed in the center span of the bridge, which opens a clear space of two hundred feet.

The plan of this draw is similar to one which has been constructed on the London and Brighton Railroad, which has a single draw, moving in one direction, of sixty-six feet in length.

The plan proposed for the Wheeling Bridge is in two parts, opening in the center, and moving back on the floor of the present bridge. Each draw will open one hundred feet (being thirty-four feet more than the single draw above mentioned), and making the whole opening two hundred feet, equal to the space between the center piers.

The plan proposed will require the removal of the roof and the center trusses of the end spans of the present bridge, to allow the draws to move back on the floors. The draws to be **620*** timber truss frames, each two hundred feet long, the ends supported by timber suspenders from the top of a well-braced center

frame; the land ends of the draws to be loaded sufficiently to balance the projecting portion of the same. When the draws are closed, the ends are to be secured together with iron pins passing through iron straps, and the land ends fastened to the end spans of the permanent bridge in a similar manner. When the bridge is thus closed and secured, it will form a perfect suspension bridge of two hundred feet span.

The draws will be moved on wheels moving on iron rails, laid on the floor of the end spans, which will require to be strengthened by additional timbers. The trusses should also be strengthened with arch ribs and timbers to support the additional weight of the draws.

The draws to be moved by gearing placed in the piers, working into a rack on the under side of the draw bridge frame; the gearings moved by a capstan placed on the side of the bridge over the piers. The capstan may be worked by man or horse power.

The floor of the draw will be two and a half feet above the floor of the permanent bridge, which may be overcome by a light platform attached to the end of the draw, that would move with the draw when opening or closing.

The cost of removing the center span of the permanent bridge, strengthening the side or end spans, and constructing the draw bridge, is estimated at thirty-three thousand and twenty-three dollars and sixty cents (\$33,023.60).

It is proper that I should state that there would be some difficulty experienced in the opening of this, or any other practicable draw, during very strong gales of wind; and at such times some delays would unavoidably occur in the passage of vessels.

The present bridge over the western channel would not admit of the construction of a draw of more than two hundred feet in width, without the expenditure of a sum nearly as great as that required for the construction of a new bridge.

A draw of three hundred feet in width may be constructed, either in the present bridge, or in a new bridge over the western channel, in the same manner as before stated, at the western end of the suspension bridge.

The expense of the construction of such a draw would exceed the cost of elevating the suspension bridge to the height stated in the order of the court, and there would be the same difficulties in operating and maintaining it as have been before stated.

In my opinion, no draw can be constructed in either of the bridges at Wheeling, which would produce no delay, and present no obstruction ***621** to the safe and convenient passage, at all times, of the largest class of steamboats which navigate the Ohio River at Wheeling.

In reply to the third question of the court, I have to state, that the removal of the western bridge will open an unobstructed channel for the packets which now pass Wheeling, when the water is six feet deep on the Wheeling bar.

It has been previously stated that steamboats, with chimneys eighty feet high, will have a passageway under the flooring of the suspension bridge of ninety-six feet in width in a five feet stage of water, and of one hundred and twelve feet in a six feet stage.

By removing the obstructions in the western channel, which are now caused by a bar at the north end of Zane's Island, an unobstructed channel can be obtained for such vessels at all times when they cannot pass under the suspension bridge.

A chart is herewith sent, which exhibits the obstructions of the western channel.

In reply to the fourth question of the court, it is proper to state, that from the preceding report it will be seen that the removal of the flooring of the suspension bridge will enable packets to pass under the cables, having chimneys eighty feet high, the clear width of the passage being, as before stated, from one hundred ten to two hundred and twenty-one feet in width, depending upon the stage of water in the river.

The naked cables would afford no guide to direct the passage of vessels to the point at which the chimneys would clear the cables on the one side, and not strike the bottom of the river on the other side.

It would be necessary to suspend lights on the cables during the night to indicate the passage.

In high stages of the water, and during the night, the passage of vessels of the size stated would be attended with difficulty and danger in consequence of the narrowness of the space, and of its being out of the main channel of the river. Respectfully submitted,

WILLIAM J. MCALPINE.

Albany, May 8, 1852.

This report was made the subject of another argument, in consequence of exceptions to it being filed by *Mr. Campbell*, the Attorney-General of Pennsylvania, and *Mr. Stanton*, also of counsel for the complainant. The report of the case has already been extended to such an unusual length, that the reporter cannot find room to notice the arguments of the respective counsel upon the exceptions.

622*] *Mr. Justice McLean* delivered the opinion of the court:

The plans lately proposed, through defendant's counsel, to obviate the obstructions to the navigation of the Ohio River, by reason of the Wheeling Bridge, complained of by the plaintiff, having been referred to William J. McAlpine, Esquire, civil engineer, he reports—

That a draw cannot be made in the suspension bridge which shall afford a safe and convenient passage for the largest class of steamboats, which ply from Pittsburgh, having chimneys eighty feet high, on a depth of water thirty feet from the ground. And he reports that a draw can be constructed in the wooden bridge over the western channel of the river, which will, under ordinary circumstances, offer a safe and convenient passage for such boats.

That bridge, he states, consists of three spans, each of two hundred feet in length; and he proposes that the draw shall be placed in the center span of the bridge, which will open a clear space of two hundred feet. He also reports, in answer to the third question of the court, "that the removal of the Western Bridge will open an obstructed channel for the packets which now pass Wheeling, when the water is six feet deep on the Wheeling bar."

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On this report the parties have been heard.

The counsel for the defendants complain that no notice was given to them of the late action of the engineer. A notice was unnecessary. The proposed plans were submitted by the defendants, and they were referred to the engineer, who acted under the commissioner; and who, having made the surveys and reports, was in possession of all the evidence necessary to give the required information to the court. He had only to look into his own work for the data to make the additional report in regard to both bridges and the two channels of the river, over which they have been constructed. His opinion as to a draw, and the other matters referred to him, were strictly within the line of his profession. No act done under the late reference was open for investigation by proof, or subject to be influenced by argument. The presence of the parties by their counsel was neither necessary nor desirable, and notice to the defendant was not, therefore, required to be given.

By the reference the court did not intend to make the opinion of the engineer the immediate basis of a final decree. They were desirous of ascertaining all the facts which could have a bearing in the decision of the case. They were fully impressed with its high importance to the public and to the defendants. And, whilst a high sense of duty required them to maintain the public right, they were solicitous, as expressed in their former opinion, to do so, with the least possible expense to the defendants.

"In their former opinion nothing was [***623** said, from which an inference could be drawn, that the right of crossing the Ohio River by bridges, was incompatible with its navigation. Had this bridge been constructed, in the language of its charter, so 'as not to obstruct the navigation of the Ohio in the usual manner, by steamboats and other craft, as are now commonly accustomed to navigate the same, when the river shall be as high as the highest floods hereinbefore known,' this suit could never have been instituted. The charter was granted in 1847, long after the great floods in 1832, and in subsequent years.

The right of navigating the Ohio River, or any other river in our country, does not necessarily conflict with the right of bridging it. But these rights can only be maintained when they are so exercised as not to be incompatible with each other. It is in their improper exercise, and not in their nature, that any incompatibility exists.

We can derive but little instruction on this subject, from European experience and practice. The rivers on that continent are generally diminutive, and of no very great length. They do not compare with the great rivers of the West. The bridges on the Rhine are numerous, and most, if not all of them, have draws, through which boats are continually passing. But their boats are small, with low and light chimneys, and some, if not many of the bridges, rest upon the surface of the water. A boat of two hundred and ninety-five feet in length, as the Pittsburgh, it is believed, is not to be found engaged in inland river navigation in Europe.

The report now before us, in its outlines, is not objected to by the defendants. On the contrary, they ask the court to sanction it, leaving

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open its details. In their former opinion, after stating the elevation which must be given to the suspension bridge to remove the obstruction, the court say, "if this, or some other plan, shall not be adopted, which shall relieve the navigation from obstruction, on or before the first day of February next, the bridge must be abated." It was supposed that some plan might be suggested to remove the obstruction, at less expense than the elevation or abatement of the bridge. The court had before them only the general plan for relief reported by the commissioner. Under such circumstances they felt themselves bound to receive and refer the propositions submitted by the defendants' counsel. The affirmative action on these propositions belong to the defendants; and also the eventual responsibility.

The court think that the report of the engineer, in its general aspect, without examining its details, affords such probability of success as to entitle the defendants to the proposed **ex-624*** periment. *We look to the desired results, and not to the practicability and efficiency of the plan. Of these the defendants must judge. They have the means of ascertaining, with the utmost accuracy, whether a channel can be opened, in the western branch of the river, so as to afford a safe and an unobstructed navigation for the largest class of boats, having chimneys eighty feet high, when they cannot pass under the suspension bridge. This is the object desired, and anything short of this would not be satisfactory.

When the subject of a draw was first suggested to the court, it was intimated that no draw was known which exceeded seventy feet in width, but it was supposed that one of eighty feet might be constructed. And the court then said, "we entertain great doubts whether a draw in either of the bridges, as proposed, can be constructed so as to afford a convenient passage for the steamboats that ply upon the Ohio River." A draw of two hundred feet in the clear is now proposed, and one less than that would not answer the public demand.

The court will not now examine whether there be not in the western channel other obstructions than the bridge. If such obstruction exist, of whatsoever nature, they must be known to the defendants, and must be removed.

With these general remarks, the court will leave the defendants free in the matter, to act as their own judgments shall dictate.

The elevation of the bridge, in pursuance of the report of the commissioner, was ordered by court, as the best mode of removing the obstruction, suggested by the evidence. The abatement of the nuisance was the most direct and ordinary mode for giving relief in such cases. The alternative of elevating the bridge was adopted, from considerations connected with the interests of the defendants, and the accommodation of the public. The same views have influenced us, in relation to the proposition now before us. We do not sanction them further than to leave them to the defendants, to work out and secure, if they shall think proper, the required results, as stated in this opinion. The inconsiderable delay of two or three minutes in passing the draw, and running the increased distance of the western channel, does not constitute a material objection. From the state-

ment made the increase of time would be less than is ordinarily consumed in the landing or receiving a passenger at the shore.

The objection, that the navigation of the eastern channel of the river has been improved by the government, and that the plaintiff has a right to its unobstructed use, is admitted to have much force.

*In the multitudinous concerns of **[*625]** commerce, we must view things practically, and cannot deal in abstractions. It is not always in the discretion of a court to measure justice by doing or requiring to be done the exact thing which would seem to be most appropriate. Cases may arise in which great interests are involved, that may have had their origin in wrongful acts, yet connected with circumstances which render it extremely difficult, if not impracticable, to do the thing, or cause it to be done, which is most fit and proper. In such cases, as in the law of mechanics, equivalents are of necessity substituted. And if the thing done be all that justice can require, it may suffice. Such is not unfrequently the necessary action of a court of chancery.

If the western channel of the river shall be made to afford an equally safe and unobstructed passage for boats, as the eastern channel, before the structure of the suspension bridge, excepting the mere passage of the draw, and the increased distance, no appreciable injury is done to commerce.

The court will direct the decree which has been filed, and which required the bridge to be elevated, as therein specified, on or before the first day of February next to be recorded, and that it shall stand as the order of this court, unless before that time the western channel of the river shall be made by the defendants, to afford an unobstructed passage to boats of the largest class which ply to Pittsburg, agreeably to this opinion; and leave is given to either party to move the court in relation to this matter, on the first Monday of February next.

The costs of this suit are ordered to be paid by the defendants.

Decree.

This cause having been heard in February last, and the opinion of the court pronounced: on the suggestions of the defendants' counsel a reference on certain points was made to William J. McAlpine, whose report having been made and arguments heard from the counsel on both sides at the adjourned term, in May, 1852, the cause stands for a final decree, on the original bill, the amendments thereto, the answers of respondents, and replications to said answers; and on the proofs in the cause, together with the report of the commissioner appointed by this court to examine the premises, and on the exceptions to said report: when it appeared that the respondents, in the year 1849, had erected a suspension bridge supported by iron wire cables across that portion of the River Ohio lying between the City of Wheeling and Zane's Island, by virtue of a charter granted by the Commonwealth of Virginia, the span of said bridge being over one thousand feet long; and it also appeared that across the other channel *of the river west of Zane's Island, **[*626]** there is a truss bridge so constructed as altogether to prevent the passage of steamboats

through that channel, which bridge is owned and maintained by the defendants. And it further appeared that the suspension bridge over the channel of the river east of the island, is so near the flow of the water in its ordinary stages as seriously to hinder and obstruct the largest class of steamboats from passing and re-passing under said bridge, in going to and returning from the port of Pittsburg, in the State of Pennsylvania; that large and expensive public improvements made by, and the property of that State, consisting of canals connecting railroads, turnpike roads and slack water navigation in said State, constructed years before the said suspension bridge was erected, all of which improvements terminate at Pittsburg, on the Ohio River, and extend throughout the State of Pennsylvania, to the east and north, connecting the City of Philadelphia, in said State, and Lake Erie with the River Ohio. That a large commerce for several years has been and now is carried on over these public works of internal improvement, on which Pennsylvania levies reasonable tolls to maintain said works, and to compensate her for their erection. That said bridge imposes serious obstructions to the largest class of vessels propelled by steam, and which bring freight and passengers from below said bridge, and which freight and passengers are intended to pass east and north over the canals and railroads of Pennsylvania, or to be conveyed down the Ohio River, having been transported on the public works of Pennsylvania, a portion of which commerce has been hindered and prevented, and hereafter must be hindered and prevented from passing over the public works of that State, because of obstructions to navigation interposed by said bridge. That the said Ohio River is a navigable stream. The navigation whereof by law is free to all citizens of the United States, and ought to remain unobstructed; and that the said suspension bridge not only obstructs and hinders navigation on said river, but by means of such obstructions does occasion a special damage to the said State of Pennsylvania as aforesaid, for which there is not a plain and an adequate remedy at law, but on the contrary thereof, such injury is irreparable by an action or actions at common law.

It is, therefore, decreed and adjudged, that said suspension bridge is an obstruction and nuisance, and that the complainant has a just and legal right to have the navigation of the said river made free, either by the abatement or elevation of the bridge, so that it will cease to be an obstruction, in ordinary stages of high water, to the largest class of steam vessels now navigating the Ohio River, and which alteration **627** is hereby declared *to be an elevation of said suspension bridge, to the height of one hundred and eleven feet at least, in its undermost parts, above the low water mark, by the Wheeling gauge of the Ohio's water; and that the height of said one hundred and eleven feet shall be maintained to the extent of three hundred feet on a level headway over the channel of the said river. And that, from the respective

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ends of said headway, of three hundred feet, to the abutments of each end of the bridge, the descent shall not exceed at the rate of four feet fall to every hundred feet of extension on the line of the bridge; and that the same shall be removed by respondents, or altered, as above stated, on or before the first day of February, 1853.

Since the above decree was drawn, certain propositions having been made by the defendants to open an unobstructed navigation for boats of the largest class, which ply to Pittsburg, through the western channel of the river, as is more particularly stated in the last opinion of the court in this case, which may avoid the obstructions by reason of the bridge complained of by the plaintiffs; and as time has been given to the first Monday of February next, for the defendants, should they deem proper, to carry out their propositions, by removing all obstructions in the western channel, on which day the plaintiff may move the court on the subject of the decree, and of the proposed alterations in the western channel, which, being before the court, will enable them to act in the premises as the law and the equity of the case may require.

The court order the costs to be paid by defendants.

Mr. Chief Justice Taney and **Mr. Justice Daniels** dissented.

Opinion of Mr. Justice Daniel:

When this case was formerly before us, my opinion was expressed at length against the right of this court to take jurisdiction thereof. My opinion upon this question remains unchanged; but the court having taken jurisdiction, I do not conceive that my objection to the cognizance by the court of this controversy forbids my concurrence in any modification of the decree originally proposed in this case, calculated to relieve the defendants from the operation of exactions, believed by me to be unwarranted by law. I therefore concur in the proposed modification of the former decree, by which a draw is authorized in the bridge over the western branch of the River Ohio. I think, however, that the length prescribed by this court for the draw is greater than the public exigencies require, and *that a draw of one hundred **[628]** feet, at the utmost, would be ample to meet those exigencies. It is also my opinion, that the costs in this cause should be equally borne by the parties.

Mr. Chief Justice Taney also dissented, concurring in the opinion of **Mr. Justice Daniel**.

S. C., 9 How., 647; 18 How., 421.
Cited—18 How., 430; 1 Black, 634; 2 Black, 495; 3 Wall., 742, 790; 1 Otto, 355; 2 Otto, 564; 3 Otto, 102; 5 Otto, 516; 10 Otto, 283; McAll., 287, 299; 6 McLean, 149, 219, 240, 1 Abb. U. S., 24, 164, 306; Woolw., 156; 2 Dill., 91, 406-413; 4 Blatchf., 409, 410; 11 Blatchf., 286-287; 13 Blatchf., 476; 1 Biss., 552; 1 Cliff., 253; 3 Cliff., 55; 4 Cliff., 412; 4 Ben., 206; 2 Bond, 371; 3 Hughes, 488; 3 Hughes, 603; 4 Hughes, 636; 2 McCrary, 519; 3 McCrary, 265, 3 McArthur, 49; 7 Sawy., 134, 144, 145.

REPORTS

OF

CASES

ARGUED AND ADJUDGED IN

THE

Supreme Court of the United States,

IN DECEMBER TERM, 1852.

BY BENJAMIN C. HOWARD,

Counselor at Law, and Reporter of the Decisions of the Supreme Court
of the United States.

VOL. XIV.

JUDGES
OF THE
SUPREME COURT OF THE UNITED STATES
DURING THE TIME OF THESE REPORTS.

The Hon. ROGER B. TANEY, *Chief Justice.*
The Hon. JOHN M'LEAN, *Associate Justice.*
The Hon. JAMES M. WAYNE, *Associate Justice.*
The Hon. JOHN CATRON, *Associate Justice.*
The Hon. PETER V. DANIEL, *Associate Justice.*
The Hon. SAMUEL NELSON, *Associate Justice.*
The Hon. ROBERT C. GRIER, *Associate Justice.*
The Hon. BENJAMIN R. CURTIS, *Associate Justice.*

JOHN J. CRITTENDEN, Esq., *Attorney-General.*
WILLIAM THOMAS CARROLL, Esq., *Clerk.*
BENJAMIN C. HOWARD, Esq., *Reporter.*
RICHARD WALLACH, Esq., *Marshal.*

PROCEEDINGS

IN RELATION TO THE

DEATH OF THE LATE JUDGE McKINLEY.

At the opening of the court, this morning, *Mr. Crittenden*, the Attorney-General of the United States, addressed the Court as follows:

That since its adjournment yesterday, the members of the bar and officers of the court held a meeting and had adopted resolutions expressive of their high sense of the public and private worth of the Hon. John McKinley, lately one of the justices of this court, and their deep regret at his death. By the same meeting I was requested to present those resolutions to the court, and to ask that they might be entered on their records, and I rise now to perform that honored task.

Besides the private grief which naturally attend it, the death of a member of this court, which is the head of a great, essential and vital department of the government, must always be an event of public interest and importance.

I had the good fortune to be acquainted with *Judge McKinley* from my earliest manhood. In the relations of private life he was frank, hospitable, affectionate. In his manners he was simple and unaffected, and his character was uniformly marked with manliness, integrity and honor. Elevation to the bench of the Supreme Court made no change in him. His honors were borne meekly, without ostentation or presumption.

He was a candid, impartial and righteous judge. Shrinking from no responsibility, he was fearless in the performance of his duty, seeking only to do right, and fearing nothing but to do wrong.

For many of the last years of his life he was enfeebled and afflicted by disease, and his active usefulness interrupted and impaired; but his devotion to his official duties remained unabated, and his death was probably hastened by his last ineffectual attempt at their performance by attending the last term of this court.

Death has now set her seal to his character, making it unchangeable forever; and, I think, it may be truly inscribed upon his monument that as a private gentleman, and as a public magistrate, he was without fear and without reproach.

This occasion cannot but remind us of other afflicting losses which have recently befallen us. The present, indeed, has been a sad year for the profession of the law. In a few short months it has been bereaved of its brightest and greatest ornaments. *Clay*, *Webster*, and *Sergeant* have gone to their immortal rest in quick succession. We had scarcely returned from the grave of one of them, till we were summoned to the funeral of another. Like

bright stars they have sunk below the horizon, and have left the land in wide-spread gloom. This hall, that knew them so well, shall know them no more. Their wisdom has no utterance now, and the voice of their eloquence shall be heard here no more forever.

This hall itself seems as though it was sensible of its loss, and even these marble pillars seem to sympathize as they stand around us like so many majestic mourners.

But we will have consolation in the remembrance of these illustrious men. Their names will remain to us, and be like a light kindled in the sky to shine upon us, and to guide our course. We may hope, too, that the memory of them, and their great examples, will create a virtuous emulation which may raise up men worthy to be their successors in the service of their country, its Constitution and its laws.

For this digression and these allusions to *Clay*, *Webster*, and *Sergeant*, I hope the occasion may be considered as a sufficient excuse; and I will not trespass by another word, except only to move that these resolutions, in relation to *Judge McKinley*, when they shall have been read by the clerk, may be entered on the records of this court.

At a meeting of the members of the bar and officers of the court, held in the Supreme Court Room on Tuesday, the 7th day of December, 1852, the Honorable Solomon W. Downs, of Louisiana, was called to the chair, and John A. Campbell, Esquire, of Alabama, appointed Secretary.

On motion of *Richard S. Coxe*, Esquire, it was resolved that a committee of three gentlemen be appointed by the Chair to prepare and report to the meeting resolutions on the occasion of the lamented death of the Honorable John McKinley, one of the Associate Justices of the Supreme Court of the United States.

Whereupon the Chair appointed *Richard S. Coxe*, Esquire, of the District of Columbia; *Reverdy Johnson*, Esquire, of Maryland, and *William Rawle*, Esquire, of Pennsylvania, to constitute the committee.

Mr. Coxe, on behalf of the committee, reported to the meeting the following resolutions, which were unanimously adopted:

Resolved, That among the afflictive dispensations with which it has pleased Almighty God to visit us, in common with the entire nation, during the last few months, we are especially called upon to deplore the death of the Honorable John McKinley, who, for the period of fifteen years, had filled an honorable position on the bench of the Supreme Court, which he

adorned by his simple purity of character, his learning, industry, and courtesy of manner.

Resolved, That this meeting deeply lament the death of *Judge McKinley*, and will cherish an affectionate remembrance of his many virtues and eminent worth as a judge, a patriot and a man, and that we will wear the usual badge of mourning during the residue of the term.

Resolved, That the Chairman and Secretary of this meeting transmit a copy of these proceedings to the family of the deceased, and to assure them of our sincere condolence on account of the bereavement which they have sustained.

Resolved, That the Attorney General be requested to present these proceedings to the court, with a request that they be entered on its minutes. S. W. DOWNS, Chairman.

J. A. CAMPBELL, Secretary.

To which *Mr. Chief Justice Taney* replied:

When the court assembled at the last term, one of its first acts was to express its sorrow for the loss of a highly respected member of the court, who died in the preceding vacation. And now, when we meet again, we have to lament the death of another who has fallen since the last adjournment.

We cordially unite with the bar in all that they have said of the character and worth of *Judge McKinley*. He was a member of this court for fifteen years, and we knew him well. He was a sound lawyer, faithful and assiduous in the discharge of his duties while his health was sufficient to undergo the labor. And his life was most probably shortened by the effort he made to attend this court at the last adjourned term, when his health had become too infirm to encounter the fatigue of a journey to

Washington. He was frank and firm in his social intercourse, as well as in the discharge of his judicial duties. And no man could be more free from guile, or more honestly endeavor to fulfill the obligations which his office imposed upon him. We truly deplore his death.

We have indeed met together at the present term under circumstances peculiarly painful. And when we are speaking of the loss sustained by the death of a brother of the bench, we unavoidably call to mind the three distinguished members of the bar who have also died since the last session of the court. Very soon after the adjournment the death of *Henry Clay* was announced. In a few months afterwards *Daniel Webster* followed him; and before this term commenced the name of *John Sergeant* was added to the melancholy list. These gentlemen have all for the last thirty years been identified with the proceedings of this court, standing always in the foremost ranks of the profession, and ornamenting it by their genius, their learning and their eloquence. And while they were maintaining this distinguished position before the judicial tribunals, they were able at the same time to place their names among the leading and eminent statesmen of the day, exercising a strong and wide influence upon the great political questions which were agitated during the period in which they lived.

The interval between the last and present session of the court has been a brief one. But sad events have been crowded into it. And we shall direct the proceedings of the bar and this response to be entered on the records of the court, as the evidence of the deep sense which the court entertain of the loss sustained at the bar as well as on the bench.

THE DECISIONS

OF THE

Supreme Court of the United States,

AT

DECEMBER TERM, 1852.

1)*ANDREW WYLE, JR., Administrator of
SAMUEL BALDWIN, Appellant,

v.

RICHARD S. COXE.

*No appeal lies to this court from denial motion
to open decree in equity.*

An appeal will not lie to this court from a refusal of the court below to open a prior decree, and grant a rehearing. The decision of this point rests entirely in the sound discretion of the court below.

The case of *Brockett v. Brockett*, 2 How., 240, explained.

Two appeals having been taken, one from the original decree and the other from the refusal to open it, the latter must be dismissed, and the case stand for hearing upon the first appeal.

A motion for a mandate upon the court below, to carry the decree into execution, overruled.

THIS was an appeal from the Circuit Court of the United States for the District of Columbia.

It was brought before the court upon the following motion:

The appellee in this case moves the court to dismiss the second appeal in this record from the order of the Circuit Court, overruling a motion to open the decree and grant a rehearing. And also, to award a writ of *procedendo*, commanding the said Circuit Court to proceed and execute the first decree.

RICHARD S. COXE,

Dec. 22d, 1852.

In pro. per.

Mr. Chief Justice Taney delivered the opinion of the court:

This is an appeal from the decree of the Circuit Court for the District of Columbia.

The bill was filed by the appellee to recover 2*) a sum of money *which he alleged was due to him for services rendered to the appellant, as administrator, and to Baldwin, the intestate, in his lifetime, in recovering a large sum of money, which was due to the said Baldwin from the Mexican government. The case proceeded to final hearing; and, on the 28th of April, 1852, the court passed its decree, directing the appellant, as administrator, to pay to the appellee \$3,780, with interest from the 16th of May, 1851, until paid.

From this decree the appellant prayed an appeal to this court, and executed an appeal bond HOWARD 14.

in the usual form, in the penalty of \$200. The bond is dated on the 6th of May, 1842, and on the same day was left for approval in the clerk's office, and, as appears by an indorsement upon it, was approved and filed on the 18th of the same month.

On the 18th of May, 1852, the appellant filed a petition for a rehearing, and on the same day moved to open the decree. The appellee answered the petition on the 19th. And on the 22d, the motion to open the decree and for a rehearing was overruled by the court. And thereupon the appellant prayed an appeal, as well from this order as from the decree of April 28th; and on the same day executed an appeal bond in the penalty of \$7,500, which was approved by the court.

The case is therefore here upon two appeals: 1st, from the final decree, directing the payment of the money; and 2d, from the order overruling the motion to open this decree and grant a rehearing.

In relation to the order, it is plain that no appeal will lie from the refusal of a motion to open the decree and grant a rehearing. The decision of such a motion rests in the sound discretion of the court below, and no appeal will lie from it.

The case of *Brockett v. Brockett*, 2 How., 240, which was relied on in the argument, was decided on different ground. In that case, before any appeal was taken, a petition was filed to open the decree for certain purposes, and the court referred it to a commissioner to examine and report on the matters stated in the petition. Upon his report, the court refused to open the decree, and the party thereupon appealed from this refusal, as well as the original decree, and gave bond, with sufficient security, to prosecute the appeal. This bond was given within ten days of the refusal of the motion, but was more than a month after the original decree. And the court held that this appeal was well taken; not because an appeal will lie from the refusal of a motion to open the decree and grant a rehearing, but because the court regarded the original decree as suspended by the action of the court on the motion, and that it was not effectual and final until the motion was overruled.

*But in this case the decree was not [*3 suspended. It was final from its date. An appeal had been regularly taken from it, and

an appeal bond given. And the case has come up to this court upon that appeal. There is no ground, therefore, for saying, that the first decree was not final until the motion was overruled. It is now before this court upon the first appeal; and the second appeal, although it professes to be an appeal from the original decree, as well as from the subsequent order, could not act on the original decree, which was already removed; and the validity of this last appeal must rest altogether on the refusal to open and rehear. And, as an appeal will not lie from the decision of such a motion, the appeal, so far as concerns the order on the petition for a rehearing, and the refusal of the Circuit Court to grant the same, must be dismissed.

The first appeal was, however, regularly taken, and the case will stand for hearing when it is reached in the regular call of the docket. And as it is now presented by the record, we see no ground for a mandate to the Circuit Court. No application has been made to it to carry the decree into execution, or to stay proceedings in it pending this appeal. We are bound to presume that the court below will do whatever may be right in the premises, if the subject is properly brought before it. And we cannot, in advance, undertake to guide their judgment by a mandate.

The motion for an order on the Circuit Court, to proceed to carry the decree into execution, is therefore overruled.

Ex-parte DAVID TAYLOR.

Mandamus will not lie to re-examine decision of Circuit Court of D. C. on sufficiency of affidavit to hold to bail and amount of bail.

A rule will be refused for the judges of the Circuit Court of the District of Columbia to show cause why a *mandamus* should not issue, unless a case is presented which *prima facie* requires the interposition of this court.

Such a case is not presented where the Circuit Court decided that, under an Act of Congress, an affidavit was sufficient to hold a party to special bail. That court had the power, by the Act, to exercise its judicial discretion.

This Act of Congress regulated the subject, and not the statute of Maryland, passed in 1715.

THIS case came before the court upon the following motion and petition:

Ex-parte
DAVID TAYLOR. } Petition for a *Mandamus* to the Judges of the Circuit Court of the District of Columbia, for Washington County.

The above petitioner moves the Honorable 4*) the Judges of the *Supreme Court of the United States, for a rule on the Judges of the Circuit Court of the District of Columbia for Washington County, to show cause why a *mandamus* should not issue commanding them to admit the appearance of the petitioner to a suit in said Court, by Thomas Ewing, Jr., against said petitioner; and the petitioner moves for the said rule on his petition, and the transcript therewith filed.

1. Because there is no legal cause of bail set forth in the proceedings of said suit, and by the refusal of the Circuit Court to allow his appearance to be entered to said suit, he is unlawfully detained in custody by the marshal of said district.

2. Because the Act of Maryland, passed in 1715, ch. 46, sec. 3, is in force in the County of Washington, and no wise repealed; and the petitioner was by virtue of said Act entitled to appear to said suit, on giving special bail in the sum of one hundred and thirty-three dollars thirty-three and a third cents. But the court refused to allow him so to appear, or to enter bail in said amount.

3. Because the petitioner has a legal right to appear without bail, or upon giving bail to the amount required by the Act of 1715, ch. 46, sec. 3, and thereby to be discharged from prison, and the said legal right does not depend on the discretion of the court, but is fixed and regulated by law, and there is other legal remedy for the petitioner in the premises.

ROBERT J. BRENT, for Petitioner.

To the Judges of the Supreme Court of the United States.

The petition of David Taylor respectfully sheweth, that he is now confined in the jail in the City of Washington, at the suit of a certain Thomas Ewing, Jr., and he refers to the accompanying transcript of the record of said suit, and makes the same a part of this petition, for the better understanding of the proceedings under which he is now unjustly and oppressively detained in prison.

Your petitioner sheweth, that by said record it appears he was held to bail in said suit, upon the affidavit of said Ewing, and without a copy of the declaration being served on him, as required by the Act of the Legislature of Maryland of 1715, ch. 46, sec. 3.

That, at the return of the writ of *capias ad respondendum*, issued in said cause, your petitioner moved to enter his appearance without giving special bail, because of the alleged insufficiency of the affidavit to hold to bail, but said motion was overruled by the Circuit Court of the District of Columbia for Washington County. That thereupon your petitioner moved to enter his appearance to said suit, upon giving good and *sufficient special [*5] bail, in the sum of one hundred and thirty-three dollars and thirty-three and one third cents, because of the omission to serve your petitioner with a copy of the declaration, according to the terms of the aforesaid Act of 1715, ch. 40, sec. 3; and, your petitioner then and there tendered in open court good and sufficient bail, in the last-mentioned sum of money. The sufficiency of said bail for said amount was fully admitted by said court, as will appear by reference to said transcript of the record; but the court overruled said application upon the express ground that your petitioner was bound to enter special bail to said action, in the amount of the sum sworn to in the affidavit of said Ewing, which sum is shown in said affidavit to be four thousand nine hundred and seventy dollars. Your petitioner is advised that the aforesaid recited Act of the Legislature of Maryland is in full force in Washington County aforesaid; and

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NOTE.—When *mandamus* will issue. See note to *McCluney v. Stillman*, 2 Wheat., 300.

that under and by virtue of said law, it was the duty of the marshal to require no greater appearance bail, and of the court to require no greater special bail than the amount specified in said Act, where no copy of the declaration is sent to be served with the writ; and your petitioner is also advised, that there is in said affidavit no legal cause of bail whatever. Wherefore, inasmuch as the said Circuit Court has refused both of said applications for an appearance on the part of your petitioner to said suit, and as the law provides no other adequate remedy in the premises, whereby your petitioner can, before the final determination of said suit, regain his personal liberty, whereof he is now illegally and unjustifiably deprived, your petitioner prays that the writ of *mandamus* may be issued and directed to the Judges of said Circuit Court, commanding and enjoining them to receive the appearance of your petitioner to said action, either without requiring special bail, or upon your petitioner causing good and sufficient special bail to be entered to said action, in the sum of one hundred and thirty-three dollars and thirty-three cents and one third of a cent.

And, as in duty bound, your petitioner will ever pray, &c.

ROBERT J. BRENT, for Petitioner.

District of Columbia, Washington County, to wit:

Before the subscriber, a justice of the peace of the District of Columbia, in and for Washington County, personally appears David Taylor, the within petitioner, and made oath on the Holy Evangel of Almighty God, that the facts, as stated in the said petition, are true, to the best of his knowledge and belief.

J. W. BECK, J. P.

Dec. 10, 1852.

6*] **District of Columbia, ss.*

At a Circuit Court of the District of Columbia, begun and held in and for the County of Washington, at the City of Washington, on the third Monday of October, being the eighteenth day of the same month, in the year of our Lord one thousand eight hundred and fifty-two, and of the independence of the United States the seventy-seventh.

Present,

WILLIAM CRANCH, Chief Judge.

THE HON. JAMES S. MORSELL, and } Assistant
JAMES DUNLOP, } Judges.

RICHARD WALLACH, Esquire, Marshal.

JOHN A. SMITH, Clerk.

In the records of proceedings of the said court, amongst others, are the following, to wit:

THOMAS EWING, JR., }

DAVID TAYLOR. }

Be it remembered, to wit: on the 4th day of October, 1852, the said plaintiff, by Charles S. Wallach, Esquire, his attorney, prosecuted and sued forth out of the Circuit Court here, the United States writ of *capias ad respondendum*, directed to the marshal of the District of Columbia, in form following, to wit:

District of Columbia, to wit:

The United States of America, to the Marshal of the District of Columbia, Greeting:

We command you, that you take David

Taylor, late of Washington County, if he shall be found within the County of Washington, in your said district, and him safely keep, so that you have his body before the Circuit Court of the District of Columbia, to be held for the county aforesaid, at the City of Washington, on the 8d Monday of October instant, to answer unto Thomas Ewing, Jr., in a plea of trespass on the case, and so forth.

Hereof fail not at your peril, and have you then and there this writ.

Witness WILLIAM CRANCH, Esq., Chief Judge of our said court, at the City of Washington, the 22d day of May, Anno Domini one thousand eight hundred and fifty-two.

Issued this 4th day of October, 1852.

Wallach. JNO. A. SMITH, Clerk.

**District of Columbia, Washington County, [7 to wit:*

And the aforesaid plaintiff, on the day of prosecuting and suing forth of the foregoing writ, declared against the said defendant in the plea aforesaid, in the form following, to wit:

District of Columbia, Washington County, to wit:

David Taylor, late of the county aforesaid, was attached to answer unto Thomas Ewing, Jr., in a plea of trespass on the case, and so forth. And whereupon, the said plaintiff, by Charles S. Wallach, his attorney, complains that, whereas the defendant, on the first day of September, in the year eighteen hundred and fifty-two, at the county aforesaid, was indebted to the plaintiff in the sum of four thousand nine hundred and seventy dollars, current money of the United States, for sundry matters and articles, properly chargeable in an account, as by a particular account thereof herewith into court exhibited, appears. And being so indebted, the defendant, in consideration thereof, afterwards, to wit: on the day and year aforesaid, of the county aforesaid, undertook and faithfully promised to the said plaintiff, to pay him the aforesaid sum of money, when he should be thereto afterwards required.

And whereas, also, the defendant, on the first day of September, in the year eighteen hundred and fifty-two, at the county aforesaid, was indebted to the plaintiff in the further sum of four thousand nine hundred and seventy dollars, for work and labor done and performed by the plaintiff for the defendant, at his special request; and in the further sum of four thousand nine hundred and seventy dollars, for money received by the defendant for the use of the plaintiff; and in the further sum of four thousand nine hundred and seventy dollars, for money lent and advanced by the plaintiff to the defendant, at his, the defendant's, request; and in the further sum of four thousand nine hundred and seventy dollars, for money paid, laid out and expended, by the plaintiff for the use of the defendant, at his, the defendant's, request; and being so indebted the defendant afterwards, that is to say, on the day and year aforesaid, at the county aforesaid, in consideration thereof, undertook, and then and there faithfully promised to the said plaintiff, that he, the defendant, the said several sums of money, when required, would well and truly pay to the plaintiff.

And whereas, the defendant afterwards, that is to say, on the first day of September, in the

year aforesaid, at the county aforesaid, accounted with the plaintiff, of and concerning divers sums of money, from the said defendant to the 8*] plaintiff due, *owing then, in arrear and unpaid; and upon such accounting, the said defendant was then and there found in arrear, and indebted to the said plaintiff the further sum of four thousand nine hundred and seventy dollars; and being so found in arrear and indebted, the said defendant afterwards, that is to say, on the day and year last mentioned, at the county aforesaid, in consideration thereof, undertook, and then and there faithfully promised to pay to the plaintiff, when thereto afterwards required, the said last-mentioned sum of money.

Nevertheless, the said defendant promises in nowise regarding, the said several sums of money, or any part thereof, though often required, to the plaintiff has not paid, but the same to pay has always refused, and still refuses, to the damage of the plaintiff, in the sum of ten thousand dollars, and therefore, he brings suit &c. CHARLES S. WALLACH,

For the Plaintiff.

The said plaintiff, by his attorney aforesaid, at the time of prosecuting and suing forth the said writ, also filed the following affidavit to hold to bail, to wit:

District of Columbia, Washington County, to wit :

THOMAS EWING, JR.,

v.

DAVID TAYLOR.

On this fourth day of October, 1852, personally appeared before me, the subscriber, a justice of the peace in and for the county and district aforesaid, Joseph T. Coombs, of the county and district aforesaid, agent for the plaintiff in the above cause, and made oath on the Holy Evangelical of Almighty God, that David Taylor, a resident of the State of North Carolina, defendant in the above cause, is indebted to the said plaintiff in the full and just sum of four thousand nine hundred and seventy dollars, for moneys due upon a certain agreement or contract herewith filed, and for work and labor done at his the said David Taylor's, special instance and request, in the district and county aforesaid, a particular account whereof is herewith filed. And that the said Taylor, being now in the said county and district, is about to remove from and go out of said county and district, and remove his property, rights and credits from said county and district, with a view and in order to avoid the payment of the said debt, as this affiant verily believes, and that said debt was contracted in said county and district by the said David Taylor; and that said work and labor were done and performed in the said county and district by the said 9*] plaintiff, between the 8th *day of March, 1850, and the first day of September, 1852, at his, the said David Taylor's, special instance and request.

J. T. COOMBS.

Subscribed and sworn before me,

H. NAYLOR, J. P.

4th October, 1852.

Agreement referred to in the foregoing Affidavit.

Contract made and concluded on the twenty-eighth day of March, A. D. 1851, by and between Thomas Ewing, Junior, formerly of Ohio, and David Taylor, formerly of North

Carolina, in behalf of himself and his wife and children, in these words:

The said party of the first part covenants and agrees to prosecute before Congress, or before the public departments of the general government, the claim of the said party of the second part, and that of his wife and children, under the Cherokee Treaty of 1835-6, to the appraised value of a reservation of 640 acres of land, lying in the State of Tennessee, which said claim was before the Committee of Indian Affairs of the Senate at the last session of Congress; and further, that the said party of the first part will use proper diligence in the prosecution of the said claim, and at no time will let the interests of the said party of the second part suffer by want of a proper degree of attention to the claim, on his part, unless prevented from rendering it by sickness or some other unavoidable and unforeseen necessity.

And the said party of the second part, in consideration of the valuable services which the said party of the first part has already rendered in the prosecution of the said claim; and in further consideration of the agreement which the said party of the first part herein makes, to continue to prosecute the claim until it is finally allowed and paid, hereby covenants and agrees to pay unto the said party of the first part the sum of twenty per centum upon the amount of said claim, whenever the same may be allowed; and if at any time a part of it only is allowed, then the said party of the second part covenants and agrees to pay unto the said party of the first part, a like percentage upon the sum allowed.

And for the true and faithful performance of all the agreements above mentioned, the parties to these presents bind themselves, each unto the other, in the penal sum of five thousand dollars, as fixed and settled damages, to be paid by the failing party.

In testimony whereof, the parties to these presents have hereunto set their hands and affixed their seals, the day and year first above written.

THO. EWING, JR. [SEAL.]

his
DAVID TAYLOR. [SEAL.]
mark.

*The within contract was read by me [*10 to Mr. Taylor, before signing it, and he declared himself fully satisfied with the conditions herein expressed.

Signed, sealed and delivered in my presence, this 28th day of March, A. D. 1851.

W. H. COLLEDGE.

A copy of which said affidavit was made, and sent with the writ aforesaid to the marshal of the district aforesaid, thereon indorsed, to wit: "To be served on the defendant with the writ."

Account referred to in the foregoing Affidavit, to wit :

WASHINGTON, Sept. 1st, 1851.

Mr. David Taylor, Dr. to Thomas Ewing, Jr.

To commission, 20 per cent., on \$24,853.04, amount allowed on your claim against United States, under Cherokee Treaty of 1835, for work and labor done and performed in obtaining said allowance, and as per agreement, \$4,970.00.

At which mentioned third Monday of October, in the year eighteen hundred and fifty-

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two, and the day of the return of the foregoing writ, comes again into the Circuit Court here, the said plaintiff, by his attorney aforesaid; and the marshal of the district aforesaid, to whom the said writ was in form aforesaid directed, makes return thereof to the court thus indorsed, to wit: "*Cepi in jail.* R. Wallach, Marshal."

And now, to wit: on the — day of November, A. D. 1853, in open court, appears David Taylor, in custody of the marshal of the district aforesaid, and moves the court here that he be permitted to enter a common appearance to the said writ of the said Thomas Ewing, Jr.; and at the same time the said David Taylor, by his attorney, Robert J. Brent, Esq., offered to appear to said writ, and to defend the same; but the court refused to allow the said David Taylor to appear to said writ until he should give special bail, to the amount of indebtedness sworn to in the affidavit of said Thomas Ewing, Jr., filed in this cause. And thereupon the said David Taylor, so being in open court, prayed the court to take special bail for him in this action, to the amount of one hundred and thirty-three dollars thirty-three and one third cents. And at the same time appeared in open court John Frederick May and Joseph L. Williams, residents of the District of Columbia, who, with the consent of the said David Taylor, offered to enter themselves as special bail for the said David Taylor, and to justify in double the said last amount; but the court, in no wise denying the sufficiency of said bail as offered, refused to accept or take special bail [11*] for *any amount less than the amount sworn to by said Thomas Ewing, Jr., as aforesaid; and the said David Taylor declining to give or offer bail to the amount required by the court, he is thereupon ordered and remanded by the court to the custody of the Marshal of the District of Columbia.

Test. JOHN A. SMITH, Clerk.

District of Columbia, Washington County, to wit:

I, John A. Smith, Clerk of the Circuit Court of the District of Columbia, for the County of Washington, hereby certify that the foregoing is a full and perfect transcript of all the proceedings had in the said court, in the said case of *Thomas Ewing, Jr.*, against *David Taylor*, as appears from the minutes of the proceedings of said court.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said court, this 10th December, 1853.

[SEAL.]

JNO. A. SMITH, Clerk.

Mr. Chief Justice Taney delivered the opinion of the court:

It appears in this case, that a suit was brought in the Circuit Court of the United States for Washington County, in the District of Columbia, by Thomas Ewing, Jr., against David Taylor, to recover a sum of money which he alleged to be due to him, upon a contract which is set forth in the proceedings, and also for services rendered to Taylor at his instance and request.

The writ issued on the 4th of October, 1852, returnable to the October term, which began on the third Monday of the same month. And at the time of issuing the writ, the plaintiff filed

his declaration containing the usual money counts, and also an affidavit stating the amount due, and the nature of his claim; that the debt was contracted in Washington County, in the District of Columbia, and that Taylor, being then in said county and district was about to remove from it, and remove his property, rights and credits, in order to avoid the payment of this debt.

The marshal arrested Taylor, and made his return upon the writ "*Cepi in jail*;" and thereupon Taylor appeared in court, in the custody of the marshal, and by his counsel, moved for leave to appear on common bail. But the court refused to permit him to appear and to discharge him from custody, until he should give bail to the amount of the debt sworn to in the affidavit of the plaintiff. Taylor then moved for leave to appear, upon giving bail in the sum of one hundred and thirty-three dollars thirty-three and a third cents, claiming that he was entitled to be discharged upon giving bail to that amount, under the Act of Assembly of Maryland of 1715, which Act, together with the other laws of Maryland in force when the United States assumed jurisdiction over [*12] this district, were adopted by Congress as the laws of Washington County.

But the Circuit Court adhered to its decision, and refused to permit the party to appear, without giving bail to the amount claimed in the plaintiff's affidavit.

Upon this state of the case, Taylor moves for a rule on the judges of the Circuit Court to show cause why a *mandamus* shall not be issued from this court, commanding the judges of the Circuit Court to permit Taylor to appear to the above-mentioned suit on common bail, in order that he may be discharged from the custody of the marshal; and failing that motion, then to show cause why he should not be permitted to appear, upon giving bail to the amount of one hundred and thirty-three dollars and thirty-three and one third cents, under the provisions of the Maryland law.

According to the established practice of this court, a rule of this kind is not granted as a matter of course, and the inferior court is never called on to show cause, unless a case is presented which *prima facie* requires the interposition of this court. It was so settled in the case of *The Postmaster-General v. Trig, Administrator of Rector*, 11 Pet., 178.

We proceed, then, to inquire whether such a case has been presented to support this motion.

The proceedings by which Taylor was arrested and held in custody, were under the Act of Congress of August 1st, 1842 (5 Stat. at Large, 498). This Act provides that no person shall be held to bail in any suit in the District of Columbia, unless upon such an affidavit as is described in the law, which must be filed previously to the issuing of the writ.

It is insisted, on behalf of Taylor, that he was entitled to his discharge from custody upon entering an appearance by his attorney to the suit, because, as he alleges, the affidavit filed in the suit does not conform to the provisions of the Act of Congress, and therefore was not sufficient, under that law, to justify the court in demanding bail.

But that is a question which this court cannot

consider. The Act of Congress provides that the sufficiency of the affidavit to hold to bail, and the amount of bail to be given, shall, upon application of the defendant, be decided by the court in term time, and by a single judge in vacation. In deciding upon the application to discharge Taylor from the custody of the marshal, the court must necessarily have considered and interpreted the Act of Congress, as well as the affidavit, and determined whether the affidavit was sufficient or not. And certainly, even in England, the King's Bench never claimed or exercised the power to issue a *mandamus* to an inferior court of record, commanding it to [13*] *reverse its judgment, in a matter where the law authorized it to judge. In the case before us, the power of deciding on the sufficiency of the affidavit, and the amount of bail, is a part of the judicial power of the court. It has exercised this power, and passed its judgment. We do not mean to say that this judgment is in any respect erroneous. But assuming it to be so, this court cannot, by *mandamus*, command them to reverse it. The writ has never been extended so far, nor ever used to control the discretion and judgment of an inferior court of record acting within the scope of its judicial authority. There is no ground, therefore, for the rule under the Act of Congress.

The application under the Maryland Act of 1715, is equally untenable. The provision in that Act relied on in support of the motion, was never held in Maryland to apply to anything but the bail bonds to be taken by the sheriff in certain cases, and never influenced the decision of the courts as to the amount of bail to be required when the defendant was brought into court. But it is unnecessary to speak of that Act, or of the construction it received in the courts of Maryland, because the right of the plaintiff in the Circuit Court to demand bail depends altogether upon the Act of Congress. And if there is any discrepancy between this Act and the Act of Assembly of 1715, the Act of Congress must govern, and is a repeal *pro tanto* of the Maryland law.

The rule to show cause is therefore refused.

Cited—7 Wall., 386; 11 Otto, 720.

THOMAS MOORE, Executor of RICHARD
EELS, Plaintiff in Error,
v.

THE PEOPLE OF THE STATE OF
ILLINOIS.

*Illinois statute for punishment of offense of harboring or secreting fugitive slave, not in conflict with U. S. Const. or laws.**

A State, under its general and admitted power to define and punish offenses against its own peace and policy, may repel from its borders an unacceptable population, whether paupers, criminals, fugitives or liberated slaves; and consequently, may punish her citizens and others who thwart this policy, by harboring, secreting, or in any way assisting such fugitives.

It is no objection to such legislation that the offender may be liable to punishment under the Act of Congress for the same acts, when injurious to the owner of the fugitive slave.

The case of *Prigg v. The Commonwealth of Pennsylvania*, 16 Peters, 539, presented the following questions, which were decided by the court:

1. That under and in virtue of the Constitution of the United States, the owner of a slave is clothed with entire authority in every State in the Union, to seize and recapture his slave, wherever he can do it without illegal violence or a breach of the peace.

2. That the government of the United States is clothed with appropriate authority and functions to enforce the delivery, on claim of the owner, and has properly exercised it in the Act of Congress of 12th February, 1793.

3. That any state law or regulation which [*14 interrupts, impedes, limits, embarrasses, delays or postpones the right of the owner to the immediate possession of the slave, and the immediate command of his service, is void.

This court has not decided that state legislation in aid of the claimant, and which does not directly nor indirectly delay, impede or frustrate the master in the exercise of his right under the Constitution, or in pursuit of his remedy given by the Act of Congress, is void.

THIS case was brought up from the Supreme Court of the State of Illinois, by a writ of error issued under the 25th section of the Judiciary Act.

The section of the law of Illinois under which Eels was indicted in 1842 and the facts in the case are set forth in the opinion of the court, and need not be repeated. The court before which he was tried, fined him four hundred dollars, and the Supreme Court of Illinois affirmed the judgment. The case is reported in 4 Scammon's Rep., 498.

It was argued, in this court, by *Mr. Chase* for the plaintiff in error, and a printed argument filed by *Mr. Dixon* on the same side; and by *Mr. Shields* for the defendant in error, who filed a printed argument prepared by *Mr. McDougall*, Attorney-General of Illinois.

The arguments urged by the counsel for the plaintiff in error, in order to show that the law of Illinois was void, were—

1. That the Act of Congress, passed in 1793, was constitutional; that the power of legislating upon the subject of fugitive slaves ought to be vested in Congress; that the Act had been declared to be constitutional by the following authorities: 16 Peters, 620 *et seq.*; 9 Johns., 67; 12 Wendell, 311; 2 Pick., 11; 5 Sergeant & Rawle, 62; 2 Wheeler's Crim. Cases, 594.

2. That the power was vested exclusively in Congress, and if there was an omission to legislate, silence was as demonstrative of its will as express legislation. (5 Wheat., 1, 21, 22; 16 Pet., 617 *et seq.*)

3. That admitting the power to be concurrent, its exercise by Congress supersedes all state legislation. (1 Kent, 380, 391; 1 Story's Com. on Con., secs. 437 to 443; 12 Wend., 316, 325; 1 Pet. Con. Rep. 429; 4 *Id.*, 414-415; 2 Wheel. Crim. Cas., 594; 5 Wheat., 21, 24, 36, 70, 75; 14 Wend., 532-6; 16 Pet., 617, 618.)

4. The Act of Congress of 1793, and the law of Illinois, conflict with each other.

5. Two laws legislating over the same offense, cannot exist at the same time.

6. If so, the law of Illinois must give way.

It was particularly pressed upon the court by *Mr. Chase*, that this court had decided, in the case of *Prigg v. Pennsylvania*, 16 Pet., 539, that all state legislation upon the subject of fugitive *slaves was void, whether professing to be in aid of the legislation of Con-

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gress, or independent of it, was void; and he claimed the benefit of that decision.

The counsel for the defendant in error commented on the various positions above mentioned; and the following extract from the brief shows the principal ground relied upon to indicate the state law:

The case just cited, *Houston v. Moore*, 5 Wheaton, leads directly to the question, what is the particular power exercised by the State in the present instance; whence derived, and what the design and mode of its operation. And it may be as well here to remark, that it is not alone in the light of an Act in aid of the legislation of Congress, that this law is to be considered. The question before this court is one of power—of power in the State to legislate in the particular manner. If the power exists in the State, no matter from whence derived, the validity of the law cannot be questioned.

It is now contended that the power in question belongs to the States in virtue of their original and unsundered sovereignty; in virtue of those great conservative powers which all governments must have, exercise and maintain for their own protection and preservation; powers which, in the language of Mr. Madison (*Federalist*, No. 45), "extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people, and the internal order, improvement and prosperity of the State."

"In *The City of New York v. Miln*, 11 Pet., 139, the court say, "that a state has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation, when that jurisdiction is not surrendered or restrained by the Constitution of the United States," &c.

It has been before remarked, that slavery exists to a limited extent in the State of Illinois; nevertheless, it is the settled policy of the State to discourage the institution, as also a free negro population. By numerous acts of legislation, before and since the present Constitution, it has been made penal to introduce negroes from other states, except upon severe conditions. Negroes have been and continue to be regarded as constituting a vagabond population; and to prevent their influx into the State, restrictive laws have been from time to time passed. In connection with this regulation is to be found the law in question, prohibiting persons within the State from harboring or secreting fugitive negro slaves. The question whether a state may not prohibit its citizens from harboring or protecting felons, fugitives from other countries, is the same with this. It is [16*] possible "that some new state might become a country of refuge for the accused and convicted outcasts of older and stronger governments; would that state be compelled to receive and welcome the moral pestilence? Certainly not; the right of self-preservation, necessary to all governments, would justify any act required to repel them from her borders.

It was upon this principle, as a sovereign power in the State, that this court sustained the law of New York, intended to prevent the influx of a pauper and vagabond population at the port of New York. (*City of New York v. Miln*, 11 Pet., 142.) In which case the court

says: "We think it as competent and as necessary for a state to provide precautionary measures against the moral pestilence of paupers and vagabonds and possibly convicts, as it is to guard against the physical pestilence which may arise from unsound and infectious articles imported, or from a ship the crew of which may be laboring under an infectious disease."

It was in favor of this same power that the court, in *Prigg v. Pennsylvania*, 16 Pet., 625, qualify the general terms of their opinion. "To guard, however, against any possible misconstruction of our views, it is proper to state that we are by no means to be understood, in any manner whatsoever, to doubt or to interfere with the police power belonging to the States, in virtue of their general sovereignty," &c.

The State may arrest, restrain, and even remove from its borders, the fugitive slave, and so long as the rights of the owner are not interfered with, it is a constitutional exercise of power. If, then, the greater power exists, that over the person of the slave, for the purpose of police, certainly the lesser power, that over the citizen, preventing him from harboring, secreting or protecting the slave, for like purposes of police will not be denied.

It will be perceived that this view of the case settles the point made in the opposing argument, that the law of Illinois is a violation of the federal and state Constitutions, which prohibit two punishments for one offense. A legal offense is the breach of a law. Eels, in harboring a fugitive slave, violated a law of this State, by interfering with its internal policy. He also violated a law of Congress, by interfering with the rights of the slave owner secured by the Constitution. The one act constitutes two distinct offenses against the several laws of distinct jurisdictions. Within the same jurisdiction one act frequently constitutes several offenses, as in the familiar cases of assaults, libels and other personal injuries, which are offenses against the persons injured, and at the same time offenses against the government; and the different offenses may be separately tried, *and separately punished. [*17 The constitutional provision is not, that no person shall be subject, for the same act, to be twice put in jeopardy of life or limb; but for the same offense, the same violation of law, no person's life or limb shall be twice put in jeopardy.

Mr. Justice Grier delivered the opinion of the court:

The plaintiff in error was indicted and convicted under the Criminal Code of Illinois for "harboring and secreting a negro slave." The record was removed by writ of error to the Supreme Court of that State; and it was there contended, on behalf of the plaintiff in error, that the judgment and conviction should be reversed, because the statute of Illinois, upon which the indictment was founded, is void, by reason of its being in conflict with that article of the Constitution of the United States which declares "that no person held to labor or service in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be deliv-

ered up on claim of the party to whom such labor may be due." And also, because said statute is in conflict with the Act of Congress on the same subject.

That this record presents a case of which this court has jurisdiction under the twenty-fifth section of the Judiciary Act, is not disputed.

The statute of Illinois, whose validity is called in question, is contained in the 149th section of the Criminal Code, and is as follows: "If any person shall harbor or secrete any negro, mulatto or person of color, the same being a slave or servant owing service or labor to any other persons, whether they reside in this State or in any other state or territory or district, within the limits and under the jurisdiction of the United States, or shall in any wise hinder or prevent the lawful owner or owners of such slaves or servants from retaking them, in a lawful manner, every such person so offending shall be deemed guilty of a misdemeanor, and fined not exceeding five hundred dollars, or imprisoned not exceeding six months."

The bill of indictment, framed under this statute, contains four counts. The first charges that "Richard Eels, a certain negro slave, owing service to one C. D., of the State of Missouri, did unlawfully secrete, contrary to the form of the statute," &c.

2. That he harbored the same.

3. For unlawfully secreting a negro owing labor in the State of Missouri to one C. D., which said negro had secretly fled from said State and from said C. D.

4. For unlawfully preventing C. D., the **18*** lawful owner of said *slave, from retaking him in a lawful manner, by secreting the said negro, contrary to the form of the statute, &c.

In view of this section of the Criminal Code of Illinois, and this indictment founded on it, we are unable to discover anything which conflicts with the provisions of the Constitution of the United States or the legislation of Congress on the subject of fugitives from labor. It does not interfere in any manner with the owner or claimant in the exercise of his right to arrest and recapture his slave. It neither interrupts, delays or impedes the right of the master to immediate possession. It gives no immunity or protection to the fugitive against the claim of his master. It acts neither on the master nor his slave; on his right or his remedy. It prescribes a rule of conduct for the citizens of Illinois. It is but the exercise of the power which every State is admitted to possess, of defining offenses and punishing offenders against its laws. The power to make municipal regulations for the restraint and punishment of crime, for the preservation of the health and morals of her citizens, and of the public peace, has never been surrendered by the States, or restrained by the Constitution of the United States. In the exercise of this power, which has been denominated the police power, a state has a right to make it a penal offense to introduce paupers, criminals or fugitive slaves within their borders, and punish those who thwart this policy by harboring, concealing, or secreting such persons. Some of the states, coterminous with those who tol-

erate slavery, have found it necessary to protect themselves against the influx either of liberated or fugitive slaves, and to repel from their soil a population likely to become burdensome and injurious, either as paupers or criminals.

Experience has shown, also, that the results of such conduct as that prohibited by the statute in question are not only to demoralize their citizens who live in daily and open disregard of the duties imposed upon them by the Constitution and laws, but to destroy the harmony and kind feelings which should exist between citizens of this Union, to create border feuds and bitter animosities, and to cause breaches of the peace, violent assaults, riots and murder. No one can deny or doubt the right of a state to defend itself against evils of such magnitude, and punish those who perversely persist in conduct which promotes them.

As this statute does not impede the master in the exercise of his rights, so neither does it interfere to aid or assist him. If a state, in the exercise of its legitimate powers in promotion of its policy of excluding an unacceptable population, should thus indirectly benefit the master of a fugitive, no one has a right to *complain that it has, thus far at least, [*19 fulfilled a duty assumed or imposed by its compact as a member of the Union.

But though we are of opinion that such is the character, policy and intention of the statute in question, and that for this reason alone the power of the State to make and enforce such a law cannot be doubted, yet we would not wish it to be inferred, by any implication from what we have said, that any legislation of a state to aid and assist the claimant, and which does not directly nor indirectly delay, impede or frustrate the reclamation of a fugitive, or interfere with the claimant in the prosecution of his other remedies, is necessarily void. This question has not been before the court, and cannot be decided in anticipation of future cases.

It has been urged that this Act is void, as it subjects the delinquent to a double punishment for a single offense. But we think that neither the fact assumed in this proposition, nor the inference from it, will be found to be correct. The offenses for which the fourth section of the Act of 12th February, 1793, subjects the delinquent to a fine of five hundred dollars, are different in many respects from those defined by the Statute of Illinois. The Act of Congress contemplates recapture and reclamation, and punishes those who interfere with the master in the exercise of this right—first, by obstructing or hindering the claimant in his endeavors to seize and arrest the fugitive; second, by rescuing the fugitive when arrested; and third, by harboring or concealing him after notice.

But the Act of Illinois, having for its object the prevention of the immigration of such persons, punishes the harboring or secreting negro slaves, whether domestic or foreign, and without regard to the master's desire either to reclaim or abandon them. The fine imposed is not given to the master, as the party injured, but to the State, as a penalty for disobedience to its laws. And if the fine inflicted by the

Act of Congress had been made recoverable by indictment, the offense, as stated in any one of the counts of the bill before us, would not have supported such an indictment. Even the last count, which charges the plaintiff in error with "unlawfully preventing C. D., the lawful owner, from retaking the negro slave," as it does not allege notice, does not describe an offense punishable by the Act of Congress.

But admitting that the plaintiff in error may be liable to an action under the Act of Congress, for the same acts of harboring and preventing the owner from retaking his slave, it does not follow that he would be twice punished for the same offense. An offense, in its legal signification, means the transgression of a law. A man may be compelled to make reparation in damages *to the injured party, and be liable also to punishment for a breach of the public peace, in consequence of the same act; and may be said, in common parlance, to be twice punished for the same offense. Every citizen of the United States is also a citizen of a state or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both. Thus, an assault upon the Marshal of the United States, and hindering him in the execution of legal process, is a high offense against the United States, for which the perpetrator is liable to punishment; and the same act may be also a gross breach of the peace of the state, a riot, assault, or a murder, and subject the same person to a punishment, under the state laws, for a misdemeanor or felony. That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offense; but only that by one act he has committed two offenses, for each of which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other; consequently, this court has decided, in the case of *Fox v. The State of Ohio*, 5 How., 432, that a state may punish the offense of uttering or passing false coin, as a cheat or fraud practiced on its citizens; and in the case of *The United States v. Marigold*, 9 How., 560, that Congress, in the proper exercise of its authority, may punish the same act as an offense against the United States.

It has been urged, in the argument on behalf of the plaintiff in error, that an affirmance of the judgment in this case will conflict with the decision of this court in the case of *Prigg v. The Commonwealth of Pennsylvania*, 16 Pet., 540. This, we think, is a mistake.

The questions presented and decided in that case differed entirely from those which affect the present. *Prigg*, with full power and authority from the owner, had arrested a fugitive slave in Pennsylvania, and taken her to her master in Maryland. For this he was indicted and convicted under a Statute of Pennsylvania, making it a felony to take and carry away any negro or mulatto for the purpose of detaining them as slaves.

The following questions were presented by the case and decided by the court:

1. That, under and in virtue of the Constitution of the United States, the owner of a

slave is clothed with entire authority, in every State in the Union, to seize and recapture his slave, wherever he can do it without illegal violence or a breach of the peace.

*2. That the government is clothed [*21 with appropriate authority and functions to enforce the delivery, on claim of the owner, and has properly exercised it in the Act of Congress of 12th February, 1793.

3. That any state law or regulation which interrupts, impedes, limits, embarrasses, delays or postpones the right of the owner to the immediate possession of the slave, and the immediate command of his service, is void.

We have in this case assumed the correctness of these doctrines; and it will be found that the grounds on which this case is decided were fully recognized in that. "We entertain," say the court (page 625), "no doubt whatsoever, that the States, in virtue of their general police power, possess full jurisdiction to arrest and restrain runaway slaves, and remove them from their borders, and otherwise to secure themselves against their depredations and evil example, as they certainly may do in cases of idlers, vagabonds and paupers. The rights of the owners of fugitive slaves are in no just sense interfered with or regulated by such a course; and in many cases, the operations of the police power, although designed essentially for other purposes—for the protection, safety, and peace of the state—may essentially promote and aid the interests of the owners. But such regulations can never be permitted to interfere with or to obstruct the just rights of the owner to reclaim his slave, derived from the Constitution of the United States, or with the remedies prescribed by Congress to aid and enforce the same."

Upon these grounds, we are of opinion that the Act of Illinois, upon which this indictment is founded, is constitutional, and therefore affirm the judgment.

Mr. Justice McLean:

In the case of *Prigg v. The Commonwealth of Pennsylvania*, the police power of the States was not denied, but admitted. This court held, in *Fox v. The State of Ohio*, 5 How., 410, that a person might be punished under a law of the State for passing counterfeit coin, although the same offense was punishable under the Act of Congress; and consequently, that the conviction and punishment under the state law would be no bar to a prosecution under the law of Congress. In that case I dissented, and gave at large the grounds of my dissent.

As the case now before us involves the same principle as was ruled in that case, I again dissent for the reasons then given, and I deem it unnecessary now to repeat them.

It is contrary to the nature and genius of our government, to punish an individual twice for the same offense. Where the jurisdiction is clearly vested in the federal government, and *an adequate punishment has been pro- [*22 vided by it for an offense, no state, it appears to me, can punish the same act. The assertion of such a power involves the right of a state to punish all offenses punishable under the Acts of Congress. This would practically disregard, if it did not destroy, this important branch of criminal justice, clearly vested in the

federal government. The exercise of such a power by the States would, in effect, be a violation of the Constitution of the United States, and the Constitution of the respective States. They all provide against a second punishment for the same act. It is no satisfactory answer to this, to say that the States and federal government constitute different sovereignties, and consequently, may each punish offenders under its own laws.

It is true, the criminal laws of the federal and state governments emanate from different sovereignties, but they operate upon the same people, and should have the same end in view. In this respect, the federal government, though sovereign within the limitation of its powers, may, in some sense, be considered as the agent of the States, to provide for the general welfare, by punishing offenses under its own laws within its jurisdiction. It is believed that no government, regulated by laws, punishes twice criminally the same act. And I deeply regret that our government should be an exception to a great principle of action, sanctioned by humanity and justice.

It seems to me it would be as unsatisfactory to an individual as it would be illegal, to say to him that he must submit to a second punishment for the same act, because it is punishable as well under the state laws, as under the laws of the federal government. It is true he lives under the *agis* of both laws; and though he might yield to the power, he would not be satisfied with the logic or justice of the argument.

ORDER.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Illinois, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court in this cause be, and the same is hereby affirmed, with costs.

Cited—18 Wall., 172, 201; 7 Otto, 537; 10 Otto, 277, 390; 1 Woods, 324; 1 Hughes, 553, 559.

23*] *CORNELIUS KANOUSE, *Plaintiff in Error*,

v.

JOHN M. MARTIN.

Motion to dismiss writ of error.

Where a motion was made under the 12th section of the Judiciary Act to remove a cause from a state court to the Circuit Court of the United States, notwithstanding which the State Court retained cognizance of the case, and it was ultimately brought to this court under the 25th section of the Judiciary Act, a motion to dismiss it for want of jurisdiction cannot be sustained. The question will remain to be decided upon the full hearing of the case.

A MOTION was made by *Mr. Martin* to dismiss this case, which was argued by himself and *Mr. Garr*.

The circumstances upon which the motion was based, are stated in the opinion of the court.

Mr. Chief Justice Taney delivered the opinion of the court:

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This is a writ of error, directed to the Superior Court of the City of New York, and a motion has been made by the defendant in error to dismiss it for want of jurisdiction.

The record shows that a suit was brought by the defendant in error against the plaintiff, in the State Court above mentioned; the former being a citizen of New York, and the latter a citizen of New Jersey. The plaintiff in error, at the time of entering his appearance in the State Court, filed his petition, stating the citizenship of the parties, and praying for the removal of the cause for trial into the next Circuit Court, to be held in the district where the said suit was pending; and, at the same time, offered good and sufficient security for his entering in such court, on the first day of the session, copies of the process against him, and also for his then appearing and entering special bail in the cause.

The State Court, however, refused to permit the cause to be removed; and after the petition was filed and the bond given, proceeded in the case, and finally gave judgment against the plaintiff in error for the sum of money mentioned in the record. Various proceedings, it appears, were afterwards had in the appellate courts of the State, in relation to this judgment, but the decision in these courts was also against the plaintiff in error; and the judgment rendered in the Superior Court of the City of New York, still remains there and is in full force, if that court had jurisdiction of the case after the application to remove it.

The case then, as it stands on the motion, is this: The plaintiff in error claimed the right to remove this cause from the State Court to the Circuit Court of the United States, under the 12th section of the Judiciary Act of 1789. The right claimed was denied by the State Court, which retained the case, and proceeded to give a final judgment against him.

*It is therefore precisely one of the [*24 cases enumerated in the 25th section of the Act of 1789, in which jurisdiction is conferred upon this court, and in which the judgment of the State Court may be reviewed upon writ of error. For the construction of an Act of Congress was drawn in question, and the decision of the court was against the right claimed under it, by the plaintiff in error.

As to the authority of the Superior Court of the City of New York to retain the case, and the validity or the invalidity of its proceedings and judgment, after the motion to remove; that question, according to the practice of the court, will stand for hearing when the case is reached in the regular call of the docket.

But the motion to dismiss, for want of jurisdiction in this court, is overruled.

ORDER.

On consideration of the motion, made on a prior day of the present term of this court, to dismiss this writ of error, and of the argument of counsel thereupon had, as well in support of as against the motion, it is now here ordered by the court, that the said motion be, and the same is hereby overruled.

S.C., 15 How., 198.

Cited—19 Wall., 224; 21 Wall., 552; 5 Otto, 386; 9 Otto, 542; 12 Otto, 136; 1 Biss., 427; 2 Biss., 113; 6 Blatchf., 118, 380; 1 Abb. U. S., 386; 3 Dill., 357.

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Ex-parte WILLIAM MANY.

Mandamus will not lie to compel Circuit Court to do an act wholly within its judicial discretion.

Where there was a blank in the record of the Circuit Court in the taxation of the costs recovered by the plaintiff, and the judgment being affirmed by this court, a mandate with the same blank went down to the Circuit Court; and a motion was there made to open the original judgment for the purpose of taxing the costs, which motion was refused by the court, such refusal cannot be reached by a *mandamus* from this court.

The refusal of the court was not a ministerial act, but an exercise of judicial discretion. This court could issue a *mandamus* for the Circuit Court to proceed to judgment, but such a writ would not be appropriate to the present case.

MR. CHIEF JUSTICE Taney delivered the opinion of court:

A motion has been made for a rule on the District Judge of the Massachusetts District, to show cause why he should not proceed to adjudicate and allow the petitioner's costs in an action at law in the Circuit Court. The rule is moved for upon the District Judge, because he alone was holding the Circuit Court when the decision was made which has given rise to this application.

The case is this: Many recovered a judgment in the Circuit Court for the District of Massachusetts against Sizer and others, for the infringement of a patent right. The judgment was entered in the following words:

"It is thereupon considered by the court, that the said William V. Many recover against the said George W. and Henry Sizer the sum of seventeen hundred and thirty-three dollars and seventy-five cents damages and costs of suit taxed at ———."

The judgment was rendered in 1848; and upon writ of error brought by the defendants, it was affirmed in this court at December Term, 1851. The costs were not taxed in the Circuit Court before the removal, and the blank left for them remained unfilled when the judgment was affirmed. The usual mandate issued to the Circuit Court to carry the judgment into execution, and the blank space for costs was necessarily left in the mandate, in order to conform to the judgment of the court below, as it appeared in the transcript transmitted to this court.

Upon the return of the case to the Circuit Court, the counsel for the plaintiff moved that his costs be taxed by the clerk as and for the October Term, 1848, and that an order be made amending the record of the judgment of the Circuit Court so as to insert therein the amount of the taxation, and that an execution on the judgment so amended be issued.

The court refused to allow the amendment to be made, and overruled the motion. And we think its judgment, whether it be correct or not, cannot be revised in the form of proceeding moved for on behalf of the plaintiff. The decision of the Circuit Court was not a mere ministerial act. It was the decision of a court of competent jurisdiction made in the exercise of judicial authority and discretion. This court might unquestionably issue a *mandamus* to the court below to proceed to judgment. But in this case the court has proceeded to judgment, upon the question submitted for its decision. And whether that judgment be erroneous or

not, this court has not jurisdiction to re-examine it in a proceeding by *mandamus*.

The motion for a rule to show cause must therefore be overruled for want of jurisdiction.

Cited—14 Wall., 166, 170; 11 Otto, 720; 1 Biss., 429.

JOHN A. BROWN, Administrator of JOHN ASPDEN, Deceased, ET AL., Appellants,

MATHIAS ASPDEN'S ADMINISTRATORS ET AL.

When re-argument will be heard.

A re-argument of a case decided by this court will not be granted, unless a member of the court, who concurred in the judgment, desires it; and when that is the case, it will be ordered without waiting for the application of counsel.

*And this is so whether the decree of the [*26] court below was affirmed by an equally divided court or a majority, or whether the case is one at common law or chancery.

The rules of the English Court of Chancery have not been adopted by this court. Those which are applicable to a court of original jurisdiction, are not appropriate to an appellate court.

THIS was an appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania, and was the conclusion of the case of *Aspden et al. v. Nixon et al.*, reported in 4 How., 487.

It was affirmed by a divided court in December, 1852; and in February, 1853, a petition for a rehearing was filed by the appellants.

Upon which petition **Mr. Chief Justice Taney** delivered the opinion of the court:

A motion has been made for a rehearing in this case, and we have been referred to the practice of the English Chancery Court in support of the application. The argument presupposes that this court, in cases in equity, has adopted the rules and practice of the English Chancery. But this is a mistake. The English Chancery is a court of original jurisdiction; and this court is sitting as an appellate tribunal. It would be impossible, from the nature and office of the two tribunals, to adopt the same rules of practice in both.

Nothing could show this more strongly than the present application. By the established rules of chancery practice, a rehearing, in the sense in which that term is used in proceedings in equity, cannot be allowed after the decree is enrolled. If the party desires it, it must be applied for before the enrollment. But no appeal will lie to the proper appellate tribunal, until after it is enrolled, either actually or by construction of law. And, consequently, the time for a rehearing must have gone by before an appeal could be taken. In the House of Lords, in England, to which the appeal lies from the Court of Chancery, a rehearing is altogether unknown. A re-argument, indeed, may be ordered, if the House desires it, for its own satisfaction. But the chancery rules in relation to rehearings, in the technical sense of the word, are altogether inapplicable to the proceedings on the appeal.

Undoubtedly this court may and would call for a re-argument, where doubts are entertained which it is supposed may be removed by fur-

ther discussion at the bar. And this may be done after judgment is entered, provided the order for re-argument is entered at the same term. But the rule of the court is this: that no re-argument will be heard in any case after 27*] judgment is entered, unless some member of the court who concurred in the judgment afterwards doubts the correctness of his opinion, and desires a further argument on the subject. And when that happens, the court will, of its own accord, apprise the counsel of its wishes, and designate the points on which it desires to hear them.

There is certainly nothing in the history of the English Court of Chancery to induce this court to adopt rules in relation to re arguments, analogous to the chancery practice upon applications for a rehearing. According to the general practice of that court, one rehearing, where the application has been sanctioned by the signature of two counsel, is a matter of course. And this facility in obtaining one rehearing, has naturally lead to others, and in cases of interest or difficulty, two, or even three rehearings have sometimes been allowed, under the special leave of the court, before the decree was enrolled, and consequently, before it could be removed to the House of Lords. The natural result of this practice is to produce some degree of carelessness in the first argument, and hesitation and indecision in the court. But the great evil is in the enormous expenses occasioned by these repeated hearings, and the delays which it produces in the decision, which often prove ruinous to both parties before the final decree is pronounced. Nor is the mischief confined to the particular suit in which such proceedings and delays are permitted to take place. A multitude of others are always behind it, waiting anxiously to be heard. And the result of the practice of which we are speaking has been such that, although the court has always been filled by men of the highest order, distinguished for their learning and industry, yet the expenses and delays of the court have become a byword and reproach to the administration of justice, and Parliament has at length been compelled to interpose.

And if this court should adopt a practice analogous to that of the English Chancery, we should soon find ourselves in the same predicament; and we should be hearing over again at a second term almost all the cases which we had heard and adjudged at a former one, and upon which our own opinions would have been definitively made up upon the first argument. We deem it safer to adhere to the rule we have heretofore acted on. And no re-argument will be granted in any case, unless a member of the court who concurred in the judgment desires it; and when that is the case, it will be ordered without waiting for the application of counsel.

It is true that the decree of affirmance in this court, in the case before us, was upon an equal division of the members composing the court at the time of the argument, eight being 28*] present. But the case was fully heard, more than a week being occupied in the arguments of counsel. And when, upon conference and a full interchange of opinion, it was found that the court was divided, the case was held over until the present term, in order that each member of the body might have an

ample opportunity of investigating the subject for himself. This has been done. And when the court re-assembled, it was found that the opinions of each member of the tribunal was unchanged, and the decree was therefore affirmed by a divided court. Further arguments would be mere waste of time, when opinions have been formed after so much argument and such deliberate examination.

Nor is the circumstance, that a decree is affirmed by a divided court, any reason for ordering a re-argument before a full bench in any case. In a body as numerous as this, it must often happen, from various causes, that the bench is not full. And experience has shown, that it has rarely happened that every judge has been present every day throughout any one entire term. The case before us is certainly an important one, in its principles and in the amount in dispute. But there are many cases on the docket at every term of the court much more important in both respects. And if it is to be understood that cases of this description are not to be finally decided without the concurrence of a majority of the whole bench, it would be an useless consumption of time to hear them in the absence of any one judge, because it would be uncertain whether a judgment could follow after the argument. And it is easy to foresee the inconvenience, delay and expenses to which a practice of that kind would subject the parties, and the uncertainty and confusion it would produce (to the great injury of other suitors) in the order of business as it stands on the docket of the court.

Neither is there any difference between a decree in chancery and a judgment at law, as to its affirmance on a division of the court. In both cases, the motion is to reverse; and if that fails, the judgment or decree necessarily stands, and must therefore be affirmed. And in most of the cases affirmed in this manner, a majority, in fact, of the judges, who act judicially upon the case, concur in the judgment. For the Circuit Court is composed of two members, and if both are on the bench, they must concur in the judgment or decree; otherwise it could not be passed, and the point would be certified by a divided court.

In every view of the subject, we see no sufficient ground for ordering a re-argument, and the application is therefore refused.

Cited—7 Wall., 112; 9 Wall., 604; 14 Wall., 22; 12 Otto, 108; 14 Otto, 416; 12 Blatchf., 16.

*JOHN HAGAN, surviving Partner of [*29 the late firm of JOHN HAGAN & Co., Appellant,

v.

LEROY P. WALKER, Administrator of WILLIAM H. POPE, Deceased, AND FRANCES ANN POPE, Widow and Guardian ad litem of WILLIAM POPE and JULIA ANN POPE, minor children of said WILLIAM H. POPE, Deceased, AND SAMUEL BRECK, Administrator of LEROY POPE, Deceased.

Equity jurisdiction—conveyance in fraud of creditors—what proof necessary—parties prior incumbrancer must be, when.

A court of equity has jurisdiction of a bill against the administrator of a deceased debtor and a person to whom real and personal property was conveyed by the deceased debtor, for the purpose of defrauding creditors.

In such a case, the court does not exercise an auxiliary jurisdiction to aid legal process, and consequently it is not necessary that the creditor should be in a condition to levy an execution, if the fraudulent obstacle should be removed.

It is proper to make a prior incumbrancer, who holds the legal title, a party to the bill, in order that the whole title may be sold under the decree; for the purpose of such a decree, the prior incumbrancer is a necessary party; but the court may order a sale subject to the incumbrance, without having the prior incumbrancer before it, and in fit cases it will do so.

If the prior incumbrancer is out of the jurisdiction, or cannot be joined without defeating it, it is a fit cause to dispense with his presence, and order a sale subject to his incumbrance, which will not be affected by the decree.

TTHIS was an appeal from the District Court of the United States for the Northern District of Alabama.

The bill was originally filed in the names of John Hagan, of New Orleans, and a citizen of the State of Louisiana, and Thomas Barrett, of New Orleans, and a citizen of the State of Louisiana, formerly commission merchants and partners, trading under the firm, name and style of John Hagan & Co., complainants, against William H. Pope, of Huntsville, and a citizen of the State of Alabama, Samuel Breck, of Huntsville, and a citizen of the State of Alabama, the said Breck being the administrator of the estate of Leroy Pope, who in his lifetime resided in Huntsville, and was a citizen of the State of Alabama, and Charles B. Penrose, of Washington City, and a citizen of the District of Columbia, and successor in office of Virgil Marcy, who in his lifetime resided in Washington City, and was a citizen of the District of Columbia, and Solicitor of the Treasury of the United States.

The suit was commenced in February, 1846. The plaintiffs were judgment creditors of Leroy Pope, by a judgment rendered in April, 1834, upon which an execution in October, 1834, was returned, "No property found."

The plaintiffs sought to obtain satisfaction of this judgment, from property which they allege the said Leroy Pope conveyed fraudulently to his son William H. Pope, the defendant.

This property was conveyed, March, 1834, by 30*] Leroy Pope to *William H. Pope, and upon considerations which the plaintiffs alleged to be colorable and inadequate.

The property thus conveyed, was charged to have been the whole estate of the said Leroy, and William H. Pope was charged to have been, before that time, without property, and to have had no means of payment for this.

The plaintiffs alleged that the property was never delivered to the "exclusive possession" of William H. Pope, but "remained as much in the possession of the said Leroy as the said William; and that the said Leroy and William enjoyed the proceeds and profits jointly."

They allege that William H. Pope, in March, 1834, conveyed the land and slaves to the Solicitor of the Treasury in mortgage, to secure a debt due to the United States by the said Leroy Pope, of \$29,290.90, which William H. Pope, at that date assumed, and for which he gave his note; and that at the same date he guaranteed to the United States a debt of \$30,-

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000, for which other security had been given to the United States by Leroy Pope.

They averred that the \$20,000 thus mentioned, was paid from the securities deposited by Leroy Pope, and that the only debt really incurred by William H. Pope, was that for \$29,290.90. This debt the plaintiffs admitted to be a charge on the property, and they did not contest it. They charged, however, that the securities to the Solicitor of the Treasury were designed by the grantor (William H. Pope), as a fraud upon the creditors of Leroy Pope.

The death of Leroy Pope was alleged to have occurred in 1844, and the appointment of Breck, as administrator, in 1844.

The prayer of the bill was, that the conveyances of Leroy and William H. Pope should be declared null. That, after satisfying the debt of the United States, the remainder of the property should be appropriated to satisfy the debt of the plaintiffs. Process was prayed against William H. Pope and Samuel Breck, administrators of Leroy Pope, and the Solicitor of the Treasury (Penrose), a citizen of the District of Columbia.

The defendants, Breck and Pope, demurred to the bill; the demurrer was allowed by the District Court, and the bill was dismissed.

An appeal from this decree of dismissal brought the case up to this court. It was argued by *Mr. Johnson* for the appellant, and *Mr. J. A. Campbell* for the appellees.

As the demurrer was sustained in the court below, the points before this court to be argued were, the reasons for dismissing the bill and sustaining the demurrer. These were stated by *Mr. Campbell*, as follows, and it is sufficient to state the points and authorities.

*1. That the jurisdiction of the Court [*31 of Chancery to set aside conveyances executed by a failing debtor to defraud creditors, is not an original and independent jurisdiction of that court, but is an auxiliary and limited jurisdiction. The creditor must show that the remedies at law have been exhausted—that there is an obstruction which can only be removed by the aid of the Court of Chancery, and that his cause is so situated at law, that, upon the interposition of the court in the manner sought, he could immediately enforce the right he claims. (3 Mylne & Craig, 407; 11 S. & M., 386; 8 Barb., N. Y., 593; 7 Ala., 319, 928; 1 Hill's So. Car., 297, 307; 20 Johns., 554; 2 Rand, 384; 1 Paige, 888.)

II. The bill shows in this case three facts sufficient to have determined the lien of the judgment against Leroy Pope, under the laws of the United States, and the State of Alabama.

Five years had elapsed from the 3d of March, 1839, before the filing of the bill. The Act of Congress of that date determined the lien. (5 Stat. at Large, 338.)

Ten years had elapsed from the judgment and return of the last execution. (Clay's Digest, 206, 207, secs. 28, 29; 5 Ala., 188; 18 Ala., 675; 19 Ala., 207.)

The death of Leroy Pope put an end to the lien of the judgment and the right to issue execution. (*Bauh v. Jones*, 18 Ala., 167.)

III. The plaintiff sets forth the conveyance of Leroy Pope to William H. Pope, to have taken

place in 1834. He does not aver that the conveyance was upon any trust for Leroy Pope, nor does he aver that any title remained in Leroy Pope. The bar of the Statute of Limitations of six years will apply to the personal property. (7 Yerger, 222; 1 Bailey, Ch., 228; 1 Humph., 335; 1 Hill, Ch., 113; 8 Yerger, 145; 7 Wheat., 60, 117, &c.; Peck, 41.)

IV. The Court of Chancery, except in cases of express trusts and fraud, follow the courts of law in the application of the Statute of Limitation.

In this case no trusts in favor of Leroy Pope are charged to exist; nor is there an averment that the plaintiff did not discover till within six years the fraudulent purpose and consideration upon which they were made.

In the absence of such averments, the court will presume the possession to have been consistent with the legal title, and the bar of the statute will run from the date of the title deeds. (4 How. S. C., 503, 560; 7 How., 234; 10 Wheat., 168.)

In reference to personal property, the limitation upon personal actions is adopted in equity. (1 Dev. & B. Eq., 95; 5 Ala., 90, 508; 3 Ala., 756.)

§2*] *V. No averment is made by the plaintiff showing the condition of the estate of Leroy Pope after his death. The bill contains an averment, that the crops from the lands and other profits of the estate have been large, and that Leroy Pope enjoyed them till his death.

There is nothing to show that ample means are not to be found in the hands of the administrator to pay the debt. No presentment to, nor demand of, the administrator is averred, and no refusal to pay on his part shown. A bill must show this, or it is fatally defective. (3 Ham., 287; 5 Harr. & J., 381; 5 Gill & J., 432; 2 McCord's Ch., 416, 169.)

VI. The court had no jurisdiction of the cause. The Solicitor of the Treasury, a citizen of the District of Columbia, is made a party. The prayer of the bill is to cancel deeds made to him, and to appropriate property in which he has a legal right. (3 Cranch, 267; 14 Pet., 60, 65.)

Mr. Justice Curtis delivered the opinion of the court:

John Hagan & Co. filed their bill in the District Court of the United States for the Northern District of Alabama, in which they state that in the year 1834 they recovered a judgment at law in that court against Leroy Pope, for upwards of seven thousand dollars, which is wholly unsatisfied; that a writ of *feri facias*, running against the lands, goods and body of the debtor, was regularly issued, and on the 10th day of October, 1834, was returned *nulla bona*; and from that time to the filing of the bill, there has not been, in that district or elsewhere, any property of Leroy Pope out of which the judgment debt could be collected, except certain property afterwards mentioned. The bill further alleges, that about a month before the complainants recovered their judgment at law, Leroy Pope, intending to defraud the complainants and to hinder them from obtaining payment, made conveyances, both of real and personal estate, to a large amount, to his son, William H. Pope, who was a party to the

fraud, and is made a defendant in the bill; that Leroy Pope died in the year 1844, and Samuel Breck, who was appointed his administrator, is also a party defendant. The complainants are averred to be citizens of Louisiana, and William H. Pope and the administrator citizens of Alabama. The defendants having demurred to the bill, it was dismissed by the District Court, and the complainant, who is the surviving partner, appealed to this court.

The principal ground upon which the demurrer has been rested in this court is, that the bill does not show that the complainants are entitled to equitable relief. The argument is, that the jurisdiction of a court of equity, to aid a judgment creditor, *by removing [*33 a fraudulent incumbrance on the property of his debtor, is ancillary merely; that this aid is not given unless the creditor has obtained a lien at law upon the specific property sought for, if that be legal property upon which an execution could be levied; or if it be equitable assets, not liable to a levy by execution; that the creditor must have exhausted his legal remedy, by a return of *nulla bona* on his execution, and must also be in a condition to proceed at once at law to enforce his right, if the obstacle should be removed. That if his judgment has become ineffectual to entitle him to an execution, so that he could not levy, even if the assets were legal, and not subject to any fraudulent incumbrance, equity will not exert itself to subject equitable property to the payment of his judgment. And it is further argued, that according to the local law of Alabama, governing these proceedings at law, the judgment creditors had lost their lien on the personal estate of the debtor, because they had suffered more than one term to elapse without issuing an *alias* execution; and upon the real estate, because more than ten years elapsed after the return of their last execution, and before this bill was filed; and that the lien, both upon the personal and real estate, was destroyed by the death of Leroy Pope, which suspended the right to issue an execution. That, by reason of his death and the lapse of more than ten years, the right to issue an execution being suspended, equity would not subject equitable assets to the payment of this judgment.

It does not distinctly appear whether the property sought to be reached by this bill is equitable or legal. There is reason to suppose, from some allegations in the bill, that a part or the whole of the property was conveyed by Leroy Pope, in 1831, to Louis McLane, as Secretary of the Treasury, to secure a debt due to the United States by a deed of trust, and this conveyance is not impeached. If it embraced the whole or any part of the property now in question, only an equitable estate therein was left in Leroy Pope. The bill is not distinct in its allegations on this subject; but we do not deem it necessary that it should be; because we are of opinion that this case is not to be treated as an application by a judgment creditor for the exercise of the ancillary jurisdiction of the court, to aid him in executing legal process, but comes under a head of original jurisdiction in equity. It is a bill by a creditor of a deceased debtor, against the administrator and a party who is fraudulently

holding all the property of the deceased, which in equity should be applied to the payment of this debt, and the bill prays that the debt may be paid out of this fund. That a single creditor may maintain a bill against an administrator of a deceased debtor, for a discovery of assets and the payment of his debt, there can be no doubt. That, in some cases, he may join with the administrator a third person, who is in possession of property which is amenable to the payment of the debt, is also clear. The instances in which it has been actually held that such third person might be joined, are chiefly cases of collusion between the administrator and the third person possessed of assets, insolvency of the administrator, and where the third person was the surviving party of the deceased. (*Uterson v. Mair*, 2 Ves., Jr., 95; *Alager v. Rowley*, 6 Ves., 748; *Burroughs v. Elton*, 11 Ves., 29; *Gedge v. Traill*, 1 Russ. & M., 281; *Long v. Majestre*, 1 Johns. Ch., 306.) But it will be found that the equitable right of the creditor to join a third person, and have a discovery and an appropriation of assets held by him, has never been limited to these particular cases.

For, while it is generally agreed that some special case must be made, it is also declared in all the cases, that what is to constitute it has not been limited by any precise and rigid rule. In *Holland v. Prior*, 1 M. & K., 240, Lord Brougham applied the rule to the case of a representative of a deceased representative, without any suggestion of collusion between him and the present representative. In *Simpson v. Vaughn*, 2 Atk., 33, Lord Hardwicke said: "It has been said at the bar, that you may make any person a defendant that you apprehend has possessed himself of assets upon which you have a lien. But this certainly cannot be laid down as a general rule; for it would be of dangerous consequence to insist that you can make any person a defendant who has assets, unless you can show to the court he denies that he has assets, or applies them improperly." Considering, then, that some special and sufficient reasons must be shown for proceeding against a third person, jointly with the administrator, the inquiry is, whether this bill does not contain those reasons; and we are of opinion it does.

It appears, from the statements in the bill, that William H. Pope is in possession of all the assets of the deceased debtor, both real and personal, holding them under conveyances made to him by the deceased, absolute in form, but accompanied by secret trusts in favor of the grantor, designed to defraud this particular creditor, and prevent him from obtaining payment of his judgment, and that this fraudulent design has thus far been successfully executed.

Now, these conveyances are not only valid on their face, but they are really valid as between the parties; and though they are void as against creditors, and the property, both at law and in equity, is subject to the payment of the debts of the deceased, yet the embarrassments [*35] attending any attempt by the administrator to possess himself even of that part of these assets, which were personally, at law would certainly be great, and perhaps insuperable. (2 Rand., 384; *Martin v. Root*, 17 Mass., 228.) It is true he is the represen-

tative of creditors, as well as of the next of kin, and in the former capacity might be able to make good his claim to a sufficient amount of these personal assets to enable him to pay the debts. (*Holland v. Craft*, 20 Pick., 321.) But the impracticability of taking an account of the debts at law, and proportioning the recovery to the amount required to pay them, would render a resort to equity indispensable to do entire justice between all parties, even if the assets were legal in their nature. If this bill had contained an allegation that the administrator had been requested to sue, and had refused, the case would be free from all doubt; and, upon the facts averred in the bill, we do not think such a request necessary; because it does appear that about two years elapsed after the death of Leroy Pope before this bill was filed, and the administrator took no step to reduce these assets to possession; because, when this bill was filed, he resists it by a demurrer, relying on the Statute of Limitations; because it must be admitted to have been doubtful how far he had a remedy, without the concurrence of any creditor; and chiefly because there is no danger of interfering with the due course of administrations, or taking from administrators their proper control over suits for the recovery of assets, by holding that a creditor may file a bill against the administrator and the fraudulent grantee of deceased debtor, to subject the property fraudulently conveyed to the payment of the debt. It comes within the case put by Lord Hardwicke; for here this specific property is amenable to the claim of this creditor, and in the sense in which he employs the word, the creditor had a lien upon these assets; and it does appear to the court, that the party holding them both denies that they are assets and applies them improperly, for he claims them as his own, and is endeavoring to defeat a just creditor by an assertion of a title invalid as against him.

In this view of the case, it is not essential that the creditor cannot proceed at law until after a revival of the judgment by a *scire facias*. In *Burroughs v. Elton*, 11 Ves., 36, 37, Lord Eldon had occasion to consider the force of this objection in a similar case. It was a bill to reach real assets in the hands of a surviving partner. The complainant's judgment was upwards of seventeen years old, and no step had been taken to revive it against the administrator or the heir. His decision, in accordance with two previous cases to which he refers, was, that such a creditor could sustain the bill, though it might be necessary to direct him to proceed at law to revive his judgment.

*It has been argued, that the bill does [*36] not show that there are not other assets in the hands of the administrator sufficient to pay this debt, and contains no allegation that the administrator was ever requested to pay it. But the bill does expressly aver, that aside from the property fraudulently conveyed, there is not, anywhere, any property of Leroy Pope, out of which the debt could be collected; and although it states that the fraudulent grantor and grantee both remained in possession, and took the crops jointly, and that these crops were of great value, yet, inasmuch as between themselves the crops belonged to the grantee, and as it was the object of the conveyances to prevent

them from being applied to the benefit of creditors, we are of opinion there is no presumption that anything arising from this joint possession ever came to the hands of the administrator, and therefore, that a demand on him would have been a vain act, which the creditor was not compelled to do.

One other ground on which the demurrer has been rested, requires notice. The bill alleges that after the fraudulent conveyances to William H. Pope had been made, he mortgaged the property to Virgil Maxcy, as Solicitor of the Treasury of the United States, to secure the debt of Leroy Pope which William H. Pope assumed to pay, and it avers that this debt has been in part paid by means described in the bill. Virgil Maxcy and, subsequently when he went out of office, his successor, Charles B. Penrose, were named as parties to the bill, but they were out of the jurisdiction, no process was served on either of them, and neither ever appeared or answered. The bill prays that William H. Pope may be compelled to pay to the United States the balance due to them, out of the property in question, and that the residue may be subjected to the payment of the complainant's debt, and for other and further relief.

Under the Act of Congress of the 28th of February, 1839 (5 Stat. at Large, 321, sec. 1), it does not defeat the jurisdiction of the court that a person named as defendant is not an inhabitant of or found within the district where the suit is brought; the court may still adjudicate between the parties who are properly before it, and the absent parties are not to be concluded or affected by the decree.

It is obvious, however, that there may be cases in which the court cannot adjudicate between the parties who are regularly before it, for the reason that it cannot bind those who are absent. Where no relief can be given without taking an account between an absent party and one before the court, though the defect of parties may not defeat the jurisdiction, strictly speaking, yet the court will make no decree in favor of the complainant.

37*] *The case before us is not one of this character; for although the whole of the relief specially prayed for cannot be granted in the particular mode there indicated, because the United States not being a party, no account can be taken of the debt due to them from Leroy Pope or William H. Pope, yet, subject to the incumbrance of this debt, and without affecting it in any manner, the property may be appropriated to the payment of the complainant's debt.

It is true, that in *Finley v. The Bank of the United States*, 11 Wheat., 306, which was a bill to foreclose a mortgage by sale, Chief Justice Marshall says: "It cannot be doubted that the prior mortgagee ought regularly to have been a party defendant, and that had the existence of his mortgage been known to the court, no decree ought to have been pronounced in the cause until he was introduced into it." But it could not have been intended by this to say, that a prior incumbrancer was absolutely a necessary party without whose presence no decree of sale could be made, because in that very case the court refused to treat the decree as erroneous, after it had been executed.

In *Delabers v. Norwood*, 8 Swanst., 144,

n., in a bill to obtain payment of an annuity charged on land, prior annuitants were held not to be necessary parties. In *Rose v. Page*, 2 Sim., 471, the same rule was applied to a prior mortgagee; and in *Wakeman v. Grover*, 4 Paige, 28, and *Rundell v. Marquis of Donegal*, 1 Hogan, 808, and *Post v. Mackall*, 3 Bland, 495, to prior judgment creditors; and in *Parker v. Fuller*, 1 Russ. & My., 656, persons having incumbrances on real property, which the bill sought to subject to the payment of debts of the deceased owner, were held not to be necessary parties to the bill. (See, also, *Hoxie v. Carr*, 1 Sum., 173; *Calvert on Parties*, 128.)

On the other hand there, are cases in which it has been declared that all incumbrancers are necessary parties. Many are collected in Story's Eq. Pl., 178, n. But we consider the true rule to be, that where it is the object of the bill to procure a sale of the land, and the prior incumbrancer holds the legal title, and his debt is payable, it is proper to make him a party in order that a sale may be made of the whole title. In this sense, and for this purpose, he may be correctly said to be a necessary party, that is, necessary to such a decree. But it is in the power of the court to order a sale subject to the prior incumbrance, a power which it will exercise in fit cases. And when the prior incumbrancer is not subject to the jurisdiction of the court, or cannot be joined without defeating its jurisdiction, and the validity of the incumbrance is admitted, it is fit *to dis- [*38 pense with his being made a party. To such a case the 47th rule for the equity practice of the Circuit Courts of the United States is applicable, and by force of it, this cause may proceed without making the United States, or the Solicitor of the Treasury, a party to the decree.

The decree of the District Court must be reversed, and the case remanded, with directions to overrule the demurrer and order the defendants, other than the representative of the United States, to answer the bill.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Alabama, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed, that the decree of the said District Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said District Court, with directions to overrule the demurrer, and to order the defendants, other than the representative of the United States, to answer the bill.

Cited—17 How., 141, 508; 23 How., 108; 6 Wall., 289; 3 Otto, 204; 4 Otto, 738; 3 Hughes, 77; 2 Curt., 84, 177; 6 Bank. Reg., 141; 9 Bank. Reg., 303, 309; 15 Bank. Reg., 548; 2 Abb. U. S., 432; 8 Blatchf., 329; 17 Blatchf., 399; 2 Low., 89.

JOHN KENNETT, EZEKIEL S. HAINES,
EDEN B. REEDER, GEORGE GRAHAM,
JR., JOHN McCARTY, JOSHUA YORKE,
AND ROBERT B. BOWLER, *Appellants*,
v.

THOMAS J. CHAMBERS.

Jurisdiction—contract with citizen of Texas made

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before U. S. acknowledged its independence and while at war with Mexico, cannot be enforced in U. S. court.

It belongs exclusively to the Political Department of the government to recognize or to refuse to recognize a new government in a foreign country, claiming to have displaced the old and established a new one.

Until the Political Department of the government acknowledged the independence of Texas, the judiciary were bound to consider the old order of things as having continued.

While the government of the United States acknowledged its treaty of limits and of amity and friendship with Mexico as still subsisting and obligatory, no citizen of the United States could lawfully furnish supplies to Texas to enable it to carry on the war against Mexico.

A contract, made in Cincinnati, after Texas declared itself independent, but before its independence was acknowledged by the United States, whereby the complainants agreed to furnish, and did furnish money to a General in the Texan army, to enable him to raise and equip troops to be employed against Mexico, was illegal and void, and cannot be enforced in a court of the United States.

The circumstance that the Texan officer agreed, in consideration of these advances of money, to convey to them certain lands in Texas, of which he covenanted that he was then the owner, will not make the contract valid when it appears upon the face of it, and by the averments in the bill, that the object and intention of the complainants in advancing the money was to assist Texas in its military operations.

39*) "A contract made in the United States at that time for the purchase of land in Texas, would have been valid even if the money was afterwards used to support hostilities with Mexico. But in this case it was not an ordinary purchase, but the object of the complainants, as avowed in the contract and the bill, was to aid Texas in its war with Mexico.

The contract being absolutely void by the laws of the United States at the time it was made, the circumstance that it was valid in Texas, and that Texas has since become a member of the Union, does not entitle the complainants to enforce it in the courts of the United States.

No contract can be enforced in the courts of the United States, no matter where made or where to be executed, if it is in violation of the laws of the United States, or is in contravention of the public policy of the government or in conflict with subsisting treaties.

IN this cause *Mr. Justice Catron* was absent, because of indisposition, during the hearing before the court, and took no part in the decision.

This was an appeal from the District Court of the United States for the District of Texas.

The facts in the case are stated in the opinion of the court.

There were several causes of demurrer filed in the court below, but it is necessary to notice only the following, because the decision in this court turned entirely upon them:

1. The said bill, if the facts therein were true, which is in no sort admitted, contains no matter or thing of equity upon which to ground any decree, or give the complainants any aid or relief.

2. The complainants' said bill shows no legal or valid agreement upon which to ask the aid or decree of the court; but to the contrary, sets out and shows an agreement which was in vio-

lation of the neutrality of the United States towards the Republic of Mexico in her contest with Texas.

8. The complainants' said bill seeks the aid or assistance of the court to enforce the specific execution of an agreement made in the State of Kentucky, between citizens thereof and this defendant, in violation of the policy of the government of the United States in her intercourse with foreign governments.

The demurrer was sustained generally by the court below, and therefore all the points were open to argument in this court; but it is not necessary to notice any except those upon which the judgment of the court rested.

It was argued by *Mr. Snethen* for the appellants, and there was also a brief filed upon that side by *Mr. L. Sherwood*. On the part of the appellee it was argued by *Mr. Volney E. Howard*.

Mr. Snethen contended that the neutrality and foreign policy of the United States towards Mexico were regulated entirely by law, which was found in the 6th section of the Act of Congress *of the 20th of April, 1818 (8 Stat. [*40 at Large, 449]. There is an entire absence, in the contract, of all declaration or indication of the place or country where the proposed military expeditions were to be begun, or of the place whence they were to be carried on. It will not be denied that, to subject an offender to the pains and penalties of this section, it must be incontestably and directly shown and proved that the "military expedition or enterprise" which he may "begin or set on foot," or "provide or prepare the means for," was begun or set on foot "within the territory or jurisdiction of the United States," and was "to be carried on from thence" against a nation with whom they were at peace. So obvious a proposition hardly needs the weight of authority to support it. Now, the contract proves no such offense. The defendant may have done, and intended to have carried on, all the acts which the complainants enabled him to do, within and from some other country than the United States. The place or country where the forbidden acts were done and whence they were to be carried on, cannot be inferred from the language of the contract with any degree of certainty, and the omission cannot be supplied by any known rule of construction.

The 6th section of the Act of 1818 is a penal enactment, and must be construed strictly, and the proof to sustain an offense against it must be direct and positive. The contract affords not only no such proof, but no proof at all, that the forbidden acts were done within the United States, and to be carried on from thence. No such offense, therefore, as that denounced by the Act, when strictly construed, having been proved against the parties to the contract, the contract itself consequently was not, when made, in violation of the neutrality or foreign policy of this country towards Mexico and other nations, as established and defined by said section and Act.

The same course of argument was pursued by *Mr. L. Sherwood* in his brief for the appellants.

1. Texas, at the time of this contract, was an independent government. And in making the contract the complainants did not violate the

NOTE.—Illegal contracts, what are. How far fraud or illegal consideration will avoid a contract. See note to *Armstrong v. Toler*, 11 Wheat., 258.

What contracts are void as against public policy, or as illegal. Illegal consideration, when a defense. Agreement not to bid. Lobby service. Contingent fees. To prevent competition. See note to *Bartle v. Nutt*, 4 Pet., 184.

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laws of the United States, enacted to preserve our neutrality with nations with whom we were at peace, nor did they violate our Treaty of Amity with Mexico. Hence, the contract was legal, under the laws of the United States.

The people of Texas, represented by delegates, met in general convention at Washington, in Texas, on the 2d day of March, 1836, and declared themselves a "Free and Independent Republic." And then and there set themselves at work to organize and establish a government. And on the 17th day of the same month, had fully organized a government by § 1*] the name *of "The Republic of Texas," under a written Constitution. (Laws of Republic of Texas, Vol. I., page 1 to 25.)

Then a new nation was born. An independent nation, that maintained her independence and freedom among the nations of the earth, and was subsequently recognized by them as possessing all the sovereignty and attributes of other nations. As such Republic, she maintained her independence in fact and in name, until she became incorporated into the government of the United States, December 29, 1845.

The first question to be determined by this court is, whether Texas, at the time before stated, had the right to become, and whether she did become an independent government.

That she had the right so to become, will not be doubted by any man, nor by any court, who "hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed. That whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it, and to institute a new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness."

Such right your Honors will not doubt. It was happily incorporated in the first principles of the first truly written international law; in America, the first law that is learned by the courts or by the bar—learned generally, ere professional studies are commenced, and imbibed almost with the first nourishment of the American child.

That Texas, at the time to which I have referred, became entirely severed from the Republic of Mexico, is fully shown by the reference I have made to the first volume of her laws. That she maintained her independence, and was never again subjected to the dominion of Mexico, is a fact sustained by the history of her struggles, as well as by the history of our own government, and other governments in their negotiations with her.

Although our government had not officially recognized the independence of Texas, at the date of this contract, yet, shortly after that period, official correspondence and intercourse commenced between the United States and the Republic of Texas, and we find a treaty negotiated between the two governments as early as April, 1838. (8 Stat. at Large, 510.)

It is claimed that this contract is void, as

being in violation of the laws of the United States, provided for the punishment *of [§ 4.2 persons who shall, within the territory or jurisdiction of the United States, "begin or set on foot, or provide or prepare, the means for any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, with whom the United States are at peace".

This is a penal statute, and must be construed strictly. And I respectfully insist, that while it is the policy of the United States government to preserve her neutrality between belligerent nations, there is nothing in this law to prevent one of her citizens entering into a contract with a citizen of another independent government for the purchase of land lying in that government, even though it be recited in the contract that it is the intention of the person selling his lands to use the money he receives for them in raising and equipping volunteers to maintain and advance the independence of his country.

It does not appear, from the bill, that the contract was for the advancement of funds to raise and equip volunteers within the United States, or to carry on war from thence against Mexico. For aught that appears, the design of General Chambers was to raise his volunteers in Texas. And it might as well be presumed that they were to be raised in Europe, as in the United States.

Besides, Texas was an independent government. And the purpose of General Chambers, as declared, was to maintain her independence, and not to make incursions from the United States, or even from Texas, into Mexico.

There is nothing in this statute inhibiting a citizen of the United States from volunteering in the service of another government to maintain her independence, already declared; and uphold her government, fully instituted; nor declaring it unlawful for a citizen of the United States to contribute means for such purposes.

Again, it is insisted by the defendant that this contract is in violation of the Treaty of Amity, Commerce and Navigation between the United States of America and the United Mexican States, of April 5, 1832.

The 1st article of that Treaty is in these words: "There shall be a firm, inviolable and universal peace, and a true and sincere friendship between the United States of America and the United Mexican States, in all the extent of their possessions and territories, and between their people and citizens respectively, without distinction of persons or places."

In revolutions, there must be a time when an old government ends and a new one begins. And when a new one begins, it must embrace a certain portion of the earth of which it has possession. Now, with regard to this provision of the Treaty, I *respectfully insist, [§ 4.3 that by a revolution, a portion of what was before Mexico, ceased to be any part of the possessions or territory of Mexico, and became the possessions and territory of the new government; and that this provision in the Treaty could no longer bind the United States to regard the revolted territory as any part of the Mexican territory.

In regard to the obligations of this Treaty, and its binding force upon the United States, in September, 1836, the question is not, whether

the United States had recognized the independence of Texas; but whether Texas had, in fact, achieved her independence.

If Texas had not achieved her independence in 1836, when this contract was executed, then she had not achieved it at a subsequent period, when the United States government did officially recognize her independence. And if these citizens of Ohio, in September, 1836, violated this Treaty of Amity with Mexico, then the United States government violated the same Treaty in March, 1837, by recognizing, and in April, 1838, by treating with the Republic of Texas. For when this contract was made, the revolted colony had already achieved her independence, established her government, and had never relinquished any part of her territory acquired by the revolution.

The question whether Texas had achieved her independence in September, 1836, was a historic and governmental fact—a fact not depending upon any question of recognition by other and different nations.

It is true that other governments might or might not, as they should choose, send to and receive from Texas diplomatic agents. But whether they did or not, could not alter the fact of Texan independence, so long as Mexico never repossessed herself of the revolting territory. And so far as the fact of Texan independence was concerned, it was no more the province of our government than of any other to determine when that fact transpired. And, as I conceive, no more the province of any government, than of the citizens, except so far as concerns the relations of diplomacy.

The recognition of the independence of Texas, by the United States, in no way determined the fact as to when she became independent, any more than did the acknowledgment of the independence of the United States by the British government determine the fact as to when the United States became independent. If the time or date of the independence of revolting colonies depends on the decision of neutral nations, and not upon the fact whether the revolting colony has established a civil government which is continued in successful operation, performing all the functions of an [44*] independent power, then we are *all mistaken in the date of our national existence; and instead of celebrating the anniversary of the 4th of July, 1776, we should ascertain the different days of the recognition of our independence by other nations, and celebrate them. And thus, instead of having one national holiday, we would have as many as there are nations with whom we have diplomatic relations. By such a decision our boys would be delighted, and the interests of pyrotechnists greatly benefited.

Mr. Volney E. Howard, for the appellees:

We insist that the bill in this case cannot be maintained, because,

1. It is shown, on the face of the contract and the bill, that the obligation was given to enable General Chambers to raise and equip volunteers, to carry on a war in Texas against the Republic of Mexico, and was therefore in violation of our neutrality laws with Mexico. The contract was entered into in Ohio, in September, 1836, before this government had acknowledged the independence of Texas. Contracts to furnish money to carry on war

by revolted subjects, against a government with whom we are at peace, are void. (1 Kent, 116, 118, 123; *Devoitz v. Hendricks*, 9 Moore C. B., 586.) If the government does not interfere, it is illegal for citizens to do so. (1 Kent, 24, note A, 25, note.) And, until the government acknowledges the independence of the revolted province, the courts recognize the ancient condition of things, under which this contract would be illegal. (1 Kent, 25; 9 Ves., 347; 4 Cranch, 272; 13 J. R., 561, 587; 3 Wheat., 324, 610; Wheaton's Elements, 453.)

2. It appears from the contract, and the allegations of the bill, on page 8 of the Record, that the contract in this case was entered into, not only for the purpose of furnishing money to equip volunteers to carry on a war in Texas against Mexico, in aid of the revolutionists, but for the further illegal purpose of raising volunteers to proceed from this country. The contract was therefore void, as against the laws of the United States and our Treaty of Amity and Friendship with Mexico. The contract was executed in Cincinnati, on the 16th September, 1836, and recites that General Chambers "is now engaged in raising, arming and equipping volunteers for Texas," &c.. (Act of Congress, 1836, p. 53; Senate Journal, 1837, pp. 110, 810; Act of March 10, 1838, 5 Stat. at Large, 212; Ex. Doc. 1835, p. 183; Vol. VI., Doc. 256; Doc. 88, p. 36.)

Mr. Chief Justice Taney delivered the opinion of the court:

This is an appeal from the decree of the District Court of the United States for the District of Texas.

*The appellants filed a bill in that court [*45] against the appellee, to obtain the specific execution of an agreement which is set out in full in the bill; and which they allege was executed at the City of Cincinnati, in the State of Ohio, on or about the 16th of September, 1836. Some of the complainants claim as original parties to the contract, and the others as assignees of original parties, who have sold and assigned to them their interest.

The contract, after stating that it was entered into on the day and year above mentioned, between General T. Jefferson Chambers, of the Texan army, of the first part, and Morgan Neville and six others, who are named in the agreement, of the City of Cincinnati, of the second part, proceeds to recite the motives and inducements of the parties in the following words:

"That the said party of the second part, being desirous of assisting the said General T. Jefferson Chambers, who is now engaged in raising, arming and equipping volunteers in Texas, and who is in want of means therefor; and, being extremely desirous to advance the cause of freedom and the independence of Texas, have agreed to purchase of the said T. Jefferson Chambers, of his private estate, the lands hereinafter described."

And after this recital follows the agreement of Chambers, to sell and convey to them the land described in the agreement, situated in Texas, for the sum of twelve thousand five hundred dollars, which he acknowledged that he had received in their notes, payable in equal installments of four, six and twelve months, and

he covenanted that he had a good title to this land, and would convey it with general warranty. There are other stipulations, on the part of Chambers, to secure the title to the parties, which it is unnecessary to state, as they are not material to the questions before the court.

After setting out the contract at large, the bill avers that the notes given, as aforesaid, were all paid; and sets forth the manner in which the complainants, who were not parties to the original contract, had acquired their interest as assignees; and charges, that notwithstanding the full payment of the money, Chambers, under different pretexts, refuses to convey the land according to the terms of his agreement.

It further states, that they are informed and believe that he received full compensation, in money, scrip, land or other valuable property, for the supplies furnished by him, and in arming and equipping the Texan army referred to in the said contract, and which it was in part the object of the said parties of the second part to assist him to do, by the said advances made by them, as before stated, and which said advances did enable the said Chambers so to do. **46***] *To this bill the respondent (Chambers) demurred, and the principal question which arises on the demurrer is, whether the contract was a legal and valid one, and such as can be enforced by either party in a court of the United States. It appears on the face of it, and by the averments of the appellants in their bill, that it was made in Cincinnati, with a general in the Texan army, who was then engaged in raising, arming and equipping volunteers for Texas, to carry on hostilities with Mexico; and that one of the inducements of the appellants, in entering into this contract and advancing the money, was to assist him in accomplishing these objects.

The District Court decided that the contract was illegal and void, and sustained the demurrer and dismissed the bill; and we think that the decision was right.

The validity of this contract depends upon the relation in which this country then stood to Mexico and Texas; and the duties which these relations imposed upon the government and citizens of the United States.

Texas had declared itself independent a few months previous to this agreement. But it had not been acknowledged by the United States; and the constituted authorities charged with our foreign relations, regarded the treaties we had made with Mexico as still in full force, and obligatory upon both nations. By the Treaty of Limits, Texas had been admitted by our government to be a part of the Mexican territory; and by the first article of the Treaty of Amity, Commerce and Navigation, it was declared, "that there should be a firm, inviolable and universal peace, and a true and sincere friendship between the United States of America and the United Mexican States, in all the extent of their possessions and territories, and between their people and citizens respectively, without distinction of persons or place." These Treaties, while they remained in force, were, by the Constitution of the United States, the supreme law, and binding not only upon the government, but upon every citizen. No contract could lawfully be made in violation of their provisions.

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Undoubtedly, when Texas had achieved her independence, no previous treaty could bind this country to regard it as a part of the Mexican territory. But it belonged to the government, and not to individual citizens, to decide when that event had taken place. And that decision, according to the laws of nations, depended upon the question whether she had or had not a civil government in successful operation, capable of performing the duties and fulfilling the obligations of an independent power. It depended upon the state of the fact, and not upon the right which was in contest between the parties. And the *President, in his [*47 message to the Senate, of December 22, 1836, in relation to the conflict between Mexico and Texas, which was still pending, says: "All questions relative to the government of foreign nations, whether of the old or the new world, have been treated by the United States as questions of fact only, and our predecessors have cautiously abstained from deciding upon them until the clearest evidence was in their possession, to enable them not only to decide correctly, but to shield their decision from every unworthy imputation." (Senate Journal of 1836, 37, p. 54.)

Acting upon these principles, the independence of Texas was not acknowledged by the Government of the United States until the beginning of March, 1837. Up to that time, it was regarded as a part of the Territory of Mexico. The Treaty which admitted it to be so, was held to be still in force and binding on both parties, and every effort made by the government to fulfill its neutral obligations, and prevent our citizens from taking part in the conflict. This is evident, from an official communication from the President to the Governor of Tennessee, in reply to an inquiry in relation to a requisition for militia, made by General Gaines. The despatch is dated in August, 1836; and the President uses the following language: "The obligations of our Treaty with Mexico, as well as the general principles which govern our intercourse with foreign powers, require us to maintain a strict neutrality in the contest which now agitates a part of that republic. So long as Mexico fulfills her duties to us, as they are defined by the Treaty, and violates none of the rights which are secured by it to our citizens, any act on the part of the government of the United States, which would tend to foster a spirit of resistance to her government and laws, whatever may be their character or form, when administered within her own limits and jurisdiction, would be unauthorized and highly improper. (Ex. Doc. 1836, 1837, Vol. I., Doc. 2, p. 58.)

And on the very day on which the agreement of which we are speaking was made (September 10, 1836), Mr. Forsyth, the Secretary of State, in a note to the Mexican Minister, assured him that the government had taken measures to secure the execution of the laws for preserving the neutrality of the United States, and that the public officers were vigilant in the discharge of that duty. (Ex. Doc., Vol. I., Doc. 2, page 68, 64.)

And still later, the President, in his message to the Senate of December 22, 1836, before referred to, says: "The acknowledgment of a new state as independent, and entitled to a

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place in the family of nations, is at all times an act of great delicacy and responsibility; but more especially so when such a state has forcibly separated itself from another, of which it formed an integral part, and which still claims dominion over it." And, after speaking of the policy which our government had always adopted on such occasions, and the duty of maintaining the established character of the United States for fair and impartial dealing, he proceeds to express his opinion against the acknowledgment of the independence of Texas, at that time, in the following words:

"It is true, with regard to Texas, the civil authority of Mexico has been expelled, its invading army defeated, the Chief of the Republic himself captured, and all present power to control the newly organized government of Texas annihilated within its confines. But, on the other hand, there is, in appearance at least, an immense disparity of physical force on the side of Mexico. The Mexican Republic, under another executive, is rallying its forces under a new leader, and menacing a fresh invasion to recover its lost dominion. Upon the issue of this threatened invasion, the independence of Texas may be considered as suspended; and, were there nothing peculiar in the relative situation of the United States and Texas, our acknowledgment of its independence at such a crisis would scarcely be regarded as consistent with that prudent reserve with which we have heretofore held ourselves bound to treat all similar questions."

The whole object of this message appears to have been to impress upon Congress the impropriety of acknowledging the independence of Texas at that time; and the more especially as the American character of her population, and her known desire to become a State of this Union, might, if prematurely acknowledged, bring suspicion upon the motives by which we were governed.

We have given these extracts from the public documents not only to show that in the judgment of our government Texas had not established its independence when this contract was made, but to show also how anxiously the constituted authorities were endeavoring to maintain untarnished the honor of the country, and to place it above the suspicion of taking any part in the conflict.

This being the attitude in which the government stood, and this its open and avowed policy, upon what grounds can the parties to such a contract as this come into a court of justice of the United States and ask for its specific execution? It was made in direct opposition to the policy of the government, to which it was the duty of every citizen to conform. And while they saw it exerting all its power to fulfill in good faith its neutral obligations, they made themselves parties to the war, by furnishing means to a general of the Texan army, for the avowed purpose of aiding and assisting him in his military operations.

It might indeed fairly be inferred, from the language of the contract and the statements in the appellants' bill, that the volunteers were to be raised, armed, and equipped within the limits of the United States. The language of the contract is: "That the said party of the second part (that is, the complainants), being

desirous of assisting the said General T. Jefferson Chambers, who is now engaged in raising, arming and equipping volunteers for Texas, and is in want of means therefor." And as General Chambers was then in the United States, and was, as the contract states, actually engaged at that time in raising, arming and equipping volunteers, and was in want of means to accomplish his object, the inference would seem to be almost irresistible that these preparations were making at or near the place where the agreement was made, and that the money was advanced to enable him to raise and equip a military force in the United States. And this inference is the stronger, because no place is mentioned where these preparations are to be made; and the agreement contains no engagement on his part, or proviso on theirs, which prohibited him from using these means and making these military preparations within the limits of the United States.

If this be the correct interpretation of the agreement, the contract is not only void, but the parties who advanced the money were liable to be punished in a criminal prosecution, for a violation of the neutrality laws of the United States. And certainly, with such strong indications of a criminal intent, and without any averment in the bill from which their innocence can be inferred, a court of chancery would never lend its aid to carry the agreement into specific execution, but would leave the parties to seek their remedy at law. And this ground would of itself be sufficient to justify the decree of the District Court dismissing the bill.

But the decision stands on broader and firmer ground, and this agreement cannot be sustained either at law or in equity. The question is not whether the parties to this contract violated the neutrality laws of the United States or subjected themselves to a criminal prosecution; but whether such a contract, made at that time, within the United States, for the purposes stated in the contract, and the bill of complaint, was a legal and valid contract, and such as to entitle either party to the aid of the courts of justice of the United States to enforce its execution.

The intercourse of this country with foreign nations, and its policy in regard to them, are placed by the Constitution of the United States in the hands of the government, and its decisions upon these subjects are obligatory upon every citizen of the Union. He is bound to be at war with the nation against which the war-making power has declared war, and equally bound to commit no act of hostility against a nation with which the government is in amity and friendship. This principle is universally acknowledged by the laws of nations. It lies at the foundation of all government, as there could be no social order or peaceful relations between the citizens of different countries without it. It is, however, more emphatically true in relation to citizens of the United States. For as the sovereignty resides in the people, every citizen is a portion of it, and is himself personally bound by the laws which the representatives of the sovereignty may pass, or the treaties into which they may enter, within the scope of their delegated authority. And when that authority has plighted its faith to another nation that there shall be peace and friendship between the citizens of the two countries, every citizen

of the United States is equally and personally pledged. The compact is made by the department of the government upon which he himself has agreed to confer the power. It is his own personal compact as a portion of the sovereignty in whose behalf it is made. And he can do no act, nor enter into any agreement to promote or encourage revolt or hostilities against the territories of a country with which our government is pledged by treaty to be at peace, without a breach of his duty as a citizen, and the breach of the faith pledged to the foreign nation. And if he does so he cannot claim the aid of a court of justice to enforce it. The appellants say, in their contract, that they were induced to advance the money by the desire to promote the cause of freedom. But our own freedom cannot be preserved without obedience to our own laws, nor social order preserved if the judicial branch of the government countenanced and sustained contracts made in violation of the duties which the law imposes, or in contravention of the known and established policy of the Political Department, acting within the limits of its constitutional power.

But it has been urged in the argument that Texas was in fact independent, and a sovereign state at the time of this agreement; and that the citizen of a neutral nation may lawfully lend money to one that is engaged in war, to enable it to carry on hostilities against its enemy.

It is not necessary, in the case before us, to decide how far the judicial tribunals of the United States would enforce a contract like this, when two states, acknowledged to be independent, were at war, and this country neutral. It is a sufficient answer to the argument to say that [51*] the question whether Texas had or *had not at that time become an independent state, was a question for that department of our government exclusively which is charged with our foreign relations. And until the period when that department recognized it as an independent state, the judicial tribunals of the country were bound to consider the old order of things as having continued, and to regard Texas as a part of the Mexican territory. And if we undertook to inquire whether she had not in fact become an independent sovereign state before she was recognized as such by the treaty-making power, we should take upon ourselves the exercise of political authority, for which a judicial tribunal is wholly unfit, and which the Constitution has conferred exclusively upon another department.

This is not a new question. It came before the court in the case of *Rose v. Himely*, 4 Cr., 272, and again in *Hoyt v. Gelston*, 8 Wheat., 324. And in both of these cases the court said, that it belongs exclusively to governments to recognize new states in the revolutions which may occur in the world; and until such recognition, either by our own government or the government to which the new state belonged, courts of justice are bound to consider the ancient state of things as remaining unaltered.

It was upon this ground that the Court of Common Pleas in England, in the case of *De Wutz v. Hendricks*, 9 Moore's C. B., 586, decided that it was contrary to the law of nations for persons residing in England to enter into engagements to raise money by way of loan for the purpose of supporting subjects of

a foreign state in arms against a government in friendship with England, and that no right of action attached upon any such contract. And this decision is quoted with approbation by Chancellor Kent, in 1 Kent's Com., 116.

Nor can the subsequent acknowledgment of the independence of Texas, and her admission into the Union as a sovereign State, affect the question. The agreement being illegal and absolutely void at the time it was made, it can derive no force or validity from events which afterwards happened.

But it is insisted, on the part of the appellants, that this contract was to be executed in Texas, and was valid by the laws of Texas, and that the District Court for that State, in a controversy between individuals, was bound to administer the laws of the State, and ought therefore to have enforced this agreement.

This argument is founded in part on a mistake of the fact. The contract was not only made in Cincinnati, but all the stipulations on the part of the appellants were to be performed there, and not in Texas. And the advance of money which they *agreed to make for [*52 military purposes was in fact made and intended to be made in Cincinnati, by the delivery of their promissory notes, which were accepted by the appellee as payment of the money. This appears on the face of the contract. And it is this advance of money for the purposes mentioned in the agreement, in contravention of the neutral obligations and policy of the United States, that avoids the contract. The mere agreement to accept a conveyance of land lying in Texas, for a valuable consideration paid by them, would have been free from objection.

But had the fact been otherwise, certainly no law of Texas then or now in force could absolve a citizen of the United States, while he continued such, from his duty to this government, nor compel a court of the United States to support a contract, no matter where made or where to be executed, if that contract was in violation of their laws, or contravened the public policy of the government, or was in conflict with subsisting treaties with a foreign nation.

We therefore hold this contract to be illegal and void, and affirm the decree of the District Court.

Messrs. Justices Daniel and Grier dissented.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Texas, and was argued by counsel: on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said District Court in this cause be, and the same is hereby affirmed, with costs.

Cited—21 Wall., 490; 2 Otto, 132; 2 Abb. U. S., 40; 12 Bank. Reg., 141; 3 Cliff., 500.

JOSEPH WISWALL, Plaintiff in Error,

DAVID SAMPSON, Lessee of EDWARD HALL and EDWARD S. DARGAN.

Judgment lien on real estate in custody of receiver appointed in chancery—how protected and enforced.

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Where real estate is in the custody of a receiver, appointed by a court of chancery, a sale of the property under an execution issued by virtue of a judgment at law, is illegal and void.

The proper modes of proceeding pointed out, to be pursued by any person who claims title to the property, either by mortgage or judgment or otherwise.

THIS case was brought up by writ of error from the Circuit Court of the United States for the Southern District of Alabama.

53*] *It was an ejectment for the following lot, in the City of Mobile, bounded south by St. Francis Street, and lying between Water and Commerce and Planters streets of the said city, having a front of thirty-five feet on St. Francis Street, and extending to Planters Street, with the same breadth; bounded east by lands formerly belonging to M. D. Eslava, and west by a lot of Beach, Ela & Co.

The declaration contained three counts; two upon a demise from Edward Hall, a citizen of the State of Maryland, and the third a demise from Edward S. Dargan.

Although the decision of the court turned upon a single point, it is necessary to connect it with the other circumstances of the case which are somewhat complicated.

The following table contains a reference to the principal facts bearing upon the respective titles of the plaintiff and defendant:

1840, April 28. Ticknor, being in possession, conveyed the property to Day.

Plaintiff's Title. 1840.	Defendant's Title. 1840.
Dec. 28. Fowler and others obtained a judgment against Ticknor for \$4,991.	
Dec. 31. Crouch & Sneed obtained a judgment against Ticknor for \$7,176.25.	
1842.	1842.
	June 14. Wiswall obtained judgment against Ticknor for \$2,233.17.
	July 1. <i>Fi. fa.</i> issued on it, returned "no property found."
1843.	1843.
	Feb. 7. Bill filed by Wiswall to set aside the deed from Ticknor to Day as fraudulent.
1845.	1845.
Feb. 24. <i>Alias fi. fa.</i> on Crouch & Sneed's judgment.	
April 7. <i>Alias fi. fa.</i> on Fowler's judgment.	
July 7. Lot sold to Dargan under the executions.	April Term. Deed from Ticknor to Day set aside as fraudulent.
August 13. Marshal executed a deed to Dargan.	June 27. Receiver appointed by the Chancellor, took possession.
	Nov. 28. Dargan applied to the Chancellor to have the property delivered over to him, or for leave to bring an ejectment. Both refused.
1847.	1847.
	March 1. Lot sold by the Master in Chancery to Wiswall, and deed made.
1848.	1848.
April—Dargan brought an ejectment against Wiswall.	

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*Upon the trial, the following bill of [*54 exceptions was taken:

Be it remembered, that on the trial of this cause on this 4th day of January, 1849, before the Hon. William Crawford, *Judge*, the plaintiffs, to show title in their lessors, offered in evidence a judgment rendered in this court on the 28th December, 1840, in favor of C. S. Fowler & Co., against John Ticknor, for \$4,991, besides costs; also a judgment rendered in this court, on the 31st December, 1840, in favor of Crouch & Sneed against John Ticknor, \$7,176.25 and costs; upon each of which judgments *fi. fas.* were issued within a year and returned by the marshal, "No property found;" no other executions or process issued upon either of these judgments, except the following: Upon the judgment of Crouch & Sneed an *alias fi. fa.* was issued on the 24th February, 1845, and levied on the property sued for, upon which the marshal returned, "Levied"—and "the sale of the property levied on postponed by Judge E. S. Dargan, until further order." And on the 17th May, 1845, a *pluries fi. fa.* issued on this judgment and was levied on the same property. Upon the judgment of C. S. Fowler & Co. an *alias fi. fa.* was issued on the 7th of April, 1845, and levied on the same property, and returned, "For want of time to sell." And on the first day of May, 1845, a *venditioni exponas* issued, upon which and the execution on the Crouch and Sneed judgments, issued the 17th May, the property was sold by the marshal on the 7th July, 1845, to Edward S. Dargan, for \$7,500; and a deed was made by the marshal to said Dargan, bearing date the 13th of August, 1855. The plaintiff further offered in evidence a deed of release and quitclaim of the same premises, from Edward S. Dargan to Edward Hall, one of the lessors, bearing date the 3d of April, 1848, a copy of which is hereto attached, marked X; to the reading of which the defendant, by his attorney, objected, on the ground that it was neither acknowledged nor recorded; but the objection was overruled by the court, and the deed admitted in evidence upon the proof of the handwriting of Dargan, and the defendant excepted. The plaintiff further offered evidence to show that John Ticknor was in possession of the property sued for from 1838 or 1839 claiming title, and that he remained in possession until about 1845; but whether, after 1840, Ticknor claimed it as his own, or held possession as the tenant of some one else, witness did not know. It further appeared that Ticknor built the store; that in 1839 or 1840 he became embarrassed; and that he owed a large sum of money to one James L. Day, and from sometime in 1840 carried on business in the store as the agent of said Day. Day was often there and had the control, but Ticknor managed all the details. It was further proved that McCoy and Johnson, the tenants *served with the declaration, were [*55 in possession of the premises in April, 1848, and had been in possession since November, 1847.

The defendant then offered in evidence a judgment obtained in the circuit court of Mobile County, on the 14th day of June, 1842, in favor of Joseph Wiswall against John Ticknor, for the sum of \$2,233.17, besides costs; and a *fi. fa.* issued thereon the 1st July, 1842, returnable

to the fall term of said court, which was returned by the sheriff, No "property found"; also the transcripts from the records, duly certified, of a deed made by John Ticknor to James L. Day, bearing date the 28th of April, 1840, a copy of which is annexed, marked A; also the exemplification of a decree and proceedings in a suit in chancery, filed the 7th of February, 1843, by Joseph Wiswall, as a judgment creditor of John Ticknor, against said Ticknor and James L. Day; a copy of which bill, answers and decrees, are hereto annexed, marked B; also a decree and proceedings in the same court of chancery upon a bill filed March 1st, 1845, by the President, Directors and Company of the Bank of Mobile, James Stewart and Henry Lazarus, several judgment creditors of said Ticknor; and against said Ticknor and James S. Day; which bill was similar in its form and object to the bill of Wiswall, and was served on the defendant, Ticknor, on the 1st March, 1845; a copy of the answer of Day, and the decree, is annexed, marked C. The defendant then proved that Waring, the receiver of the Court of Chancery in the above two suits, went into the possession of the property sued for on St. Francis Street, as such receiver, on the 27th day of June, 1845, and remained in possession as such receiver until the same was sold by him on the 1st Monday of March, 1847; that notice was given at the marshal's sale, when the property was bid off by Dargan, of the pendency of the above-named suits in chancery, and the claims of the complainants there asserted, and that he was, as receiver aforesaid, then in possession of said property under the decrees in chancery in the above suits. The property was duly sold by the receiver on the 1st day of March, 1847, to K. B. Sewell for six thousand five hundred dollars, and a deed of the same made to him by the said receiver and master in chancery; and on the tenth day of May, 1847, the same was conveyed by said Sewall to the defendant, Joseph Wiswall; it was also shown that the purchaser from the receiver went into possession, and that the whole amount of the purchase money was paid and appropriated under the directions of the Court of Chancery.

The defendant then offered in evidence the transcript of a decree and proceedings had in a 56th court of chancery, in Mobile, *upon the petition of Edward S. Dargan against Moses Waring, Receiver, Joseph Wiswall, John Ticknor, and James L. Day, a copy of which is hereto annexed, marked exhibit D; which decree had been affirmed by the Supreme Court; C. Cuyler, the deputy-marshal who made the sale to Dargan, testified that no money whatever was paid upon said sale, but that Dargan gave his note to the marshal for the costs.

John F. Adams testified that he acted as the attorney of C. S. Fowler & Co., in recovering their judgment in this court, and had ever since represented said judgment; and that E. S. Dargan, from some time prior to the marshal's sale, represented the judgment of Crouch & Sneed; that it was agreed between said attorneys, Adams and Dargan, representing said judgments, that the land should be sold upon them, and bid off in the name of Dargan, and that if the title thus acquired should enable Dargan to recover the property, the judgment

of C. S. Fowler & Co. should be paid out of it; but that if the property should not be recovered by such title, then the sale was to be considered a nullity, and no money to be paid whatever on account of it; and that this was the understanding of Adams, but that after the sale he yielded to the views of Dargan, and signed a memorandum to the effect that Dargan should be a trustee for the parties. It was further in evidence that with the arrangements between Dargan and Adams there was no connection on the part of Ticknor, the defendant in the judgment, and no assent was given by him to them.

Adams also testified that, as the representative of the judgment of C. S. Fowler & Co., he entered a motion in this court at the Spring Term, 1847, to amend the marshal's return made upon the execution in that case, to show that no money was in fact paid on said bid of Dargan; and said motion was produced and read to the jury, and is still pending and undetermined.

Defendant then offered to read a bill filed in the Chancery Court of Mobile, on the 18th February, 1847, in the name of David A. Hall, assignee in bankruptcy of C. S. Fowler & Co., against John Ticknor, James L. Day, Moses Waring, Receiver; Joseph Wiswall, Bank of Mobile, James Stewart, and Henry Lazarus, the object of which bill was to reach and have appropriated to the payment of said judgment of C. S. Fowler & Co. the proceeds of the sale of the property to be made in that court upon the bill of said Wiswall and others; said bill was filed by J. F. Adams, as solicitor of the parties, and sets forth, among other things, the following: "That the said premises were sold on the 1st of July, 1845, by the marshal, to Edward S. Dargan, for the nominal sum of \$7,500, and the marshal executed to said Dargan his formal deed for the same, and thereupon *made return upon the process that the [57] premises were sold for the sum above named. And your orator now averreth, that in fact neither the sum of \$7,500, nor any other sum, was paid by said Dargan to the plaintiffs in execution, or to any person for them, but his said bid was made upon his stipulation made with the plaintiffs' attorney, and on the distinct understanding and intent on his part, that in case his title under the said sale should prove to be valid and effectual in law, he would pay to the said plaintiffs or your orator so much money upon his said bid as he might thereafter be able to realize by a sale; but if the said title should not prove to be available nor enable him to obtain possession, that in that case he should pay nothing." Said bill is not sworn to, and is still pending in the Court of Chancery. To the introduction of this bill as evidence, the plaintiffs objected, on the ground that it was not connected with the plaintiffs in this suit, and as being the statement of counsel merely, and not evidence against C. S. Fowler & Co.; and the objection was sustained, and the said bill excluded; to which the defendant, by his counsel, excepted. This was all the evidence offered in the case, and thereupon the court charged the jury—

That the deed from Ticknor to Day, of April 28th, 1840, was, upon its face, in connection with the answers of Ticknor and Day, fraud-

ulent as to creditors, and void; to which, the defendant excepted.

The court further charged, that the title of Dargan, derived from the marshal's sale, under the judgment of C. S. Fowler & Co. and of Crouch & Sneed, was superior to the title of Wiswall, derived from the sale under the chancery proceedings, and entitled the plaintiffs to recover; to which the defendant, by his counsel, excepted.

The court further charged the jury, that the proceedings and decree in the Court of Chancery, upon the petition of Dargan, was not binding or conclusive upon the parties in this suit; that it was not necessary for Dargan to go into the Court of Chancery for aid, that his remedy was at law, and the proceedings there upon his petition had no effect whatever upon his title, and must be wholly disregarded in this suit; to which the defendant, by his counsel, also excepted, and requested the court to give the following charges to the jury:

1. That, if the jury believe the deed from the marshal to Dargan was made without any pecuniary consideration, it could pass no title; which the court refused; but charged that, under the evidence before them, it was valid if no money was paid by the purchaser; to which the defendant excepted.

2. That the filing of Wiswall's bill in **58** chancery, and the proceedings thereon, to a final decree in his favor, gave him a specific lien upon the property of Ticknor, from the commencement of his suit, which could not be divested by any subsequent proceedings upon the older judgments under which the plaintiffs here claim; which was refused, and the defendant excepted.

3. That the receiver of the Court of Chancery, in the suits of Wiswall and others, being in possession of the property under the order of that court at the time of the marshal's sale, and notice thereof being given at that sale, affected the purchaser, and invalidated his title; which was refused; and the court charged that such possession and notice in no manner affected the marshal's sale, or the purchaser under it; and the defendant excepted.

4. That the proceedings in the Court of Chancery, upon the petition of Dargan, the purchaser at the marshal's sale, was conclusive upon the parties and his title thus acquired; which was refused; and the defendant excepted.

5. That, under the statutes and decisions of Alabama, it is not the oldest judgment, but the judgment lien, that has been kept alive by the oldest execution, regularly issued, without the loss of a term, that has the priority as between judgment creditors; which was refused; and the defendant excepted.

6. That, if neither Dargan nor Edward Hall were in possession of the property on the 8d of April, 1848, the deed of that date, from Dargan to Hall, was void and conveyed no title; this was also refused; and the court charged that, under the evidence before the jury, this deed was valid; to all which the defendant excepted.

And the defendant tenders the above as his bill of exceptions in the case, and prays the court to sign and seal the same, which is done accordingly.

WILLIAM CRAWFORD. [SEAL.]

All the exceptions were argued in this court; HOWARD 14.

but it is only necessary to refer to the above charge, viz.: that the title of Dargan was superior to that of Wiswall, and that the decree in chancery, on the petition of Dargan, was not conclusive upon the rights of the parties; that he was not bound to go into that court for relief, as his remedy was at law.

It was argued by *Mr. Seward* for the plaintiff in error, with a brief of *Mr. Sewall*, and by *Mr. Chilton* for the defendant in error, with a brief of *Mr. John A. Campbell*.

It was contended, by the counsel for the plaintiff in error, that *the court erred in [*59 refusing to instruct the jury, "that the receiver of the Court of Chancery, in the suits of Wiswall and others, being in possession of the property, under the order of the court, at the time of the marshal's sale, and notice thereof being given at that sale, affected the purchase by Dargan and invalidated his title; and in charging, on the contrary, that such possession and notice in no manner affected the marshal's sale, or the purchase under it." Because,

1. The levy, under the judgments of C. S. Fowler & Co. and Crouch & Sneed, invested neither the marshal with any title, nor the Federal Court with any jurisdiction over the land, nor could it divest any title, if the defendant Ticknor was in possession, unless followed by an actual sale by the marshal, and payment of the purchase money by the purchaser. (*Forrest & Lyon v. Cump*, 16 Ala., 647.)

And then, not until the sale took place and the money was paid. The sale took place in July; the deed was made in August. (1 Rich. Eq., 340.)

2. But Ticknor was not in possession. The Court of Chancery, by its receiver, was in possession on the 25th June previous; and held, not for Ticknor, but for Wiswall and the other parties claiming against Ticknor. (3 P. Wms., 379; 2 Story, Eq., sec. 833.) The Court of Chancery was not holding the property in safe custody, until the right should be determined between Wiswall on the one side, and Ticknor & Day on the other; for it had already determined the right in favor of Wiswall, and ordered a sale, and the proceeds to be applied to his judgment. (*Ticknor & Day v. Wiswall*, 9 Ala., 178.) Its jurisdiction was complete, and adverse to all third parties. (10 Paige, 43.)

Where different courts have concurrent jurisdiction, that before which proceedings are first had, and whose jurisdiction first attaches, has authority paramount to the others, and cannot be ousted by subsequent proceedings in those courts. The Court of Chancery took jurisdiction to decide upon the right and title to this land, when Wiswall filed his bill on the 7th February, 1843, and it continued its jurisdiction over it until it was sold under its decree. No jurisdiction as to the premises attached to the Federal Court before the sale to Dargan, if then. (*Hagan v. Lucas*, 10 Pet., 400; *Smith v. McIver*, 9 Wheat., 532; *Corning v. White*, 2 Paige, 567; *The Robert Fulton*, 1 Paine, 621; *P. & M. Bank v. Walker*, 7 Ala., 945; *Parker v. Browning*, 8 Paige, 389.)

The counsel for the defendant in error thus noticed this point:

*We deny that the Court of Chancery [*60 could prevent the execution of the levy made by the marshal, by placing a receiver in posses-

sion. The Court of Chancery insists upon no such power.

The rule of chancery is stated in 7 Paige, 518. The head notes are: "When property is rightfully in the hands of a receiver, it is in the custody of the court, and cannot be distrained upon for rent without permission of the court by whom the receiver was appointed; and any person who takes the property out of the possession of the receiver without such permission, after he has notice of the character in which possession is holden, is guilty of a contempt."

The same principles are applicable to any interference with the possession of a receiver, sequestrator, committee or custodee, who holds the property as the officer of the Court of Chancery; as his possession is the possession of the court itself. (*Noe v. Gibson*, 7 Paige, 513.)

Where a receiver is in possession of real estate which is subject to the lien of a judgment, the sale of the premises by the sheriff, upon an execution on such judgment, does not disturb the possession of the receiver; and the sheriff cannot, therefore, be proceeded against for a contempt in making such a sale. But the purchaser cannot disturb the possession of the receiver, when he obtains his conveyance from the sheriff, without the permission of the court. (9 Paige, 373.)

This subject is discussed at large in a late case before Lord Truro, reported in 3 Gordon & Macnaghten, 104, from which we extract:

"I am of opinion that it is not competent for anyone to interfere with the possession of a receiver, or to disobey an injunction or any other order of the court, on the ground that such orders were improvidently made. Parties must take a proper course to question their validity; but while they exist they must be obeyed. I consider the rule to be of such importance to the interests and safety of the public, and to the due administration of justice, that it ought on all occasions to be inflexibly maintained. I do not see how the court can expect its officers to do their duty, if they do it under the peril of resistance, and of that resistance being justified on grounds tending to the impeachment of the order under which they are acting. In the present case, it would have been perfectly open to the plaintiffs in the execution to have applied to this court, to be heard *pro interesse suo*, or to have been heard on a summary application for leave to levy under their execution, notwithstanding the possession of the receiver. There is no instance in which justice may not be readily obtained by persons who are supposed to have their rights in-
[61*] terfered with by an order or process issued by this court. Thus, I find, in one case, where a party wished to distrain for rent on property in the possession of a receiver, that the court, being satisfied that the legal right of distress was paramount to the title of the party for whose benefit the receiver was appointed, allowed the distress to be made. In another case, where property liable to distress had been sold, and the receiver had received the proceeds and paid them into court, the landlord having claimed a right to distrain while the receiver was in possession, this court ordered the receiver to pay out of those proceeds, to the landlord, the rents that were due to him, the receiver being in possession for the benefit of the

tenant for life, who was liable for the payment of that rent which was so sought to be distrained for on the property in the possession of the receiver. I apprehend, then, it may be taken as a rule, that though this court may have issued a process, or have made an order which may interfere with the supposed rights and interests of other parties, not parties to the cause, it is always competent for such parties to make an application to the court for relief; and it is not to be presumed or doubted, but that justice will be duly administered to them on that application.

Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the Southern District of Alabama.

The suit in the court below was an action of ejectment against Wiswall to recover the possession of a lot of land situated in the City of Mobile.

The lessors of the plaintiff gave in evidence two judgments against John Ticknor—one in favor of Fowler & Co. for \$4,491, rendered 28th December, 1840—the other in favor of Crouch & Sneed for \$7,167.25, rendered 31st December of the same year, each of them in the Circuit Court of the United States. Executions were issued upon each of the judgments within the year, and returned by the marshal "No property found."

An *alias fi. fa.* was issued on the judgment in favor of Crouch & Sneed on the 24th February, 1845, and the lot in question levied on; an *alias fi. fa.* was also issued on the judgment in favor of Fowler & Co. on the 7th April, 1845, and a levy made on the same; and on the 7th July the lot was sold on both executions, and bid off by Dargan, one of the lessors of the plaintiff, for the sum of \$7,500, and a deed executed to him by the marshal on the 18th August of the same year. Dargan quit-claimed the premises to Hall, the other lessor. The lessors of the plaintiff claim title under this sale.

*The defendant, Wiswall, gave in evidence a judgment in his favor against Ticknor in the Circuit Court of the State for \$2,293.17, rendered 14th June, 1842; an execution issued 1st July of the same year, which was returned by the sheriff "No property found;" also a deed of the lot in question from Ticknor to one James L. Day, bearing date 28 April, 1840; and the exemplification of a decree and the proceedings in chancery on a bill filed 7th February, 1843, by Wiswall against Ticknor and Day, setting aside the deed to Day as fraudulent and void against creditors. The decree was rendered April Term, 1845. Also the appointment of a receiver by the court, to whom possession of the property was delivered on the 27th June of the same year. The receiver remained in the possession till the lot was sold by the master, 1st March, 1847, under the decree in chancery, and was purchased in for the defendant Wiswall for the sum of \$6,500.

The defendant claims under this title.

Notice was given, on the day of sale, by the marshal, under the two judgments, of the pendency of this suit in chancery, and of the ap-

pointment of a receiver, and that he was in the possession of the property.

It appeared, also, that the lot was bid off by Dargan at the marshal's sale, by an arrangement between the attorneys representing the two judgments, Dargan being the attorney for the one in favor of Crouch & Sneed, that if the title thus acquired should enable him to recover the property, the judgment in favor of Fowler & Co. should be paid out of it; but, if he should fail to recover it, then the sale was to be considered a nullity, and no money was to be paid.

It further appeared, that an application had been made by the attorney in the judgment in favor of Fowler & Co. to the court to amend the marshal's return so as to set forth the fact that no money had been paid, and that the motion was then pending in court. And further, that a bill had been filed in chancery by the assignee in bankruptcy of the judgment of Fowler & Co. against the defendant and others, to have the proceeds of the sale of the property on the decree applied to the payment of that judgment, and in which bill it is insisted that the sale under the two judgments was inoperative, on account of the agreement between the attorneys under whom it was made, and that this suit was then pending.

It further appeared, that Dargan applied to the Court of Chancery on the 26th November, 1845, by petition, setting out his title under the two judgments to have the possession of the lot by the receiver delivered up to him; or if that should not be ordered, then that he might be at liberty to bring an action of ejectment against the receiver to recover the same.

63*] *That the defendant Wiswall put in his answer, setting up the same matters now relied on to invalidate the sale to Dargan, and also claiming a paramount lien upon the property by virtue of his judgment, and bill in chancery and decree setting aside the fraudulent conveyance to Day, directing a sale and application of the proceeds to the payment of his judgment, the appointment of a receiver, &c.

That the Chancellor overruled the application, and dismissed the petition on the 10th December, 1845. From which order an appeal was taken to the Supreme Court, and the decree or order affirmed.

After the evidence was closed, the court charged the jury, that the title of Dargan under the marshal's sale upon the two judgments was superior to that of the defendant under the sale upon the decree in chancery, and directed a verdict for the plaintiff. And further, that the decree in chancery on the petition of Dargan was not conclusive upon the rights of the parties—that he was not bound to go into that court for relief, as his remedy was at law.

The case is now before us on exceptions to this charge.

It was made a question, on the argument, whether or not the lien of the judgments, under which the marshal's sale took place, had not been postponed to that of Wiswall, on account of laches in the enforcement of them by execution. But in the view we have taken of the case, the validity of the liens, at the time of sale, will be conceded, without, however, intending to express any opinion upon the question.

Wiswall filed his bill in chancery against Ticknor and Day, to set aside the fraudulent

conveyance to the latter, and have the property applied to the satisfaction of his judgment, on the 7th February, 1848. In that bill he prayed for a sale of the real estate, and for the appointment of a receiver to take charge of it with other assets of the judgment debtor; and, also, for an injunction. A temporary injunction was granted. On the coming in of the answers of the defendants, the complainant, on the 11th April of the same year, moved for the appointment of a receiver, and the defendants, at the same time, moved to dissolve the injunction. The court denied the motion to appoint the receiver, and dissolved the injunction, expressing the opinion that the answers so far explained the circumstances under which the deed to Day was given, as to remove the charge of fraud against it. An appeal was taken to the Supreme Court, and on the 10th April, 1844, that court reversed the order of the court below, and remanded the cause for further proceedings: and on the 15th April, 1845, the *Chancellor* made a decree, that the deed was fraudulent and void, as against the complainant; and referred *the case to a [*64 master, to take and state the account between the parties. He further ordered and decreed that a receiver should be appointed to take possession of all the property embraced in the fraudulent conveyance; and particularly that possession should be delivered to him of the premises in question; and further, that the receiver, under the direction of the master, should sell the same and apply the proceeds to the payment of the complainant's judgment, with costs, &c.

The receiver was appointed on the 27th June, 1845, and on the same day Ticknor, who was in possession of the premises, attorned to him, who held possession until the sale was made in pursuance of the decree. It will be recollected that the execution on the judgment in favor of Crouch & Sneed, was issued, and levied on the 24th February, 1845; and on that in favor of Fowler & Co. 7th April of the same year, and that the sale took place under which the lessors of the plaintiff claim, 7th July, 1845.

At the time, therefore, of this sale, the receiver was in the possession of the premises, under the decree of the Court of Chancery—in other words, the possession and custody of them were in the Court of Chancery itself (as the court is deemed the landlord), to abide the final decree to be thereafter rendered in the suit pending.

The appointment of a receiver is a matter resting in the discretion of the court; and, as a general rule, in making the appointment on behalf of a complainant seeking to enforce an equitable claim, or a claim which is the subject of equitable jurisdiction, against real estate, it will take care not to interfere with the rights of a person holding a prior legal interest in the property. Thus: where there is a prior mortgage having the legal estate, the court will not, by the appointment of a receiver, deprive him of his right to the possession; but at the same time, it will not permit him to object to the appointment by any act short of a personal assertion of his legal rights, and the taking of possession himself. (1 J. & W. 648; 2 Swanst., 108, 187; 3 *Id.*, 112, n. 115; 8 Daniel's Pr., 1950, 1951.)

If the person holding the legal interest is not in possession, the equitable claimant against the property is entitled to the interference of the court, not only for the purpose of preserving it from waste, but for the purpose of obtaining the rents and profits accruing, as a fund in court to abide the result of the litigation. For until the person holding the legal interest takes possession, or asserts his right to the possession, the accruing rents and profits present a question simply between the parties to the litigation. And the court will also appoint a receiver, even against a party having possession [65*] under a legal title, if it *is satisfied such party has wrongfully obtained that interest in the property. Thus it is where fraud can be proved, and immediate danger is likely to result, if possession, pending the litigation, should not be taken by the court in the mean time. (18 Ves., 105; 16 *Id.*, 59; 3 Daniel's Pr., 1955.)

The effect of the appointment is not to oust any party of his right to the possession of the property, but merely to retain it for the benefit of the party who may ultimately appear to be entitled to it; and when the party entitled to the estate has been ascertained, the receiver will be considered his receiver (T. & R., 345; Daniel's Pr., 1982); and the master will usually be directed to inquire what incumbrances there are affecting the estate, and into the priorities respectively. (10 J. R., 521, *Codwise v. Gelston.*)

When a receiver has been appointed, his possession is that of the court, and any attempt to disturb it, without the leave of the court first obtained, will be a contempt on the part of the person making it. This was held in *Angel v. Smith*, 9 Ves., 335, both with respect to receivers and sequestrators. When, therefore, a party is prejudiced by having a receiver put in his way, the course has either been to give him leave to bring an ejectment, or to permit him to be examined *pro interesse suo*. (1 J. & W., 176, *Brooks v. Greathed*; 3 Daniel's Pr., 1984.) And the doctrine that a receiver is not to be disturbed, extends even to cases in which he has been appointed expressly, without prejudice to the rights of persons having prior legal or equitable interests. And the individuals having such prior interests must, if they desire to avail themselves of them, apply to the court either for liberty to bring ejectment, or to be examined *pro interesse suo*; and this, though their right to the possession is clear. (1 Cox, 422; 6 Ves., 287.)

The proper course to be pursued, says Mr. Daniel, in his valuable treatise on Pleading and Practice in Chancery, by any person who claims title to an estate or other property sequestered, whether by mortgage or judgment, lease or otherwise, or who has a title paramount to the sequestration, is to apply to the court to direct the plaintiff to exhibit interrogatories before one of the masters, in order that the party applying may be examined as to his title to the estate. An examination of this sort is called an examination *pro interesse suo*; and an order for such examination may be obtained by a party interested, as well where the property consists of goods and chattels or personally, as where it is real estate.

And the mode of proceeding is the same in the case of the receiver. (6 Ves., 287; 9 *Id.*, 336; 1 J. & W., 178; 3 Daniel's Pr., 1984.)

A party, therefore, holding a judgment [66] which is a prior lien upon the property, the same as a mortgagee, if desirous of enforcing it against the estate after it has been taken into the care and custody of the court, to abide the final determination of the litigation, and pending that litigation, must first obtain leave of the court for this purpose. The court will direct a master to inquire into the circumstances, whether it is an existing unsatisfied demand, or as to the priority of the lien, &c., and take care that the fund be applied accordingly.

Chancellor Kent, in delivering the opinion of the court in *Codwise v. Gelston*, as Chief Justice, observed, "that if a fund for the payment of debts be created under an order or decree in chancery, and the creditors come in to avail themselves of it, the rule of equity then is, that they shall be paid *in pari passu*, or upon a footing of equality. But when the law gives a priority, equity will not destroy it, and especially where legal assets are created by statute, as in case of a judgment lien, they remain so, though the creditors be obliged to go into equity for assistance. The legal priority will be protected and preserved in chancery."

The settled rule, also, appears to be, that where the subject matter of the suit in equity is real estate, and which is taken into the possession of the court pending the litigation, by the appointment of a receiver, or by sequestration, the title is bound from the filing of the bill; and any purchaser, *pendente lite*, even if for a valuable consideration, comes in at his peril. (3 Swanst., 278, n., 298, n.; 2 Daniel's Pr., 1287; 6 Ves., 287; 9 *Id.*, 336; 1 J. & W., 178; 3 Daniel's Pr., 1984.)

It has been argued, that a sale of the premises on execution and purchase, occasioned no interference with the possession of the receiver, and hence no contempt of the authority of the court; and that the sale therefore, in such a case, should be upheld. But, conceding the proceedings did not disturb the possession of the receiver, the argument does not meet the objection. The property is a fund in court, to abide the event of the litigation, and to be applied to the payment of the judgment creditor, who has filed his bill to remove impediments in the way of his execution. If he has succeeded in establishing his right to the application of any portion of the fund, it is the duty of the court to see that such application is made. And, in order to effect this, the court must administer it independently of any rights acquired by third persons, pending the litigation. Otherwise, the whole fund may have passed out of its hands before the final decree, and the litigation become fruitless.

It is true, in administering the fund, the court will take care that the rights of prior liens or incumbrances shall not be destroyed: *and will adopt the proper measures, by [67*] reference to the master or otherwise, to ascertain them, and bring them before it. Unless the court be permitted to retain the possession of the fund, thus to administer it, how can it ascertain the interest in the same to which the prosecuting judgment creditor is entitled, and apply it upon his demand?

There can be no difficulty in ascertaining the prior liens and incumbrances, as all of them are matters of record. Several of the judgment

creditors came in, in this case, and received their share in the distribution.

These two judgment creditors had notice of the suit before the sale, and might have made themselves parties to it, and claimed application of the fund according to the priority of their liens.

They were also before the court, pending the litigation, on the petition of Dargan, who had purchased for their benefit, to have the possession of the receiver delivered up to the purchaser. There is no pretense, therefore, for saying that they have not had notice of the proceedings in the equity suit. The prayer of the petition was denied, among other grounds, because their appropriate remedy was a motion to the court, founded on their judgments to have the proceeds of the sale under the decree applied to them according to priority.

We agree, that the person holding the prior legal lien or incumbrance, must have notice, and an opportunity to come in and claim his prior right to the property or interest in the fund before his legal right can be affected; and the proper way is by summons or notice upon the order or direction of the court.

This notice can be readily given on the report of the master, of the prior liens or incumbrances resting upon the estate.

But it is not necessary to go this length in the case before us, as it is sufficient to say that the sale under the judgment, pending the equity suit, and while the court was in possession of the estate without the leave of the court, was illegal and void. We do not doubt but that it would be competent for the court, in case the judgment creditor holding the prior lien had not come in and claimed his interest in the equity suit, to decree a sale in the final disposition of the fund subject to his judgment. The purchaser would then be bound to pay it off. But this disposition of the legal prior incumbrance is a very different matter, and comes to a very different result, from that of permitting the enforcement of it, *pendente lite*, without the leave of the court. The rights of the several claimants to the estate or fund is then settled, and the purchase under the decree can be made with a full knowledge of the condition of the title, or charges to which it may be subject.

[68*] *Neither do we doubt but that it is competent, and might, in some cases, be fit and proper for the court, where the property in dispute is ample, and the litigation protracted, to permit the execution to issue, and compel the prosecuting creditor to pay off the judgment. (3 Beav., 428.) But it is manifest that these proceedings, on behalf of the prior incumbrancer, should be under the control of the discretion of the court, as the condition of the title to the property may frequently be so complicated and embarrassed, that unless the sale was withheld until the title was cleared up by the judgment of the court, great sacrifice must necessarily ensue to the parties interested.

This case affords an apt illustration of the remark. The marshal's sale was made under an arrangement that no money was to be paid by the purchaser, unless he succeeded in obtaining a title to the property under it. It is obvious, therefore, if the purchase had been unconditional, and at the risk of the purchaser, it

must have been bid off for a nominal consideration.

As we have already said, it is sufficient, for the disposition of this case, to hold, that while the estate is in the custody of the court, as a fund to abide the result of a suit pending, no sale of the property can take place either on execution or otherwise, without the leave of the court for that purpose. And upon this ground, we hold that the sale by the marshal on the two judgments was illegal and void, and passed no title to the purchaser.

We are also inclined to think that the question of title to the property under the marshal's sale is concluded between these parties by the judgment of the court in the proceedings on the petition by the purchaser for the removal of the receiver, and to be let into the possession. This, we have seen, is the appropriate remedy on behalf of a person claiming a paramount legal right to an estate which has been brought into the possession and safe keeping of the Court of Chancery, pending the litigation in respect to it.

This proceeding was explained by Lord Eldon in *Angel v. Smith*, 9 Ves., 335, speaking of the rule in respect to sequestrators, and which he held was equally applicable in the case of receivers. "Where sequestrators," he observed, "are in possession under the process of the court, their possession is not to be disturbed, even by an adverse title, without leave: upon this principle, that the possession of the sequestrators is the possession of the court, and the court being competent to examine the title, will not permit itself to be made a suitor in a court of law, but will itself examine the title. And the mode is, by permitting the party to come in to be examined *pro interesse suo*; the practice being, to go before the master to state his title, and there is the judgment of the master, and afterwards, if necessary, *of the [*69 court upon it. (See, also, 10 Beav., 318; 2 Daniel's Pr., 1271; 2 Madd., 21; 1 P. Wms., 308.)

An appeal to the House of Lords will lie from the order or decree of the Chancellor upon exceptions to the master's report in the matter. (2 Daniel's Pr., 1273; 3 *Id.*, 1633, 1634.)

In the petition to the Chancellor in the case before us, the purchaser set out his title at large under the marshal's sale, and claimed the possession of the property by virtue of his title. that the receiver might be removed, and the possession delivered to the petitioners.

The answer of Wiswall set up his right to the property under the decree in the suit against *Ticknor and Day*.

The right of the petitioner, therefore, under his title to the possession of the property as against the right of Wiswall under the proceedings in equity and the decree in his favor, would seem to be a question directly involved. The court so understood the issue and passed upon it; holding, as we hold in this case, that the sale was illegal and void, having been made while the estate was in the possession and safe keeping of the Court of Chancery. From this decision an appeal was taken to the Supreme Court, where the order or decree of the court below was affirmed. (11 Ala., 938, *Dargan v. Waring and others*.)

The question is one depending very much upon the local law of Alabama, and the judgment, therefore, in the matter, by the highest court of the State, is entitled to the highest respect.

For these reasons we are of opinion that the judgment of the court below was erroneous and must be reversed, and the case remitted for further proceedings.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Alabama, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, for further proceedings to be had therein in conformity to the opinion of this court.

Cited—14 How., 375; 17 How., 255, 475; 20 How., 107, 596; 12 Otto, 263; 14 Otto, 129; 2 Woods, 421, 619; 3 Woods, 435; 2 Bank. Reg., 139; 3 Bank. Reg., 131, 162, 163; 6 Bank. Reg., 159, 332; 8 Bank. Reg., 384; 9 Bank. Reg., 307; 16 Bank. Reg., 415; 2 Hughes, 401; 4 Hughes, 352, 353; 6 Blatchf., 237; 7 Blatchf., 20; 18 Blatchf., 103; 2 Abb. U. S., 155; 3 Biss., 119; 5 Biss., 69; 4 Ben., 98; 2 McCrary, 343; 1 Flippin, 68; 3 McArthur, 219; 4 Dill., 509, 512.

70*] *SAMUEL SAMPLE, ISRAEL W. PICKINS, AND BURWELL SCOTT,
Appellants,

v.

SHADRACH BARNES.

When equity will not relieve against judgment at law.

Where there was a judgment at law against a defendant in Mississippi, and he sought relief in equity, upon the ground that the consideration of the contract was the introduction of slaves into the State, and consequently illegal; a court of equity will not grant relief, because the complainant was *in part delicto* with the other party.

Moreover, such a defense would have been good at law; and the averments, that deception practiced to prevent the complainant from making the defense, are not sustained by the evidence in the case. And further, after the judgment, the complainant gave a forthcoming bond, thus recognizing the validity of the judgment.

NOTE.—When a judgment at law will be enjoined in equity. See note to Davis v. Tileston, 6 How., 114.

Equity jurisdiction after trial at law. See note to Smith v. M'Iver, 9 Wheat., 532.

Whether when parties are in part delicto or participate criminals, equity will relieve.

Where parties are concerned in illegal agreements, or other transactions, whether they are *mala prohibita* or *mala in se*, courts of equity, following the rule of law, as to participators in crime, will not grant relief, in accordance with the maxim, *In part delicto, potior conditio defendantis*. Bromley v. Smith, Doug., 697, note, 698; Vandeyk v. Herrett, 1 East, 96; Hanson v. Hancock, 8 Term R., 575; Browning v. Morris, Cowp., 790; Osborne v. Williams, 18 Ves., 379; Buller, N. P., 131, 132; 1 Fonbl. Eq., B. 1, ch. 4, sec. 4, note (y.) Bosenquet v. Dashwood, Cas. T. Talb., 37, 40, 41; Harrington v. Bigelow, 11 Paige, 349; Warburton v. Aiken, 1 McLean, 460.

The old cases often gave relief, both at law and in equity, where the party would otherwise derive an advantage from his iniquity. But the modern doc-

THIS was an appeal from the Circuit Court of the United States for the Southern District of Mississippi.

The facts are all stated in the opinion of the court.

It was argued, in a printed brief, for the appellants, by Messrs. Walker, Freeman, and Volney E. Howard. No counsel appeared for the appellee.

The argument consisted chiefly in comments upon the testimony, and contending that giving a forthcoming bond did not recognize the validity of the judgment.

The giving and forfeiture of the forthcoming bond did not deprive the party of his right to a decree for a new trial at law. It is, in legal effect, little more than the ordinary bond of replevin. There were no judicial proceedings on the forfeiture, and no right, under the laws of Mississippi, to inquire into the irregularities, errors, or frauds of the original judgment. The giving of the bond therefore did not operate a delay in presenting his defense at law. He could only make it in equity.

It has been decided, in Mississippi, that the giving and forfeiting of a forthcoming bond operates as an extinguishment of the original judgment. But this has been held with reference to judgment liens and process. The courts would not, of course, permit an execution on the original judgment, and on the statutory judgment on the forthcoming bond, or sustain liens on both judgments. The courts of that State, however, have fully recognized the principle, that the statutory judgment rested entirely on the judicial judgment; and have held that the former could not be supported without the latter, and became void on its reversal. (*Hoy v. Couch*, 5 How. Miss., 188.) If, therefore, the appellant had a good cause for a new trial in chancery, he did not lose it by giving the forthcoming bond. So far as the merits and the equity is concerned, both proceedings are but one judgment. The statutory proceeding is only held a judgment, as a mere legal fiction, and cannot stand in the way of a court of equity.

*Mr. Justice Daniel delivered the [*71 opinion of the court:

In their bill, filed in the Circuit Court, it is alleged by the appellants, that in the month of October, 1836, the appellee, Barnes, in con-

trine has adopted a more severely just, and probably politic and moral rule, which is to leave the parties where it finds them, giving no relief, and no countenance to claims of this sort. See the cases at law: *Tompkins v. Bernet*, 1 Salk., 22; *Bromley v. Smith*, Doug., 695, note; *Collins v. Bluntern*, 3 Wils., 347; *Lowry v. Bourdieu*, Doug., 468; *Marak v. Abel*, 3 Bos. & Pull., 35; *Vandeyk v. Herrett*, 1 East, 96; *Lubbock v. Potts*, 7 East, 449, 456; *Browning v. Morris*, Cowp., 750; *Hanson v. Hancock*, 8 Term R., 575; *McCullum v. Gourley*, 8 Johns., 147; *Buller*, N. P., 131, 132, 133; *Worcester v. Eaton*, 11 Mass., 368, 376, 377; *Phelps v. Decker*, 10 Mass., 257, 274.

And in equity, see cases of *Neville v. Wilkinson*, 1 Bro. C. C., 543, 547, 548; *Jacob*, 67; *Watts v. Brooks*, 3 Ves., 612; *East India Co. v. Neave*, 5 Ves., 173, 181, 184; *Thompson v. Thompson*, 7 Ves., 469; *Knox v. Haughton*, 11 Ves., 168; *St. John v. St. John*, 11 Ves., 535, 536; *Osborne v. Williams*, 18 Ves., 379; *Bosenquet v. Dashwood*, Cas. T. Talb., 37; *Rider v. Kidder*, 10 Ves., 386; *Rawden v. Shadwell*, Amb., 269.

Where agreements or transactions are repudiated

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junction with one Dunett, introduced from other States of the Union into the State of Mississippi, and in violation of her Constitution and laws, a number of negro slaves, for the purpose of being sold as merchandise. That, in execution of the design for which they were introduced, a number of those slaves were sold by the appellee to one Thomas B. Ives, from whom he took, in payment, a bill of exchange, bearing date, in October, 1836, drawn by Ives on N. and J. Dicks, of New Orleans, and indorsed by the appellant, Sample, and one G. A. Thompson. That this bill, being presented first for acceptance and subsequently for payment, was in each instance, refused by the drawees, but was not protested either for non-acceptance or non payment. That after these transactions, upon some agreement between Barnes and Ives, a second bill of exchange was, in 1837, drawn by the latter upon the firm of Ford, Markham & Co., for \$5,916.66, at ten months after date, and was indorsed by the appellant, Sample, and by George A. Thompson, the indorsers of the previous bill, and was substituted in lieu thereof. That this second bill was not paid; but whether it was protested, or whether notice of its dishonor was ever given, the appellant, Sample, states that he was unable to recollect. That Barnes, being urged by Sample to sue Ives immediately for the amount of the second bill, instead of complying with this direction, took a deed of trust on certain property of Ives, stipulating in this deed to give further time for the payment of the bill; and that this deed of trust, and the agreements therein contained, were made without the knowledge and against the consent and directions of the appellant, Sample, and in fraud of his rights as a surety. That a suit having been instituted in the Circuit Court of the United States for the Southern District of Mississippi, against Sample, as the last indorser of the bill of exchange drawn on Ford, Markham & Co.; the said Ives, upon information being given him of that fact by Sample, assured him that he need not feel any uneasiness on that account, as he, Ives, had employed able counsel to defend him in that suit. That subsequently to this assurance from Ives, in a conversation of the appellant, Sample, with Barnes, the latter promised him, that if Ives would confess a judgment in the State Court for the amount of the bill, he,

Barnes, would dismiss the suit he had instituted against the appellant as indorser of that bill. That, upon communicating to Ives the proposition of the appellee, Ives professed his perfect readiness to comply with that proposal, and Barnes then parted with the *appel- [*72] lent, with the professed purpose of obtaining from Ives a confession of judgment; and at the same time agreed with the appellant, Sample, that, in the event of a failure by Ives to give such confession, he would inform Sample thereof, in order that they, conjointly, might endeavor to obtain from Ives a fulfillment of his promise. That Barnes omitted to give information of the refusal on the part of Ives; but permitted the appellant, Sample, to remain under the impression that a confession of judgment had been given by Ives, until after the commencement of the Circuit Court, in the month of May, 1839, when the appellant, Sample, was informed by Barnes that Ives was insolvent. That, by these circumstances, and especially by the conduct of Barnes, Sample was thrown off his guard, and a judgment by default was, in consequence thereof, rendered against him at the May Term of the Circuit Court in 1839, for the sum of \$6,822.62, and the costs of suit. That, execution having been sued out on this judgment, the appellant, Sample, in conformity with advice given him, had, with the other appellants, Pickins and Scott, as his sureties, executed a forthcoming bond for the delivery to the marshal, of the property therein named; which bond, having been forfeited, operated as a judgment, and execution thereon had been sued out, and had been levied on the slaves and other personal property of Sample.

Upon the foregoing statements, the appellants prayed that the original contract for the sale of the slaves by Barnes, and all the undertakings and liabilities growing out of that sale, might be declared to be void as having been in violation of the constitution and laws of Mississippi; and that for this cause, affecting the character of the contract, and by reason, too, of the fraud and deception imputed by the bill to the appellee, Barnes, with reference to Sample, the judgments and executions obtained for his benefit might be perpetually enjoined.

Upon the 24th of April, 1840, an injunction was awarded the appellants by the Judge of the District Court of the United States for the Southern district of Mississippi.

as being against public policy, that the relief is asked by one *in part delicto*, is not material, in equity. *Van Dyck v. Hewett*, 1 East, 96; *Hanson v. Hancock*, 6 Term R., 575; *St. John v. St. John*, 11 Ves., 535, 536; *Bromley v. Smith*, Doug., 665, 667, 668; *Hatch v. Hatch*, 9 Ves., 292, 298; *Roberts v. Roberts*, 3 P. Williams, 66, 74, and note (1); *Brownling v. Morris*, Cowp., 790; *Morris v. McCulloch*, 2 Eden, 190, and note, 193; *Goldsmith v. Brunling*, 1 Eq. Abr., Bonds, &c., F. 4, p. 88; 1 Fonbl. Eq., B. 1, ch. 2, sec. 13, and note; *Smith v. Brunling*, 2 Vern., 202; *Morris v. McCulloch*, Ambler, 432; S. C., 2 Eden, 190; see *Newland on Contracts*, ch. 33, p. 483-482; *Hill v. Spencer*, Ambler, 641; *Nye v. Moseley*, 6 Barn. & Cr., 133; *Chesterfield v. Janson*, 2 Ves., 137, 138; *Worcester v. Eaton*, 11 Mass., 376, 377; *Osborne v. Williams*, 18 Ves., 379; *McCullum v. Gourlay*, 8 Johns., 147; *O'Malley v. Reese*, 6 Barb., 658; *Morgan v. Groff*, 5 Denio, 364; 4 Barb., 628; *Like v. Thompson*, 9 Barb., 315; *Watts v. Brooks*, 3 Ves., 612; *Arden v. Patterson*, 5 Johns., 49; *Willard*, Eq. Jur., 213; 1 Story, Eq. Jur., sec. 298; *Union Bridge Co. v. Troy and Lansingburgh R. R. Co.*, 7 Lans., 240.

Money paid upon illegal contract may, while the contract remains executory, be recovered back, in action for its disaffirmance and on the ground that it is void. 2 Com. on Const., 109, 110; *Colton v. Thurland*, 5 Term R., 405; *Smith v. Birkmore*, 4 Taunt., 474; *Hastelen v. Jackson*, 8 Barn. & Cr., 221; *Vischer v. Yates*, 11 Johns., 29, 30; *Yates v. Foote*, 12 Johns., 13; *Utica Ins. Co. v. Kip*, 8 Cow., 20; *Mount v. Stokes*, 4 Term R., 564; *Lowery v. Bordien*, Doug., 470; *Edgar v. Fowler*, 3 East, 225; *Morgan v. Groff*, 4 Barb., 624.

But where the contract is executed, and the money has been paid over, the maxim *pacta est conditio possidentis* applies. Same authorities.

If one party acts under oppression, imposition, hardship, undue influence, or great inequality of age, or condition, although he may be *in delicto*, he is not *in part delicto*, and may have relief in equity. 1 Story, Eq. Jur., sec. 300; *Osborne v. Williams*, 18 Ves., 379; *Phalen v. Clark*, 19 Conn., 421; *Pineaston v. Brown*, 3 Jones' (N. C.) Eq., 494; *Freelove v. Cole*, 41 Barb., 318; *Goodenough v. Spencer*, 15 Abb. Pr. N. S., 248; 46 How. Pr., 347; 2 Thomp. & C., 508.

To that portion of the bill which charges the introduction of slaves in violation of the constitution and laws of Mississippi, the appellee declines to answer, as that charge included the liability to a criminal prosecution. To this refusal of the appellee no exception was taken, either in the pleadings or at the hearing of the cause. To every other charge in the bill the answer is directly responsive, and fully denies every material allegation. And with respect to all the charges, inclusive of the first, the testimony adduced by the complainant below, falls far short of sustaining any one of them. It is deemed loose, vague, and immaterial. Nay, the very contract with Ives, 73*] filed as an exhibit *with the bill, and which is alleged to have been an agreement for indulgence to Ives, to the prejudice of the rights of Sample, absolutely overthrows this assertion, and is shown upon its face, and by its terms and object, to have been simply an additional security from Ives, operating, if at all, for the advantage of Sample; a security, too, which the grantee in that instrument had the right to enforce immediately upon failure to pay the bill of exchange drawn on Ford, Markham & Co.

Upon the hearing of this cause before the Circuit Court at the November Term of 1848, the injunction which had been awarded the appellants was dissolved, and the bill dismissed with costs. For the examination of that decree upon appeal, this cause is now before us.

This case is then left to be decided upon its features, as disclosed in the bill and answer; and the application to these of a few settled and familiar principles of equity jurisprudence, will at once determine its fate. And first with respect to the intrinsic merits of the appellant's original claim to exemption from liability; and second, as to the degree or extent in which such claim, if ever existing, has been affected by his own conduct, as evincing either the assertion or the surrender of that claim. The bill commences by charging the introduction and sale of slaves within the State of Mississippi, in violation of the constitution and laws of that State, as the essential ground of impeachment of the original contract and of Sample's exemption from liability accruing therefrom. Yet it is somewhat singular, that whilst urging this objection, and whilst admitting his participation in the sale, by giving it the sanction of his name and credit, he is entirely silent as to any knowledge by him as to the illegality of a transaction in which he bore so important a part. He certainly possessed, at some period of time, knowledge of the character of that transaction; and if his knowledge reached back to its origin and purposes, or to the date of his own participation therein, he must be viewed as standing *in pari delicto* with all similar actors therein—a position which, however it might shield him against attempts from associates in wrong, so far as these should be urged through the instrumentality of courts of justice, can invest him with no rights, either at law or in equity, as against advantages acquired by his confederates. The appellant, Sample, was certainly bound to show himself clear of the taint of a transaction which he denounces as illegal and fraudulent, but in which he shows that he has mingled from its inception, and

which he deliberately ratified at an interval of six months after his first participation in it. His failure to do this, if his denunciation of the transaction be taken as true, must be decisive of his fate before a tribunal which lends its *aid or countenance to those only who [*74 can present themselves with pure hands, and who are free from suspicion.

The rule, as applicable to the position of this party, a rule believed to be without exception, has been distinctly announced by this court in a case very similar in most of its features to the one now before us; for that, like the present, was a case in which the contract was impeached for precisely the same reason for which the interposition of equity was here invoked; and in that, too, as in this instance, after the omission to set up a defense at law. We allude to the case of *Creath's Administrator v. Sims*, in the 5th of Howard, where this court, on page 204, have thus announced the rule by which courts of equity are governed. "Whosoever," say they, "would seek admission into a court of equity, must come with clean hands, and such a court will never interfere in opposition to conscience or good faith. The effect of these principles upon the statements of the complainant is obvious upon the slightest consideration. The complainant alleges that the obligation to which he had voluntarily become a party was intentionally made in fraud of the law, and for this reason he prays to be relieved from its fulfillment. This prayer, too, is addressed to a court of conscience; to a court which touches nothing which is impure. The condign and appropriate answer from such a tribunal to such a prayer is this, that however unworthy may have been the conduct of your opponent, you are confessedly *in pari delicto*; you cannot be permitted here to plead your own demerits: precisely, therefore, in the position in which you have placed yourself, in that position we must leave you." The attitude of the appellant, Sample, in connection with this aspect of the case, would of itself alone be conclusive against his application to equity for relief; but as this party has adduced other reasons upon which he has supposed himself entitled to equitable interposition, it may not be out of place to show their utter inconsistency with the very rudiments of equity jurisprudence: with principles so familiar to the courts and to the profession as to render their particular announcement scarcely necessary. The defense now attempted to be set up by Sample, viz.: the illegality under the constitution and statutes of Mississippi of the consideration for which the two bills of exchange were given, if true, was a legal defense, to be availed of in the action at law by plea or demurrer. Of this principle he seems to be aware, and therefore he endeavors to escape from its operation by attempting to fix upon Barnes certain practices by which he, Sample, was prevented from making a proper defense in the action against him in the Circuit Court; but with respect to the testimony adduced to establish such alleged practices it may be remarked in the *first place, that it [*75 does not make them out as they are averred by the bill to have occurred; and in the next place, admitting the averments in the bill, with respect to the practices objected against Barnes after the institution of the suit at law, suppos-

ing them to have occurred as stated in the bill, they could have formed no valid obligation upon Barnes to surrender, without consideration or equivalent, his legal rights, nor any dispensation to the appellant, Sample, from his duty to guard his interests in the pending litigation in which he was a party. Barnes had no power to compel a confession of judgment by Ives; and even if such confession had taken place, there could be no propriety in requiring Barnes to substitute for his demand, upon a solvent debtor, a judgment against another who was not solvent.

The appellant, Sample, appears to have been guilty of the grossest neglect and disregard of that diligence which the law requires at the hands of all suitors, and from the consequences of which they cannot be rescued consistently with the rights of others or the order of society. The law, as applicable to such neglect, is plainly declared in the case of *Creath v. Sims*, already quoted, in which this court have said that "a court of equity will never be called into activity to remedy the consequences of laches or neglect, or the want of reasonable diligence. Whenever, therefore, a competent remedy or defense shall have existed at law, the party who may have neglected to use it, will never be permitted here to supply the omission, to the encouragement of useless and expensive litigation, and perhaps to the subversion of justice."

How, then, shall the conduct of the appellant, Sample, be reconciled with the principles by this court so emphatically announced? He not only omits to insist upon his legal defense in the suit at law against him in the Circuit Court, but, after the judgment in that court by default, he executes a delivery bond, with the other appellants as his sureties; thus, after the first judgment against himself by default, he procures a second judgment against himself and his sureties as it were by confession. This party has, by his conduct, four times recognized the claim against him by Barnes—twice by his indorsement upon the bills drawn on N. and J. Dicks & Co., and on Ford, Markham & Co.; in the third instance by permitting the judgment by default; and fourth, by executing the forthcoming bond, which he knew was tantamount to a confession of judgment for the demand.

Upon these grounds, solely, and independently of the original consideration on which the undertaking by Sample was founded, and supposing that consideration to have been invalid, if inquired into at the proper time, this [76*] appellant must, by his conduct, *be regarded as having waived all right of inquiry into that consideration, nay, rather as having repeatedly admitted its validity. To permit him, after so doing, to contradict all that he has repeatedly and formally declared, would be to allow him to falsify his solemn acts, to trifle with the settled rules of law and the practice of the courts, and would lead to endless litigation.

We therefore order that the decree of the Circuit Court dissolving the injunction and dismissing the bill in this case be, and the same is hereby affirmed.

ORDER.

This cause came on to be heard on the tran-
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script of the record from the Circuit Court of the United States for the Southern District of Mississippi, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

Cited—4 Otto, 658; 5 Otto, 161; 17 Bank. Reg., 572.

WILLIAM F. RAYMOND'S LESSEE

v.

NICHOLAS LONGWORTH.

When sale for taxes void in Ohio.

In the State of Ohio, it is not a sufficient description of taxable lands to say, "Cooper, James, 5 acres, section 24, T. 4, F. R. 1." A deed made in consequence of a sale for taxes under such a description is void. The courts of Ohio have so decided, and this court adopts their decision.

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of Ohio.

It was an ejectment, brought by Raymond, for the following property, viz.: All that certain tract of land in the western part of Cincinnati, commencing thirty feet north of Nicholas Longworth's individual property, on the west side of Mill Creek Road; thence north, on the line of said road, five hundred feet, and extending back, the same width, at right angles with said road, four hundred feet.

The facts are set forth in the opinion of the court.

It was argued by *Mr. Chase* for the plaintiff in error, and submitted, on printed argument, by *Mr. Stanberry* for the defendant in error.

The bill of exceptions brought up other points besides the one upon which the judgment of this court rested; but it is not necessary to notice them.

*The following authorities were cited [*77] by *Mr. Stanberry*, in support of the ruling of the Circuit Court.

The entire record having been admitted in evidence, the defendant requested the court to instruct the jury, "that the description of the lot upon the duplicate, as appears by the abstract aforesaid" (Exhibit D), "was not a pertinent description of the lot, such as the statute required; and therefore, that the forfeiture to the State of Ohio was illegal and void, and the subsequent sale, by the auditor of Hamilton County, to Charles Phelps, was also void."

This instruction, as prayed by the defendant, was given by the court; and the plaintiff excepted to this opinion of the court also.

On the validity of this exception turns the principal question in the case.

In behalf of the defendant, and in support of the ruling of the court on this point, we deem it unnecessary to do more than point out the utter want of certainty in the description of the land, as contained upon the duplicate for taxation, and in the advertisements for sale and returns, as exhibited throughout the abstract from the record (Exhibit D, aforesaid); and having done so, refer the court to the uni-

form course of decision in Ohio upon the subject—invariably holding such descriptions invalid, and forfeitures and sales under them void. Indeed, all this is fully and sufficiently done in the circuit report of the present case. (4 McLean, 481; and in the case of *Miner's Lessee v. McLean's Assignee*, 4 McLean, 138.)

We shall, therefore, only briefly state, that the description of the lands, as shown by this record, upon the duplicate of taxes, and in the various returns and advertisements, is thus throughout:

"Cooper, James, 5 acres, S. 24, T. 4, fr. R. 1, Cincinnati. Value, \$830. Amount due, \$——."

This is to be read substantially thus: "Five acres in section 24, fractional range 1, Cincinnati, valued at 830 dollars," &c.

The uncertainty of description, which renders the title void, consists in its being wholly impossible to know in what part of the section this particular lot of five acres is located. Entire sections contain 640 acres; and these five acres, so far as appears, may as readily be in one part as another.

Such descriptions have been holden void by the Supreme Court of Ohio, in the following cases: *Lessee of Massie's Heirs v. Long et al.*, 2 O. R., 287; *Lessee of Treon v. Emerick*, 6 O. R., 391; *Lessee of Laferty v. Byers*, 5 O. R., 458; see, also, 15 O. R., 134; 16 O. R., 24.

78*] *Mr. Justice Catron delivered the opinion of the court:

Raymond sued Longworth, in the Circuit Court of Ohio, for a piece of land, containing about five acres, lying in the western part of the City of Cincinnati. The plaintiff claimed title, under a sale for state taxes, for the years 1837 and 1838, made by the Auditor of Hamilton County, to Charles Phelps, for eighty dollars.

The land had been listed for taxation, as the property of James Cooper. The description on the tax list, and in the subsequent return to the State Auditor, and in the advertisements of the property for sale, was as follows: "Cooper, James, 5 acres, sec. 24, T. 4, F. R. 1." The taxes not having been paid, and the land being advertised and offered for sale by the Auditor of Hamilton County, and no bid being made for it, it was returned to the General Auditor, as forfeited to the State, and he again ordered the land to be advertised and sold. On the trial below, it was insisted that the description of the premises was vague on the tax list, and in the duplicate returned to the State Auditor, and in the advertisements offering the land for sale; that no forfeiture could be founded on such description, nor a valid sale be made. And so the Circuit Court instructed the jury, pronouncing the County Auditor's deed to Charles Phelps void. And the question presented is, whether the description was sufficient.

The uncertainty consists in not setting forth in what part of section 24 the five acres are situated.

It is settled, by the Supreme Court of Ohio, that the tax list, and the duplicate transmitted to the State Auditor, as well as the advertisement, must describe the land so that its identity may be ascertained from the descrip-

tion, either by the owner, who wishes to pay the taxes before it is offered for sale, or that he may redeem after a forfeiture is pronounced; or that the public may be assured what is offered for sale.

We refer to the description in the leading case, where the sales were pronounced void for want of sufficient certainty. In *Mathews v. Thompson*, 5 Ohio, the description was, "100 acres, sec. 4, township 7, range 4." In 5 Ohio, 458, "Haines, John, No. entry, 4401; original quantity, 170 acres; quantity taxed, 70 acres." In 6 Ohio, 399, "Sixty acres, part of the N. half of S. 13." In 16 Ohio, 25, there had been listed 833 acres, as part of an original survey for 1,000 acres, without specifying in what part of the 1,000 acres the 833 acres lay. In each of the cases cited, it was held that the description was vague and the sale void. Here, the five acres are listed, and advertised as part of section 24, and the description is equally vague as any of the foregoing. And, as the State Courts have *settled what certainty [*79 is required, it is our duty to follow their decisions on the State laws, regulating proceedings in cases of tax sales.

We accordingly order the judgment of the Circuit Court to be affirmed.

ORDKR.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Ohio, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

Att'g—4 McLean, 481.

DAVID B. HERMAN, *Plaintiff in Error*,

v.

JAMES PHALEN.

SAME v. SAME.

Laws of Texas before admission as State.

The case of *League v. De Young and Brown*, 11 Howard, 185, considered and again established.

THESE two cases were brought up by writ of error from the Circuit Court of the United States for the Eastern District of Louisiana, and were argued together by Messrs. Allen and Ovid F. Johnson for the defendant in error. No counsel appeared for the plaintiff in error.

The points in the case were argued in the case of *League v. De Young*, 11, Howard, 185, to which the reporter refers.

Mr. Chief Justice Taney delivered the opinion of the court:

The two cases have been argued together and depend upon the same principles. They were decided in the Circuit Court, before the opinion

NOTE.—Re-affirms *League v. De Young*, 11 How., 185.

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of this court was pronounced in the case of *League v. De Young and Brown*, reported in 11 Howard, 185. In that case, all of the questions which arise in the cases before us were fully considered and decided; and that decision is adverse to the doctrines now contended for by the defendant in error. Upon reviewing the opinion in *League v. De Young and Brown*, we see no reason for changing it in any respect; and these two cases must therefore be reversed, and a mandate issued to the Circuit Court, directing the judgment in each of them to be reversed, and the judgment entered for the plaintiff in error.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court 80* of the United States for the *Eastern District of Louisiana, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to enter judgment for David B. Herman, the plaintiff in error.

GEORGE RUNDLE AND WILLIAM GRIF-
FITHS, Trustees of the Estate of JOHN
SAVAGE, Deceased, *Plaintiffs in Error*,
v.
THE DELAWARE AND RARITAN CAN-
AL COMPANY.

Delaware River—Riparian owners have no right to obstruct, except by license from Pa. and N. J.—such license is revocable and subject to public necessities

By the law of Pennsylvania, the River Delaware is a public navigable river, held by its joint sovereigns in trust for the public.

Riparian owners, in that State, have no title to the river, or any right to divert its waters, unless by license from the States.

Such license is revocable, and in subjection to the superior right of the State, to divert the water for public improvements, either by the State directly, or by a corporation created for that purpose.

The proviso to the Provincial Acts of Pennsylvania and New Jersey, of 1771, does not operate as a grant of the usufruct of the waters of the river to Adam Hoops and his assigns, but only as a license, or toleration of his dam.

As, by the laws of his own State, the plaintiff could have no remedy against a corporation authorized to take the whole waters of the river for the purpose of canals, or improving the navigation, so, neither can he sustain a suit against a corporation created by New Jersey for the same purpose, who have taken part of the waters.

The plaintiffs being but tenants at sufferance in the usufruct of the water to the two States who own the river as tenants in common, are not in a condition to question the relative rights of either to use its waters without consent of the other.

This case is not intended to decide whether a first license, for private emolument, can support an action against a later license of either sovereign or both, who, for private purposes, diverts the water to the injury of the first.

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of New Jersey.

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The facts in the case are set forth in the opinion of the court.

It was argued in print by *Messrs. Ashmead and Vroom* for the plaintiffs in error, and by *Mr. John M. Read*, orally, for the defendants in error. There was also a printed argument upon the same side, submitted by himself and *Mr. Green*.

The arguments, upon both sides, contained historical accounts of the legislation of Pennsylvania and New Jersey on the subject of the River Delaware, and the various compacts and negotiations between them. It is impossible, in the report of a law case, to give an explanation of these transactions, commencing before the Revolution. Those who may have occasion to investigate the matter minutely, would do well to obtain from the counsel their respective arguments. All that will be attempted, *in this report, will be to give an account [*81 of the points which were made.

The declaration charged the Canal Company with having,

1. Erected a dam in the River Delaware, above the works of the plaintiffs, and, by means of it, obstructed and penned up the waters of the river.

2. With digging a canal, and diverting the waters of the river into it, and so leading them into the State of New Jersey.

3. With cutting off the streams and brooks which theretofore had been tributary to the said River Delaware, and preventing them from flowing into it.

4. With using the waters, taken from the river, to supply the said canal, and to create a water power, from which they supply various mills, manufactories, and other establishments, with water, for the sake of gain.

The judgment of the court upon the demurrer being that the plaintiffs had no right of action, the counsel for the plaintiffs in this court assumed the following as the grounds upon which the court below founded its decision, which grounds they severally contested.

The points ruled in the court below, and of which the plaintiffs complain as being erroneous, are:

1. That the authority under which the dam of Adam Hoops has been kept and maintained in the River Delaware, since the year 1771, was not a grant, but a license, revocable at the pleasure of New Jersey alone, and, at best, impunity for a nuisance.

2. That the plaintiffs, who claim as the assignees of Adam Hoops, for the diversion of the water from their mills, cannot recover, because their works are situated in the State of Pennsylvania, and not in New Jersey, and that the claim for damages must be regulated by the rule established by the Pennsylvanian courts, which rule is opposed to the one recognized in the State of New Jersey, and applied by the Supreme Court to these defendants in error in a similar case.

3. That it is not competent for the plaintiffs to question the authority of New Jersey, to take the waters of the Delaware for her public improvements, without the consent of Pennsylvania.

First Point. With respect to the first point, the counsel for the plaintiffs in error contended,

1. That the said acts were, in form, substance, and legal effect, a grant, and not a license. They then commented on the acts, and cited the following authorities:

An authority given, will operate by way of license or grant, according to its nature and the intention of the parties. Thus, in 15 Viner's Abr., tit. Lease (N.), Pl. 1, it is said, 82*] "That if a *man license me to enter into his land, and to occupy it for a year, half year, or such like, this is a lease and shall be so pleaded." A confirmation of a title by Act of Congress (which was the least effect to be given to the Acts of 1771 and 1804), not only renders it a legal title, but furnishes higher evidence of that fact than a patent, inasmuch as it is a direct, whereas a patent is only the act of its ministerial officer. (*Grignon's Lessee v. Astor*, 2 Howard, 319; *Sims v. Irvine*, 3 Dallas, 425; *Patton v. Easton*, 1 Wheaton, 476; *Strother v. Lucas*, 12 Peters, 410.) In this latter case, at page 454, it is said by Judge Baldwin, delivering the opinion of the court, "that a grant may be made by a law, as well as a patent pursuant to a law, is undoubted (6 Cr., 128); and a confirmation by a law is as fully, to all intents and purposes, a grant, as if it contained in terms a grant *de novo*."

If the Acts of 1771 are to be regarded as a technical license, such license is not revocable by the parties granting it, or either of them, it being a license not executory, but executed, on the faith of which large expenditures had been incurred, previous to the alleged revocation by the State of New Jersey, in 1830, by the passage of the Act chartering the Delaware and Raritan Canal.

The authorities are clear and conclusive, that a license by one man to another, to make use of his land for purposes requiring expenditures of money, and contemplating permanence, is in effect a grant, and is not revocable in its nature. Thus, in *Rerick v. Kern*, 14 S. & Rawle, 267, it is said, that "permission to use water for a mill, or anything else that was viewed by the parties as a permanent erection, will be of unlimited duration and survive the erection itself, if it should be destroyed, or fall into a state of dilapidation." Although a license executory may be revoked, yet a license executed cannot be. (*Winter v. Brockwell*, 8 East, 308.) Lord Ellenborough says, in this case, "that he thought it unreasonable, that after a party had been led to incur expense, in consequence of having obtained a license from another to do an act, and that the license had been entered upon, that either should be permitted to recall his license." In *Taylor v. Waters*, 7 Taunton, 874, it is decided that a license granted on consideration cannot be revoked. *Liggins v. Inge*, 7 Bingham, 682 (20 English Com. Law, 287), decides that where the plaintiff's father, by oral license, permitted the defendant to lower the bank of a river, and to make a weir above the plaintiff's mill, whereby less water than before flowed to the plaintiffs' mill, the plaintiff could not sue the defendants for continuing the weir; the court holding that the license in that case, being executed, was not 83*] countermandable *by the party who gave it. So, in *Wood v. Manly*, 11 Adol. & Ellis, 34 (39 Eng. Com. Law, 19), it was held that a license to enter upon land to take away prop-

erty purchased thereon, was part of the consideration of the purchase, and could not be revoked. The case of *Webb v. Paternoster*, Palmer, 151, asserts the general principle, that an executed license is not countermandable. *Rerick v. Kern*, 14 S. & Rawle, 267, was the case of a license to use a water power, given without any consideration, and held not revocable. The court said the license "was a direct encouragement to spend money," and "it would be against all conscience to annul it;" and further, that "the execution of it would be specifically enjoined, and that the party to whom the license was granted would not be turned round to his remedy for damages." "How very inadequate it would be, in a case like this," says the court, "is perceived by considering that a license, which has been followed by the expenditure of ten thousand dollars, as a necessary qualification for the enjoyment of it, may be revoked by an obstinate man who is not worth as many cents." Again, it is remarked, "having had in view an unlimited enjoyment of the privilege, the grantee has purchased, by the expenditure of money, a right indefinite in point of duration."

3. If the joint Acts of 1771 and 1804 are ever to be regarded as a revocable license, and not as a grant, such license has never been actually revoked by both or either of the State Legislatures. The Act of 1830, by which the Delaware and Raritan Canal Company was chartered by the State of New Jersey, contains no such provision, and a revocation by implication will not be inferred where so great a wrong would be perpetrated on an individual.

4. Admitting that the State of New Jersey, by the Act chartering the Delaware and Raritan Canal Company, intended to revoke the grant or executed license made to Adam Hoopes, and those claiming under him, it was incompetent for that State to do so.

If the joint Act of the Legislatures of the two States be a grant, or, what is the same in legal effect, an executed license, then that grant or executed license is a contract within the meaning of the Constitution, and cannot be impaired by subsequent legislation. (*Fletcher v. Peck*, 6 Cranch, 87; *Terrel v. Taylor*, 9 Cranch, 43.) Where a Legislature has once made a grant, it is as much estopped by it as an individual. Such a grant amounts to an extinguishment of the right of the grantor, and a contract not to re-assert that right. (*Id.*) It is a principle applicable to every grant that it cannot effect pre-existing titles. Although a grant is conclusive on its face, and cannot be controverted, *yet if the thing granted is *84 not in the grantor, no right passes to the grantee. (*City of New Orleans v. Armas*, 9 Peters, 224; *New Orleans v. United States*, 10 Peters, 662; *Lindsay v. Lessee of Miller*, 6 Peters, 666.)

Again: if the franchise and privileges, secured to the plaintiffs by the joint Acts of 1771, are the subject of legislative revocation, the revocation must certainly be as extensive as the license accorded. It must, to be effectual, be the joint act of both Legislatures, and not the separate act of either. Pennsylvania was no party to the charter granted by New Jersey to the defendants. Indeed, she refused to become such, on the terms proposed by her. In many

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respects, this case resembles that of *The Chesapeake and Ohio Canal Company v. The Baltimore and Ohio Railroad Company*, 4 Gill & Johns, 1. This was the case of a contest between the plaintiffs, who claimed under the joint Acts of the States of Maryland and Virginia and the United States, and the defendants, who claimed part of the same franchise under a separate Act of the State of Maryland. It was held that neither Maryland nor Virginia, without the consent of the other, could impair a charter granted by their previous joint legislation, nor could they do so even jointly.

Second Point. The second proposition ruled by the learned Judge below, was, that the plaintiffs, who claim as the assignees of Adam Hoops, for the diversion of the water from their mills, cannot recover, because their works are situated in the State of Pennsylvania, and not in New Jersey, and that the claim for damages must be regulated by the Pennsylvania courts, which rule is opposed to the one recognized in the State of New Jersey, and applied by the Supreme Court to these defendants in error in a similar case.

1. The accuracy of this position is denied; because the action, having been instituted in the Circuit Court of New Jersey, against a New Jersey corporation, to recover damages consequent upon the erection of a public work exclusively within her own soil, the laws of New Jersey and the decisions of its Supreme Court, must furnish the rule of decision as to the extent of the liability of this corporation for the act complained of, and not the laws and decisions of Pennsylvania, as to the liability of Pennsylvania corporations.

2. If the plaintiffs' claim for damages is to be regulated by the decisions in Pennsylvania, there is no case of binding authority in the adjudications of Pennsylvania, which rules this point against them; the doctrine not going to the extent supposed by the learned judge.

Third Point. The third point ruled by the learned judge below, is, "that it is not competent [*85*] petent for the plaintiffs to question the authority of New Jersey to take the waters of the Delaware River for her public improvements, without the consent of Pennsylvania, the channel and waters of this river being vested in the two States, as tenants in common, and no one can question the authority of either to divert the water, but the other."

(These points were examined and contested.)

It has been before mentioned that the briefs of the counsel contained references to numerous historical documents. That filed on the part of the defendants in error was very elaborate, and *Mr. Read* referred to them in his oral argument. The summing up was as follows:

We have thus presented a chronological detail of the history of the Delaware, and of the legislative negotiation, and executive action of both States in relation to the river, its navigation, and the various uses of its water for canal or mill purposes; and we think it can leave no doubt, in any dispassionate mind, that the plaintiffs in error have no title whatever to claim damages from the Delaware and Raritan Canal Company, for taking water from the river for the use of its canal, under a direct and positive authority granted by the Legislature of New Jersey.

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Adam Hoops' dam, uniting the main land with Bird's Island, and extending from the head of it into the main channel of the river, and perhaps one other dam on the Pennsylvania side, were erected by the owners of the fast land, prior to 1771, without any authority whatever, either from the Crown or the provincial government. Now, these erections being in the river, and beyond the low water mark, whether the tide ebbd and flowed there or not, or whether the river was then vested in the Crown or the proprietaries, were, by the unquestioned law of Pennsylvania, nuisances, and could have been abated by individuals, and certainly by the authorized agents of the government.

The law of Pennsylvania is well stated by *Mr. Justice Grier* in this case. "But the law of Pennsylvania," says the learned judge, "by which the title and rights of the plaintiffs must be tested, differs materially from that of England and most of the other States of the Union. As regards her large fresh water rivers, she has adopted the principles of the civil law, in preference to that of England." (*Rundle v. Delaware and Raritan Canal Company*, Wallace, Jr., 297.)

In the case of *Carson v. Blazer*, the Supreme Court of that State decided that the large rivers, such as the Susquehanna and Delaware, were never deemed subject to the common law of England applicable to fresh water streams; but they are to be treated as "navigable rivers;" that the grants of William Penn, the proprietary, never extended beyond the margin of the river, which belonged to the public; and [*86*] that the riparian owners have, therefore, no exclusive right to the soil or water of such river, *ad flum medium aqua*.

These principles are fully sustained by all the Pennsylvania cases down to the present time, which are cited below, and which also exemplify the doctrine that mere tolerations or licenses on navigable streams, are always in the power of the sovereign, and can be withdrawn, at any moment, without any violation of the constitutional provision.

These nuisances were in existence at the passage of the Act of 9th March, 1771, and, under its general terms, the commissioners named in it would have been obliged to abate them at once, as artificial obstructions to the navigation, except for the proviso in the 7th section, which prohibits the commissioners, therein appointed, from removing or altering the same. The same observation applies to the New Jersey Act of the same year.

"But," to use again the language of the learned judge below, "we can discover nothing in the nature of a grant in the words of this proviso. It amounts to no more than the present toleration of a nuisance, previously erected, or, at most, to a license revocable at pleasure. The doctrine of the cases which we have just quoted, applies to it with full force and conclusive effect; nor can the plaintiff claim by prescription against the public for more than the Act confers on him, which, at best, is but an impunity for a nuisance." (2 Binn., 475; *Brown v. Commonwealth*, 3 S. & R., 273; *Shrunk v. Schuylkill Navigation Co.*, 14 S. & R., 71; *Bacon v. Arthur*, 4 Watts, 437; *Couvert v. O'Connor*, 8 Watts, 470; *Ball v. Slack*,

2 Wharton, 508, 538; *Monongahela Nav. Co. v. Coons*, 8 W. & S., 101; *Susquehanna Canal Co. v. Wright*, 9 Id., 9; *Commonwealth v. Church*, 1 Barr, 105; *Fisher v. Carter*, 1 Wallace, Jr., 69; *Mayor v. Commissioners of Spring Gardens*, 7 Barr, 348; *Reading v. Commonwealth*, 1 Jones, 201; *M'Kinney v. Monongahela Nav. Co.*, 2 Harris, 66; *Henry v. Pittsburg*, 8 W. & S., 85; *O'Connor v. Pittsburg*, Sept., 1851, MS.; Wallace, Jr., 300, 301.)

But if there be any doubt on this subject, it is removed by a reference to the agreement of 26th April, 1783, between the two sovereign States of New Jersey and Pennsylvania, then recognizing no common superior, and not affected by any provision afterwards contained in the Constitution of the United States.

The Acts of 1771 were temporary in their character, and all operations under them ceased from the commencement of the Revolutionary War. The compact of 1783, which is perpetual in its operation, declared "the River Delaware, from the station point, or northwest corner of New Jersey northerly; to the place [87*] *upon the said river where the circular boundary of the State of Delaware toucheth upon the same, in the whole length and breadth thereof, is, and shall continue to be and remain a common highway, equally free and open for the use, benefit and advantage of the said contracting parties."

Such language admits of no dispute. It is a complete and total revocation of all license or toleration, or grant of any kind to any dams or works erected on the Pennsylvania or Jersey side of the river, which were nuisances *ab origine*.

It cannot be supposed that two or more original nuisances were saved out of the general and comprehensive terms of the compact, and that they are to subsist to all future time as obstacles to any use of the river, by either or both States, which may in any manner affect the works thus placed on the soil and in the waters of the public.

This view is supported by the unbroken legislation of Pennsylvania particularly—by the ground taken by her commissioners in 1817, and virtually recognized by those of New Jersey, and by the subsequent agreements of 1829 and 1834, entered into by the commissioners of both States, which treated these works as nuisances, and as not to be regarded in any disposition to be made of the waters of the river, whether by the erection of dams, or for the supply of canal or water power.

They were in fact treated as if they had no legal existence. Can such a title give a claim for damages upon a company incorporated by a sovereign state of the confederacy?

It is also clearly "not competent for the plaintiffs to question the authority of New Jersey to take the waters of the Delaware for her public improvements, without the consent of Pennsylvania. The channel and waters of this river are vested in the two States, as tenants in common, as we have already seen; and no one can question the authority of either to divert its waters but the other. Pennsylvania was the first to seize on a portion of their joint property, for her separate use, and is estopped by her own act from complaint against New Jersey, who has but followed her example.

Besides this, mutual consent may be presumed from mutual acquiescence. At all events, the plaintiff, who is shown to have no title to the river, or any part of it, and whose toleration or license could at best only protect him from a prosecution, is not in a situation to dispute the rights of either, or claim compensation for a diversion of its waters, for the purpose of the public improvements of either of its sovereign owners.

Mr. Justice Grier delivered the opinion of the court:

The plaintiffs in error, who were plaintiffs below, are owners of "certain mills in [*88 Pennsylvania, opposite to the City of Trenton, in New Jersey. These mills are supplied with water from the Delaware River, by means of a dam extending from the Pennsylvania shore to an island lying near and parallel to it, and extending along the rapids to the head of tide water.

The plaintiffs, in their declaration, show title to the property under one Adam Hoops, who had erected his mill and built a dam in the river previous to the year 1771. In that year, the Provinces of Pennsylvania and New Jersey, respectively, passed Acts declaring the River Delaware a common highway for purposes of navigation up and down the same, and mutually appointing commissioners to improve the navigation thereof, with full power and authority to remove any obstructions whatsoever, natural or artificial; and subjecting to fine and imprisonment any person who should set up, repair or maintain any dam or obstruction in the same, provided "that nothing herein contained shall give any power or authority to the commissioners herein appointed, or any of them, to remove, throw down, lower, impair or in any manner to alter a mill dam erected by Adam Hoops, Esq., in the said River Delaware, between his plantation and an island in the said river, nearly opposite to Trenton; or any mill dam erected by any other person or persons in the said river, before the passing of this Act, nor to obstruct, or in any manner to hinder the said Adam Hoops, or such other person or persons, his or their heirs and assigns, from maintaining, raising, or repairing the said dams respectively, or from taking water out of the said river for the use of the said mills and waterworks erected as aforesaid, and none other."

The declaration avers, that by these Acts of the provincial Legislatures, the said Hoops, his heirs and assigns, became entitled to the free and uninterrupted enjoyment and privilege of the River Delaware for the use of the said mills, &c., without diminution or alteration by or from the Act of said Provinces, now States, of Pennsylvania and New Jersey, or any person or persons claiming under them or either of them. Nevertheless, that the defendants erected a dam in said river above plaintiffs' mills, and dug a canal and diverted the water, to the great injury, &c.

The defendants are a Corporation, chartered by New Jersey, for the purpose of "constructing a canal from the waters of the Delaware to those of the Raritan, and of improving the navigation of said rivers." They admit the construction of the canal, and the diversion of

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the waters of the river for that purpose, but demur to the declaration, and set forth as causes of demurrer—

"That the Act of the Legislature of the then 89*] Province of Pennsylvania, *passed March ninth, in the year of our Lord one thousand seven hundred and seventy-one, and the Act of the then Province of New Jersey, passed December twenty-first, in the year of our Lord one thousand seven hundred and seventy-one, as set forth in said amended fifth count, do not vest in the said Adam Hoops, or in his heirs or assigns, the right and privilege to the use of the water of the River Delaware without diminution or alteration, by or from the Act of the then Province, now State, of Pennsylvania, or of the then Province, now State, of New Jersey, or of any person or persons claiming under either of them, or of any person or persons whomsoever, as averred in the said amended fifth count of the said declaration. And also, for that it does not appear, from the said amended fifth count, that the same George Rundle and William Griffiths are entitled to the right and privilege to the use of the water of the River Delaware, in manner and form as they have averred in the said amended fifth count of their declaration.

"And also that, as it appears from the said amended fifth count, that the said River Delaware is a common highway and public navigable river, over which the States of Pennsylvania and New Jersey have concurrent jurisdiction, and a boundary of said States, these defendants insist that the legislative Acts of the then Province of Pennsylvania and New Jersey, passed in the year of our Lord seventeen hundred and seventy-one, as set forth in the said amended fifth count, were intended to declare the said River Delaware a common highway and for improving the navigation thereof, and that the provision therein contained, as to the mill dam erected by Adam Hoops, in the said River Delaware, did not and does not amount to a grant or conveyance of water power to the said Adam Hoops, his heirs or assigns, or to a surrender of the public right in the waters of the said river, but to a permission only to obstruct the waters of the said river by the said dam, without being subjected to the penalties of nuisance; that the right of the said Adam Hoops was, and that of his assigns is, subordinate to the public right at the pleasure of the Legislature of Pennsylvania and New Jersey, or either of them."

On this demurrer the court below gave judgment for the defendants, which is now alleged as error.

It is evident, that the extent of the plaintiff's rights as a riparian owner, and the question whether this proviso operates as the grant of a usufruct of the waters of the river, or only as a license or toleration of a nuisance, liable to revocation or subordinate to the paramount public right, must depend on the laws and customs of Pennsylvania, as expounded by her own courts. It will be proper, therefore, to 90*] give a brief sketch of *the public history of the river and the legislative action connected with it, as also of the principles of law affecting aquatic rights, as developed and established by the courts of that State.

The River Delaware is the well known
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boundary between the States of Pennsylvania and New Jersey. Below tide water, the river, its soil and islands, formerly belonged to the Crown; above tide water, it was vested in the proprietaries of the co-terminous provinces—each holding *ad medium flum aque*. Since the Revolution, the States have succeeded to the public rights both of the Crown and the proprietaries. Immediately after the Revolution, these States entered into the compact of 1783, declaring the Delaware a common highway for the use of both, and ascertaining their respective jurisdiction over the same. For thirty years after this compact, they appear to have enjoyed their common property without dispute or collision. When the Legislature of either State passed an Act affecting it, they requested and obtained the concurrence and consent of the other. Their first dispute was caused by an Act of New Jersey, passed February 4, 1815, authorizing Coxe and others to erect a wing dam, and divert the water for the purpose of mills and other machinery. The consent of the State of Pennsylvania was not requested; it therefore called forth a protest from the Legislature of that State. This was followed by further remonstrance in the following year. A proposition was made to submit the question of their respective rights to the Supreme Court of the United States, which was rejected by New Jersey. After numerous messages and remonstrances between the governors and Legislatures, commissioners were mutually appointed to compromise the disputes. But they failed to bring the matter to an amicable conclusion. The dispute was never settled, and the wing dam remained in the river.

In 1824, New Jersey passed the first Act for the incorporation of the Delaware and Raritan Canal Company, for which the Company gave a bonus of \$100,000. This Act requires the consent of the State of Pennsylvania; and on application being made to her Legislature, she clogged her consent with so many conditions, that New Jersey refused to accept her terms, returned the bonus to the Company; and so the matter ended for that time.

Both parties then appointed commissioners to effect, if possible, some compact or arrangement by which each State should be authorized to divert so much water as would be necessary for these contemplated canals. After protracted negotiations, these commissioners finally (in 1834) agreed upon terms, but the compact proposed by them was never ratified by either party.

*In the mean time, each State appropriated to itself as much of the waters of the river as suited its purpose. In 1827 and 1828 Pennsylvania diverted the River Lehigh, a confluent of the Delaware; and afterwards, finding that stream insufficient, took additional feeders for her canal, out of the main stream of the Delaware. On the 4th February, 1880, the Legislature of New Jersey passed the Act under which the defendants were incorporated, and in pursuance of which they have constructed the dam and feeder, the subject of the present suit.

The canals in both States, supplied by the river, are intimately and extensively connected with their trade, revenues and general property—while the navigation of the river above

tide water, and the rapids at Trenton, is of comparatively trifling importance, being used only at times of the spring freshets, for floating timber down the stream, when the artificial diversions do not affect the navigation. The practical benefits resulting to both parties, from their great public improvements, appear to have convinced them that further negotiations, complaints or remonstrances, would be useless and unreasonable; and thus, by mutual acquiescence and tacit consent, the necessity of a more formal compact has been superseded.

The law of Pennsylvania, by which the title and rights of the plaintiffs must be tested, differs materially from that of England, and most of the other States of the Union. As regards her large fresh water rivers, she has adopted the principles of the civil law. In the case of *Carson v. Blaser*, the Supreme Court of that State decided, that the large rivers, such as the Susquehanna and Delaware, were never deemed subject to the doctrines of the common law of England, applicable to fresh water streams, but that they are to be treated as navigable rivers; that the grants of William Penn, the proprietary, never extended beyond the margin of the river, which belonged to the public, and that the riparian owners have therefore no exclusive rights to the soil or water of such rivers *ad flum medium aquæ*.

In *Shrunk v. The Schuylkill Navigation Company*, the same court repeat the same doctrine; and Chief Justice Tilghman, in delivering the opinion of the court, observes: "Care seems to have been taken, from the beginning, to preserve the waters of these rivers for public uses, both of fishery and navigation; and the wisdom of that policy is now more striking than ever, from the great improvements in navigation, and others in contemplation, to effect which, it is necessary to obstruct the flow of the water, in some places, and in others to divert its course. It is true that the State would have had a right to do these things for the public benefit, even if the rivers had been private property; but then, compensation must [92*] have been made to the owners, the amount of which might have been so enormous as to have frustrated, or at least checked these noble undertakings."

In the case of *The Monongahela Navigation Company v. Coons*, the defendant had erected his mill under a license given by an Act of the Legislature (in 1808) to riparian owners to erect dams of a particular structure, "provided they did not impede the navigation," &c. The Monongahela Navigation Company, in pursuance of a charter granted them by the State, had erected a dam in the Monongahela, which flowed back the water on the plaintiff's mill, in the Youghiogany, and greatly injured it. And it was adjudged by the court, that the company were not liable for the consequential injury thus inflicted. The court, speaking of the rights of plaintiff, consequent on the license granted by the Act (of 1808), observe: "That Statute gave riparian owners liberty to erect dams of a particular structure, on navigable streams, without being indictable for a nuisance, and their exercise of it was, consequently, to be attended with expense and labor. But was this liberty to be perpetual, and forever tie up the power of the State? Or, is not the contrary

to be inferred, from the nature of the license? So far was the Legislature from seeming to abate one jot of the State's control, that it barely agreed not to prefer an indictment for a nuisance, except on the report of viewers to the Quarter Sessions. But the remission of a penalty is not a charter, and the alleged grant was nothing more than a mitigation of the penal law."

The case of *The Susquehanna Canal Company v. Wright* confirms the preceding views, and decides, "that the State is never presumed to have parted with one of its franchises in the absence of conclusive proof of such an intention. Hence a license, accorded by a public law to a riparian owner, to erect a dam on the Susquehanna River, and conduct the water upon his land for his own private purposes, is subject to any future provision which the State may make with regard to the navigation of the river. And if the State authorize a company to construct a canal which impairs the rights of such riparian owner, he is not entitled to recover damages from the company. In that case, Wright had erected valuable mills, under a license granted to him by the Legislature; but the court say: "He was bound to know that the State had power to revoke its license whenever the paramount interests of the public should require it. And, in this respect, a grant by a public agent of limited powers, and bound not to throw away the interests confided to it, is different from a grant by an individual who is master of the subject. To revoke the latter, after an expenditure in the prosecution of it, would be a fraud. But he who accepts a license from the Legislature, knowing [93*] that he is dealing with an agent bound by duty not to impair public rights, does so at his risk; and a voluntary expenditure on the foot of it, gives him no claim to compensation."

The principles asserted and established by these cases, are, perhaps, somewhat peculiar, but, as they affect rights to real property in the State of Pennsylvania, they must be treated as binding precedents in this court. It is clear, also, from the application of these principles to the construction of the proviso under consideration, that it cannot be construed as a grant of the waters of a public river for private use, or a fee-simple estate in the usufruct of them, "without diminution or alteration." It contains no direct words of grant, which would operate by way of estoppel upon the grantor. The dam of Adam Hoops was a nuisance when it was made; but as it did little injury to the navigation, the commissioners, who were commanded to prostrate other nuisances, were enjoined to tolerate this. The mills of Hoops had not been erected on the faith of a legislative license, as in cases we have quoted, and a total revocation of it would not be chargeable with the apparent hardship and injustice which might be imputed to it in those cases. His dam continues to be tolerated, and the license of diverting the water to his mills is still enjoyed, subject to occasional diminution from the exercise of the superior right of the sovereign. His interest in the water may be said to resemble a right of common, which by custom is subservient to the right of the lord of the soil; so that the lord may dig clay-pits, or empower others to do so, without leaving sufficient herbage

on the common. (*Bateson v. Green*, 5 T. R., 411.)

Nor can the plaintiff claim by prescription against the public for more than the Act confers on him, which is at best impunity for a nuisance. His license, or rather toleration, gives him a good title to keep up his dam and use the waters of the river, as against everyone but the sovereign, and those diverting them by public authority, for public uses.

It is true that the plaintiff's declaration in this case alleges that the waters diverted by defendants' dam and canal are used for the purpose of mills, and for private emolument, but as it is not alleged or pretended that defendants have taken more water than was necessary for the canal, or have constructed a canal of greater dimensions than they were authorized and obliged by the charter to make; this secondary use must be considered as merely incidental to the main object of their charter. We do not, therefore, consider the question before us, whether the plaintiff might not recover damages against an individual or private corporation, diverting the water of this river [94*] *to their injury, for the purpose of private emolument only, with or without license or authority of either of its sovereign owners. The case before us requires us only to decide, that by the laws of Pennsylvania, the River Delaware is a public, navigable river, held by its joint sovereigns, in trust, for the public; that riparian owners of land have no title to the river, or any right to divert its waters, unless by license from the State. That such license is revocable, and in subjection to the superior right of the State, to divert the water for public improvements.

It follows, necessarily, from these conclusions, that, whether the State of Pennsylvania claim the whole river or acknowledge the State of New Jersey as tenant in common, and possessing equal rights with herself; and whether either State, without consent of the other, has or has not a right to divert the stream, it will not alter or enlarge the plaintiff's rights. Being a mere tenant at sufferance to both, as regards the usufruct of the water, he is not in a condition to question the relative rights of his superiors. If Pennsylvania chooses to acquiesce in this partition of the waters, for great public improvements, or is estopped to complain by her own acts, the plaintiff cannot complain, or call upon this court to decide questions between the two States, which neither of them sees fit to raise. By the law of his own State, the plaintiff has no remedy against a corporation authorized to take the whole river for the purpose of canals or improving the navigation; and his tenure and rights are the same as regards both the States.

With these views, it will be unnecessary to inquire whether the compact of 1783, between Pennsylvania and New Jersey, operated as a revocation of the license or toleration implied from the proviso of the Colonial Acts of 1771, as that question can arise only in case the plaintiff's dam be indicted as a public nuisance.

Nor is it necessary to pass any opinion on the question of the respective rights of either of these co-terminous States to whom this river belongs, to divert its waters, without the consent of the other.

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The question raised is not without its difficulties; but being bound to resolve it by the peculiar laws of Pennsylvania, as interpreted by her own courts, we cannot say that the court below has erred in its exposition of them, and therefore affirm the judgment.

Messrs. Justices McLean and Daniel dissented.

Mr. Justice Catron gave a separate opinion; and *Mr. Justice Curtis* dissented from the judgment of the court, on the merits, but not from its entertaining jurisdiction.

*The following are the opinions of [95
Messrs. Justices Catron and Daniel:

Mr. Justice Catron:

My opinion is, and long has been, that the mayor and aldermen of a city corporation, or the president and directors of a bank, or the president and directors of a railroad company (and of other similar corporations), are the true parties that sue and are sued as trustees and representatives of the constantly changing stockholders. These are not known to the public, and not suable in practice, by service of personal notice on them respectively, such as the laws of the United States require. If the president and directors are citizens of the state where the corporation was created, and the other party to the suit is a citizen of a different state, or a subject or citizen of a foreign government, then the courts of the United States can exercise jurisdiction under the third article of the Constitution. In this sense I understood *Letson's* case, and assented to it when the decision was made; and so it is understood now.

If all the real defendants are not within the jurisdiction of the court, because some of the directors reside beyond it, then the Act of February 28, 1843, allows the suit to proceed, regardless of this fact, for the reasons stated in *Letson's* case. (2 How., 497.)

If the United States courts could be ousted of jurisdiction, and citizens of other states and subjects of foreign countries be forced into the state courts, without the power of election, they would often be deprived, in great cases, of all benefit contemplated by the Constitution; and in many cases, be compelled to submit their rights to judges and juries who are inhabitants of the cities where the suit must be tried, and to contend with powerful corporations, in local courts, where the chances of impartial justice would be greatly against them; and where no prudent man would engage with such an antagonist, if he could help it. State laws, by combining large masses of men under a corporate name, cannot repeal the Constitution; all corporations must have trustees and representatives, who are usually citizens of the state where the corporation is created; and these citizens can be sued, and the corporate property charged by the suit; nor can the courts allow the constitutional security to be evaded by unnecessary refinements, without inflicting a deep injury on the institutions of the country.

Mr. Justice Daniel:

In the opinion of the court, just announced in this cause, I am unable to concur.

Were the relative rights and interests of the

96*] parties to this *controversy believed to be regularly before this court, I should have coincided in the conclusions of the majority; for the reason that all that is disclosed by the record, either of the traditions or the legislation of the States of Pennsylvania and New Jersey, shows an equal right of claim on the part of either of those States to the River Delaware, and to the uses to which the waters of that river might be applied. From such an equality in each of those States, it would seem regularly to follow, that no use or enjoyment of the waters of that river could be invested in the grantees of one of them, to the exclusion of the like use and enjoyment by the grantees of the other. The permission, therefore, from Pennsylvania to Adam Hoops, or his assignees, to apply the waters of the Delaware in the working of his mill, whatever estate or interest it might invest in such grantee, as against Pennsylvania, could never deprive the State of New Jersey of her equal privilege of applying the waters of the same river, either directly, in her corporate capacity, or through her grantee, the Delaware and Raritan Canal Company. My disagreement with my brethren in this case has its foundation in a reason wholly disconnected with the merits of the parties. It is deducible from my conviction of the absence of authority, either here or in the Circuit Court, to adjudicate this cause; and that it should therefore have been remanded, with directions for its dismissal, for want of jurisdiction.

The record discloses the fact, that the party defendant in the Circuit Court, and the appellee before this court, is a Corporation, styled in the declaration, "a Corporation created by the State of New Jersey." It is important that the style and character of this party litigant, as well as the source and manner of its existence be borne in mind, as both are deemed material in considering the question of the jurisdiction of this court, and of the Circuit Court. It is important, too, to be remembered, that the question here raised stands wholly unaffected by any legislation, competent or incompetent, which may have been attempted in the organization of the courts of the United States; but depends exclusively upon the construction of the 2d section of the 8d article of the Constitution, which defines the judicial power of the United States; first, with respect to the subjects embraced within that power; and second, with respect to those whose character may give them access, as parties, to the courts of the United States. In the second branch of this definition, we find the following enumeration, as descriptive of those whose position, as parties, will authorize their pleading or being impleaded in those courts; and this position is limited to "controversies to which the United 97*] States are a party; controversies *between two or more states—between citizens of different states—between citizens of the same state, claiming lands under grants of different states—and between the citizens of a state and foreign citizens or subjects."

Now, it has not been, and will not be, pretended, that this Corporation can, in any sense, be identified with the United States, or is endowed with the privileges of the latter; or if it could be, it would clearly be exempted from all

liability to be sued in the federal courts. Nor is it pretended that this Corporation is a state of this Union; nor, being created by, and situated within the State of New Jersey, can it be held to be the citizen or subject of a foreign state. It must be, then, under that part of the enumeration in the article quoted, which gives to the courts of the United States jurisdiction in controversies between citizens of different states, that either the Circuit Court or this court can take cognizance of the Corporation as a party; and this is, in truth, the sole foundation on which that cognizance has been assumed or is attempted to be maintained. The proposition, then, on which the authority of the Circuit Court and of his tribunal is based, is this: The Delaware and Raritan Canal Company is either a citizen of the United States, or it is a citizen of the State of New Jersey. This proposition, startling as its terms may appear, either to the legal or political apprehension, is undeniably the basis of the jurisdiction asserted in this case, and in all others of a similar character, and must be established, or that jurisdiction wholly fails. Let this proposition be examined a little more closely.

The term "citizen" will be found rarely occurring in the writers upon English law; those writers almost universally adopting, as descriptive of those possessing rights or sustaining obligations, political or social, the term "subject" as more suited to their peculiar local institutions. But in the writers of other nations, and under systems of polity deemed less liberal than that of England, we find the term "citizen" familiarly reviving, and the character and the rights and duties that term implies, particularly defined. Thus, Vattel, in his 4th book, has a chapter (cap. 6th), the title of which is: "The concern a nation may have in the actions of her citizens." A few words from the text of that chapter will show the apprehension of this author in relation to this term. "Private persons," says he, "who are members of one nation, may offend and ill-treat the citizens of another; it remains for us to examine what share a state may have in the actions of her citizens, and what are the rights and obligations of sovereigns in that respect." And again: "Whoever uses a citizen ill, indirectly offends the state, which is bound to protect this citizen." The meaning of the term "citizen" *or [98 "subject," in the apprehension of English jurists, as indicating persons in their natural character, in contradistinction to artificial or fictitious persons created by law, is further elucidated by those jurists, in their treatises upon the origin and capacities and objects of those artificial persons designated by the name of corporations. Thus, *Mr. Justice Blackstone*, in the 18th chapter of his 1st volume, holds this language: "We have hitherto considered persons in their natural capacities, and have treated of their rights and duties. But, as all personal rights die with the person; and, as the necessary forms of investing a series of individuals, one after another, with the same identical rights, would be inconvenient, if not impracticable; it has been found necessary, when it is for the advantage of the public to have any particular rights kept on foot and continued, to constitute artificial persons, who maintain a perpetual succession, and enjoy a

kind of legal immortality. These artificial persons are called corporations."

This same distinguished writer, in the first book of his Commentaries, p. 123, says: "The rights of persons are such as concern and are annexed to the persons of men, and when the person to whom they are due is regarded, are called simply rights; but when we consider the person from whom they are due, they are then denominated, duties." And again, cap. 10th of the same book, treating of the PEOPLE, he says: "The people are either aliens, that is, born out of the dominions or allegiance of the crown, or natives, that is, such as are born within it." Under our own systems of polity, the term, "citizen," implying the same or similar relations to the government and to society which appertain to the term "subject" in England, is familiar to all. Under either system, the term used is designed to apply to man in his individual character, and to his natural capacities; to a being, or agent, possessing social and political rights, and sustaining social, political and moral obligations. It is in this acceptation only, therefore, that the term "citizen" in the article of the Constitution can be received and understood. When distributing the judicial power, that article extends it to controversies between citizens of different states. This must mean the natural physical beings composing those separate communities, and can by no violence of interpretation be made to signify artificial, incorporeal, theoretical, and invisible creations. A corporation, therefore, being not a natural person, but a mere creature of the mind, invisible and intangible, cannot be a citizen of a state, or of the United States, and cannot fall within the terms or the power of the above-mentioned article, and can therefore neither plead nor be impleaded in the courts of the United States. Against this position it may be urged, that the converse thereof has been ruled by this court, and that this matter is no longer open for question. In answer to such an argument, I would reply, that this is a matter involving a construction of the Constitution, and that wherever the construction or the integrity of that sacred instrument is involved, I can hold myself trammelled by no precedent or number of precedents. That instrument is above all precedents; and its integrity everyone is bound to vindicate against any number of precedents, if believed to trench upon its supremacy. Let us examine into what this court has propounded in reference to its jurisdiction in cases in which corporations have been parties; and endeavor to ascertain the influence that may be claimed for what they have heretofore ruled in support of such jurisdiction. The first instance in which this question was brought directly before this court, was that of *The Bank of the United States v. Deveaux*, 5 Cranch, 61. An examination of this case will present a striking instance of the error into which the strongest minds may be led, whenever they shall depart from the plain, common acceptation of terms, or from well-ascertained truths, for the attainment of conclusions, which the subtlest ingenuity is incompetent to sustain. This criticism upon the decision in the case of *The Bank v. Deveaux*, may perhaps be shielded from the charge of presumptuousness, by a subsequent decision of this court, hereafter to be

mentioned. In the former case, the Bank of the United States, a Corporation created by Congress, was the party plaintiff, and upon the question of the capacity of such a party to sue in the courts of the United States, this court said, in reference to that question, "The jurisdiction of this court being limited, so far as respects the character of the parties in this particular case, to controversies between citizens of different states, both parties must be citizens, to come within the description. That invisible, intangible and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen, and consequently cannot sue or be sued in the courts of the United States, unless the rights of the members in this respect can be exercised in their corporate name. If the corporation be considered as a mere faculty, and not as a company of individuals, who, in transacting their business, may use a legal name, they must be excluded from the courts of the Union." The court having shown the necessity for citizenship in both parties, in order to give jurisdiction; having shown further, from the nature of corporations, their absolute incompatibility with citizenship, attempts some qualification of these indisputable and clearly stated positions, which, if intelligible at all, must be taken as wholly subversive of the positions so laid down. After stating the requisite of citizenship, and showing that a corporation cannot be a citizen, "and consequently that [*100] it cannot sue or be sued in the courts of the United States," the court goes on to add "unless the rights of the members can be exercised in their corporate name." Now, it is submitted that it is in this mode only, viz.: in their corporate name, that the rights of the members can be exercised; that it is this which constitutes the character, and being, and functions of a corporation. If it is meant beyond this, that each member, or the separate members, or a portion of them, can take to themselves the character and functions of the aggregate and merely legal being, then the corporation would be dissolved; its unity and perpetuity, the essential features of its nature, and the great objects of its existence, would be at an end. It would present the anomaly of a being existing and not existing at the same time. This strange and obscure qualification, attempted by the court, of the clear, legal principles previously announced by them, forms the introduction to, and apology for, the proceeding, adopted by them, by which they undertook to adjudicate upon the rights of the corporation, through the supposed citizenship of the individuals interested in that corporation. They assert the power to look beyond the corporation, to presume or to ascertain the residence of the individuals composing it, and to model their decision upon that foundation. In other words, they affirm that in an action at law, the purely legal rights, asserted by one of the parties upon the record, may be maintained by showing or presuming that these rights are vested in some other person who is no party to the controversy before them.

Thus stood the decision of *The Bank of the United States v. Deveaux*, wholly irreconcilable with correct definition, and a puzzle to professional apprehension, until it was encountered by this court, in the decision of *The Louisville*

and *Cincinnati Railroad Company v. Letson*, reported in 2 Howard, 497. In the latter decision, the court, unable to untie the judicial entanglement of the Bank and Deveaux, seem to have applied to it the sword of the conqueror; but, unfortunately, in the blow they have dealt at the ligature which perplexed them, they have severed a portion of the temple itself. They have not only contravened all the known definitions and adjudications with respect to the nature of corporations, but they have repudiated the doctrines of the civilians as to what is imported by the term "subject" or "citizen," and repealed, at the same time, that restriction in the Constitution which limited the jurisdiction of the courts of the United States to controversies between "citizens of different states." They have asserted that, "a corporation created by, and transacting business in a state, is to be deemed an inhabitant of the state, [101*] capable of being treated *as a citizen, for all the purposes of suing and being sued, and that an averment of the facts of its creation, and the place of transacting its business, is sufficient to give the circuit courts jurisdiction."

The first thing which strikes attention, in the position thus affirmed, is the want of precision and perspicuity in its terms. The court affirm that a corporation created by, and transacting business within a state, is to be deemed an inhabitant of that state. But the article of the Constitution does not make inhabitants a requisite of the condition of suing or being sued; that requisite is citizenship. Moreover, although citizenship implies the right of residence, the latter by no means implies citizenship. Again, it is said that these corporations may be treated as citizens, for the purpose of suing or being sued. Even if the distinction here attempted were comprehensible, it would be a sufficient reply to it, that the Constitution does not provide that those who may be treated as citizens, may sue or be sued, but that the jurisdiction shall be limited to citizens only; citizens in right and in fact. The distinction attempted seems to be without meaning, for the Constitution or the laws nowhere define such a being as a *quasi* citizen, to be called into existence for particular purposes; a being without any of the attributes of citizenship, but the one for which he may be temporarily and arbitrarily created, and to be dismissed from existence the moment the particular purposes of his creation shall have been answered. In a political, or legal sense, none can be treated or dealt with by the government as citizens, but those who are citizens in reality. It would follow, then, by necessary induction, from the argument of the court, that as a corporation must be treated as a citizen, it must be so treated to all intents and purposes, because it is a citizen. Each citizen (if not under old governments) certainly does, under our system of polity, possess the same rights and faculties, and sustain the same obligations, political, social and moral, which appertain to each of his fellow-citizens. As a citizen, then, of a state, or of the United States, a corporation would be eligible to the state or federal Legislatures; and if created by either the state or federal governments, might, as a native-born citizen, aspire to the office of President of the United States—or to the command of

armies, or fleets, in which last example, so far as the character of the commander would form a part of it; we should have the poetical romance of the spectre ship realized in our Republic. And should this incorporeal and invisible commander not acquit himself in color or in conduct, we might see him, provided his arrest were practicable, sent to answer his delinquencies before a court-martial, and subjected to the penalties *of the articles of [*102 war. Sir Edward Coke has declared, that a corporation cannot commit treason, felony, or other crime; neither is it capable of suffering a traitor's or felon's punishment; for it is not liable to corporeal penalties—that it can perform no personal duties, for it cannot take an oath for the due execution of an office; neither can it be arrested or committed to prison, for its existence being ideal, no man can arrest it; neither can it be excommunicated, for it has no soul. But these doctrines of Lord Coke were founded on an apprehension of the law now treated as antiquated and obsolete. His Lordship did not anticipate an improvement by which a corporation could be transformed into a citizen, and by that transformation be given a physical existence, and endowed with soul and body too. The incongruities here attempted to be shown as necessarily deducible from the decisions of the cases of *The Bank of the United States v. Deveaux*, and of *The Cincinnati and Louisville Railroad Company v. Letson*, afford some illustration of the effects which must ever follow a departure from the settled principles of the law. These principles are always traceable to a wise and deeply founded experience; they are, therefore, ever contemporaneous, and in harmony with themselves and with reason; and whenever abandoned as guides to the judicial course, the aberration must lead to bewildering uncertainty and confusion. Conducted by these principles, consecrated both by time and the obedience of sages, I am brought to the following conclusions: 1st. That by no sound or reasonable interpretation can a corporation—a mere faculty in law—be transformed into a citizen, or treated as a citizen. 2d. That the second section of the third article of the Constitution, investing the courts of the United States with jurisdiction in controversies between citizens of different states, cannot be made to embrace controversies to which corporations and not citizens are parties; and that the assumption, by these courts, of jurisdiction in such cases, must involve a palpable infraction of the article and section just referred to. 3d. That in the cause before us, the party defendant in the Circuit Court having been a Corporation aggregate, created by the State of New Jersey, the Circuit Court could not properly take cognizance thereof; and therefore, this cause should be remanded to the Circuit Court, with directions that it be dismissed for the want of jurisdiction.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of *New Jersey, and was argued by [*103 counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this

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cause be, and the same is hereby affirmed, with costs.

Aff'g.—1 Wall., Jr., 275.

Cited—14 How., 457; 15 How., 260; 16 How., 326, 328, 350; 2 Woods, 472.

In re THOMAS KAINE, An Alleged Fugitive from Great Britain.

Extradition—Treaty with Great Britain—Writ of habeas corpus and certiorari to bring up prisoner and record of circuit court refused—Divided court—Power of single judge in vacation.

Under the tenth article of the Treaty of 1842, between the United States and Great Britain, a warrant was issued by a commissioner, at the instance of the British Consul, for the apprehension of a person who, it was alleged, had committed an assault, with intent to murder, in Ireland.

The person being arrested, the Commissioner ordered him to be committed, for the purpose of abiding the order of the President of the United States.

A *habeas corpus* was then issued by the Circuit Court of the United States, the District Judge presiding, when, after a hearing, the writ was dismissed, and the prisoner remanded to custody.

A petition was then presented to the Circuit Judge, at his chambers, addressed to the Justices of the Supreme Court, and praying for a writ of *habeas corpus*, which was referred by the Circuit Judge, after a hearing, to the Justices of the Supreme Court, in bank, at the commencement of the next term thereof.

At the meeting of the court, a motion was made, with the papers and proceedings presented to the Circuit Judge annexed to the petition, for writs of *habeas corpus* and *certiorari* to bring up the defendant and the record from the Circuit Court, for the purpose of having the decision of that court examined.

The motion was refused, the writs prayed for denied, and the petition dismissed.

ON the 14th of June, 1852, Anthony Barclay, the British Consul at New York, addressed to Samuel R. Betts, Judge of the District Court of the United States for the Southern District of New York, and to any commissioners authorized to perform judicial duties in the matter, a requisition and complaint. It set forth, that it had been represented to Mr. Barclay, and was believed by him, that one Thomas Kane, or Kaine, or Cain, then of Cooleen, in Ireland, did, on or about the 5th of April, 1851, fire a pistol at one James Balfie, with intent to murder him; that a warrant to apprehend him was issued by a justice of the peace, but that said Kane had absconded and fled to the United States. The requisition further stated, that the crime of which he had been guilty would have justified his apprehension and commitment if it had been committed within the United States. It then asked that a warrant for his apprehension might be issued, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence should be deemed sufficient, that it should be certified to the proper executive authority, in order that a warrant might issue for the surrender of such fugitive, under the Treaty between the United States and Great Britain.

104*] *The truth of this complaint was sworn to by Mr. Barclay.

NOTE.—When *habeas corpus* may issue and when not, and from what courts and by what judges; what may be inquired into by writ of. See note to *United States v. Hamilton*, 3 Dall., 17.

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Kaine was arrested and brought before Joseph Bridgman, a Commissioner of the United States, at New York.

The case was heard before the Commissioner, who decided, on the 23d of June, that the evidence was sufficient in law to justify the commitment of Kaine, upon the charge of assault with intent to commit murder; and ordered that the prisoner should be committed, to abide the order of the President of the United States.

A writ of *habeas corpus* was sued out, and allowed by Judge Betts. The writ was returnable to the Circuit Court of the United States; and, on the 3d of July, Judge Betts, the District Judge, then sitting alone in the Circuit Court, decided that the writ should be dismissed and the prisoner be remanded to the custody of the marshal.

On the 17th of July, the Acting Secretary of State issued a warrant, directing the marshal to deliver up Kaine to the British Consul.

On the 22d of July, Kaine presented a petition to Mr. Justice Nelson, at his chambers, praying for a writ of *habeas corpus*. The petition, although handed to Mr. Justice Nelson, was addressed to the Justices of the Supreme Court of the United States, which was not then in session.

On the 3d of August, Mr. Justice Nelson allowed the writ, and made it returnable on the 11th.

The marshal, in his return, stated the above facts, when, on the same day, Mr. Justice Nelson ordered as follows:

"The marshal having made the within return, Ordered, that in consequence of the difficult and important questions involved in the case, it be heard before all the Justices of the Supreme Court in bank, at the commencement of the next term thereof; and that, in the mean time, the prisoner remain in the custody of the said marshal."

A motion was made in this court for a *certiorari*, to bring up the proceedings of the Circuit Court, when holden by Judge Betts, which were printed, and ready to be used if the writ should be ordered.

In this condition of the case, the court passed the following order:

On consideration of the petition filed in this cause yesterday, and of the arguments of counsel thereupon had, as well in support of the application as against it, it is now here ordered by the court, that counsel have leave to argue the following questions, to wit:

1. Has this court jurisdiction upon the case, as certified by Judge Nelson?

*2. Can a *certiorari* issue to bring up [*105 the proceedings in the Circuit Court?

3. Assuming the court to have jurisdiction, and the proceedings in the Circuit Court to be legally before this court, is the party entitled to be discharged?

And it is further ordered by the court, that the same be, and hereby are set down for argument on the first Monday of January next.

The unusual length of the opinions delivered by the Judges prevents the Reporter from inserting the arguments of counsel, which he would wish to do.

The case was argued by Messrs. Busted and Brady for the petitioner, no counsel appearing on the other side.

As the opinions refer to a particular part of the proceedings and evidence below, it is necessary to insert the following:

Warrant. To John M. Higginson, Esq., Sub-Inspector, and his Assistants, this to execute.

County of Westmeath, to wit:

Whereas, complaint on oath has been made before her Majesty's justices of the peace, of and for the said County of Westmeath, at Ballinlober, on this day, that one Thomas Kane did, at Cooleen, in said County of Westmeath, on this fifth day of April, instant, feloniously and maliciously fire a pistol, loaded with powder and lead, at one James Balfe, with the intent to murder him, and did then and there wound the aforesaid James Balfe:

These are, therefore, in her Majesty's name, to charge and command you, immediately on receipt thereof, to apprehend and bring before some of her Majesty's justices of the peace, of and for said county, the body of the aforesaid Thomas Kane, to answer the complaint, and to be further dealt with according to law.

Given under my hand and seal, this 5th day of April, 1851.

JAS. FEATHERSTON, J. P. [SEAL.]

To Sub-Constable Martin Meagher and his lawful assistants, this warrant legally to execute.

J. M. HIGGINSON, 3d S. I.

MOATE, 5th April, 1851.

Endeavored to execute same on the 11th and 12th of April, '51, at Liverpool, without effect.

MARTIN MEAGHER, A. C.

106* Endeavored to execute this warrant on the night of the 29th instant, with J. M. Higginson, Esq., S. I., and party: did not succeed.

JAMES GREEN, Head Constable.

Do. do. on the 7th, June, '51. MOATE, May 30th, '51.

J. G., H. C.

Endeavored to be executed on the 6th July '51, by

JAS. MOORE, C.

Do. Oct. 16. } J. G., H. C. Endeavored to execute this warrant on Thos. Kane, night of the 29th Feb., '52, without effect.

Do. do. 28. } J. G., H. C. Endeavored to execute this warrant on Thos. Kane, night of the 29th Feb., '52, without effect.

Do. Nov. 10, '51. M. M., A. C.

Do. Nov. 25, '51. J. MALON, S. C.

Do. Nov. 29, '51. A. C. MEAGHER and party. M. COSTIGAN, Const.

Do. Dec. 21st. M. COSTIGAN, C. Endeavored to execute this warrant, night of the 18th March, '52, without effect.

Do. do. 27th. A. C. MEAGHER and party. M. COSTIGAN, Const.

Do. do. 12th Jan'y, '52. A. C. MEAGHER and party. M. COSTIGAN, Const.

Do. 22d Feb., '52. By Sub-Inspr. and party. M. COSTIGAN, Const.

Borough of Liverpool, to wit:

Whereas, proof upon oath hath this day been made before me, one of her Majesty's justices of the peace for the said borough, that the name, James Featherston, to the within warrant subscribed, is of the handwriting of the justice of the peace within mentioned. I do hereby authorize Martin Meagher, who bringeth to me this warrant, and all other persons to whom it was originally directed, or by whom it may lawfully be executed, and also all constables and other peace officers of the said borough of Liverpool, to execute the same within the said late mentioned borough.

Given under my hand, this 11th day of April, 1851.

R. E. HARVEY.

County of Westmeath, to wit:

The information and complaint of James

Balfe, of Shurock, farmer, taken 5th day of April, in the year of our Lord 1851, before the undersigned, one of her Majesty's justices of the peace in and for said County of Westmeath, who saith, that on this day (the 5th day of April) I was ploughing near that part of the land of Cooleen, in said County of Westmeath, which land a man named William Stones had lately been dispossessed of, and about which he had frequently threatened me, and told me a few days since that I might sow it, but that I should not *live to reap it. Saith, about [*107 the hour of 12 o'clock at noon, on said day, a man named Thomas Cain, or Kain, came up to me when I was ploughing, armed with a case of pistols. On coming up to me he said to me, 'God save you; are you Peter Balfe?' I said, don't you know well I am not, Tom. He then asked, is that Stones' land? I said not; that it was the other side of the ditch. He then asked me, was I warned to have nothing to do with it (Stones' land), and I said not, except what I heard from Stones. He then said he came to warn me, and asked had I a prayer book. I said not. Well, I have one myself; and he took both pistols in one hand, and took a prayer book out of his pocket and threw it on the ground towards me. I stooped to take it up, and while stooping he fired one of the pistols at me; and on examining my person, I found the mark of a bullet and twenty-seven grains of shot in my side, just under my left arm. He was so close that the powder discolored my coat, and some of the said shot marks was on my left arm. I then jumped up and ran away, and he followed me some distance; he then turned back towards the horses, and I went into John Mularney's house, and sent for the horses. I saw no more of him. I knew him well for some years back, and I kept his prayer book.

his
JAMES BALFE, mark.

Sworn before me the day and year first mentioned, at Ballentubbe, in said County of Westmeath, this 5th day of April, 1851.

JAMES FEATHERSTON, J.

I certify that the information, copied on the other side hereof, is the original deposition upon which the original warrant has been issued by me for the apprehension of Thomas Kain, charged with shooting at James Balfe, of Shurock, in the County of Westmeath, with intent to murder him, the said James Balfe; and I further certify, that the said copy at the other side hereof is a true copy of said original deposition.

Dated the 25th day of May, 1852.

JAS. FEATHERSTON, H.

One of her Majesty's Justices of the Peace of the County of Westmeath, in Ireland.

Witness present—MARTIN MEAGHER, A. C.

The following opinion was delivered by Mr. Justice Catron, in which Messrs. Justices McLean, Wayne, and Grier, concided. Mr. Justice Curtis delivered a separate opinion, and Mr. Chief Justice Taney, Messrs. Justices Daniel and Nelson, dissented.

*Mr. Justice Catron:

The facts adduced on the part of Kane, the applicant for our interference, show that a complaint was made out in due form by coun-

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sel, at the instance of the British government, through its agents, to secure the surrender of the fugitive; and that Mr. Barclay, the British Consul at New York, was specially employed, by direct authority of the British Minister, accredited to this government, to take the proper steps, according to the tenth article of the Treaty of 1842; and furthermore, an officer of the Irish constabulary, who was able to identify Katine, had been sent to Mr. Barclay, with letters from the British Home Department, to assist in the prosecution.

In pursuance of this authority, Mr. Barclay made the necessary affidavit, and caused Katine to be arrested and brought before Joseph Bridgham, Esquire, a commissioner appointed by the Circuit Court of the United States, for the Southern District of New York; who reports the principal facts presented to him, as having occurred in Ireland, as follows: "The original warrant in this case was issued by James Featherstonhaugh, Esq., a justice of the peace of the County of Westmeath, Ireland, in which county the alleged crime was committed. The warrant was produced before me, together with a copy of the information or affidavit upon which said warrant was issued, said copy being certified according to the Act of Congress, by the justice of the peace who issued the warrant, and attested by the oath of the witness to be a true copy. James Balfé, the witness who made the information or affidavit, states, among other things, 'that on the 5th day of April, 1851, he was ploughing some land in the County of Westmeath, when Thomas Katine came up to him, armed with a case of pistols, and after some conversation respecting some land, of which a man named Stone had lately been dispossessed, and respecting which the witness had been threatened, said, that he came to warn the witness Balfé about it, and asked if he, witness, had a prayer book; witness said that he had not; Katine then said that he had one himself, and threw it on the ground before the witness, who stooped to pick it up; that while stooping, Katine fired one of the pistols at him, and that on examining his person he found marks of a bullet and twenty-seven shot in his side, just under his left arm; that he then fled, and that Katine pursued him to some distance, but finally turned back, and witness saw no more of him.'

Upon this information the said Featherstonhaugh, justice of the peace for the County of Westmeath, granted his warrant, for the apprehension of Thomas Katine, the prisoner, upon complaint on oath, made before him, that the prisoner had feloniously and maliciously fired [109] a pistol, loaded with powder and *lead, at the said James Balfé, with intent to murder him. This warrant, dated April 5, 1851, was immediately put into the hands of one Martin Meagher, constable of Westmeath, who made search for the prisoner and was unable to find him or to execute the warrant. The said Meagher was produced before me, as a witness, and testified, among other things, that he was acting constable of the Irish constabulary, of the County of Westmeath, in Ireland, and had been such constable for several years; that he knew Thomas Katine, the prisoner, and had known him for three years and upwards; that he had received, as such constable, the warrant

before mentioned, to execute against the prisoner; that it was the original warrant; that he saw James Featherstonhaugh, the magistrate, execute it; and that he knew said Featherstonhaugh to be a justice of the peace of the County of Westmeath, in Ireland."

The case presented to us shows that the facts here stated are correctly made. Nothing is found in the proceedings before us, from which it appears that our government took any step to aid the British authorities in arresting and committing Katine. And the Attorney-General declined to appear, on the part of the United States in this court, in opposition to this motion; nor did counsel appear on behalf of the British government, the argument before us being on behalf of the fugitive only.

On the foregoing state of facts the question arises, whether the United States Commissioner had power and jurisdiction to proceed without the previous authority of his own government.

Several obscurities in our Extradition Treaties with Great Britain and France were supposed to require legislation, on the part of Congress, to secure their due execution, and accordingly the Act of August 12th, 1848, was passed. By its provisions, the Judges of the Supreme Court, and those of the District Courts of the United States, the Judges of the several State Courts, and also Commissioners appointed for the purpose by any of the courts of the United States, are severally vested with power and jurisdiction to act, on complaint made under oath, charging a person with having committed any of the crimes enumerated within the foreign jurisdiction; and to issue a warrant for the apprehension of the person charged, so that he may be brought before such judge or commissioner, to the end that the evidence of criminality may be heard and considered; and if it be deemed sufficient to sustain the charge, under the provisions of the Treaty, then it is made the duty of the judge or commissioner, to certify the fact of sufficiency, together with a copy of all the testimony taken before him, to the Secretary of State, so that a warrant may issue by the Executive, on the requisition of the foreign government, through its proper authorities, *for the surrender of the fugi- [*110] tives. And the person charged shall be committed to jail, and there remain under the warrant of the judge or commissioner until the surrender shall be made.

That an executive order of surrender to a foreign government is purely a national act, is not open to controversy; nor can it be doubted that this executive act must be performed through the Secretary of State by order of our Chief Magistrate representing this nation. But it does not follow that Congress is excluded from vesting authority in judicial magistrates to arrest and commit, preparatory to a surrender.

The Treaty with Great Britain is equally binding on us as the Act of Congress, and it likewise confers jurisdiction and authority on the judges and magistrates of the respective governments, to issue warrants for the apprehension of fugitives; and for hearing and considering the evidence produced against them; and also provides, that the committing magistrate shall certify as to the sufficiency of the evidence, to the executive authority, so that a warrant of surrender may issue. But we are

here more particularly considering the first and third sections of the Statute; they are merely explanatory of the Treaty, and altogether consistent with it. Congress was scrupulously careful, neither, to limit or extend the Treaty stipulations. According to the terms of the Statute, no doubt is entertained by me, that the judicial magistrates of the United States, designated by the Act, are required to issue warrants, and cause arrests to be made, at the instance of the foreign government, on proof of criminality, as in ordinary cases when crimes are committed within our own jurisdiction, and punishable by the laws of the United States.

But it is insisted that, as these acts, in cases of fugitives, must be done in conformity to a treaty of one nation with another, and as a nation can only act through the supreme executive authority, representing the nation, the Judges and Commissioners have no power to take the first step without being authorized to do so by the President, who represents the nation; and that the agents of a foreign nation have no right to call on our judicial officers to act, in advance of authority from the President.

On the other hand, it is supposed that the judicial magistrate proceeds in obedience to the Treaty and Act of Congress, by which he is invested with power to determine, independent of the President's commands, on the authority of those who apply to prosecute the fugitive; and that he must decide for himself, before the warrant issues, whether the prosecutor has the authority of his nation to demand the warrant, [111*] either from official *station, or by special deputation, in some satisfactory form, so that oppression of the party accused will be avoided.

That the British Consul in this instance had the authority of his government to demand the arrest and commitment, cannot be doubted; nor that the British government was, and now is, seeking the surrender.

Two Acts of Parliament have been passed to carry the Treaty of 1842 into effect in the British dominions; one in 1843, and the other in 1845; the authority of which is invoked as expressing the true construction of the Treaty. They require one of the principal secretaries of state in England, if the fugitive is found in England, or the Chief Secretary of the Lord-Lieutenant of Ireland, if the fugitive is found there, or if found in a colony abroad, the officer administering the government of the colony, to signify that the requisition has been made, and to require all magistrates and officers of justice within the jurisdiction where the requisition is made, to aid in apprehending the person accused, and committing him for the purpose of being delivered, according to the provisions of the Treaty.

The British Acts confer authority to arrest and commit, on judges of courts, and also on justices of the peace, and inferior police magistrates. Our Act of Congress excluded justices of the peace and inferior magistrates, and limits the power to the Judges of the United States Courts, and to Commissioners appointed for the purpose by them; and to the respective State Judges. And these, as already declared, are, in my opinion, authorized to proceed without a previous mandate from the Executive Depart-

ment. Nor can I see any good reason why it should be otherwise. The judicial magistrate is bound to decide on the sufficiency of the affidavits on which the warrant of arrest is founded, and compelled to determine on the right to further prosecute, in every step of the proceeding; and why he should not have power to decide on the prosecutor's authority to institute the proceeding, it is difficult to perceive.

The people of this country could hardly be brought to allow an interference of the President with the Judges in any degree.

The experiment was made during Mr Adams' administration, in 1799, and signally failed. Jonathan (or Nathan) Robbins had been arrested as a fugitive, under the 27th article of Jay's Treaty, for murder in the British fleet. He was imprisoned at Charleston under a warrant of the District Judge of South Carolina, and had been confined six months, when the Secretary of State addressed a letter to the Judge, mentioning that application had been made by the British Minister to the President for the delivery of Robbins, according to the Treaty. The letter said: "The President advises and requests you to deliver him up." *On this authority the prisoner was [*112 brought before the District Court on *habeas corpus*, and his case fairly enough heard, to all appearance, from the accounts we now have of it; and the Judge ordered the surrender in the following terms: "I do therefore order and command the marshal, in whose custody the prisoner now is, to deliver the body of said Nathan Robbins, *alias* Thomas Nash, to the British Consul, or such person or persons as he shall appoint to receive him."

The prisoner was accordingly delivered to a detachment of federal troops stationed there, to aid in the surrender; and they delivered him to an officer of the British navy, who was ready to receive him on board of a vessel of war, in which he was carried away.

That the judge acted by order of the President, and in aid of the Executive Department, was never disputed; and the then administration was defended on the ground that the Treaty was a compact between nations, and might be executed by the President throughout; and must be thus executed by him, until Congress vested the courts or judges with power to act in the matter; which had not been done in that instance. (5 Pet., Ap., 19; 7 Am. Law Jour., 13.)

The subject was brought to the notice of the House of Representatives in Congress, by resolutions impeaching the President's conduct in Robbins' case, and where Mr. Marshall (afterwards Chief Justice of this court) made a speech in defense of the President's course, having much celebrity then and since, for its ability and astuteness. But a great majority of the people of this country were opposed to the doctrine that the President could arrest, imprison and surrender a fugitive, and thereby execute the Treaty himself; and they were still more opposed to an assumption that he could order the courts of justice to execute his mandate, as this would destroy the independence of the judiciary, in cases of extradition, and which example might be made a precedent for similar invasions in other cases; and from that day to this, the judicial power has acted in cases of

extradition, and all others, independent of executive control.

That the eventful history of *Robbins'* case had a controlling influence on our distinguished negotiator, when the Treaty of 1842 was made; and especially on Congress, when it passed the Act of 1848, is, as I suppose, free from doubt. The assumption of power to arrest, imprison, and extrude, on executive warrants, and the employment of a judicial magistrate to act in obedience to the President's commands, where no independence existed or could exist, had most materially aided to overthrow the administration of a distinguished revolutionary patriot, [113*] *whose honesty of purpose no fair-minded man at this day doubts. Public opinion had settled down to a firm resolve, long before the Treaty of 1842 was made, that so dangerous an engine of oppression as secret proceedings before the executive, and the issuing of secret warrants of arrest, founded on them, and long imprisonments inflicted under such warrants, and then, an extradition without an unbiased hearing before an independent judiciary, were highly dangerous to liberty, and ought never to be allowed in this country. Congress obviously proceeded on this public opinion, when the Act of 1848 was passed, and therefore referred foreign powers to the judiciary when seeking to obtain the warrant, and secure the commitment of the fugitive; and which judicial proceeding was intended to be independent of executive control, and in advance of executive action on the case. And such has been the construction, and consequent practice, under the Act of Congress and Treaty by our Executive Department, as we are informed, on application to that department. What aid the executive will afford to a foreign government through its prosecuting attorneys, in cases arising under treaties, rests with itself, and not with us, as it acts altogether independent of the judiciary.

In my judgment, the law is as it should be. The Treaty of 1842 settled the dividing line of jurisdiction between the United States and the British possessions in America, from the Atlantic Ocean to the Rocky Mountains. On either side of the line, in great part, there is an extensive population; escapes of criminals from the jurisdiction where the crime was committed, to the other, must often occur; and if criminals are taken at all, they must be arrested in hot pursuit, when fleeing from justice. To do so, a magistrate must be at hand to issue the warrant, cause the arrest, and adjudge the criminality. If Congress had declared that the President should first be applied to through the British Minister, and then issue his mandate to the judges to proceed in each case, the Treaty would become nugatory in most instances; and in the entire range of country west of the Rocky Mountains and for more than five hundred miles on this side of it, throughout the great western plains, no arrests could be made, nor would they be attempted.

What Great Britain has done by its legislation, cannot control our decision; we must abide by our own laws. If theirs are inconvenient, or supposed to violate the spirit of the Treaty, it is the duty of our government to complain, and ask that they be reformed.

There is another striking consideration that must have had weight with our government,

when the Act of 1848 was passed. Judges and state magistrates arrest and commit our own citizens, *without exception, in all instances, and for every grade of crime and offense against our state and federal laws; they determine on the rights of the prosecutor to commence the proceeding; on the sufficiency of the affidavit on which the warrant of arrest is founded; on the evidence of criminality after the arrest is made; and imprison or take bail preparatory to a trial in court. Of this there is no complaint, nor any supposed danger of oppression, as the writ of *habeas corpus* promptly corrects all irregularities. Why, then, should a foreign criminal be more tenderly dealt by? He, too, has every benefit of the writ of *habeas corpus*; and furthermore can only be arrested by the authority of his own government; whereas, our citizens can be arrested at the instance of any person making the proper affidavit that the crime had been committed within our jurisdiction.

This country is open to all men who wish to come to it. No question, or demand of a passport meets them at the border. He who flees from crimes committed in other countries, like all others, is admitted; nor can the common thief be reclaimed by any foreign power. To this effect we have no treaty. But it is certainly due to our citizens that they should be protected against murderers, and those who attempt to murder; and against pirates, house burners, robbers and forgers.

That these should be extruded, on the demands of a foreign government where the crime was committed, and there punished, is due to humanity. Such wicked and dangerous men ought not to remain here. The case before us furnishes a striking instance of our dangerous condition in this respect. The prisoner successfully resisted and evaded execution of process on him by the civil authority in England, to which he fled from Ireland, for nearly a year, and in various instances, as the official returns on the original warrant show. And when the Circuit Court heard his case, the Judge tells us that it was to be deplored, that during the argument, the manifestations by the crowd thronging the court, to resist the detention of the prisoner, should be such that the marshal reported to the court he could not venture to remove him from the prison, in obedience to the writ, without an armed force; and therefore his case was heard, from necessity, in the prisoner's absence, for fear 'that he would be rescued from the custody of the law by a mob.'

It also appears, that when the warrant of the Secretary of State was delivered to the British consul and agent, he had to delay, and could not ship the prisoner, 'on account of the expressed belief of the marshal, of the necessity of an armed or powerful police force, to counteract outward excitement and threats of rescue.'

This case is embarrassed with some other considerations. It is urged that the Commissioner who committed Kaine had no power, because he had not been specially appointed for that purpose. The circuit court held, that the order of appointment covered the case of fugitives. That the order conferred on this special magistrate authority to commit in all other criminal cases, to the full extent that the

United States Judges have authority, is admitted; and that he was a magistrate of the United States government, within the direct term of the Treaty, cannot be denied, as I think. If there was a doubt, however, as to the meaning of the order of appointment, it was quite easy to remedy the defect in several ways. The order might have been amended, and a new commitment made, as one of the clerks of the Federal Court at New York was acting as Commissioner; or either of the Judges might have committed the defendant in the exercise of the original jurisdiction. But the Circuit Court has construed its own order, nor will I interfere with that construction.

It is proper, however, to say, that Commissioners, acting under orders of appointment, couched in general terms, as this is, in its concluding part, have executed the Act of 1848, without anyone supposing they wanted power, until now; nor has any special appointment been made, to the mere end of executing the act, by any court of the United States, so far as I know. I feel quite safe in saying, that it has not been done in any judicial circuit in the United States.

The proof that Kaine shot Balfe, with an intent to commit murder, is conclusive, beyond controversy, if competent; and the only question that can arise on the merit is, whether the copy of Balfe's deposition, received by Commissioner Bridgman, was admissible.

It is objected, "that there was no evidence what the authority of the foreign magistrate was; whether to issue warrants or to take cognizance of offenses, and of what grade of offenses."

The Commissioner held, that it was not necessary to produce the commission under which the Irish magistrate held office, and acted, nor to prove its contents, proof that he publicly discharged the duties being *prima facie* evidence of his official character; the presumption being, that if a man regularly acts in a public office, he has been rightfully appointed. Meagher proves that the Irish magistrate thus acted, and his proof is fortified by the original warrant produced by him. It is official and authentic on its face.

There was sufficient evidence, in my opinion, before the Commissioner, to establish the official character of the magistrate, before whom Balfe's deposition was taken; and that the copy proved to be a true copy, by Meagher, was [116*] properly received, *under the 2d section of the Act of 1848. It requires, that copies shall be certified under the hand of the person issuing the warrant, and proved to be true copies by the oath of the party producing them. And I think it is doubtful whether Congress did not mean to say, that the official character of the magistrate should be *prima facie* established by the deposition and certificate, without further proof of his authority.

After Kaine had been committed by the Commissioner, the Circuit Court was applied to, by petition, for writs of *habeas corpus* and *certiorari*, to bring up the prisoner and proceedings before that court. The writs were issued, and a very thorough examination had of the law and the facts. The court decided that the commitment was, in all respects, legal and proper, concurred with the Commissioner's decision, and ordered

the prisoner to be remanded to the custody of the marshal, under the commitment of the Commissioner.

The opinion and judgment of the District Judge, who presided, are before us, and form part of the proceedings presented here; and it is due to that able jurist to say, that he brought to the consideration of the case a degree of patience, learning and capacity rarely met with, and which no other judge can disregard without incurring the risk of error.

After this careful consideration of the case, in open court, the Circuit Judge granted a second writ of *habeas corpus*, and thereby stayed the warrant for Kaine's extradition, awarded by the Secretary of State, and which had been delivered to the British authorities; and the matter was again brought before that Judge, at chambers, but not deeming it proper to act, he adjourned the proceeding, as presented to him, into this court; and of the case thus presented, we are called on to take jurisdiction. Cognizance could only be taken of the matter, on the assumption that original jurisdiction existed in the Circuit Judge to act, but on which he did not act; and the case comes here as one of original jurisdiction, which we are called on to exercise; and as the Constitution declares that this court shall only have appellate powers, in cases like this, it follows that the transfer made by the Circuit Judge is of no validity, and must be rejected. Foreseeing that we might thus hold, the counsel for the prisoner, Kaine, also moved this court, on petition, with the papers and proceedings presented to the Circuit Judge annexed thereto, for writs of *habeas corpus* and *certiorari*, to bring up the defendant, and the record from the Circuit Court, to the end of having the decision of that court examined here.

The case has been carefully and ably argued before us, on behalf of the prisoner; and anxiously considered by this court, *on [*117 every ground presented, and especially on its merits; and I am authorized to say, that Judges McLean, Wayne, and Grier, agree with the views above given, and that we refuse the motion for the writ, on the merits. We are not disposed, under the circumstances, to exercise the jurisdiction of this court in the case.

Mr. Justice Curtis:

To state intelligibly the grounds on which I rest my judgment in this case, it is necessary to advert to the proceedings by means of which it comes before us.

On the 14th day of June, 1852, a complaint, on oath, was presented to Joseph Bridgman, Esq., one of the commissioners to take affidavits, &c., appointed by the Circuit Court of the United States, in the Southern District of New York, charging that Thomas Kaine, in that part of the dominions of Her Britannic Majesty, called Ireland, had feloniously assaulted one John Balfe, and inflicted upon him a wound with a pistol, with intent to murder him: that a warrant to arrest Kaine, for this felony, was issued by a justice of the peace, duly authorized for this purpose, but Kaine having fled from justice, took refuge in the United States, and was then in the Southern District of New York; and the complainant, who describes himself as the Consul of Her

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Britannic Majesty in New York, prays that a warrant may be issued to apprehend Kaine, to the end that such proceedings may take place for his surrender to the authorities of Great Britain as are required by the Treaty between the United States and Great Britain, and the Act of Congress, passed to carry that Treaty into effect.

A warrant did issue, Kaine was arrested, and a hearing took place, the result of which was, that the Commissioner ordered Kaine to be committed, pursuant to the Treaty, to abide the order of the President of the United States, in the premises.

In this stage of the proceedings, a writ of *habeas corpus* was issued by the Circuit Court of the United States for the Southern District of the New York. Kaine was brought before that court, in which the District Judge then presided, and after a hearing, upon all the objections raised by the prisoner, the writ of *habeas corpus* was dismissed, and Kaine was remanded and continued in the custody of the marshal, under his arrest and commitment by the process of the Commissioner. On the 22d day of July, 1852, Kaine presented to Mr. Justice Nelson, at chambers, a petition addressed to the Justices of the Supreme Court of the United States, in which he sets forth, that he is detained in custody by an order made by Judge Betts, on the 9th day of July, 1852, that his detention is illegal, and praying **118*** for a writ of *habeas corpus* to inquire into the cause of his commitment.

Upon this petition, Mr. Justice Nelson made an order, under which a writ issued, which is as follows:

The President of the United States of America, to the United States Marshal for the Southern District of New York, or to any other person or persons having the custody of Thomas Kaine, greeting:

We command you, that you have the body of Thomas Kaine, by you imprisoned and detained, as it is said, together with the cause of such imprisonment and detention, by whatever name the said Kaine may be called or charged, before our Justices of our Supreme Court of the United States, at his chambers, in Cooperstown, New York, on the 11th day of August, instant, to do and receive what shall then and there be considered, concerning the said Thomas Kaine.

Witness, SAMUEL NELSON, Esq., one of our Justices of our said Court, this third day of July, eighteen hundred and fifty-two.

RICHARD BUSTEED, Attorney for petitioner.

Upon the return of the marshal to this writ, a hearing was had, which resulted in the following order, made by Mr. Justice Nelson:

COOPERSTOWN, August 11, 1852. At Chambers.

The marshal having made the within return. Ordered, that in consequence of the difficulty and important questions involved in the case, it be heard before all the Justices of the Supreme Court, in bank, at the commencement of the next term thereof; and that, in the mean time, the prisoner remain in the custody of the said marshal. S. NELSON.

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These are the proceedings which have brought this case here, and the first question which arises is, whether, under these proceedings, we have any power to act?

In my opinion, we have not. Passing over the question, whether the court itself could rightfully issue a writ of *habeas corpus* upon the case made before Mr. Justice Nelson, which I shall consider hereafter, I think a judge of the court in vacation, at his chambers, has no power to grant a writ of *habeas corpus* out of this court, or to make such a writ returnable before himself, and then adjourn it into term; and, that if he had such power, it has not been exerted in this case, the writ actually issued not being a writ out of this court, or upon which, as process, this court can take any action.

It is not to be doubted, that whatever jurisdiction belongs to the Supreme Court, under any writ of *habeas corpus ad subjiciendum*, is *appellate. It is equally clear that no **[*119]** part of the appellate jurisdiction of this court can be exercised by a single judge, at his chambers. It is also well settled, that the question, whether such a writ of *habeas corpus* shall issue from this court, is one upon which the court ought to pass, before the writ issues: the allowance of the writ being an exercise of its limited appellate jurisdiction, which only the court itself has the power to exert. (*Ex-parte Milburn*, 9 Peters, 704.)

From these premises it also follows, that if such a writ be issued from this court, it cannot be made returnable before a judge, at chambers, for the reason that he cannot there exercise any appellate power under it. And, finally, this writ does not bear the seal of the Supreme Court, is not tested by the Chief Justice or signed by the clerk, as is required by the Act of Congress (1 Stat. at Large, 93), but bears the seal of the Circuit Court of the Southern District of New York, is tested by Mr. Justice Nelson, is not signed by any clerk, and therefore cannot be considered process issuing out of this court, or upon which we can take jurisdiction.

I concur with my brethren in the opinion, that under this writ the court can pass no order whatever.

It remains to consider the application made by the counsel of Kaine, to have another writ of *habeas corpus* allowed by this court.

The first question is, whether we have jurisdiction to act under the writ, if allowed in the case shown by the petitioner. There are some principles, bearing on this question, which are settled. That this court has no original jurisdiction to issue a writ of *habeas corpus ad subjiciendum*, and can grant such a writ only in the exercise of its appellate jurisdiction, and consequently, by means of it, can revise only the proceedings of those tribunals over which, and in respect to which, it has an appellate control, have been so repeatedly and uniformly decided here, that they must be considered as finally settled. (*Marbury v. Madison*, 1 Cr., 175; *Ex-parte Bollman*, 4 Cr., 100, 101; *Ex-parte Kearney*, 7 Wheat., 38; *Ex-parte Watkins*, 8 Peters, 193, S. C., 7 Peters, 568; *Cohens v. State of Virginia*, 6 Wheat., 264; *Osborn v. Bank of the United States*, 9 Wheat., 738; *Ex-parte Madraza*, 7 Peters, 627; *Ex-parte Barry*, 2 Howard, 65.) That no such control, by

means of an appeal, writ of error, or other proceeding, can be exercised by this court over a commissioner, acting under the authority of an Act of Congress, or under color of such an authority, and that this court has no power in any way to revise his proceedings, I consider equally clear. In *Ex parte Metzger*, 5 Howard, 176, it was determined that a writ of *habeas corpus* could not be allowed, to examine a com-120*] mitment *by a District Judge, at chambers, under the Treaty between the United States and France, for the reason that the Judge, in ordering the commitment, exercised a special authority, and the law had made no provision for the revision of his judgment. The same reason applies to the action of this Commissioner. Not only has the law made no provision for the revision of his acts by this court, but, strictly speaking, he does not exercise any part of the judicial power of the United States. That power can be exerted only by Judges, appointed by the President, with the consent of the Senate, holding their offices during good behavior, and receiving fixed salaries. (Constitution, art. 3, sec. 1.) The language of *Mr. Chief Justice Taney*, in *United States v. Ferreira*, 13 Howard, 48, in speaking of the powers exercised by a District Judge, and the Secretary of the Treasury, under the Treaty with Spain, of 1819, describes correctly the nature of the authority of such a commissioner as acted in the case before us. "The powers conferred by Congress upon the Judge, as well as the Secretary, are, it is true, judicial in their nature. For judgment and discretion must be exercised by both of them. But it is not judicial, in either case, in the sense in which judicial power is granted by the Constitution to the courts of the United States."

Since, then, the Commissioner did not, in this case, exercise any part of the judicial power of the United States, and no mode has been provided by law to transfer the case on which he acted into any court of the United States, and thus bring that case under the judicial power, this court can have no appellate control over it; because its appellate power cannot extend beyond the action of the inferior courts, established by Congress to take original jurisdiction under the Constitution, and which exercise judicial power therein conferred. As it is plain, then, that to revise the proceedings of the commissioner by a writ of *habeas corpus*, would be an exercise of original, and not of appellate jurisdiction, the inquiry recurs whether we can grant the writ for the purpose of revising the decision of the Circuit Court, made upon the writ of *habeas corpus* issued by that court.

This court has appellate power only in the cases provided for by Congress. (*United States v. Moore*, 3 Cr., 159; *Durousseau v. United States*, 6 Cr., 307.)

We must therefore find, in some Act of Congress, power to review the decision of a circuit court simply remanding a prisoner on a writ of *habeas corpus*; otherwise this writ cannot be allowed. The only grant of power, supposed to be applicable to such a case, is contained in the fourteenth section of the Judiciary Act (1 Stat. at Large, 81), which author-121*] izes this *court to issue writs of *habeas corpus*; and the question is, whether a grant of

power to issue a writs of *habeas corpus* "to examine into the cause of commitment," is a grant of power to review this particular decision of the circuit court.

As the only jurisdiction conferred arises from the authority to issue the writ, and the consequent authority to proceed under it, the exigency of the writ must necessarily limit the jurisdiction. So far as the subject matter involved in this writ extends, the jurisdiction exists, and no further.

That subject matter is "the cause of the commitment." So that we must ascertain whether the decision of the circuit court is the cause of the commitment. If it is, we have jurisdiction to inquire into it; if it is not, then that decision is not within the exigency of this writ, forms no part of its subject matter, and is not within our appellate control.

To determine whether the decision of the circuit court is the cause of the commitment in this case, it is necessary to have distinctly before us the precise acts which have been done, and then to consider their legal effect.

On the 29th day of June, 1852, the Commissioner, after the previous proceedings which have been mentioned, made the following warrant to the Marshal of the Southern District of New York:

UNITED STATES OF AMERICA,
Southern District of New York, ss.

In the matter of *Thomas Kaine*.

This case having been heard before me, on requisition, through Anthony Barclay, Esquire, Her Britannic Majesty's Consul at the Port of New York, that the said Kaine be committed for the purpose of being delivered up as a fugitive from justice, pursuant to the provisions of the Treaty made between the United States and Great Britain, August 9th, 1842, I find and adjudge that the evidence produced against the said Kaine, is insufficient in law to justify his commitment on the charge of assault with intent to commit murder, had the crime been committed within the United States. Wherefore, I order, that the said Thomas Kaine be committed, pursuant to the provisions of the said Treaty, to abide the order of the President of the United States in the premises.

Given under my hand and seal, at the City of New York, this 29th day of June, 1852.

(Signed) JOSEPH BRIDGEMAN, [L. S.]
United States Commissioner for the Southern District of New York.

Directed to the Marshal of the Southern District of New York.

*Under this warrant Kaine was held [*122 by the marshal, at the time the writ of *habeas corpus* was issued by the Circuit Court; and upon the return of that writ, several questions of law were raised and argued, touching the jurisdiction of the Commissioner, and the regularity and validity of his proceedings; and on the 9th day of July, 1852, the Circuit Court gave its decision, to the effect that the Commissioner had jurisdiction, and had proceeded regularly, and concluded by passing the following order:

"The court accordingly adjudges that the commitment and imprisonment of the prisoner for the causes in the return to the *habeas corpus* in the case set forth, are sufficient cause

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and warrant in law for his detention by the marshal.

"Therefore, it is ordered by the court, that the writ of *habeas corpus* allowed in this case be dismissed, and that the prisoner be remanded and continued in the custody of the marshal, under such his arrest and commitment by the aforesaid process."

Is this order "the cause of the commitment" of Katine within the meaning of a writ of *habeas corpus*? With the utmost respect for the opinions of those of my brethren who have so considered it, I cannot come to that conclusion. It seems to me, that it is not the cause of the commitment, either in substance or in form.

In substance, it is merely a refusal to discharge the prisoner from an existing commitment, because the cause of that existing commitment is found sufficient in law. It creates no new cause: it simply declares the existing cause to be sufficient. It makes no new commitment, and issues no new process as an instrument for it, but only pronounces the old process valid, and consequently the continuance of the commitment under it legal. The custody was at no time changed. Certainly, when a prisoner is brought into court upon the return of a *habeas corpus ad subjiciendum*, he is then in the power and under the control of the court; but until the court makes some order changing the custody, it remains. The court may, in some cases, admit to bail, and may also take order for the future production of the prisoner, without bail; but in all cases, until the court makes some order changing the custody, either for the care or security of the prisoner, or founded on the illegality of his commitment, the original custody continues. In this case, no such order was made.

If, then, this order of the Circuit Court created no new cause of commitment, made no new commitment, and only pronounced [123] "the existing cause sufficient, and the existing custody lawful, I cannot perceive how that order can, in substance, be treated as the cause of the commitment of Katine.

Nor, in my apprehension, is it so, even in form. In form, the court first adjudges that the causes set forth in the return are sufficient, and, "therefore, it is ordered by the court that the writ of *habeas corpus* allowed in this case be dismissed, and that the prisoner be remanded, and continued in the custody of the marshal, under such his arrest and commitment by the aforesaid process."

This clearly expresses, in words, precisely what would be the legal effect of dismissing the writ of *habeas corpus*, without those words. And I do not perceive how it can be more plainly expressed than by the language of this order, that the process of the Commissioner, being found sufficient, the commitment by that process is not interfered with.

It is true, the order contained the word "remanded," but in the context, where it stands, it means only that the command of the writ is no longer operative, and that the court would exercise no further control over the body of the prisoner, and not that, being out of the custody of the marshal, he is recommitted to him anew, for the words are "remanded and continued in the custody of the marshal, under

such his arrest and commitment by the aforesaid process."

In point of form, the same order would have been passed if it had been found by the Circuit Court, on the return of the writ, that the prisoner was not held under, or by color of the authority of the United States, and therefore that, under the Judiciary Act, the court had no power to relieve him by *habeas corpus*. It could not be contended that, after such an order, the prisoner was confined by order of the Circuit Court, and that its order was the cause of his commitment, yet in such a case the writ must have been dismissed and the prisoner remanded.

But whatever literal interpretation might be put upon the precise words employed in the order, I should be unable to find "the cause of the commitment" in an act of the court dismissing a writ of *habeas corpus*, because the cause of the commitment shown by the return is found sufficient. The cause of the commitment is to be looked for in the warrant under which it began, and has been continued, and not in the decision of a court pronouncing that warrant valid.

I have thus far considered this question of jurisdiction upon those principles which seem to me applicable to it. It remains to examine the former decisions of this court, to ascertain whether the question is determined by authority.

*There are two cases which have [*124 been chiefly relied on at the bar. The first is *Ex-parte Burford*, 3 Cr., 448. As this case has many facts in common with the case at bar, it is necessary carefully to examine it. Without detailing the preliminary proceedings, it will be sufficient to say, that Burford was committed to the jail of the County of Washington, in the District of Columbia, by a warrant of certain justices of the peace, which was defective, because it did not state "some good cause certain, supported by oath." That he was brought before the Circuit Court for the District of Columbia, upon a writ of *habeas corpus*, and, after a hearing, that court passed the following order, which, as it is not given in the report of the case by Judge Cranch, and as its terms seem to me to be important, I have procured from the original record in this court:

"January 8th, 1806. John A. Burford was brought into court by the Marshal of the District of Columbia, agreeably to the *habeas corpus* issued by this court, on the 4th instant, with the cause of his commitment annexed thereto (which *habeas corpus* and cause of commitment are hereunto annexed), whereupon, all and singular the premises being heard, and by the court have been fully understood, the court order that the said John A. Burford enter into a recognizance, himself in \$1,000, and one or more sureties in the like sum, for his good behavior for one year from this day, and that he be remanded to jail, there to remain until such recognizance be entered into."

This case is relied upon as a decision to show, that although this court cannot, as was held in *Metzger's* case, issue a writ of *habeas corpus* to examine the validity of the warrant of the Commissioner; yet, if the Circuit Court has, by such a writ, examined its validity, pronounced it valid, and therefore dismissed the

writ, and ordered the prisoner to be continued in the custody of the marshal, this court may, upon a writ of *habeas corpus*, examine that decision, and reverse it, if found erroneous.

Before considering whether the decision in *Burford's* case goes this length, I think it consistent with the profoundest respect for the very eminent judges who sat in that case, to say that it does not appear that the question now made was by them examined and considered, or that they themselves would have deemed it foreclosed by that decision. Indeed, that they would have not so considered, seems to me from the fact that, at the term of the court following this decision, when a writ of *habeas corpus* was moved for, to bring up the body of James Alexander, Marshall, *Ch. J.*, said: "The whole subject will be taken up *de novo*, without reference to precedents. It is the wish of this court to have the motion made in a more solemn manner to-morrow, when 125*] you may come prepared to take up 'the whole ground.'" (4 Cr., 75, *note*.) Further proceedings upon this motion became unnecessary, in consequence of the discharge of the prisoner by another tribunal; but a few days after, upon motions in behalf of Bollman and Swartwout, committed by the Circuit Court under a charge of treason, the court proceeded to hear arguments upon its jurisdiction to issue the writs, and in an elaborate judgment affirmed the jurisdiction to examine a cause of commitment by the Circuit Court. I cannot doubt, therefore, that if at that time the further question had arisen whether the court had also jurisdiction to examine a cause of commitment by a commissioner, after the Circuit Court had reviewed that cause, and pronounced it sufficient, the court would have thought it necessary to consider that question also *de novo*, upon all its grounds, and would not have treated *Burford's* case as a sufficient basis on which to rest their decision. But, as I understand *Burford's* case, it is clearly distinguishable from the case at bar. The Circuit Court, in that case, did not dismiss the writ of *habeas corpus*; they made an order under it, to imprison Burford. That order was, that he be remanded to jail, there to remain until he should enter into a recognizance, with surety, in the sum of \$1,000, for his good behavior for one year. This order was the cause of commitment, and under this order he was held when the writ of *habeas corpus* issued from this court. It necessarily superseded the order made by the justices of the peace, which was, that Burford should be imprisoned until he should recognize in the sum of \$4,000, with surety, to be of good behavior indefinitely.

It is true the Circuit Court did not proceed *de novo*, and that for this reason their order was held invalid. But the question of jurisdiction did not depend upon the validity of the order, or the cause of its invalidity, but simply upon the fact that the Circuit Court caused the commitment; and when it issued an order, complete in itself, that Burford should be imprisoned, and by that order superseded the former order of the Justices, the Circuit Court did an act which caused his commitment, and this court might inquire, by a writ of *habeas corpus*, into its validity. The distinction between such a case, and one where the Circuit Court

merely dismissed the writ of *habeas corpus*, is to my mind clear.

And it must be observed that the question now is, not whether this court treated the act of the Circuit Court as the cause of commitment. I have no doubt they did so treat it, and it seems to have been so considered in subsequent cases. In *Ex-parte Watkins*, 7 Peters, 573, *Mr. Justice Story*, in reviewing the cases on the subject of *habeas corpus*, says: "In *Ex-parte Burford*, the prisoner was in custody under a commitment by the Circuit Court, [*126 for want of giving a recognizance for his good behavior, as awarded by the court." So in *Metzger's* case, 5 How., 189, *Mr. Justice McLean* says: "*Ex-parte Burford* was a *habeas corpus*, on which the prisoner, who had been committed by the Circuit Court, in this district, was discharged, there being no sufficient cause for the commitment.

It is undoubtedly true, that the imprisonment of Burford was considered to be under a commitment by the Circuit Court, and the case is an authority to prove that when a writ of *habeas corpus* is returned in the Circuit Court, and that court makes an order imprisoning the party, this court may review that order. But it is not, in my judgment, an authority to show that the Circuit Court of the Southern District of New York did make an order imprisoning Kaine. In *Burford's* case, the court did not dismiss the writ, nor refuse to discharge the prisoner, from the commitment by the Justices, but made an order which constituted a new cause of commitment, and superseded the existing cause. In *Kaine's* case, the Circuit Court held the existing cause to be sufficient, and refused to interfere with it. In my judgment, these cases are not parallel.

Nor do I consider the case *Ex-parte Watkins*, 7 Pet., 572, to be an authority that jurisdiction exists in this case. It is only necessary to quote a single passage, from the opinion of the court, to show that it cannot aid in solving the question which I am now considering. "The award of the *capias ad satisfaciendum* must be considered as the act of the Circuit Court, it being judicial process issuing under the authority of the court. The party is in custody under that process. He is then in custody in contemplation of law, under the award of process by the court."

It is upon this ground the decision is rested, and I can find nothing in it tending to show that in the case at bar the act of the Circuit Court is the cause of commitment.

I shall not particularly examine the other decisions of this court, which are still more remote from the case at bar.

My opinion is, that the cause of commitment of Kaine is not the act of the Circuit Court, but of the Commissioner, and for this reason the writ must be refused.

But there is another ground on which this refusal may be rested. The decision of the Circuit Court was made on the 9th day of July. On the 17th day of July, a warrant was issued from the Department of State, which was in the following words:

DEPARTMENT OF STATE, WASHINGTON, July 17th, 1852.

To all whom these presents shall come, greeting:
Whereas, John F. Crampton, Envoy Extra-

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127*] ordinary and *Minister Plenipotentiary to Her Majesty the Queen of Great Britain and Ireland, hath made requisition, in conformity with the 10th article of the Treaty between the United States and Great Britain, for the mutual surrender of fugitive criminals, concluded at Washington, the 9th day of August, 1842, for the delivery up to justice of Thomas Kaine, charged with the crime of assault with an intent to commit murder, in the County of Westmeath, Ireland.

And whereas, the said Thomas Kaine hath been found in the State of New York, within the jurisdiction of the United States, and has, by proper affidavit, and in due form, been brought before Joseph Bridgman, a commissioner duly appointed by the United States Circuit Court for the Southern District of New York, in the second circuit, for examination of said charge of assault with intent to commit murder. And whereas, the said Commissioner hath deemed the evidence sufficient to authorize the commitment of said Thomas Kaine, and has, accordingly, committed him. All of which appears by a copy of the proceedings transmitted to this department.

Now, these presents are to require of the United States Marshal for the Southern District of New York, or of any other public officer or person having charge or custody of said Thomas Kaine, to surrender and deliver him up to Anthony Barclay, Her Britannic Majesty's Consul at the Port of New York, or to any other person or persons duly authorized to receive said fugitive, and conduct him to Great Britain for trial.

In testimony whereof, I have hereunto signed my name, and caused the seal of this department to be affixed, at Washington, this 17th day of July, A. D. 1852, and of the independence of the United States the seventy-seventh.

[SEAL.] (Signed) W. HUNTER,
Acting Secretary of State.

Upon its face, this warrant is perfectly regular. Its recitals set forth every fact necessary to warrant the act of extradition, according to the Treaty and the Act of Congress. It appears, by the return of the marshal upon the writ issued by Mr. Justice Nelson, that before he received that writ, this warrant had come to his hands, and he had, in obedience to it, tendered Kaine to Anthony Barclay, who expressed his readiness to receive him; and while arrangements were about to be made to put Kaine on shipboard, the writ of *habeas corpus*, issued by Mr. Justice Nelson, suspended the further execution of the warrant of extradition.

This warrant of extradition is the final process under the Treaty and Act of Congress. [28*] When it comes to the hands of *the marshal, he holds the prisoner for the purpose of executing it. Upon this process, therefore, Kaine is now held.

*The Act of Congress requires the Judge, or Commissioner, to certify to the Secretary of State his finding, together with a copy of all the testimony taken before him, that a warrant may issue upon the requisition of the proper authorities of the foreign government for the surrender of the fugitive, according to the stipulations of the Treaty. Such a warrant having issued, and its validity not having been consid-

ered by any court of original jurisdiction, in my judgment it is not the exercise of an appellate power to examine its validity by a writ of *habeas corpus*. It may be true that, if the proceedings before the Commissioner were to be held void, this warrant must also be invalid. But the question is not, whether this warrant is valid, but whether we have jurisdiction to examine its validity. It may also be true that, if this warrant were final process, issued by the Circuit Court, and we had power to examine the legality of a judgment or order of that court, pursuant to which it issued, we should also have jurisdiction upon a *habeas corpus*, to examine the validity of such a warrant, and of the proceedings of executive officers under it. But this warrant did not emanate from the Circuit Court, nor does it depend, in any way, upon its authority, nor is it a legal consequence of the action of the Circuit Court on the writ of *habeas corpus*, or in any other proceeding. It emanates from a department of the executive, which rests its action upon the proceedings of the Commissioner, and over neither can this court have, under the Constitution, nor has it under the laws, any appellate jurisdiction or control. (*Marbury v. Madison*, 1 Cr., 187.)

For the reason, then, that if a writ of *habeas corpus* were allowed in this case, the validity of the warrant of extradition could not be examined here, I think the writ should be refused.

In considering the question, whether the Supreme Court of the United States has jurisdiction, under the Constitution and laws of the United States, to entertain this application, I have not felt at liberty to allow my judgment to be pressed upon by the great value of the particular writ applied for, or the propriety and expediency of a power in this court to review the judgments of the Circuit Courts, in cases affecting the liberty of the citizen. To all that has been said concerning the pre-eminent utility of the writ of *habeas corpus*, I readily assent. But it must be remembered, that the real question here, is not whether this great writ shall be freely and efficiently used, but whether our appellate power is large enough to extend to this case. The Circuit Court has power, upon its own views of the law, to inflict, not only imprisonment, but even the punishment *of death, without ap- [*129] pellate control by this court. Even when it is alleged that the proceedings of a circuit court, by which a citizen is imprisoned, are *coram non judge* and void, its judgment is final, and no relief can be had here, by writ of error or appeal, or by *habeas corpus*. (*Ex-parte Watkins*, 3 Pet., 193; *Ex-parte Kearney*, 7 Wheat., 38.)

Undoubtedly, it would be competent for Congress to do, in cases like this, what it has done in a class of cases somewhat analogous. By the Act of August 29, 1842 (5 Stat. at Large, 589), when the subject of a foreign government is imprisoned for an act done under the authority of that government, and a writ of *habeas corpus* is issued by a judge of this court, or by a district judge, an appeal to the Circuit Court, and from its order to this court, is expressly given.

It is for Congress to determine whether this class of cases requires the same privileges. Un-

til it so determines, I must give my decision upon our jurisdiction, as, according to my judgment, it exists, unaffected by the consideration that it might be expedient to enlarge it. My opinion is, that if the writ prayed for were issued, we should not have jurisdiction to inquire into the cause of commitment shown by the petition, and consequently the writ should be refused. I give no opinion upon the sufficiency of the cause of the commitment, not deeming it to be judicially before us.

Mr. Justice Nelson:

The application for the arrest and delivery of Thomas Kaine was originally made on the requisition of the British Consul, resident at the port of New York, before Joseph Bridgham, Esq., a United States Commissioner for the Southern District of New York. A warrant was issued and the arrest made, and, on the return before this officer, an examination took place upon a charge that the fugitive had committed an assault, with intent to murder, upon one James Balfe, in Ireland, on the 5th April, 1851. The Commissioner, upon hearing the allegation and proofs, adjudged the prisoner guilty, and ordered that he be committed, in pursuance of the Treaty, to abide the order of the President of the United States. A petition was then presented to the Circuit Court for the Southern District of New York, holden by the District Judge, for a writ of *habeas corpus*, directed to the marshal, to bring up the body of the prisoner; and also a *certiorari* to the Commissioner, to bring up the proceedings that had taken place before him; and upon a full review of all these proceedings, on the 9th July, 1852, adjudged that the commitment and detention were for sufficient cause, and ordered that the writ of *habeas corpus* be dismissed, and [130*] the prisoner be *remanded, and continued in the custody of the marshal, under said commitment. On the 17th July, copies of these proceedings having been forwarded to the Department of State, at Washington, the acting secretary issued his warrant to the marshal having the custody of the prisoner, directing that he be surrendered to Mr. Barclay, the British Consul, or to any other person or persons duly authorized to receive the fugitive and transport him to Great Britain for trial. On the 22d July, a petition was presented to me, at my chambers, in Cooperstown, on behalf of the prisoner, for a writ of *habeas corpus*, which I declined allowing until the whole of the proceedings that had already taken place in the matter were laid before me. Copies of them were subsequently furnished, and, upon an examination, being satisfied that the Commissioner had no jurisdiction over the case, I allowed the writ, on the 3d of August, returnable before me, at my chambers, on the 11th of the same month, and which return was made accordingly. As the case was one in which I entertained a different opinion from that of the tribunals before whom the proceedings had taken place, not only as to the jurisdiction of the Commissioner, but also in respect to their interpretation of the Treaty and Act of Congress passed to carry it into effect; and, as the questions involved were of considerable interest of themselves, and concerned deeply the two nations who were parties to the Treaty, on

the return to the writ I entered an order, directing that the case be heard before all the judges, at the commencement of the next term of this court. The case has now been heard in full bench, and I am inclined to concur with my brethren, that we cannot entertain jurisdiction of it upon my allowance of the writ and adjournment of the proceedings to be heard in this court. The practice is a familiar one, in the proceedings under this writ, before the King's Bench, in England. 1 Burr., 400. 542, 606; Comyn's Digest, *Habeas Corpus*, 3d ed.; Bl. Com., 131; 9 Ad. & Ell., 731, *Leonard Watson's case*, and which furnished the precedent for that adopted by me in this case. That, however, is an original proceeding; and, in cases where the court has original jurisdiction to hear and determine the matters upon the return, and where the hearing may be had either before one of the justices, at chambers, or in full bench. But, according to the settled course of decisions in this court, we can only issue the writ, and entertain jurisdiction of the matters set forth on the return, in the exercise of our appellate power. (*United States v. Hamilton*, 3 Dall., 17; *Ex parte Burford*, 3 Cr., 448; *Ex parte Bollman and Swartwout*, 4 Id.; *Ex parte Kearney*, 7 Wheat., 38; *Ex parte Watkins*, 3 Pet., 193; 7 Id., 568; *Ex parte Metcalf*, 5 How., 189.) And, as the power cannot be exercised by one of the *justices, at [*131] chambers, there may be ground for a distinction between the proceedings, under the writ, in this court and in the King's Bench. The issuing of the writ, and proceedings before me, at chambers, under it, must undoubtedly be regarded as an original proceeding, and not in the exercise of an appellate power. If this conclusion be a sound one, the remedy for the defect in the law must be sought in Congress, who can make provision for the issuing of the writ in vacation as well as in term, in all cases where this court possesses jurisdiction to entertain proceedings under it. The right of the citizen to appeal to the court for the benefit of this great writ, in case of an illegal restraint of his liberty, ought not to be restricted to the time of its sitting; but, as in all other cases where its jurisdiction may be exercised, provision should be made for instituting the proceeding in vacation. The prisoner has now presented to this court a petition, praying for a writ of *habeas corpus* to be directed to the marshal, that he may be brought up, together with the ground of his commitment; and, also, for a *certiorari* to the Circuit Court, to bring up the proceedings that have taken place in that court, which disembarasses the case of all exceptions to the form of the application; and the return of the marshal and the proceedings before the Circuit Court being now before us, on this preliminary motion, by the agreement of the counsel, the case is in a situation to enable us to express an opinion upon the merits. It is objected, that this court cannot entertain jurisdiction of the case, even upon the petition, return of the marshal, and of the proceedings before the Circuit Court to the *certiorari*, for the reason, it appears, as supposed, that the prisoner is held in confinement under the warrant of the commissioner, and not under the decision and order of the Circuit Court; that this court cannot reach and review the proceedings

before the commissioner, by virtue of this writ, in the exercise of its appellate power, but can only reach and review the proceedings and order of the Circuit Court; and as the confinement of the prisoner is not under or in pursuance of the order of that court, the proceedings under the writ here would be a nullity. The first case in which this question was discussed at large by counsel and by the court, was that of *Ex-parte Bollman and Swartwout*. They were in confinement in this district, under a warrant from the Circuit Court, upon a charge of treason against the United States. Two objections were taken to the power of this court to issue the writ to bring up the prisoners: 1st, that it involved the exercise of an original jurisdiction, not given by the Constitution; and 2d, that if it was the exercise of an appellate power, it was not within the 14th section of 132*) the Judiciary Act. *which alone conferred the authority to issue this writ. Chief Justice Marshall, who delivered the opinion in that case, admitted the power could not be exercised as a part of the original jurisdiction of the court; but held, that it possessed jurisdiction, as an appellate power, under this 14th section. After answering the argument, that the power to award the writ was limited by that section to causes pending in this court, in which it was necessary, in order to enable it to make a final decision in the case, he observed that the proviso to the section extended to the whole of it; that proviso is as follows:

That writs of *habeas corpus* shall in no case extend to prisoners in jail, unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into the court to testify.

And that, construing the section with reference to this proviso, the power of the court to issue the writ extended to all cases where the prisoner was restrained of his liberty, under the authority of the federal government. The same principle is derived from that section, as stated by Mr. Justice McLean in *Ex-parte Dorr*, 8 How., 103-105. "The power given to the courts," he observes, "in this section to issue writs of *habeas corpus*, *habeas corpus*, &c., as regards the writ of *habeas corpus*, is restricted by the proviso to cases where a prisoner is in custody under or by color of the authority of the United States, or has been committed for trial before some court of the same, or is necessary to be brought into court to testify. This is so clear," he observes, "from the language of the section, that any illustration of it would seem to be unnecessary. The words of the proviso are unambiguous. They admit of but one construction." If this construction of the section is to be maintained (and the case *Ex-parte Bollman and Swartwout* was very fully and deliberately considered), then it is manifest the power to issue this great writ for the security of the liberty of the citizen is much broader than has been contended for on behalf of the prisoner in the case before us. *Hamilton's* case, decided in 1795, led the way to the decision in *Bollman and Swartwout*. That case repudiates the idea that the power to issue the writ is limited to instances where the proceeding is ancillary to the determination of a suit pending. *Hamilton* was in jail on a warrant issued

by the District Judge, at chambers, upon a charge of treason. Chief Justice Marshall, in *Ex-parte Tobias Watkins*, 3 Peters, 208, observes that in the case of *Bollman and Swartwout*, the *habeas corpus* was awarded on the same principle on which it was awarded in *Hamilton's* case; and, in *Ex-parte Kearney*, Mr. Justice Story, in stating the points in the case, observes, "the first is whether or not *this court [*133 has authority to issue a *habeas corpus* where a person is in jail under the warrant or order of any other court of the United States." And then says, "that it is unnecessary to say more than that the point has already passed in *rem judicatam* in this court. In the case of *Bollman and Swartwout*, it was expressly decided, upon full argument, that this court possessed such authority, and the question has ever since been considered at rest." In the case of *Ex-parte Watkins*, reported in 7 Peters, 568, there is a still stronger exercise of the power to issue this writ. In that case the prisoner was in custody of the marshal under three executions regularly issued out of the Circuit Court, but their efficacy had expired by the neglect of the marshal to bring in the body on the return day. The error or wrongful detention lay wholly with the marshal, and yet this court issued the *habeas corpus*, and discharged the prisoner. The case stands upon the principle decided in *Hamilton's* case, and in *Bollman and Swartwout*, that the writ may issue in all cases where the prisoner is in custody under and by color of the authority of the United States. In the case *Ex-parte Metzger*, the prisoner was committed to the custody of the marshal by the District Judge, at his chambers, under the French Treaty of extradition. This court held that they possessed no power to issue the writ of *habeas corpus*, inasmuch as the order of commitment had been made at chambers and not in court. This case undoubtedly stands alone, and has very much narrowed the power of the court in issuing this great writ in favor of the liberty of the citizen, from that repeatedly asserted in previous cases. But I do not propose to disturb it. For the case before us is within the doctrine of this case, and of every other that has heretofore been passed upon by the court, as I shall proceed briefly to show. The *habeas corpus*, which was issued in the case before us, by the court below, to the marshal, brought up the body of the prisoner, and also the warrant of commitment, into that court, and the *certiorari* to the Commissioner brought up the record, or tenor of the record of the proceedings before him, upon which the warrant had issued. The whole case, therefore, was in that court. And pending the examination or hearing, the prisoner, in all cases, on the return of the writ, is detained, not on the original warrant, but under the authority of the writ of *habeas corpus*. He may be bailed on the return *de die in diem*, or be remanded to the same jail whence he came, or to any other place of safe keeping under the control of the court, or officer issuing the writ, and by its order brought up from time to time, till the court or officer determines whether it is proper to discharge or remand him absolutely. The King's Bench may, pending the hearing, remand to the same prison or to their own, the *Marshalsea. The efficacy of the original commitment is superseded by this writ while

the proceedings under it are pending, and the safe keeping of the prisoner is entirely under the authority and direction of the court issuing it, or to which the return is made. (Bacon, title *Habeas Corpus*, B. 12: 5 Mod., 22, *The King v. Bethel*; Comyn, title *Habeas Corpus*: 1 Vent., 380, 346; 3 East., 156; 1 B. & Cr., 258; 4 B. & A., 295.) Holt, *Chief Justice*, observed, in *The King v. Bethel*, when a man comes in by *habeas corpus*, by the power of the court, he may be bailed to appear *de die in diem*, till the case is determined, and then he may be remanded to the same prison. "By the petition of right," he again remarks, "we are to bail or discharge in three days, but when we bail (that is, *de die in diem*) and afterwards remand him, it is no escape, for the entry is '*remittitur*,' and that is a commitment grounded on the old one."

The Circuit Court, in the case before us, after reviewing the proceedings on the return of the writ, and also to the *certiorari*, arrived at the conclusion that they were regular and legal; and, to use its own words,

"Accordingly adjudges that the commitment and imprisonment of the prisoner, for the causes in the return to the *habeas corpus*, in the case set forth, are sufficient cause and warrant in law for his detention by the marshal. Therefore, it is ordered by the court that the writ, &c., be dismissed, and that the prisoner be remanded, and continued in the custody of the marshal, under such his arrest and commitment by the aforesaid process," meaning the original warrant of the Commissioner.

The question here is, whether, upon the law governing the writ of *habeas corpus*, and to which I have referred, and upon this judgment of the court, the prisoner is or is not held in confinement under the order of the Circuit Court. If he is, it is admitted by all that this court has jurisdiction of the case, and is bound to revise that decision. That court not only adjudges the commitment and imprisonment lawful, but directs the prisoner to be remanded, which, says Holt, *Chief Justice*, is a commitment grounded on the old one; and, further (which was superfluous), the order directs that he shall be continued in the custody of the marshal, under the old commitment. How it can be said, in view of the law governing this writ, and of the form of the judgment of the court below, that the prisoner is not in confinement under that judgment, but simply under the process of the Commissioner, without dependence upon that judgment, I admit I am incapable of comprehending. But if any further authority is wanting upon this question, I will refer to an early case in this court, *Ex parte Burford*, 3 Cranch, 448. That was a commitment by magistrates in this district. The case 135* was reviewed on writ of *habeas corpus* by the Circuit Court, and the prisoner remanded; afterwards, a writ, issued from this court, bringing up the prisoner, and also the proceedings which were before the court below. This court discharged the prisoner, saying that the warrant of commitment by the magistrates was illegal, for not stating the cause of commitment—that the Circuit Court had revised the proceedings and corrected two of the errors of the magistrates and left the rest. The case, in principle, is not distinguishable from the one before us. Here the Circuit Court has

corrected none of the errors of the Commissioner, if any, but confirmed all of them, and recommitted the prisoner to the custody of the marshal. It has been argued that great inconvenience would arise, if the writ of *habeas corpus* could issue from this court into any part of the Union to bring up a prisoner on a petition that he was illegally restrained of his liberty under the authority of the United States, as the proceeding must be attended with delay and expense, by reason of the great extent of our territory. But, it must be remembered that, in the case of a right of property involved, dependent upon the laws of the Union, and a decision against it, the party against whom a decision has been made in a state court, however small the amount in controversy, is entitled to a writ of error to this court, to bring up the case for review, by the 25th section of the same Act in which this 14th section is found. And I am yet to learn that the right of liberty of the citizen is not as dear to him, and entitled to be guarded with equal care by the Constitution and laws, as the right of property, notwithstanding the supposed inconvenience. Such has heretofore been, as we have seen, the opinion in this court, when dealing with the writ in question; and I will simply add, in the language of *Chief Justice Denman*, in the case of the Canadian prisoners, "that it seems to me that we would be tampering with this great remedy of the subject, the writ of *habeas corpus*, if we did not say that we would abide by the practice we find, and deal with this as it has been formerly dealt with." I am satisfied, therefore, that this court has jurisdiction to issue the writ of *habeas corpus*, to inquire into the legality of the commitment below; and, as the whole case is before us on this motion, by the stipulations of the parties, shall proceed to an examination of the questions raised upon the merits.

It may, I think, be assumed, at this day, as an undoubted principle of this government, that its judicial tribunals possess no power to arrest, and surrender to a foreign country, fugitives from justice, except as authorized by treaty stipulations, and Acts of Congress passed in pursuance thereof. Whether Congress could confer the power independently of a treaty, is a question not necessarily involved in this [*136] case, and need not be examined. If it was, as at present advised, I am free to say that I have found no such power in any article or clause of the Constitution, delegated to that body by the people of the States. It belongs to the treaty-making power, and to that alone, and its exercise is dependent upon the Executive Department, with the concurrence of two thirds of the senators, and such I think has been the practical construction given to the Constitution since the foundation of this government. We must look, therefore, to the provisions of the Treaty with Great Britain, and the Act of Congress passed in pursuance thereof, for the authority to be exercised by the judiciary in the surrender of the alleged fugitive in question, and by these provisions and Act, ascertain and determine whether or not the proceedings in the tribunals below, who have ordered a surrender, are in conformity with them, and warranted by law. By the Treaty, "it is agreed that the United States and Her Britannic Majesty, shall, upon mutual requisitions by them, or their ministers,"

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officers or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder," &c.; "and the respective judges and other magistrates of the two governments shall have power, jurisdiction and authority, upon complaint, made under oath, to issue a warrant for the apprehension of the fugitive," &c.

In the case before us, Her Britannic Majesty's Consul at the port of New York made a requisition and complaint, before one of the United States Commissioners, against the fugitive in question—upon which, a warrant was issued and the arrest made, and after an examination into the charge, committed, for the purpose of being surrendered. No demand was made upon this government, by the government of Great Britain, claiming the surrender. This government was passed by, and the requisition made by the Consul, directly upon the magistrate, on the ground, as contended for, namely: that the consent or authority of the Executive is unnecessary to warrant the institution of the proceedings; and, in support of their propriety and regularity, the position is broadly taken, and without which the proceedings cannot be upheld, that, according to the true interpretation of the Treaty, any officer of Great Britain, however inferior, properly represents the sovereign of that country, who may choose to prosecute the alleged fugitive in making the requisition, and is entitled to the obedience of the judicial tribunals for that purpose, and if sufficient evidence is produced before them, to arrest and commit, that a surrender may be made; and, that in this respect, such officer is put on the footing of any of the prosecuting officers of this government, who [137*] are "authorized to institute criminal proceedings for a violation of its laws; that the country is open to him, throughout the limits of the Union, and the judicial tribunals bound to obedience on his requisition and proofs, to make the arrest and commitment. This is the argument. Now, upon recurring to the terms of the Treaty it will be seen, I think, that no such stipulations were entered into, or intended to be entered into, by either government, or any authority conferred to justify such a proceeding. The two nations agree, that upon "mutual requisition by them, or their officers or authorities respectively made"—that is, on a requisition made by the one government, or by its ministers or officers properly authorized, upon the other—the government upon whom the demand is thus made shall deliver up to justice all persons charged with the crimes, as provided in the Treaty, who shall have sought an asylum within her territories. In other words, on a demand, made by the authority of Great Britain upon this government, it shall deliver up the fugitive; and so in respect to a demand by the authority of this government upon her. This is the exact stipulation entered into, when plainly interpreted. It is a compact between the two nations in respect to a matter of national concern—the punishment of criminal offenders against their laws—and where the guilty party could be tried and punished only within the jurisdiction whose laws have been violated. The duty or obligation entered into, is the duty or obligation of the respective nations, and each is

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bound to see that it is fulfilled, and each is responsible to the other in case of a violation. When the *casus fœderis* occurs, the requisition or demand must be made by the one nation upon the other. And upon our system of government, a demand upon the nation must be made upon the President, who has charge of all its foreign relations, and with whom only foreign governments are authorized, or even permitted, to hold any communication of a national concern. He alone is authorized, by the Constitution, to negotiate with foreign governments, and enter into treaty obligations binding upon the nation; and, in respect to all questions arising out of these obligations, or relating to our foreign relations, in which other governments are interested, application must be made to him. A requisition or demand, therefore, upon this government, must, under any treaty stipulation, be made upon the Executive, and cannot be made through any other department, or in any other way. Judge Marshall, in his celebrated argument in the case of *Jonathan Robbins*, who was demanded by Great Britain, under the Treaty of 1795, and from which this part of the Treaty of 1842 was taken almost *verbatim*, speaking of the requisition in that case, observes:

"* That the case was, in its nature, a [*138 national demand, made upon the nation. The parties were the two nations. They cannot come into court to litigate their claims, nor can a court decide on them. Of consequence, the demand is not a case of judicial cognizance." He further observes, that "the President is the sole organ of the nation, in its external relations, and its sole representative with foreign nations. Of consequence, the demand of a foreign nation can only be made on him." Again, he says: "The department, which is intrusted with the whole foreign intercourse of the nation, with the negotiations of all treaties, with the power of demanding a reciprocal performance of the article, which is accountable to the nation for the violation of its engagements with foreign nations, and for the consequences resulting from such violation, seems the proper department to be intrusted with the execution of a national contract, like that under consideration."

The idea of a requisition of a foreign nation upon the judiciary of another, much more upon the humble magistrate of another, demanding, as of right, the fulfillment of treaty obligations, is certainly novel, and one that I would not willingly attribute to the distinguished men who negotiated this one, nor to the governments that ratified it. So extraordinary an interpretation ought not to be given to the instrument, unless upon the plainest and most imperative terms. It does great injustice to both nations. The proceedings, consequent upon it, compromise the character and dignity of the one making the demand, and are disrespectful to the other, and may be dangerous to the liberty of the citizen. The record before us shows, that a requisition, with due solemnity, was made upon the commissioner, in this case, by Her Britannic Majesty's government, through her Consul, and seems to imply, that the magistrate is to act under the power and authority of that government, rather than in obedience to the laws of his own; and that a refusal to

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act would be a contempt of that authority, and of the *cursus fœderis* of a treaty obligation. If any further argument was wanting for the interpretation of the Treaty for which I am contending, I might refer to that given by the authority of Great Britain, in providing by Act of Parliament for carrying it into execution on her part.

By the 6th and 7th Victoria, chapter 76, it is enacted, "That, in case a requisition shall at any time be made by the authority of the United States, in pursuance of, and according to the said Treaty, for the delivery of any person charged with the crime of murder, &c., it shall be lawful for one of Her Majesty's principal Secretaries of State, or, in Ireland, for the Chief Secretary of the Lord-Lieutenant of Ire-
139*] land, and in any *of Her Majesty's colonies or possessions abroad, for the officer administering the government of any such colony or possession, by warrant under his hand and seal, to signify that such requisition has been so made, and to require all justices of the peace, and magistrates and officers of justice, within the several jurisdictions, to govern themselves accordingly, &c.; and thereupon it shall be lawful for any justice of the peace, &c., to examine upon oath any person or persons, touching the charge," &c.

Now, it will be seen that, according to the interpretation given to the Treaty by Great Britain, the requisition for the delivery of the fugitive must be made by the President upon that government, and its warrant obtained, before any magistrate within her dominion is authorized to act in the matter. The Act of Parliament deals with the Treaty as regulating a matter of national concern, and in respect to which both nations must act in carrying into execution its stipulations; and it is only after both have acted, and an authority obtained for the surrender, that the power of the judiciary can be called into requisition. I am satisfied this is a sound interpretation of its provisions, and is one, while it secures the punishment of the offender, guards the citizens and subjects of the respective countries against any abuse of the power. While its exercise is thus kept under the supervision and control of the two governments, there can be no danger of its being perverted, to the purposes of private malice and revenge, which might justly be apprehended, if left to the unrestrained discretion of the subordinate officers of either. The construction against which I am contending, would refer the execution of the Treaty to the subordinate and inferior agents of both governments, so far as the surrender of the fugitive, on our part, is concerned; for, as I understand that construction, any subordinate officer of Great Britain may make the requisition directly upon the magistrate, for the apprehension and committal; and, upon such commitment being communicated to the government, the Secretary of State issues his warrant that the prisoner be delivered to the British authorities. And, as I am advised, that department decided, in the case before us, that the government would not go behind the decision of the Commissioner, adjudging the prisoner guilty. Thus, the whole of the proceeding in the exercise of this high and delicate power, if the requisition of the President,

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in the first place, is dispensed with, would pass out of the hands and beyond the control of the government. This seems to be the result of the American interpretation of the Treaty, sought to be established. It has been argued that, in *Metzger's* case, in which demand was made by French government, under the Treaty of November 9, 1843, the Executive *declined[*140 to act until an application had been made to the judiciary, and that this construction was sanctioned by the court in that case. The Treaty, in express terms, requires the requisition to be made through the diplomatic agents of the respective governments; but that the surrender shall not be made until the crime is established according to the laws of the country in which the fugitive is found. In that case, the requisition was made upon the Executive by the diplomatic agent of France, who was referred to the judiciary. The application to the judiciary, therefore, was with the approbation of this government. How formal it was given, does not appear in the case. The same practice was adopted by the Executive in the case of *Jonathan Robbins*. There, on the requisition made by Great Britain upon the President, he referred the case to a Judge of the District Court of the United States, to inquire into the facts and determine whether or not he was guilty of the offense charged against him. And it is upon this construction, given to the Treaty of 1795, upon which all our subsequent treaties of extradition seem to have been drafted. The power to surrender is not confided exclusively to the Executive under the Treaty in question, nor was it under the Treaty of 1795. On the requisition being made, if the President is satisfied, upon the evidence accompanying it, that a proper case is presented for an inquiry into the crime charged, the authorities claiming the fugitive are referred to the judiciary; and then, it is the duty of the courts or judges to act and to take the proper steps for the arrest and inquiry. The Executive alone possesses no authority, under the Constitution and laws, to deliver up to a foreign power any person found within the States of this Union, without the intervention of the judiciary. The surrender is founded upon an alleged crime, and the judiciary is the appropriate tribunal to inquire into the charge. It has also been urged that great inconvenience may exist in the pursuit and apprehension of fugitives upon the construction contended for, in consequence of the extended frontier line between the two countries, as much time will be consumed in making the requisition upon the President. This may be so; but I cannot agree that a sound construction of the Treaty, and one which affords nothing more than a just protection to the personal liberty of the citizen against the abuse of power, shall be made to yield to the suggestions of convenience: for, although the prisoner before us may be a foreigner, and even may be a fit subject to be given up to the subordinate and irresponsible agents of the government claiming him, still, it is not to be denied that the same power, thus attempted to be exercised by them, in this instance, is equally applicable to any citizen of *the country upon a like complaint; and [*141 besides, under our system of laws and principles of government, so far as respects personal

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security and personal freedom, I know of no distinction between the citizen and the alien who has sought an asylum under them. I will simply add, that, according to the Act of 6th and 7th Victoria, already referred to, carrying into effect this Treaty, the indulgence of any such convenience in its execution is regarded as too dangerous to the subjects of that government residing within its dominions, on the other side of this extended boundary. The Treaty, after providing for the requisition of the one government upon the other, for the surrender, then provides that the respective judges and other magistrates of the two governments shall have power, jurisdiction and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive. After the requisition has been made upon the President, the organ of the government as regards our foreign relations, and his authority obtained, the means are thus provided for procuring the surrender. An application is then made to the judiciary of the country, not upon the requisition of the foreign government, but, as in all other cases, upon the authority of its own—and the warrant issued in pursuance of such application, runs in the name of the President of the United States. The Act of Congress, passed to carry our treaties of Extradition into effect, and of course this one among others, takes up the subject at this stage of the proceedings, and designates the judicial officers who are authorized to act, and prescribes, in general terms, the steps to be pursued in the arrest, the examination of the criminal charge and final commitment for the surrender, if evidence of the criminality is found sufficient. There is no necessary discrepancy between the provisions of this Act and the Treaty, as the requisition of the one government upon the other is not attempted to be regulated or defined, but is left as regulated by the terms of that instrument. The provisions of the Treaty must, therefore, be resorted to for the purpose of ascertaining how that requisition shall be made. I have already explained my interpretation of them and need not repeat it. The judicial officers designated in the Treaty, and upon whom jurisdiction is conferred, are "the respective judges and other magistrate of the two governments." The Act of Congress in carrying out this provision, designates the Justices of the Supreme Court, the Judges of the several District Courts of the United States, the Judges of the several State Courts, and Commissioners specially authorized so to do, by any of the courts of the United States. The terms "other magistrates of the two governments," are quite indefinite and difficult in their application by judicial construction. In an enlarged sense, *they might embrace all the United States Commissioners appointed by the Circuit Court, who, under the Act of Congress of the 23d of August, 1842, are authorized to arrest persons for crimes against the United States, and imprison or bail the same; and, also, all the justices of the peace of the several States, upon whom like power is conferred by the 33d section of the Judiciary Act of 1789. I can hardly suppose that the distinguished citizen who represented this government in the negotiation of the Treaty, or the President, under whose supervision it

was entered into, contemplated the exercise of so high and delicate a power over the rights and liberty of the citizen, by so numerous a body of the magistracy of the country. But, be this as it may, Congress, in providing for the execution of the Treaty, has declared who shall constitute those "other magistrates," before whom the application may be made for the arrest and examination, and have confined the jurisdiction, in this respect, to the Judges of the several State Courts, and Commissioners specially authorized by the courts of the United States, for the performance of that duty. The provision necessarily excludes the great body of the state magistrates and of United States Commissioners, possessing general power to arrest and commit for offenses against the United States, and is in no respect in conflict with any clause in the Treaty, but in harmony with it, and in furtherance of a proper and discreet execution of its stipulations.

It has been argued that, admitting the state magistrates to possess no power under the Act of Congress passed to carry the Treaty into effect, yet that Act confers the power upon the body of United States Commissioners, authorized to arrest and commit for crimes against the United States, under the Act of 1842. A slight attention to the provisions of the Act, I think, will refute any such conclusion. The 1st section confers the exercise of the power under the Treaty, upon the Judges of the Federal Courts, and of the State Courts, and upon "Commissioners authorized so to do by any of the courts of the United States;" and the 6th section provides, "That it shall be lawful for the courts of the United States, or any of them, to authorize any person or persons to act as a commissioner or commissioners under the provisions of this Act; and the doings of such person or persons so authorized in pursuance of any of the provisions aforesaid, shall be good and available to all intents and purposes whatever."

Taking these two provisions together, and construing them as part of a regulation prescribed by law for carrying the Treaty into effect, I think it plain that a commissioner, competent to act in the matter, must be specially appointed; or authorized by *the Fed- [*143] eral Courts for that purpose. The first section confines the exercise of the power to Commissioners thus specially authorized to perform this duty; and the sixth provides for the appointment of them, and declares that their doings in the premises, in conformity with law, shall be good and valid. How it can be said that the exercise of a power thus guarded and restricted, both in the grant and in the appointment, is conferred, also, upon a body of officers appointed under a different act, and for other special and limited duties, I admit is beyond my comprehension. But it is urged that if the Act of Congress cannot be construed as conferring the power, it may be derived from the appointment of this Commissioner, under a rule of the Circuit Court of the United States, adopted in January, 1851. That rule provides that the clerk of the Circuit Court and of the District Court, and their deputies (the Commissioner in question being a deputy of the Clerk of the District Court), shall be *ex officio* Commissioner of the Circuit Court; and shall be authorized to execute all the powers, and per-

form all the duties conferred by several Acts of Congress, enumerating them, but of which the Act of 1848, the one in question, is not included, "or of any Act of Congress having relation to such Commissioners, and their duties or powers." These officers, thus appointed by the Circuit Court, are authorized, by the several acts enumerated, to take affidavits and bail in civil cases; and to arrest and commit for offenses against the United States, and the latter clause of the rule provides for the performance of any other duties that may be conferred upon them by any other Acts of Congress. Now, it is apparent, unless it can be shown that the Act of 1848 confers the power to act under the Treaty in the extradition of fugitives upon these officers, this clause in the rule has no application to the case; and that no such power has been conferred by that Act, if I am not greatly mistaken, has been already demonstrated. The rule of the court adds nothing to the argument in favor of the power, as that depends upon the Act of Congress which provides for carrying the Treaty into effect, and which confers the power only upon Commissioners, specially appointed by the Federal Courts for this purpose. The Treaty provides that the arrest of the alleged fugitive, and commitment for the purpose of a surrender, shall be made, "upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed."

The Act of Congress makes no provision on this subject, except as it respects the admissibility of a species of evidence *which will be noticed hereafter. The laws of New York, therefore, are to govern and regulate the judge or commissioner in hearing and determining the criminality of the prisoner, as he was found in that jurisdiction. This would be so even without the specific provision of the Treaty, as the only mode of proceeding, in summary criminal proceedings before the federal magistrates, is according to the practice before the state magistrates in analogous cases. The thirty-third section of the Judiciary Act of 1789, expressly provides that summary proceedings against persons for crimes committed against the United States, shall be agreeably to the usual mode of process against offenders in the state in which he may be found. I am not aware of any other Act of Congress on the subject. This accords with the construction given to the Treaty in the Act of Parliament, 6th and 7th Victoria, which requires the production of such evidence as, according to the laws of that part of Her Majesty's dominions where the prisoner is found, would justify his apprehension and committal for trial, if the crime had been there committed. According to the laws of New York, regulating these summary proceedings, in criminal cases, evidence is heard, as well on behalf of the accused as against him, and should have been so heard in this case. The 2d section of the Act of Congress, to carry into effect the Treaty, provides that on the hearing upon the return of the warrant of arrest, "copies of the depositions upon which an original warrant in any such foreign country may have been granted, under the hand of the person or per-

sons issuing such warrant, and attested upon the oath of the party producing them, to be true copies of the original depositions, may be received in evidence of the criminality of the person so apprehended."

This species of evidence is exceedingly loose and unsatisfactory, in any aspect in which it can be viewed; but certainly it cannot be characterized as evidence of any description, unless it appears that the magistrate in the foreign country taking the depositions and issuing the warrant, had jurisdiction of the case, and was competent to perform these acts. Unless the authority exists, the acts are *coram non jure*, and void. And the rule is universal, that in the case of magistrates, or other persons of limited or special jurisdiction, any party setting up a right or title under, and by virtue of, their acts or proceedings, must first show affirmatively that they possessed jurisdiction or authority to act in the matter. The jurisdiction is never presumed. These are principles too familiar to require a reference to authorities. It was proved, in this case, that the person taking the depositions in Ireland, and issuing the warrant, acted as a justice of the peace; and, it has been contended, that affords *evidence [*145] not only of his appointment to that office, but also of the competency of his jurisdiction. I cannot assent to this doctrine. I admit that evidence of a person exercising the duties of a public officer, and even reputation of the fact, may dispense with the proof of a regular appointment, and if there is no question as to the extent of his power or authority, the proof will be sufficient. But if, in addition to the appointment, it becomes necessary to give evidence of his jurisdiction, neither his acting in the office, or reputation, furnishes any evidence of the fact. (1 Phillips, Ev., 482, 483, 450; C. & Hill's Notes, 280, 281; 3 Wend., 267.) If a contrary principle can be found in the law, it is a little remarkable that the rule should ever have obtained that, in an action founded upon the adjudication or decision of a magistrate, or any other officer of special and limited jurisdiction, the party claiming a right under it must aver and prove jurisdiction in the particular case, for the very adjudication, or decision, would afford all the necessary evidence of the officer acting as such within the principle contended for. In other words, the judgment would afford evidence *per se* of the jurisdiction, and in all cases dispense with further proof, and thus every inferior magistrate would be placed upon the footing of courts of general jurisdiction. I do not think it necessary to pursue this branch of the argument further, and am satisfied that the Commissioner acted, in the arrest and commitment of the prisoner, without any competent evidence of his guilt of the crime alleged against him. To permit the copies as evidence, without proof of the jurisdiction of the magistrate, would be against all principle, and might lead to the most scandalous abuses in carrying into execution the stipulations of the Treaty. This species of evidence is very differently guarded, in the Act 6th and 7th Victoria. There, copies of the depositions laid before the government, and upon which the proper officer issued his warrant to the magistrates, authorizing them to institute proceedings to arrest and commit the fugitive, are

those only permitted to be given in evidence. In other words, copies of the depositions upon which the government acted in the matter, are admissible as evidence of the criminality. The original of these are those upon which our government made the requisition; and, of course, the good faith of the nation is pledged that they were taken before competent officers, and that the facts stated in them were true. But, in the case before us, the copy was taken by a police officer of the foreign country, and produced here before the Commissioners, without the sanction of either government, and without any competent evidence of the authority of the person before whom it was taken. There was no evidence of the authority of this magistrate, [146*] or of any authority under the Treaty, for the arrest of the accused, before the Commissioner, but what depended upon the oral testimony of this officer, and the statement of the Consul, of what had been represented to him in the matter. The Consul does not aver that any of the facts stated by him, in what he calls his requisition upon the Commissioner, were within his own knowledge. Even the authority attempted to be derived from the Under Secretary of State in Ireland, depends upon the oral statement of this police witness; and I assert, and do so upon the responsibility that I know belongs to my place and the occasion, that there is not one word or scintilla of evidence in the record of the Commissioner, upon which the accused in this case has been tried and adjudged guilty, but depends entirely and exclusively upon the oral examination of this foreign police officer, who does not pretend that he had any personal knowledge of the commission of the crime. His knowledge only extends to the verification of the copy of the deposition taken before a person in Ireland, of whose authority to take it we know nothing. To those familiar with the criminal laws of this country, I need not say that such evidence, against any person charged with an offense against our laws, would be inadmissible and utterly worthless, and especially so, under the laws of the State of New York, which must govern in this case, unless otherwise regulated by Act of Congress; and equally so, in my judgment, within a sound construction of the Act providing for the admissibility of these copies of a deposition, taken before the foreign magistrate.

I have thus gone over the case much more at large than I should have deemed it necessary, were it not for the very great diversity of opinion in respect to it among my brethren. I have regarded it as a case of considerable importance, not only from the delicacy of the power involved in the Treaty, the provisions of which we are called upon to interpret, but also from the principles lying at the foundation, which concern the rights and liberty of every citizen of the United States. I cannot but think the denial of the power to grant the writ of *habeas corpus*, in this case, is calculated to shake the authority of a long line of decisions in this court, from *Hamilton's* case, decided in 1795, down to the present one. That case, as understood and expounded in the case of *Bollman and Swartwout*, in 1807, which received the most deliberate consideration of the court, and to which the doctrine in *Hamilton's* case

was applied, held that this great writ was within the cognizance of the court, under the 14th section of the Judiciary Act, in all cases where the prisoner was restrained of his liberty, "under, or by color of the authority of the United States," and no case has held the contrary since that decision, with the exception [*147 of that of *Metzger*, decided in 1847, which, I have already stated, stands alone, but which distinctly admits the power and jurisdiction of the court in the case before us. This writ has always been justly regarded as the stable bulwark of civil liberty; and undoubtedly, in the hands of a firm and independent judiciary, no person, be he citizen or alien, can be subjected to illegal restraint, or be deprived of his liberty, except according to the law of the land. So essential to the security of the personal rights of the citizen was the uninterrupted operation and effect of this writ, regarded by the founders of the Republic, that even Congress cannot suspend it, except when, in cases of rebellion or invasion, the public safety may require it. I cannot, therefore, consent to cripple or limit the authority conferred upon this court by the Constitution and laws to issue it, by technical and narrow construction; but, on the contrary, prefer to follow the free and enlarged interpretation always given, when dealing with it by the courts of England, from which country it has been derived. They expound the exercise of the power benignly and liberally in favor of the deliverance of the subject from all unlawful imprisonment; and, when restrained of his liberty, he may appeal to the highest common law court in the kingdom, to inquire into the cause of it. So liberally do the courts of England deal with this writ, and so unrestricted is its operation in favor of the security of the personal rights of the subject, that the decision of one court or magistrate upon the return to it, refusing to discharge the prisoner, is no bar to the issuing of a second, or third, or more, by any other court or magistrate having jurisdiction of the case, and it may remand or discharge, according to its judgment, upon the same matters. (13 M. & Welsby, 679; 9 Ad. & Ellis, 731; 1 East, 314; 14 Id., 91; 2 Salk., 503; 5 M. & Welsby, 47.) Upon the whole, I am satisfied that the prisoner is in confinement under the Treaty and Act of Congress, without any lawful authority. I am of opinion, therefore, that the writ of *habeas corpus* should issue in the case, to bring up the prisoner.

1. On the ground that the judiciary possesses no jurisdiction to entertain the proceedings under the Treaty for the apprehension and committal of the alleged fugitive, without a previous requisition, made under the authority of Great Britain, upon the President of the United States, and his authority obtained for the purpose.

2. That the United States Commissioner, in this case, is not an officer within the Treaty or Act of Congress, upon whom the power is conferred, to hear and determine the question of criminality, upon which the surrender is to be made.

*3. That there was no competent evidence before the Commissioner, if he possessed that power, to issue the warrant. And,

4. Upon these grounds, the Circuit Court ought to have discharged the prisoner, instead

of remanding him into custody, and its decision in the case is a proper subject of review by this court, by virtue of the writ of *habeas corpus*.

Mr. Chief Justice Taney:

I concur in opinion with my brother Nelson. The questions involved in this application are very grave ones; and I should have felt it to be my duty to state the grounds on which my opinion has been formed, had not the whole subject been so fully and, to my mind, satisfactorily discussed by him. But, concurring, as I do, in all that he has said, I shall forbear any discussion on my part, and content myself with expressing my entire assent to the opinion he has just delivered.

Mr. Justice Daniel:

The question just disposed of by the court, involving the lives and liberties, not only of those who from abroad may seek protection under our laws, but the lives and liberties of our own citizens, is undoubtedly one of the most important which can claim the vigilance of our government in every department. Having deliberately compared my own views of this vital question with what has been so well expressed by my brother Nelson, and concurring, as I do, in all that he has said upon it, I deem it unnecessary to do more than thus solemnly to attest my adherence to the great principles of law, justice and liberty vindicated by him.

ORDER.

On consideration of the petitions for writs of *habeas corpus* and of *certiorari* filed in this case, and of the arguments of counsel thereupon had, it is now here considered, ordered and adjudged by this court, that the writs prayed for be, and the same are hereby denied; and that the said petitions be, and the same are hereby dismissed.

Further proceedings are reported in 8 Blatchf., 1. Cited—18 How., 323; 1 Wall., 253; 8 Wall., 99, 100; 13 Wall., 402; 18 Wall., 163, 185; 10 Otto, 341, 402; 6 Blatchf., 419; 11 Blatchf., 190; 12 Blatchf., 374.

149*] *DAVIS B. LAWLER, TIMOTHY WALKER, STEPHEN S. L'HOMME-DIEU, GEORGE GRAHAM, JOHN S. HARRISON, AND JACOB BURNETT,
Plaintiffs in Error,

v.

JAMES H. AND JOHN WALKER.

Jurisdiction—Cause certified by Supreme Court of Ohio and this court—certificate defective in not specifying statutes.

Where the Supreme Court of a state certified that there was "drawn in question the validity of statutes of the State of Ohio," &c., without nam-

NOTE.—Jurisdiction of U. S. Supreme Court. It is for State courts to construe their own statutes. Supreme Court will not review their decisions, except when specially authorized to by statute. See note to Commercial B'k v. Buckingham, 5 How., 317.

Jurisdiction of U. S. Supreme Court, where federal question arises, or where is drawn in question statutes, treaty or Constitution of U. S. See note to

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ing the statutes, this was not enough to give jurisdiction to this court, under the 25th section of the Judiciary Act.

Nor, in this case, would the court have had jurisdiction if the statutes had been named, because, In 1816 the Legislature of Ohio passed an "Act to prohibit the issuing and circulation of unauthorized bank paper," and in 1839, an Act amendatory thereof; and the question was, whether or not a canal company, incorporated in 1837, was subject to these Acts. In deciding that it was, the Supreme Court of Ohio only gave a construction to an Act of Ohio, which neither of itself, nor by its application, involved in any way a repugnancy to the Constitution of the United States, by impairing the obligation of a contract.

The case of *The Commercial Bank of Cincinnati v. Buckingham's Executors*, 5 How., 317, examined and sustained.

THIS case was brought up by writ of error from the Supreme Court of the State of Ohio, under the 25th section of the Judiciary Act.

As the case was decided upon the point of jurisdiction, it will be necessary to state only so much of it as to show what the question was which came before this court. (See 18 Ohio, 151.)

James H. Walker and John Walker, partners in trade, under the name of J. H. & J. Walker, brought a writ against the plaintiffs in error in the Hamilton Court of Common Pleas, in Ohio. The action was brought to recover \$2,000 from the plaintiffs in error, as directors, stockholders or otherwise interested in an association known as the Cincinnati and Whitewater Canal Company. The evidence upon the trial was, that the plaintiffs had become the holders of a large amount of such notes as the following:

No. 18667.

D.

The Cincinnati & Whitewater Canal Co. promise to pay one dollar to R. McCurdy, or order, twelve months after date, for value received, at their office, Cincinnati, 9th Nov., 1840.

SAM. E. FOOTE, Sec'y. J. BONSALL, Pres't.
No. 1. Indorsed "R. McCurdy."

The court charged the jury as follows:

That, if the paper was issued under the directions or orders of the defendants, and intended to circulate as currency, they would be liable in this action, whether issued for the individual benefit of the defendants or for the benefit of the Cincinnati and White-[*150 water Canal Company; that if the Company had issued notes not intended to circulate as a currency, as bank paper generally does, in the ordinary form, but merely to pay off their creditors, the defendants would not be liable; that if the defendants, in issuing said notes, acted merely as directors of the Cincinnati and Whitewater Canal Company, and within the limits of their corporate powers, they would not be personally liable; but that said charter of said Company did not authorize the issuing of notes designed or calculated to circulate as

Matthews v. Zane, 4 Cranch, 382; note to *Martin v. Hunter*, 1 Wheat., 304, and note to *Williams v. Norris*, 12 Wheat., 117.

Jurisdiction of U. S. Supreme Court to declare State Law void as in conflict with State Constitution; to revise decrees of State Courts as to construction of of state laws. Power of State courts to construe their own statutes. See note to *Jackson v. Lamphire*, 3 Pet., 280.

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money, and therefore would not protect the defendants, if the jury should be satisfied that they issued such notes; that although, in ordinary cases, where notes are made payable to order, it may be necessary for a plaintiff to prove the indorsement, yet, if the jury find, in this case, that these notes were issued and intended to circulate as a currency, it is not necessary to prove the handwriting of the indorser, and the mere fact of the plaintiffs having the notes in their possession is *prima facie* evidence of ownership.

The jury found a verdict for the plaintiffs, for \$3,452.10.

The Supreme Court of Ohio affirmed the judgment of the Court of Hamilton County, and gave the following certificate:

In this cause, the judgment of the Court of Common Pleas having been affirmed, it is now certified that this is the highest court of law in the State of Ohio, in which a decision of this suit could be had; and that there is drawn in question the validity of statutes of the State of Ohio, in which it is claimed by plaintiffs in error, those statutes are in violation of the Constitution of the United States; and which statutes have been held valid and binding by this court, notwithstanding such objections. And this certificate is ordered to be made part of the record.

The defendants brought the case up to this court.

It was argued upon printed briefs by *Messrs. Fox, Walker, and Grosbeck* for the plaintiffs in error, and by *Mr. Chase*, with whom was *Mr. Rockwell*, for the defendants in error.

The question of jurisdiction was thus stated by one of the counsel for the plaintiffs in error, *Mr. Walker*:

This case comes before this court under that clause of the 25th section of the Judiciary Act (1 U. S. Stat. at Large, 85) which authorizes a writ of error to a state court in the case of "a final judgment in any suit in the highest court of law of a state in which the decision in the suit could be had, where is drawn in question the validity of a statute of a state, on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of such its validity."

151*) *This state of fact appears on the face of the record. The validity of the Statute of Ohio, of March 18, 1839, "further to amend the Act entitled 'An Act to prohibit the issuing and circulating of unauthorized bank paper'" (Swan's Stat., 140), was drawn in question. It was drawn in question upon the ground that it was repugnant to the Constitution of the United States, because it impaired the obligation of the contract made by the State of Ohio with the Whitewater Canal Company, in the Act incorporating the latter; and the decision of the State Court—the highest court of law in the State in which the decision could be had—was in favor of the validity of that statute.

The case therefore arises where this court may entertain jurisdiction. (*Commonwealth Bank of Kentucky v. Griffith*, 14 Peters, 56.)

On the other hand, the counsel for the defendant in error contended that this court has no jurisdiction. It is not a case in which was

drawn in question the validity of a statute of a state, on the ground of its being repugnant to the Constitution of the United States, and in which the decision was in favor of such its validity.

1. The case is within the decision of the court in the case *Commercial Bank v. Buckingham*, 5 Howard, 317.

The defendants below did not claim that the Acts of Ohio were unconstitutional; their claim was that those statutes imposed a penalty for their violation, and that thus the action was barred in four years under the general Statute of Limitation of the State. The Supreme Court of Ohio decided otherwise; and as they claim erroneously, and they *now* claim on account of that erroneous decision to give this court jurisdiction.

2. It does not appear from the record that the question was raised at the trial as to the constitutionality of the Ohio Statutes of 1816 and 1839.

Nothing of the kind is shown, or to be inferred, from the pleadings in the case.

From the bill of exceptions it appears that the plaintiffs in error excepted, on three grounds, to the admission of testimony, and claimed the charge of the judge to the jury on nine points, but no one of them has any reference to, nor in any manner involves this question.

The charge itself presents no such question; no reference whatever is made to any such question in the assignments of errors in the Court of Common Pleas or Supreme Court of Ohio.

The only thing on the record, showing that the constitutional validity of any law was in question, is found in the certificate ordered by the court to be entered on the record (p. 19), "that there is drawn in question the validity of Statutes of the State of *Ohio," &c., [*152* without saying what statutes, or on what ground the decision was made, or in what manner statutes of Ohio were connected with the subject matter of the case before the court: nor is there anything in any part of the record showing that these Statutes of 1816 and 1839 were in question, nor any reference made to them.

Mr. Justice Wayne delivered the opinion of the court:

We do not think that this court has jurisdiction of this case. We cannot find in the record, nor can it be inferred from any part of it (the certificate of the Supreme Court included), which of the statutes of Ohio were declared to be valid, which has been alleged to be in conflict with the Constitution of the United States.

The 25th section of the Act to establish the judicial courts of the United States, requires something more definite than such a certificate, to give to this court jurisdiction.

The conflict of a state law with the Constitution of the United States, and a decision by a state court in favor of its validity, must appear on the face of the record, before it can be re-examined in this court. It must appear in the pleadings of the suit, or from the evidence in the course of trial, in the instructions asked for, or from exceptions taking to the

ruling of the court. It must be, that such a question was necessarily involved in the decision, and that the State Court would not have given a judgment without deciding it.

The language of the section is, that no other cause can be assigned, or shall be regarded as a ground of reversal, than such as appears on the face of the record.

This certificate is, that the Supreme Court of Ohio held that certain statutes of Ohio were valid, which had been alleged to be in violation of the Constitution of the United States, without naming what those statutes were. This is neither within the letter nor spirit of the Act.

If permitted, it would make the State Courts judges of the jurisdiction of this court, and might cause them to take jurisdiction in cases in which conflicts between the state laws and the Constitution and the laws of the United States did not exist.

The statutes complained of in this case should have been stated. Without that, the court cannot apply them to the subject matter of litigation, to determine whether or not they violated the Constitution or laws of the United States.

This court has already passed upon a certificate of a like kind from Ohio, in the case of *The Commercial Bank & Eunice Buckingham's Executors*, 5 How., 317. That was more to 153*] the purpose than this, but it was declared to be insufficient to give jurisdiction to this court. In that case it was certified that the plaintiffs in error relied upon the charter granted them in February, 1829, and the 4th section of it was given; and they claimed, if a section of an Act of 1824 was applied in the construction of their charter, that it would be a violation of the Constitution of the United States, because it impaired the obligation of a contract. It was also stated that the objection had been overruled, and that a decision had been given in favor of the validity of the Act of 1824. When the case was considered here, we first examined our jurisdiction under the 25th section, and determined against it. Not because we did not think that the certificate was a part of the record, or that it did not show sufficiently the Act which the plaintiffs in error alleged could not be applied in that case without impairing the obligation of a contract, but because we thought, from our view of the entire record, that the only question which was raised on the trial of the case in the State Court, was one of construction of two Ohio Statutes. And that was, whether or not the bank was legally liable to pay on account of its refusal to pay its notes in specie, the six per cent. imposed by the Act of 1824, as a penalty for such refusal, in addition to the twelve per cent. imposed by its charter. The constitutionality of the Act of 1824 was not denied. Indeed, it was admitted. But it was urged that the application to make the bank pay the penalty imposed by it, and twelve per cent. besides, would impair the obligation of a contract which the State had made with the corporation in their charter. Here, then, the validity of the Act of 1824 was not drawn in question, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, nor was a point raised for the

construction of any clause of the Constitution, of a treaty, or of a statute of the United States. The admission of the constitutionality and validity of the Act of 1824, only raised a question of construction of two state statutes, one of which it was said would be repugnant to the other, if its penalty should be applied to the bank, in addition to that imposed by its charter, without words implying that the bank would not be liable to an universal statute, passed before the bank was chartered, which imposes six per cent. upon all banks which should refuse to pay their notes in specie. The court decided, that the bank was liable to the penalty of the Act of 1824, but it erroneously supposed, because a constitutional point had been made in the argument, that it was one which necessarily arose from the case itself, and that it could not give a judgment in the case upon its merits without deciding that it involved the question of a conflict with the Constitution of the United States.

*It was in that view of the case that [*154 this court said, in its opinion: "It is not enough that the record shows that the plaintiff contended and claimed, that the judgment of the court impaired the obligation of a contract and violated the provision of the Constitution of the United States, and that this claim was overruled by the court; but it must appear by clear and necessary intendment, from the record, that the question must have been raised and must have been decided in order to induce the judgment." And it was also in this view, when one state statute was said to be repugnant to another, both being admitted to be constitutional, that it was said in that case, "It is the peculiar province and privilege of the State Courts to construe their own statutes," and when they did so, "it was no part of the functions of this court to review their decisions," or, in such cases, "to assume jurisdiction over them, on the pretense that their judgments have impaired the obligation of contracts."

Having said that this court had not jurisdiction in this case on account of the insufficiency of the certificate, we now say, if it could be made as definite as that in the case of *Buckingham's Executors*, by inserting in it the Statutes of Ohio, which the court supposed involved a constitutional question, that it would not give this court jurisdiction. Then the cases would be so much alike that the *Buckingham* case would rule this as to the question of jurisdiction. In the *Buckingham* case it was urged that the penalty, in a general statute upon banks, for refusing to pay their notes in specie, could not be imposed upon a bank subsequently chartered, in addition to the penalty imposed by its charter, without a violation of the Constitution of the United States. It is urged, in argument in this case, that a Statute passed in 1816, entitled "An Act to prohibit the issuing and circulating of unauthorized bank paper," which was amended in 1839, could not be applied to make the defendants liable to pay notes which were issued in 1840 by a Canal Company, in its corporate name, and which notes were meant for circulation in the community as bank paper. It was not contended that the Canal Company could legally issue such paper for circulation

as money, though it was said they could give notes payable to order in payment of its debts.

It was not denied that the Company could give notes in payment of debts, but it was said, that they could not make them for that purpose and for circulation, as bank paper. The point then raised for decision, was, whether the Canal Company could do so, without making its stockholders and directors liable to pay them to the holders of the notes, under the Statute of 1816, amended in 1839. The Supreme Court decided that the defendants in this case, being directors and stockholders of 155*] the *Canal Company, were liable, by the Statutes of 1816 and 1839, to pay such notes. It seems to us, that the statement gives its own answer, and that the Supreme Court, in making its decision, only gave a construction to an Act of Ohio, which neither of itself, nor by its application, involved in any way a repugnancy to the Constitution of the United States, by impairing the obligation of a contract. Whether the construction of the Act and the charter of the Canal Company was correct or not, we do not say. We do not mean to discuss that point, or to give any opinion upon it; but we mean to say, that the construction does not violate a constitutional point under the 25th section of the Judiciary Statute, so as to give this court jurisdiction in this cause.

If more was wanting in aid of our conclusion, it is to be found in the pleadings in the case, in the evidence given on the trial, the objections made to the admissibility of certain parts of it, in the prayers of the defendant to the court to instruct the jury, and in the charge which the court gave. By no one of them is a constitutional question raised. It was only suggested, in argument, and on that account it was, that the court certified that the validity of Statutes of Ohio was drawn into question, which were said to be in violation of the Constitution of the United States, and not because the court considered that such a point had been rightly raised before it, under the 25th section of the Judiciary Act of 1789."

We do not think it necessary to repeat anything which this court has hitherto said, from an early day to the present, concerning the 25th section. Its interpretation will be found in the case of *Crowell v. Randall*, 10 Peters, 306; in other cases, cited in that case; and in *Armstrong v. The Treasurer of Athens County*, 16 Peters, 281.

We shall direct this suit to be dismissed for want of jurisdiction.

ORDER.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Ohio, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that this cause be, and the same is hereby dismissed, for the want of jurisdiction.

Cited—18 How., 516; 4 Wall., 180; 10 Wall., 510
11 Wall., 38; 2 Otto, 329.
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*THOMAS OTIS LE ROY, AND [*156
DAVID SMITH, *Plaintiffs in Error*,

v.

BENJAMIN TATHAM, JUNIOR, GEORGE
N. TATHAM, AND HENRY B. TATHAM. 1

*Infringing letters patent—Claims construed—
What is not patentable.*

In a patent for improvements upon the machinery used for making pipes and tubes from lead, or tin, when in a set or solid state, by forcing it under great pressure, from out of a receiver, through apertures dies, and cores, the claim of the patentees was thus stated: "What we claim as our invention, and desire to secure by letters patent, is the combination of the following parts, above described, to wit: the core and bridge, or guidepiece, the chamber and the die, when used to form pipes of metal, under heat and pressure, in the manner set forth, or in any other manner substantially the same."

The Circuit Court charged the jury, "that the originality did not consist in the novelty of the machinery, but in bringing a newly discovered principle into practical application, by which an useful article of manufacture is produced, and wrought pipe made as distinguished from cast pipe."

This instruction was erroneous.

Under the claim of the patent, the combination of the machinery must be novel. The newly discovered principle, to wit: that lead could be forced, by extreme pressure, when in a set or solid state, to cohere and form a pipe, was not in the patent, and the question whether it was or was not the subject of a patent, was not in the case.

THIS case was brought up by writ of error from the Circuit Court of the United States for the Southern District of New York.

The declaration was filed by the defendants in error, on the 8th of May, 1817, to recover damages in a plea of trespass upon the case, from the plaintiffs in error, and Robert W. Lowber, for the alleged infringement of their patent, for new and useful improvements in machinery or apparatus for making pipes and tubes from metallic substances.

The declaration alleged, that John and Charles Hanson, of Huddersfield, England, were the inventors of the alleged improvements, on or before the 31st of August, 1837.

That on the 10th of January, 1840, the Hansons assigned, in writing, to H. B. and B. Tatham (two of the defendants in error), the full and exclusive right to the said improvements.

That on the 29th of March, 1841, letters patent of the United States were granted to H. B. & B. Tatham, as assignees of the Hansons, for the said improvements.

That on the 12th of October, 1841, H. B. & B. Tatham assigned to G. N. Tatham (the remaining defendant in error), one undivided third part of the said letters patent.

That, on the 14th of March, 1846, the said

1.—Mr. Justice Curtis, having been of counsel for the defendants in error, upon the letters patent drawn in question in this case, did not sit at the hearing.

NOTE.—For what patents are granted. When declared void. See note to *Evans v. Eaton*, 3 Wheat., 454.

Said to be a leading case as to patents. *O'Reilly v. Morse*, 15 How., 62; Examined and commented on in a further decision in another cause between the same parties. *Leroy v. Tatham*, 22 How., 132.

letters patent having been surrendered, on ac-
157*] count of the defective specifications *of
the said improvements, new letters patent were
issued therefor, on an amended specification,
whereby there was granted to the plaintiffs be-
low, their heirs, &c., for the term of fourteen
years from the 31st of August, 1837, the full and
exclusive right of making, vending, &c., the
said improvements; a description whereof was
annexed to and made a part of such patent.

That the letters patent were of the value of
\$50,000; and that the defendants below had
wrongfully and unlawfully made, used, and
vended the said improvements, and made lead
pipe to the amount of 2,000 tons, thereby to
the injury of the plaintiffs, \$20,000.

To this declaration, the defendants, Le Roy
and Smith, pleaded not guilty: the defendant,
Lowber, making no defense, and permitting a
default to be taken against him.

The cause was tried at the April Term, 1849,
and a verdict rendered by the jury in favor of
the plaintiffs, for \$11,394, and costs, and a bill
of exceptions was tendered by the defendants
below.

On the trial of the cause below, the plaintiffs
produced,

1. Their patent of 1846, and the specification
referred to therein, and making a part of the
same.

2. They read in evidence certain agreements
between the defendant, Lowber, and the de-
fendants, Le Roy and Smith.

3. They gave evidence tending to prove
that J. & C. Hanson were the original and
first inventors of the improvement; that the
invention was a valuable one, &c.

4. That lead, recently become set, under heat
and pressure, in a close vessel, would re-unite
perfectly after a separation of its parts; that,
in the process described in the said patent, pipe
was so made; that the Hansons were the first
and original discoverers thereof; and that such
discovery, and its reduction to a practical re-
sult, in the mode described in the patent, was
useful and important.

5. That the defendants, Smith and Le Roy,
had been jointly engaged with Lowber in mak-
ing lead pipe upon the plan described in the
letters patent, and selling the same, and had
thus made and sold large quantities of pipe;
that the agreement between them, relative
to the manufacture of pipe, was colorable
only, and was made as a cover to protect Le
Roy and Smith, and throw the responsibility on
the defendant, Lowber, who was insolvent.

6. That the improvement described in the
said letters patent was the same invention for
which letters patent had been granted to the
Hansons, in England, and to H. B. & B. Tatham,
here, as their assignees.

7. That the plaintiffs had been ready, and
158*] had offered to sell *the said invention,
and had sold the same for a large portion of
the United States, within the last eighteen
months.

The defendants below then read in evidence,
1. The description of the English patent to
the Hansons.

2. The patent to H. B. & B. Tatham, of
1841, and the specification thereof.

3. The specification of an English patent,
granted to Thomas Burr, of the 11th April, 1820.

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4. The patent and specification of Burroughs
Titus, granted in 1831.

5. The patent granted to George W. Potter,
in 1838.

6. The evidence of George Fox, tending to
show the invention and use by him of a simi-
lar machine, in 1880.

7. The specification of a patent to John
Hague, in 1822.

8. The specification of a patent granted to
Busk & Harvey, in 1817.

9. The specification of a patent granted to
Ellis & Burr, in 1836.

10. The specification of a patent granted to
Joseph Bramah, in 1797.

11. The defendants then gave evidence tend-
ing to prove that J. & C. Hanson were not the
original and first inventors of the combination
of machinery described in the letters patent.

12. That the invention was not useful, nor
the lead pipe, made upon the plan described,
good.

13. That the combination of machinery de-
scribed in public works, as having been in-
vented by Titus, Potter, Fox, Hague, Bramah,
and Busk & Harvey, were substantially the
same as that described in the plaintiffs' patent.

14. That lead, when recently become set,
under heat and extreme pressure, in a close
vessel, would not re-unite perfectly after a sepa-
ration of its parts; and that, in the process as
described in the plaintiffs' patent, it was not in
a set, but in a fluid state when it passed the
bridge.

15. That the defendants, Le Roy & Smith,
were not concerned in the manufacture of the
pipe, or in making or using the machinery;
that it was made for them by the defendant,
Lowber, at a certain price per hundred
pounds; and that they had not infringed upon
the patent of the plaintiffs.

16. That the improvement described in the
plaintiffs' patent, of 1846, was not the same in-
vention as that for which letters patent had
previously been granted to the Hansons, and
to H. B. & B. Tatham.

17. That, for the space of eighteen months,
from the date of the patent of 1841, the plain-
tiffs had neglected to put and continue on sale
to the public, on reasonable trust, the inven-
tion or discovery for which the said patent is-
sued.

*The evidence being closed, the case [*159
was argued before the jury, after the court had
given the charge, which will be presently
stated. The jury found a verdict for the plain-
tiffs, which, when increased by the court,
amounted to \$11,748.80. The following bill of
exceptions brought up the rulings of the court
upon the several points made:

The evidence being closed, the Judge
charged the jury—

That the first question which it was material
to determine was, what was the invention or
discovery of John and Charles Hanson, for
which their patent had issued, as the precise
character of that invention had been the sub-
ject of controversy on the trial.

The patentees state in their specification, that
the invention consists in certain improvements
upon, and additions to, machinery for making
pipes of metal, capable of being pressed, as
described in Burr's patent, dated April 11.

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1820 They then describe Burr's apparatus, and the process by which the pipe was made by it, and state the defects of that plan, in consequence of which, they say, it failed to go into general use.

These defects they claim to have overcome and remedied; and state that they had found that lead, and some of its alloys, when just set, or short of fluidity, and under heat and great pressure, in a close vessel, would re-unite, after a separation of its parts, as completely as if it had not been separated; or, in other words, that, under these circumstances, it could be welded.

That, on this discovery, and in reference to and in connection with it, they made a change in the machinery of Burr, by which they succeeded in making perfect pipes, and were enabled to use a bridge at the end of the cylinder and short core, and thus surmount the difficulty of the Burr machine.

They also state, that they do not claim any of the parts—the cylinder, core die, or bridge; but that they claim the combination when used to form pipes of metal, under heat and pressure, in the way they have described.

There can be no doubt that, if this combination is new, and produces a new and useful result, it is the proper subject of a patent. The result is a new manufacture.

And even if the mere combination of machinery in the abstract is not new, still, if used and applied in connection with the practical development of a principle, newly discovered, producing a new and useful result, the subject is patentable. To which last opinion and decision, the counsel for the defendants did then and there except.

In this view, the improvement of the plaintiffs is the application of a combination of machinery to a new end—to the *development and application of a new principle, resulting in a new and useful manufacture.

That the discovery of a new principle is not patentable; but it must be embodied and brought into operation by machinery, so as to produce a new and useful result.

Upon this view of the patent, it is an important question, for the jury to determine, from the evidence, whether the fact is established on which the alleged improvement is founded, that lead, in a set or semi-solid state, can thus be re-united or welded after separation.

The Judge here commented briefly upon the testimony, referring to the experiments which were testified to, and the results of which were exhibited to the jury, on the part of the plaintiffs and defendants, and, in continuation, stated:

That there was one experiment which was testified to by Mr. Keller, and the result of which was shown to the jury, which was made under circumstances that seem not to be subject to any misapprehension, and which, if he is not mistaken, and his testimony is correct, would seem to settle the question. But this was a question of fact to be decided by the jury on the evidence. Hereupon, the counsel for the defendants excepted to this part of the charge of the Judges—That it had been objected, that the improvement described in the patent of March 14, 1846, was different from

that of March 29, 1841. The act only authorized a re-issue for the same invention, the first specification being defective—That he had compared the descriptions contained in the two patents, and, though the language was in some parts different, it would be found that the improvement was substantially the same, and that he therefore apprehended they would have no great difficulty in this branch of the case; to which the defendants' counsel excepted—That it was also objected, that the plaintiffs' patent was invalid, for want of originality; that the invention had been before described in public works, and Bramah, Hague, Titus, Fox, and Potter, were relied on by the defendants—That, in the view taken by the court, in the construction of the patent, it was not material whether the mere combinations of machinery referred to were similar to the combination used by the Hansons; because the originality did not consist in the novelty of the machinery, but in bringing a newly discovered principle into practical application, by which a useful article of manufacture is produced, and wrought pipe made, as distinguished from cast pipe. Hereupon the defendants' counsel excepted.

That in the patents referred to, from the year 1797 to 1832, the combination which was claimed to be identical, was confessedly used for making pipe, by casting with fluid lead in a *mold, and after it was set by the ap- [*161 plication of water, forcing it out.

And the question is, whether any of these inventions are substantially the same as the plaintiffs'; whether, even if by these modes pipe had been successfully made for common use, it would have been made in the same manner as the Hansons'; to which opinion the counsel for the defendants excepted.

That it was further objected that the patentees have forfeited their rights, on account of having omitted to put and continue the invention on sale within eighteen months after the patent was granted, upon reasonable terms. The judge here commented upon the testimony on this part of the case, and in continuation said:

That it was not essential, under the section of the Statute referred to, that the patentees should take active means for the purpose of putting their invention in market, and forcing a sale; but that they should at all times be ready to sell at a fair price, when a reasonable offer was made.

That it was for the jury to say whether it was put and continued on sale, under this view of the law; to which opinion the counsel for the defendants excepted.

That the defendants, LeRoy and Smith, contend that they have not infringed the plaintiffs' patent; that they were but the purchasers of the pipe, and that Lowber was the manufacturer, under the agreement which has been read.

The judge here referred to the evidence on this branch of the case, and said:

That if the contract made by the defendants with Lowber was *bona fide*, and they had no connection with the manufacturer of the articles, except to furnish lead and pay him a given price, deducting the expenses; and if the contract was in fact carried out and acted upon in that manner, then the defendants would not be

liable. But if the agreement was only colorable, and was entered into for the purpose of deriving the benefit and profits of the business, without assuming the responsibility for the use of the invention, and for the purpose of throwing the responsibility on Lowber, who was insolvent, then they were as responsible as he was.

That aiding and assisting a person in carrying on the business and in operating the machinery, would implicate the parties so engaged. If, therefore, these defendants participated actively in conducting the machine, directing and supervising its operations; if the evidence establishes that position, then, as aiding and assisting, they are as responsible as Lowber (to which last opinion and decision the defendants' counsel excepted).

162*] *Prior to the giving of the preceding charge to the jury, the defendants' counsel requested the court to instruct them according to the following written proposition submitted; and his honor, after he delivered the said charge, took up the said propositions in their order, and gave the instructions to the jury, which are respectfully subjoined thereto.

Proposition I. If the jury believe that the agreements executed on the 18th of April and 18th of May, 1846, by which Lowber, as manufacturer was to make the pipe for Le Roy & Co., on his machine, at 55 cents the 100 pounds, was real and *bona fide*, on an actual dissolution of the partnership of Lowber & Le Roy, and not colorable to throw the responsibility of working the machine on Lowber alone, then the plaintiffs cannot recover.

Upon which, his honor said that he had already given all the instructions he deemed necessary on that point; the proposition was correct, and it was for the jury to decide that fact.

Proposition II. That even if the Tathams first introduced the pipe in question in this country, as an article of commerce, that does not give them any right to recover, unless the patents under which they claim were good and valid, for an invention not before known, used or described in a public work.

Upon which, his honor instructed the jury, as requested by the defendants' counsel.

Proposition III. That if the jury believe that the combination patented by the plaintiffs was before patented by Burroughs Titus, or anyone else in this country, or patented and described in a well-known public work abroad, the plaintiffs cannot recover, although such machines thus patented were not actually put in operation, so as to make pipe for the public.

Upon which his honor instructed the jury that he had already stated to them that the plaintiffs' invention did not consist in the mere combination of machinery, and, therefore, if those patents were for casting lead pipe, the point was not material; that it was not necessary that they would have made pipe for public use to defeat a subsequent patent. To which instruction, and refusal to instruct the jury as requested, the defendants' counsel excepted.

Proposition IV. That the Tatham patent is void on its face, the Burr machine having the entire combination, including heat and pressure, and the lead in a set state. The patent is void for claiming too much; should only have been for the improvement, viz.: substi-

tuting the bridge and short core for the long core, and not for the whole combination.

His honor declined to give this instruction, to which the defendants' counsel excepted.

*Proposition V. That the bridge and [*163 short core having been before patented in this country by Burroughs Titus, and also before used in other machines, no claim could be made for introducing into Burr's combination such bridge.

Upon which his honor instructed the jury as follows: Undoubtedly that is so, but that is not the plaintiffs' claim.

Proposition VI. That the state of the lead, when used as described in the plaintiffs' specification, being a principle of nature, is not the subject of a patent, either alone or in combination with the machine mentioned in that specification.

To which his honor stated, the first part of the proposition was correct, and the latter part not; and the defendants' counsel excepted.

Proposition VII. That the using of a metal in a certain state, or at a certain temperature, alone, or in combination with a machine, was not the subject of a patent.

To which his honor stated, I have already instructed the jury that the invention, as described by the Hansons, is a patentable subject; to which the defendants' counsel excepted.

Proposition VIII. That if the jury believe that the combination of cylinder, piston, bridge, short core, die and chamber, under heat and pressure, was before patented in this country, by Burroughs Titus, then the plaintiffs cannot recover.

Whereupon his honor instructed the jury, that novelty in the mere combination of the machinery was not essential to the plaintiffs' right to recover, except as connected with the development and application of the principle before mentioned; to which the defendants' counsel excepted.

Proposition IX. That if the jury believe that the same combination of cylinder, piston, bridge, short core, die and chamber, under heat and pressure, had before been patented in England, by Bramah, and published in a well-known work, then the plaintiffs cannot recover.

His honor instructed the jury, that Bramah's patent and the Tathams' were not identical, and declined to instruct them as requested; to all which the defendants' counsel excepted.

Proposition X. That if the jury believe that the Burr, Bramah, Titus, and Hague machines, or either of them, were published to the world in well-known public works, and had the same combination, in whole or in part, as the Hansons' machine, up to a certain point, the Tathams' patent is void, for claiming too much, viz.: the whole combination.

His honor instructed the jury, that he had explained to them his views on that part of the case, and declined to instruct them as requested, in the form of which the proposition was stated; and to which the defendants' counsel excepted.

*Proposition XI. That the re-issue [*164 of the patent of 1846, on which alone the plaintiffs can claim, was not warranted by the patent of 1841, it being for a different, and not the same invention, misdescribed by inadvert-

ence, accident or mistake; and, in fact, was a new patent, under color of a re-issue.

That if the jury believe that the re-issue of 1846 was for a different invention from the patent of 1841, and not for the same invention, misdescribed by inadvertence, accident or mistake, then the plaintiffs cannot recover.

His honor declined to instruct the jury according to the first branch of this proposition, to which the defendants' counsel excepted; but did instruct them in the affirmative, upon the last branch thereof.

Proposition XII. That if the jury believe that the combination patented, was before described in some well known public work, either in this country or in England, the plaintiffs cannot recover, although such machine, or the pipe made by it, was never introduced in this country.

Upon which his honor instructed the jury in the affirmative.

Proposition XIII. If the jury believe that the combination claimed was before known or used, to make lead pipe, by others than the Hansons or the Tathams, the plaintiffs are not entitled to recover, no matter how limited such knowledge or use was, if the invention was not kept secret.

Upon which his honor instructed the jury in the affirmative.

Proposition XIV. That if the Maccaroni machine, or the Busk and Harvey clay pipe machine, contained the same combination as the plaintiffs' machine, that the plaintiffs cannot recover, by reason of applying the same combination to a new use.

Which instructions his honor declined to give, and stated that he had explained to them his views on that subject; and the defendants' counsel excepted.

Proposition XV. That if the jury believe that Mr. Lowber's machine was used by his men when the lead was in a fluid, and not in a set or solid state, then there was no infringement, and the plaintiffs cannot recover, if the plaintiffs' patent were valid.

Upon which his honor instructed the jury in the affirmative.

Proposition XVI. That the jury are the sole and exclusive judges, as questions of fact, whether the combination and process were the same in plaintiffs' machine as was in Bramah's or in any other of the machines proved on the trial.

Upon which his honor charged the jury that this was so undoubtedly, subject, however, to the principles of law, as laid down in his preceding charge and instructions; to which the defendants' counsel excepted.

165*] *Proposition XVII. That if the jury believe that the lead, when it may be successfully used to make pipe with plaintiffs' machine, must not be in a set or solid state, as described in their specification, and that it can only be thus used in a fluid or pasty state, then that the patent is void, and the jury should find for the defendants, on the ground that the specification does not fairly and fully describe the nature of the invention claimed, nor the condition in which the lead should be used, so as to enable the public to ascertain the true nature of the invention, the manner of using the machine, and the condition in which the lead ought to be used.

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Which instruction his honor answered in the affirmative.

The jury then retired to consider their verdict, under the said charge and instructions; and subsequently, on the 25th day of May, 1849, returned into court with a verdict for the said plaintiffs for \$11,394 damages, and six cents costs.

And, inasmuch as the said several matters aforesaid do not appear by the record of the said verdict, the said defendants' counsel did then and there request his Honor, the said Judge, to put his seal to this bill of exceptions, containing the said several matters aforesaid; and his Honor, the said Judge, did, in pursuance of the said request, and of the statute in such case made and provided, put his seal to this bill of exceptions, containing the said several matters aforesaid, at the City of New York aforesaid, the same 25th day of May, 1849. S. NELSON.

The case was argued by *Messrs. Gillett and Noyes*, with whom was *Mr. Barbour*, for the plaintiffs in error, and by *Messrs. Cutting and Staples* for the defendants in error.

The points made by the counsel for the plaintiffs in error were the following:

1. In construing a patent, and deciding what are the inventions patented thereby, the summing up is conclusive. Nothing is patented but what is expressly claimed. (*Moody v. Fiske*, 2 Mason, 112, 118; *Rex v. Cutler*, 1 Starkie, 354; *Davies on Patents*, 398, 404; *Bovil v. Moore*, 2 Marsh., 211; *Wyeth v. Stone*, 1 Story, 285; *Hovey v. Stevens*, 3 W. & M. 17.)

2. What is described in a patent, and not claimed, whether invented by the patentee or not, is dedicated to the public, and cannot be afterwards claimed, as a part of his patent, in a re-issue, or otherwise, (*Battin v. Taggart*, *Judges Kane and Grier*, September 10, 1851; 6th section of Act of 1836; *Mellus v. Silsbee*, 4 Mason, 111; *Grant v. Raymond*, 6 Pet., 218; *Shaw v. Cooper*, 7 Pet., 292, 322, 323; *Pennock v. Dialogue*, 2 Pet., 1, 16.)

3. A patent void in part, is void in whole, except when otherwise *provided [**166** by statute. (*Wyeth v. Stone*, 1 Story, 285, 273-294; *Moody v. Fiske*, 2 Mason, 118, 119; *Woodcock v. Parker*, 1 Gall., 438; *Evans v. Eaton*, 7 Wheat., 356; 5 Cond. R., 302, 314; *Bovil v. Moore*, *Davies' Patents*, 398; *Id.*, 2 Marshall, 211; *Hill v. Thompson*, 3 B. Moore, 244; *Becinton v. Hawks*, 4 B. & Ald., 511; *Saunders v. Aston*, 3 B. & Ald., 881; *Kay v. Marshall*, 5 Bing. N. C., 492; *Gibson v. Brund*, 4 M. & Gr., 178; *McFarlane v. Price*, 1 Starkie, 199; *Minton v. Moore*, 1 Nev. & P., 595; *Rex v. Cutler*, 1 Starkie, 359.)

4. The Judge was bound to present to the consideration of the jury, as a question of fact, in the words of the statute, whether the patentee, being an alien, "had failed and neglected, for the space of eighteen months from the date of the patent, to put and continue on sale to the public, on reasonable terms, the invention for which the patent issued." (*Tatham and others v. Loring*, decision by Judge Story on this patent, cited on brief.)

5. It was error in the Judge to instruct the jury that he had examined the surrendered and re-issued patent, and found the improvement

the same. He should have submitted the question, as one of fact, to the jury, for them to determine, upon the evidence, of the weight of which they were the exclusive judges. It was also error to instruct them that Bramah's and Tatham's patent were not identical. That was a question for the jury. (Curtis, sec. 381; *Carver v. Braintree*, 2 Story, 432; *Stimpson v. Westchester Railroad Co.*, 4 Howard, 381.)

6. The question, whether the combination had been previously patented, or described in a printed publication, was one of fact, which should have been submitted to the jury.

7. Applying an old machine to a new use, or to produce a new result, is not the subject of a lawful patent. (*Boulton v. Bull*, 2 H. Bl., 487; *Laish v. Ilague*, Web. Pat., 207; *Crane v. Price*, 4 Mann. & Grang., 580; *Huddart v. Grainshaw*, Web. Pat., 8; *Howe v. Abbott*, 2 Story, 190, 193; *Bean v. Smallwood*, 2 Story, 408, 410; *Howe v. Stevens*, 1 Wood. & M., 290, 297, 298; *Kuy v. Marshall*, 5 Bing. & C., 492; 35 Com. Law. p. 194, 197, 198; *Gibson v. Brand*, 4 Mann. & Grang., 179, 43 Com. Law, 100, 110; *Hotchkiss v. Greenwood*, 11 Howard, 248, 266; Curtis, secs. 26, 27.)

8. Making an addition to an old combination does not authorize a patent for the whole combination. Such a patent would be broader than the invention, and void.

(Act 1836, sec. 6; Hindmarch on Pat., 184, 190, and cases cited; *Basil v. Gibbs*, Davies' Pat., 398, 413; *Whittemore v. Cutler*, 1 Gall., 478; *Barrett v. Hall*, 1 Mason, 417, 474; *Moody v. Fiske*, 2 Mason, 117; *Prouty v. Draper*, 1 Story, 568; *Howe v. Abbott*, 2 Story, 190; *Brooks v. Jenkins*, 8 McLean, 433; *Evans 167** *v. Eaton*, 1 Pet. C. C., 322; Curtis, secs. 8, 9, 10, 11; *Brooks v. Bicknell*, 4 McLean, 64, 73; *Root v. Ball*, 4 McLean, 177, 180; *Parker v. Haworth*, 4 McLean, 370, 373; *Prouty v. Ruggles*, 16 Pet. 336, 341; *Evans v. Eaton*, 7 Wheat., 356; 5 Cond. R., 302, 314.)

9. The plaintiffs, Henry B. and Benjamin Tatham, not being inventors, were not authorized to surrender the patent granted to them as assignees, and receive a re-issued patent thereon. (Patent Act of 1837, sec. 6.)

10. The re-issued patent is void, because issued to a party who was neither an original inventor, nor his assignee. (Act of 1837, sec. 6.)

11. Neither a principle nor an effect can be patented, but a patent must be for a mode of embodying the former to produce the latter, invented by the patentee. (*Kemper's case*, by Chief Justice Cranch, in Curtis on Pat., 500; *Wyeth v. Stone*, 1 Story, 285; *Hill v. Thompson*, 8 Taunton, 375; S. C., 4 Com. L., 151; *Brunton v. Hawks*, 4 Barn. & Ald., 541; S. C., 6 Com. L., 509; *Moody v. Fiske*, 2 Mason, 118; *Whittemore v. Cutler*, 1 Gall., 478, 480; *Stone v. Sprague*, 1 Story, 270, 272; *Blanchard v. Sprague*, 3 Sumner, 535, 540; S. C., 2 Story, 164, 194; *Howe v. Abbott*, 2 Story, 194; *Smith v. Downing*, decided in 1850 by Judge Woodbury; *Detmould v. Reeves*, Grier and Kane, *Judges*, 1851; *Boulton v. Watt*, 2 H. Bl., 453; S. C., Davis on Pat., 162, 192.)

The counsel for the defendants in error made the following points:

No exception was taken to the admission or exclusion of testimony; but solely to the Judge's charge.

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The invention for which the patent was granted consisted in the discovery, that, under certain conditions, and by the use and application of certain methods, lead and some of its alloys, while in a set state, could, after being separated into parts, be re-united and welded, and thus formed into pipe; and also of the mode of doing this; producing thereby a new article of manufacture, wrought lead pipe—avoiding the objections which had always prevented success in casting pipe; and by this discovery overcoming the defects of Burr's method, on which this was an improvement.

The patentees, in describing the invention, say that they "have found from experience that lead and some of its alloys, when recently become set, or in a condition just short of fluidity, being still under heat and extreme pressure, in a close vessel, will re-unite perfectly after a separation of its parts," and that, therefore, they construct their machinery as follows—and "then proceed to describe the [*168 machinery or apparatus, as adapted by them to this discovery, and by which they produce the practical result above stated.

After describing the apparatus and the modes of using it, the patentees repeat, "that the remarkable feature of their invention is, that soft metals, when in a set state, being yet under heat can be made, by extreme pressure, to re-unite perfectly, around a core after a separation, and thus be formed into strong pipes or tubes."

And "that the essential difference in the character of this pipe, distinguishing it from all others before made, was, that it was wrought under heat by pressure and constriction from set metal; and that it is not a casting formed in a mold."

And they close by claiming, as their invention, "the combination described by them, when used to form pipes of metal under heat and pressure in the manner set forth."

The Judge, in his charge, in commenting on the patent, states the invention to be substantially as above stated; and to this construction and view of the patent, no exception was taken by the defendants.

The court then proceed further to instruct the jury, in answer to certain propositions submitted by the plaintiffs in error for the consideration of the court.

I. The first proposition laid down by the court, is that the mere combination of machinery, not new, in the abstract, when combined with and applied to the practical development of a new principle, to produce a new and useful result, may be the subject of a valid patent. This principle is repeated several times, in different connections, in the course of the charge to the jury; and as often excepted to by the counsel for the defendants.

The counsel for the defendants in error, insist that the above position is correct, and supported by principle, by precedent and by practice.

1. The position is supported by principle. founded on the statutes giving patents to inventors. He who discovers a new principle, and points out the means of applying it, to produce a new and useful result, comes within the settled construction of the English Act, giving a patent, for the sole working of any manner

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of new manufactures. (See 6th section of the Act 21 James I., 1623.) By our patent law, any person, having invented or discovered any new manufacture, &c., is entitled to a patent. (See 6th section of the Act 4th July, 1836.) The term "new manufacture" includes not only the thing produced, but the means of producing it.

2. This principle is supported by authority. (Curtis, Pat., secs. 9, 71 to 91, also, ch. 2, pp. 57 to 169*) 94, and cases there cited; *Earl Dudley's patent for the use of pea or pit coal, in the manufacture of iron; 1 Carpmael, 15; Webster's Patent Cases, 14 S. C.; Nielson's patent for the hot air blast, in connection with common bituminous pit coal, in the manufacture of iron; 8 Mees. & Welsb., 806 to 825; A. D. 1841; *Nielson v. Harford, &c.*, Web. Pat. Ca., 295, 328, and 328 to 373, A. D. 1841; S. C., 374; Crane's patent for the hot air blast, in connection with anthracite coal; Crane's patent, Web. Pat. Cas., 375, date 1836; *Crane v. Price, &c.*, Webs. Pat. Cas., 377, 893, A. D. 1842; S. C., 4 Mann. & Grang., 380; S. C., 43 Eng. Com. L. R., 301; S. C., 2d vol., Frank, J., for year 1851, p. 388; *French, &c. v. Rogers, &c.*, 394 to 397, and cases there cited by the court; 6 Eng. Law and Equity, 536, overruling 2 Carlington & Kirwan, cited v. Leon., 43, 47, 52; Curtis, 81 a.; Webster, 229, note.)

II. The second exception by the defendants' counsel is to the charge of the court, in relation to Mr. Keller's evidence.

It is difficult to see upon what ground this exception of the defendants to the charge of the court is founded. After remarking upon the character and weight of the fact testified to, the whole is submitted to the jury for their decision.

III. The third exception taken to the charge of the court is found in the next two paragraphs on the same page, and relates to the re-issued patent. The same is repeated in the call of the defendants, in their eleventh proposition, upon which they ask the court to instruct the jury.

The substance of the charge, as given in both instances, is that the language in one patent was in some parts different from that in the other, but the meaning was substantially the same in both. That the re-issued patent must be for the same invention as the first; and the matter of fact was left to the jury.

IV. The next exception is to the charge of the court, as found at the top of the 42d page of the case, and is as follows:

"That in the patents referred to, from the year 1797 to 1832, the combination which was claimed to be identical, was confessedly used for making pipe, by casting with fluid lead in a mold, and after it was set, by the application of water, forcing it out.

"And the question is, whether any of these inventions are substantially the same as the plaintiffs'; whether, even, if by these modes pipe had been successfully made for common use, it would have been made in the same manner as the Hansons'; to which opinion the counsel for the defendants excepted."

Whether the modes referred to by the court, of manufacturing pipe, were the same or different, was a question of fact left to the jury; and the court did not, by the manner of

stating the point, withdraw it from the consideration of the jury.

V. The fifth exception relates to the charge of the court, as to the duty of the plaintiffs to put and keep the invention on sale on reasonable terms, and they say that it was not essential that the patentees should take active means for the purpose of putting their invention in market, and forcing a sale; but that they should at all times be ready to sell at a fair price, when a reasonable offer was made.

That it was for the jury to say whether it was put and continued on sale, under this view of the law; to which the counsel for the defendants excepted.

We insist that the court took a correct view of the statute, and properly submitted the question of fact to the jury; and that the exception is not well taken.

VI. The next exception in the order in which the defendants in error have noticed them, relates to the instructions of the court, in relation to the liability of Le Roy and Smith jointly, with the other defendant, Lowber.

It seems, to the counsel for the defendants in error, that the question was properly submitted to the jury, as a question of fact, how far Le Roy and Smith had made themselves liable with Lowber. The defendants in error insist that the exception to this part of the charge is not well taken.

VII. In answer to the fourth proposition, on which the court was requested to instruct the jury that Tatham's patent was void on its face, &c. We say that the charge of the court was correct. The patentees in Tatham's patent have pointed out clearly what they claim, and what they do not claim.

VIII. In their ninth proposition, the defendants requested the court to instruct the jury—"That if they believed the same combination of cylinder, piston, bridge, short core, die and chamber, under heat and pressure, had before been patented in England by Bramah, and published in a well-known work, then the plaintiffs cannot recover."

Upon this proposition the court instructed the jury, that Bramah's patent and the Tathams' were not identical; and declined to instruct the jury as requested. To which the counsel for the defendants excepted. This request by the defendants for the above instruction was based on the assumption of a fact not proved and not true, and was correctly refused.

IX. The defendants requested the court to instruct the jury according to their tenth proposition, which is as follows: "That if the jury believe that the Burr, Bramah, Titus, and Hague machines, or either of them, were published to the world in *well-known [*171 public works, and had the same combination, in whole or in part, as the Hanson machine, up to a certain point, the Tathams' patent is void for claiming too much, viz.: the whole combination; and the court thereupon instructed the jury, that they had explained their views on that part of the case, and declined to instruct them as requested in the form in which the proposition was stated." To which the counsel for the defendants excepted; and the defendants in error insist that this exception is not well taken.

X. The sixteenth proposition, on which the

court was requested to instruct the jury, is in the following words, namely:

"That the jury are the sole and exclusive judges as to the questions of fact, whether the combination and process were the same in the plaintiffs' machine as was Bramah's, or in any other of the machines proved on the trial. And thereupon the court instructed the jury, that this was so undoubtedly; subject, however, to the principles of law as laid down in the preceding charge and instructions." To which the counsel for the defendants excepted.

The defendants in error insist that none of the exceptions aforesaid are well taken; and that said judgment should be affirmed, with costs and damages.

Mr. Justice McLean delivered the opinion of the court:

This is a case on error from the Circuit Court of the Southern District of New York.

The action was brought in the Circuit Court, to recover damages for an alleged infringement of a patent for new and useful improvements in machinery for making pipes and tubes from metallic substances.

The declaration alleged that John and Charles Hanson, of England, were the inventors of the improvements specified, on or prior to the 31st of August, 1837; that on the 10th of January, 1840, the Hansons assigned to H. B. and B. Tatham, two of the defendants in error, the full and exclusive right to said improvements; that, on the 29th of March, 1841, letters patent were granted for the improvements to the Tathams, as the assignees of the Hansons; that, afterwards, H. B. and B. Tatham assigned to G. N. Tatham, the remaining defendant in error, an undivided third part of the patent.

On the 14th of March, 1846, the said letters patent were surrendered, on the ground that the specifications of the improvements claimed were defective, and a new patent was issued, which granted to the patentees, their heirs, &c., for the term of fourteen years, from the 31st of August, 1837, the exclusive right to make and vend the improvements secured. The declaration ^{¶172} states, the patent was of the value of fifty thousand dollars; and that the defendants below had made and vended lead pipe to the amount of two thousand tons, in violation of the patent, and to the injury of the plaintiffs twenty thousand dollars.

The defendants pleaded not guilty; the defendant Lowber did not join in the plea, but permitted judgment to be entered against him by default. On the trial, certain bills of exceptions were taken to the instructions of the court to the jury, on which errors are assigned.

The schedule, which is annexed to the patent, and forms a part of it, states that the invention consists "in certain improvements upon, and additions to, the machinery used for manufacturing pipes and tubes from lead or tin, or an alloy of soft metals capable of being forced, by great pressure, from out of a receiver, through or between apertures, dies and cores, when in a set or solid state, set forth in the specification of a patent granted to Thomas Burr, of Shrewsbury, in Shropshire, England, dated the 11th of April, 1820." After describing Burr's machine, its defects, and the improvements made on it as claimed, the patent-

ees say, "Pipes thus made are found to possess great solidity and unusual strength, and a fine uniformity of thickness and accuracy of bore is arrived at, such as, it is believed, has never before been attained by any other machinery."

"The essential difference in the character of this pipe, which distinguishes it, as well as that contemplated by Thomas Burr, from all other heretofore known or attempted, is that it is wrought under heat, by pressure and constriction, from set metal; and that it is not a casting formed in a mold."

And they declare, "We do not claim as our invention and improvement, any of the parts of the above-described machinery, independently of its arrangement and combination above set forth. What we do claim as our invention, and desire to secure, is the combination of the following parts above described, to wit: the core and bridge, or guidepiece, with the cylinder, the piston, the chamber and the die, when used to form pipes of metal, under heat and pressure, in the manner set forth, or in any other manner substantially the same."

The plaintiffs gave in evidence certain agreements between the defendants, showing the manufacture of lead pipe by the defendant Lowber, for the defendants Le Roy and Smith. And also evidence tending to prove that the said John Hanson and Charles Hanson were the original and first inventors of the improvement described in the said letters patent; that the invention and discovery therein described was new and useful; that the lead pipe manufactured thereby was superior in quality and strength, capable of resisting much greater pressure, and more free from defects than any pipe before made; that in all the modes of making lead pipe, previously known and in use, it could be made only in short pieces, but that by this improved mode it could be made of any required length, and also of any required size; and that the introduction of lead pipe, made in the mode described, had superseded the use of that made by any of the modes before in use, and that it was also furnished at a less price.

"And the plaintiffs also gave evidence tending to prove that lead, when recently become set, and while under heat and extreme pressure in a close vessel, would re-unite perfectly, after a separation of its parts; and that in the process described in the said patent, lead pipe was manufactured by being thus separated and reunited; and that the said John and Charles Hanson were the first and original discoverers thereof; and that such discovery, and its reduction to a practical result in the mode described in said letters patent, was useful and important."

"And the plaintiffs also gave evidence, conducing to prove that the improvement described in the letters patent was the same invention and discovery which had been made by the said John and Charles Hanson, and for which letters patent had been granted to them in England, and subsequently in this country, to the Tathams, as recited in the letters patent."

"And the plaintiffs also gave evidence conducing to prove that they had been ready and willing, and had offered to sell the said inven-

tion, within eighteen months succeeding the issuing of said letters patent to them, and also since: and had, within the said eighteen months, sold the same for a large portion of the United States."

The defendants' counsel then read in evidence from the "Repertory of Arts," Vol. XVI., page 344, the description of the patent to the Hansons, dated August 31, 1837. They also read in evidence the patent issued upon the application of the plaintiffs to the Patent Office, containing another specification, which was annexed to the patent surrendered. And they also read the specification of Thomas Burr's patent, of April 11, 1820. Also a patent granted to George W. Potter, described in the 12th "Franklin Journal of Arts," published in 1833; they also read the specification of a patent granted in England, to Bush and Harvey, on December 5th, 1817; and also the specification of a patent granted in England to Joseph Bramah, October 31st, 1797.

Evidence was also given to show that the combination of machinery for making lead [174*] pipe, described in public works as *having been invented by Burroughs Titus, by George W. Potter, by Jesse Fox, by John Hague, and by Joseph Bramah, were substantially the same as that used by the plaintiffs; that the combination of machinery, patented as hereinbefore stated, by Bush and Harvey, for making pipes of clay, and that used for making macaroni, were substantially the same as that described in the plaintiffs' patent.

In their charge to the jury, the court said, "They, the plaintiffs, also state, that they do not claim any of the parts of the machinery, the cylinder, core, die or bridge, but that they claimed the combination when used to form pipes of metal, under heat and pressure, in the way they have described. There can be no doubt that if this combination is new, and produces a new and useful result, it is the proper subject of a patent." "The result is a new manufacture. And even if the mere combination of machinery in the abstract is not new, still, if used and applied in connection with the practical development of a principle, newly discovered, producing a new and useful result, the subject is patentable. In this view, the improvement of the plaintiffs is the application of a combination of machinery to a new end; to the development and application of a new principle, resulting in a new and useful manufacture. That the discovery of a new principle is not patentable, but it must be embodied and brought into operation by machinery, so as to produce a new and a useful result. Upon this view of the patent, it is an important question for the jury to determine, from the evidence, whether the fact is established, on which the alleged improvement is founded, that lead in a set or semi-solid state, can thus be re-united or welded, after separation." To this instruction the defendants excepted.

It was also objected, that the plaintiffs' patent was invalid for want of originality; that the invention had been before described in public works, and Bramah, Hague, Titus, Fox and Potter, were relied on by the defendants.

To this it was replied, by the court, "That in the view taken by the court in the construction of the patent, it was not material whether

the mere combinations of machinery referred to were similar to the combination used by the Hansons, because the originality did not consist in the novelty of the machinery, but in bringing a newly discovered principle into practical application, by which a useful article of manufacture is produced, and wrought pipe made as distinguished from cast pipe." To this charge there was also an exception.

The word "principle" is used by elementary writers on patent subjects, and sometimes in adjudications of courts, with such a want of precision in its application, as to mislead. It is admitted *that a principle is not [*175] patentable. A principle, in the abstract, is a fundamental truth; an original cause; a motive; these cannot be patented, as no one can claim in either of them an exclusive right. Nor can an exclusive right exist to a new power, should one be discovered in addition to those already known. Through the agency of machinery a new steam power may be said to have been generated. But no one can appropriate this power exclusively to himself, under the patent laws. The same may be said of electricity, and of any other power in nature, which is alike open to all, and may be applied to useful purposes by the use of machinery.

In all such cases, the processes used to extract, modify, and concentrate natural agencies, constitute the invention. The elements of the power exist; the invention is not in discovering them, but in applying them to useful objects. Whether the machinery used be novel, or consist of a new combination of parts known, the right of the inventor is secured against all who use the same mechanical power, or one that shall be substantially the same.

A patent is not good for an effect, or the result of a certain process, as that would prohibit all other persons from making the same thing by any means whatsoever. This, by creating monopolies, would discourage arts and manufactures, against the avowed policy of the patent laws.

A new property discovered in matter, when practically applied, in the construction of a useful article of commerce or manufacture, is patentable; but the process through which the new property is developed and applied, must be stated, with such precision as to enable an ordinary mechanic to construct and apply the necessary process. This is required by the patent laws of England and of the United States, in order that when the patent shall run out, the public may know how to profit by the invention. It is said, in the case of *The Household Company v. Neilson*, Webster's Patent Cases, 683, "A patent will be good, though the subject of the patent consists in the discovery of a great, general, and most comprehensive principle in science or law of nature, if that principle is by the specification applied to any special purpose, so as thereby to effectuate a practical result and benefit not previously attained." In that case, *Mr. Justice Clerk*, in his charge to the jury, said, "the specification does not claim anything as to the form, nature, shape, materials, numbers or mathematical character of the vessel or vessels in which the air is to be heated, or as to the mode of heating such vessels," &c. The patent was for "the improved application of air to produce

heat in fires, forges and furnaces, where bellows or other blowing apparatus are required." **176***] "In that case, although the machinery was not claimed as a part of the invention, the jury were instructed to inquire, "whether the specification was not such as to enable workmen of ordinary skill to make machinery or apparatus capable of producing the effect set forth in said letters patent and specification." And that in order to ascertain whether the defendants had infringed the patent, the jury should inquire whether they, "did by themselves or others, and in contravention of the privileges conferred by the said letters patent, use machinery or apparatus substantially the same with the machinery or apparatus described in the plaintiffs' specification, and to the effect set forth in said letters patent and specification." So it would seem that where a patent is obtained, without a claim to the invention of the machinery, through which a valuable result is produced, a precise specification is required; and the test of infringement is, whether the defendants have used substantially the same process to produce the same result.

In the case before us, the court instructed the jury that the invention did not consist "in the novelty of the machinery, but in bringing a newly discovered principle into practical application, by which a useful article of manufacture is produced, and wrought pipe made as distinguished from cast pipe."

A patent for leaden pipes would not be good, as it would be for an effect, and would, consequently, prohibit all other persons from using the same article, however manufactured. Leaden pipes are the same, the metal being in no respect different. Any difference in form and strength must arise from the mode of manufacturing the pipes. The new property in the metal claimed to have been discovered by the patentees, belongs to the process of manufacture, and not to the thing made.

But we must look to the claim of the invention stated in their application by the patentees. They say, "We do not claim as our invention and improvement any of the parts of the above-described machinery, independently of their arrangement and combination above set forth." "What we claim as our invention, and desire to secure by letter patent, is the combination of the following parts above described, to wit: the core and bridge or guidepiece, the chamber and the die, when used to form pipes of metal, under heat and pressure, in the manner set forth, or in any other manner substantially the same."

The patentees have founded their claim on this specification, and they can neither modify nor abandon it in whole or in part. The combination of the machinery is claimed, through which the new property of lead was developed, as a part of the process in the structure of the pipes. But the jury were instructed, "that the originality of the invention did not consist **177***] in the "novelty of the machinery, but in bringing a newly discovered principle into practical application." The patentees claimed the combination of the machinery as their invention in part, and no such claim can be sustained without establishing its novelty—not as to the parts of which it is composed, but as to the combination. The question whether the

newly developed property of lead, used in the formation of pipes, might have been patented, if claimed as developed, without the invention of machinery, was not in the case.

In the case of *Bean v. Smallwood*, 2 Story, 408, *Mr. Justice Story* said: "He (the patentee) says that the same apparatus, stated in this last claim, has been long in use, and applied, if not to chairs, at least in other machines, to purposes of a similar nature. If this be so, then the invention is not new, but at most is an old invention or apparatus or machinery applied to a new purpose. Now, I take it to be clear, that a machine or apparatus or other mechanical contrivance, in order to give the party a claim to a patent therefor, must in itself be substantially new. If it is old and well known, and applied only to a new purpose, that does not make it patentable."

We think there was error in the above instruction, that the novelty of the combination of the machinery, specifically claimed by the patentees as their invention was not a material fact for the jury, and that on that ground the judgment must be reversed. The other rulings of the court excepted to, we shall not examine, as they are substantially correct.

Messrs. Justices Nelson, Wayne, and Grier dissented

Mr. Justice Nelson, dissenting:

The patent in this case, according to the general description given by the patentees, is for improvements upon, and additions to, the machinery or apparatus of Thomas Burr, for manufacturing pipes and tubes from metallic substances. They declare that the nature of their invention, and the manner in which the same is to operate, are particularly described and set forth in their specification. In that they refer to the patent of Burr of the 11th April, 1820, for making lead pipe out of set or solid lead by means of great pressure, the product being wrought pipe, as contradistinguished from cast, or pipe made according to the *Craw* bench system. The apparatus, as described by Burr, consisted of a strong iron cylinder, bored sufficiently true for a piston to traverse easily within it. This cylinder was closed at one end by the piston, and also closed at the other, except a small aperture for the die which formed the external diameter of the pipe. The core or mandrel, which determined the inner *diameter, was a long cylindrical rod [***178** of steel, one end of which was attached to the face of the piston, extending through the center of the cylinder, and passing also through the center of the die at the opposite end, leaving a space around the core and between it and the die for the formation of the pipe. The metal to form the pipe was admitted into the cylinder in a fluid state, and when it become set or solid, the power of a hydraulic press was applied to the head of the piston, which, moving against the body of solid lead in the cylinder, drove it through the die, the long core advancing with the piston and with the body of lead through the die, and thus forming the pipe. The cylinder usually holds from three to four hundred pounds of lead, and continuous pipe is made till the whole charge is driven out.

This plan, though one of deserved merit, and of great originality, failed, when reduced to practice, except for the purpose of making very large pipe, larger than that usually in demand, and consequently passed out of general use. The long core attached to the face of the piston, advancing with it in the solid lead under the great pressure required, was liable to warp and twist out of a straight line, and out of center in the die, which had the effect to destroy the uniformity of the thickness and centrality of the bore of the pipe.

The old mode, therefore, of making pipe by the draw bench system, continued down to 1887, when the patentees in this case discovered, by experiment, that lead, when recently set and solid, but still under heat and extreme pressure, in a close vessel, would re-unite after a separation of its parts, and "heal" (in the language of the patentees) "as it were by the first intention," as completely as though it had not been divided.

Upon the discovery of this property of lead, which had never before been known, but, on the contrary, had been supposed and believed, by all men of science skilled in metals, to be impossible, the patentees made an alteration in the apparatus of Burr, founded upon this new property discovered in the metal, and succeeded completely in making wrought pipe out of solid lead by means of the hydraulic pressure. The product was so much superior in quality to that made according to the old mode, that it immediately wholly superseded it in the market. The pipe was also made much cheaper.

The patentees, by their discovery, were enabled to dispense with the long core of Burr, and to fix firmly a bridge or cross bars at the end of the cylinder near the die, to which bridge they fastened a short core extending into and through the die. By this arrangement they obtained a firm, immovable core, that always preserved its centrality with the die, and secured the manufacture of pipe of uniformity [179*] of thickness of wall and *accuracy of bore, of any dimension. The lead, after being admitted into the cylinder in a fluid state, was allowed to remain till it became solid, and was then driven by the piston through the apertures in the bridge into the chamber between it and the die, where the parts re-united, after the separation, as completely as before, and, passing out at the die around the fixed short core, formed perfect pipe.

The patentees state, that they do not intend to confine themselves to the arrangement of the apparatus thus particularly specified, and point out several other modes by which the same result may be produced, all of which variations would readily suggest themselves, as they observe, to any practical engineer, without departing from the substantial originality of the invention, the remarkable feature of which, they say, is that lead, when in a set state, being yet under heat, can be made, by extreme pressure, to re-unite perfectly around a core after separation, and thus be formed into strong pipes or tubes. Pipes thus made are found to possess great solidity and unusual strength, and a fine uniformity, such as had never before been attained by any other mode. The essential difference in its character, and which distinguishes it from all other theretofore

known, they add, is that it is wrought under heat, by pressure and constriction, from set or solid metal.

They do not claim, as their invention or improvement, any of the parts of the machinery, independently of the arrangement and combination set forth.

"What we claim as our invention, they say, is the combination of the following parts above described, to wit: the core and bridge or guidepiece, with the cylinder, the piston, the chamber and die, when used to form pipes of metal under heat and pressure, in the manner set forth, or in any other manner substantially the same."

It is supposed that the patentees claim, as the novelty of their invention, the arrangement and combination of the machinery which they have described, disconnected from the employment of the new property of lead, which they have discovered, and by the practical application and use of which they have succeeded in producing the new manufacture. And the general title or description of their invention, given in the body of their letters patent, is referred to as evidence of such claim. But every patent, whatever may be the general heading or title by which the invention is designated, refers to the specification annexed for a more particular description; and hence this court has heretofore determined, that the specification constitutes a part of the patent, and that they must be construed together when seeking to ascertain the discovery claimed. (*Hogg et al. v. Emerson*, 6 How., 437.)

*The same rule of construction was [*180 applied by the Court of Exchequer, in England, in the case of *Neilson's patent* for the hot air blast. (*Webster's Cases*, 373.)

Now, on looking into the specification, we see that the leading feature of the invention consists in the discovery of a new property in the article of lead, and in the employment and adaptation of it, by means of the machinery described, to the production of a new article, wrought pipe, never before successfully made. Without the discovery of this new property in the metal, the machinery or apparatus would be useless, and not the subject of a patent. It is in connection with this property, and the embodiment and the adaptation of it to practical use, that the machinery is described, and the arrangement claimed. The discovery of this new element or property led naturally to the apparatus, by which a new and most useful result is produced. The apparatus was but incidental, and subsidiary to the new and leading idea of the invention. And hence, the patentees set forth, as the leading feature of it, the discovery, that lead, in a solid state, but under heat and extreme pressure in a close vessel, will re-unite, after separation of its parts, as completely as though it had never been separated. It required very little ingenuity, after the experiments in a close vessel, by which this new property of the metal was first developed, to construct the necessary machinery for the formation of the pipe. The apparatus, essential to develop this property, would at once suggest the material parts, especially in the state of the art at the time. Any skillful mechanic, with Burr's machine before him, would readily construct the requisite machinery.

The patentees, therefore, after describing their discovery of this property of lead, and the apparatus by means of which they apply the metal to the manufacture of pipe, claim the combination of the machinery, only when used to form pipes, under heat and pressure, in the manner set forth, or in any other manner substantially the same. They do not claim it as new separately, or when used for any other purpose, or in any other way; but claim it only when applied for the purpose and in the way pointed out in the specification. The combination, as machinery, may be old; may have been long used; of itself, what no one could claim as his invention, and may not be the subject of a patent. What is claimed is, that it never had been before applied or used, in the way and for the purpose they have used and applied it, namely: in the embodiment and adaptation of a newly discovered property in lead, by means of which they are enabled to produce a new manufacture—wrought pipe—out of a mass of solid lead. Burr had attempted it, but failed. These patentees, after the lapse of seventeen years, having discovered [*181*] covered *this new property in the metal, succeeded, by the use and employment of it, and since then, none other than wrought lead pipe, made out of solid lead, has been found in the market, having superseded, on account of its superior quality and cheapness, all other modes of manufacture.

Now, the construction, which I understand a majority of my brethren are inclined to give to this patent, namely: that the patentees claim, as the originality of their invention, simply the combination of the machinery employed, with great deference, seems to me contrary to the fair and reasonable import of the language of the specification, and also of the summary of the claim. The tendency of modern decisions is to construe specifications benignly, and to look through mere forms of expression, often artificially used, to the substance, and to maintain the right of the patentee to the thing really invented, if ascertainable upon a liberal consideration of the language of the specification, when taken together. For this purpose, phrases standing alone are not to be singled out, but the whole are to be taken in connection. (1 Sumn., 482-485.)

Baron Parke observed, in delivering the opinion of the court in *Neilson's patent*, "That, half a century ago, or even less, within fifteen or twenty years, there seems to have been very much a practice with both judges and juries to destroy the patent right, even of beneficial patents, by exercising great astuteness in taking objections, either as to the title of the patent, but more particularly as to the specifications, and many valuable patent rights have been destroyed in consequence of the objections so taken. Within the last ten years or more, the courts have not been so strict in taking objections to the specifications, and they have endeavored to hold a fair hand between the patentee and the public, willing to give the patentee the reward of his patent."

Construing the patent before us in this spirit, I cannot but think that the thing really discovered, and intended to be described, and claimed by these patentees, cannot well be mistaken. That they did not suppose the novelty

of their invention consisted, simply, in the arrangement of the machinery described, is manifest. They state distinctly that the leading feature of their discovery consisted of this new property of lead, and some of its alloys—this, they say, is the remarkable feature of their invention—and the apparatus described is regarded by them as subordinate, and as important only as enabling them to give practical effect to this newly discovered property, by means of which they produce the new manufacture. If they have failed to describe and claim this, as belonging to their invention, it is manifest, upon the face of their specification, that they have *failed to employ the [*182*] proper words to describe and claim what they intended; and that the very case is presented, in which, if the court, in the language of Baron Parke, will endeavor to hold a fair hand between the patentee and the public, it will look through the forms of expression used, and discover, if it can, the thing really invented. Apply to the specification this rule of construction, and all difficulty at once disappears. The thing invented, and intended to be claimed, is too apparent to be mistaken.

The patentees have certainly been unfortunate in the language of the specification, if, upon a fair and liberal interpretation, they have claimed only the simple apparatus employed; when they have not only set forth the discovery of this property in the metal, as the great feature in their invention, but, as is manifest, without it the apparatus would have been useless. Strike out this new property from their description and from their claim, and nothing valuable is left. All the rest would be worthless. This lies at the foundation upon which the great merit of the invention rests, and without a knowledge of which the new manufacture could not have been produced; and, for aught we know, the world would have been deprived of it down to this day.

If the patentees had claimed the combination of the core and bridge or guidepiece, with the cylinder, the chambers and the die, and stopped there, I admit the construction, now adopted by a majority of my brethren, could not be denied; although, even then, it would be obvious, from an examination of the specification as a whole, that the draughtsman had mistaken the thing really invented, and substituted in its place matters simply incidental, and of comparative insignificance. But the language of the claim does not stop here. The combination of these parts is claimed only when used to form pipes of lead, under heat and pressure, in the manner set forth—that is, when used for the embodiment and adaptation of this new property in the metal for making wrought pipe out of a solid mass of lead. This guarded limitation of the use excludes the idea of a claim to the combination for any other, and ties it down to the instance, when the use incorporates within it the new idea or element which gives to it its value, and by means of which the new manufacture is produced. How, then, can it be consistently held, that here is a simple claim to the machinery, and nothing more, when a reasonable interpretation of the words not only necessarily excludes any such claim, but in express terms sets forth a different one—one not only different in the conception of the inven-

tion, but different in the practical working of the apparatus, to accomplish the purpose intended?

183*] *I conclude, therefore, that the claim, in this case, is not simply for the apparatus employed by the patentees, but for the embodiment or employment of the newly discovered property in the metal, and the practical adaptation of it, by these means, to the production of a new result, namely: the manufacture of wrought pipe out of solid lead.

Then, is this the proper subject matter of a patent?

This question was first largely discussed by counsel and court in the celebrated case of *Boulton v. Bull*, 2 Hen., 31, 463, involving the validity of Watt's patent, which was for "a new invented method for lessening the consumption of fuel and steam in fire engines." This was effected by inclosing the steam vessel or cylinder with wood, or other material, which preserved the heat in the steam vessel; and by condensing the steam in separate vessels. It was admitted, on the arguments, that there was no new mechanical construction invented by Watt, and the validity of the patent was placed on the ground that it was for well-known principles, practically applied, producing a new and useful result. On the other hand, it was conceded that the application of the principles in the manner described was new, and produced the result claimed; but it was denied that this constituted the subject matter of a patent. Heath and Buller, *Justices*, agreed with the counsel for the defendant. But Lord Chief Justice Eyre laid down the true doctrine, and which, I think, will be seen to be the admitted doctrine of the courts of England at this day.

"Undoubtedly," he observed, "there can be no patent for a mere principle; but for a principle, so far embodied and connected with corporeal substances as to be in a condition to act, and to produce effects in any art, trade, mystery or manual occupation, I think there may be a patent. Now, this," he continues, "is, in my judgment, the thing for which the patent stated in the case was granted; and this is what the specification describes, though it miscalls it a principle. It is not that the patentee conceived an abstract notion, that the consumption of steam in fire engines may be lessened; but he has discovered a practical manner of doing it; and for that practical manner of doing it he has taken this patent. Surely," he observes, "this is a very different thing from taking a patent for a principle. 'The apparatus, as we have said, was not new. There is no new mechanical construction,' said the counsel for the patentee, 'invented by Watt, capable of being the subject of a distinct specification; but his discovery was of a principle, the method of applying which is clearly set forth.'" Chief Justice Eyre admitted that the means used were not new, and that if the patent had been taken out for the mechanism used, it must fail.

184*] *He observed, "When the effect produced is some new substance or composition of things, it should seem that the privilege of the sole working or making ought to be for such new substances or composition, without regard to the mechanism or process by which it has been produced, which, though perhaps also new, will be only useful as producing the new

substance." Again: "When the effect produced is no new substance, or composition of things, the patent can only be for the mechanism, if new mechanism is used; or for the process, if it be a new method of operating, with or without old mechanism, by which the effect is produced." And again, he observes: "If we wanted an illustration of the possible merit of a new method of operating with old machinery, we might look to the identical case before the court. (P. 493, 495, 496.)

This doctrine, in expounding the law of patents, was announced in 1795, and the subsequent adoption of it by the English courts, shows that Chief Justice Eyre was considerably in advance of his associates upon this branch of the law. He had got rid, at an early day, of the prejudice against patents so feelingly referred to by Baron Park in *Neilson v. Harford*, and comprehended the great advantages to his country if properly encouraged. He observed, in another part of its opinion, that "The advantages to the public from improvements of this kind are beyond all calculation important to a commercial country; and the ingenuity of artists, who turn their thoughts towards such improvements, is, in itself, deserving of encouragement."

This doctrine was recognized by the Court of King's Bench in *The King v. Wheeler*, 2 B. & Ald., 340, 350.

It is there observed, that the word "manufactures," in the Patent Act, may be extended to a mere process to be carried on by known implements or elements, acting upon known substances, and ultimately producing some other known substance, but producing it in a cheaper or more expeditious manner, or of a better or more useful kind.

Now, if this process to be carried on by known implements acting upon known substances, and ultimately producing some other known substance of a better kind, is patentable, *a fortiori* will it be patentable, if it ultimately produces not some other known substance, but an entirely new and useful substance.

In Forsyth's patent, which consists of the application and use of detonating powder as priming for the discharge of fire-arms, it was held that whatever might be the construction of the lock or contrivance by which the powder was to be discharged, the use of the detonating mixture as priming, which article of itself was not new, was an infringement. (Webster's Pat. Cas., 94, 97, n; Curtis on Pat., 230.)

*This case is founded upon a doctrine [185 which has been recognized in several subsequent cases in England, namely: that where a person discovers a principle or property of nature, or where he conceives of a new application of a well-known principle or property of nature, and also, of some mode of carrying it out into practice, so as to produce or attain a new and useful effect or result, he is entitled to protection against all other modes of carrying the same principle or property into practice for obtaining the same effect or result.

The novelty of the conception consists in the discovery and application in the one case, and of the application in the other, by which a new product in the arts or manufactures is the effect; and the question, in case of an infringement, is, as to the substantial identity of the

principle or property, and of the application of the same, and consequently the means or machinery made use of, material only so far as they affect the identity of the application.

In the case of *Jupe's patent* for "an improved expanding table," Baron Alderson observed, speaking of this doctrine: "You cannot take out a patent for a principle; you may take out a patent for a principle coupled with the mode of carrying the principle into effect. But then, you must start with having invented some mode of carrying the principle into effect; if you have done that, then you are entitled to protect yourself from all other modes of carrying the same principle into effect, that being treated by the jury as piracy of your original invention." (Webster's Pat. Cases, 147.) The same doctrine was maintained also in the case of *Neilson's patent* for the hot air blast, in the K. B. and Exchequer in England. (Webster's Pat. Cases, 342, 371; Curtis, sec. 74, 148, 232; Webster's Pat. Cases, 310.)

This patent came also before the Court of Sessions in Scotland; and in submitting the case to the jury, the Lord Justice remarked, "That the main merit, the most important part of the invention, may consist in the conception of the original idea—in the discovery of the principle in science, or of the law of nature, stated in the patent; and little or no pains may have been taken in working out the best mode of the application of the principle to the purpose set forth in the patent. But still, if the principle is stated to be applicable to any special purpose, so as to produce any result previously unknown, in the way and for the objects described, the patent is good. It is no longer an abstract principle. It becomes to be a principle turned to account, to a practical object, and applied to a special result. It becomes, then, not an abstract principle, which means a principle considered apart from any special purpose or practical operation, but the discovery and state-
186*) ment of a principle for a *special purpose; that is, a practical invention, a mode of carrying a principle into effect. That such is the law," he observes, "if a well-known principle is applied for the first time to produce a practical result for a special purpose, has never been disputed; and it would be very strange and just to refuse the same legal effect, when the inventor has the additional merit of discovering the principle, as well as its application to a practical object."

Then he observes, again: "Is it an objection to the patent that in its application of a new principle to a certain specified result, it includes every variety of mode of applying the principle according to the general statement of the object and benefit to be attained? This," he observes, "is a question of law, and I must tell you distinctly, that this generality of claim, that is, for all modes of applying the principle to the purpose specified, according to, or within a general statement of the object to be attained, and of the use to be made of the agent to be so applied, is no objection to the patent. The application or use of the agent for the purpose specified, may be carried out in a great variety of ways, and only shows the beauty and simplicity and comprehensiveness of the invention."

This case was carried up to the House of

Lords on exceptions to the charge, and among others, to this part of it, which was the sixth exception, and is as follows: "In so far as he (the Judge) did not direct the jury that on the construction of the patent and specification the patentee cannot claim or maintain that his patent is one which applies to all the varieties in the apparatus which may be employed in heating air while under blast; but was limited to the particular described in the specification." And although the judgment of the court was reversed in the House of Lords on the eleventh exception, it was expressly affirmed as respects this one. Lord Campbell at first doubted, but after the decision of the courts in England on this patent, he admitted the instruction was right. (Webster, Pat. Cases, 683, 684, 698, 717.)

I shall not pursue a reference to the authorities on this subject any further. The settled doctrine to the deduced from them, I think, is that a person having discovered the application for the first time of a well-known law of nature, or well-known property of matter, by means of which a new result in the arts or in manufactures is produced, and has pointed out a mode by which it is produced, is entitled to a patent; and if he has not tied himself down in the specification to the particular mode described, he is entitled to be protected against all modes by which the same result is produced, by an application of the same law of nature or property of matter. And *a fortiori*, if he has *discovered the law of nature or prop-
[*187] erty of matter, and applied it, is he entitled to the patent, and aforesaid protection.

And why should not this be the law? The original conception—the novel idea in the one case, is the new application of the principle or property of matter, and the new product in the arts or manufactures—in the other, in the discovery of the principle or property, and application, with like result. The mode or means are but incidental, and flowing naturally from the original conception; and hence of inconsiderable merit. But, it is said, this is patenting a principle, or element of nature. The authorities to which I have referred, answer the objection. It was answered by Chief Justice Eyre, in the case of *Watts' patent*, in 1795, fifty-seven years ago; and more recently in still more explicit and authoritative terms. And what if the principle is incorporated in the invention, and the inventor protected in the enjoyment for the fourteen years? He is protected only in the enjoyment of the application for the special purpose and object to which it has been newly applied by his genius and skill. For every other purpose and end, the principle is free for all mankind to use. And, where it has been discovered as well as applied to this one purpose, and open to the world as to every other, the ground of complaint is certainly not very obvious. Undoubtedly, within the range of the purpose and object for which the principle has been for the first time applied, piracies are interfered with during the fourteen years. But anybody may take it up and give to it any other application to the enlargement of the arts and of manufactures, without restriction. He is only debarred from the use of the new application for the limited time, which the genius of others has already invented and put into successful practice. The protection does not

go beyond the thing which, for the first time, has been discovered and brought into practical use; and is no broader than that extended to every other discoverer or inventor of a new art or manufacture.

I own, I am incapable of comprehending the detriment to the improvements in the country that may flow from this sort of protection to inventors.

To hold, in the case of inventions of this character, that the novelty must consist of the mode or means of the new application producing the new result, would be holding against the facts of the case, as no one can but see that the original conception reaches far beyond these. It would be mistaking the skill of the mechanic for the genius of the inventor.

Upon this doctrine, some of the most brilliant and useful inventions of the day by men justly regarded as public benefactors, and whose names reflect honor upon their country [188*]—the successful *application of steam power to the propulsion of vessels and railroad cars—the application of the electric current for the instant communication of intelligence from one extremity of the country to the other—and the more recent, but equally brilliant conception, the propulsion of vessels by the application of the expansibility of heated air, the air supplied from the atmosphere that surrounds them. It would be found, on consulting the system of laws established for their encouragement and protection, that the world had altogether mistaken the merit of their discovery; that, instead of the originality and brilliancy of the conception that had been unwittingly attributed to them, the whole of it consisted of some simple mechanical contrivances which a mechanic of ordinary skill could readily have devised. Even Franklin, if he had turned the lightning to account, in order to protect himself from piracies, must have patented the kite, and the thread and the key, as his great original conception, which gave him a name throughout Europe, as well as at home, for bringing down this element from the heavens, and subjecting it to the service of man. And if these simple contrivances, taken together, and disconnected from the control and use of the element by which the new application, and new and useful result may have been produced, happen to be old and well known, his patent would be void; or, if some follower in the track of genius, with just intellect enough to make a different mechanical device or contrivance, for the same control and application of the element, and produce the same result, he would, under this view of the patent law, entitle himself to the full enjoyment of the fruits of Franklin's discovery.

If I rightly comprehend the ground upon which a majority of my brethren have placed the decision, they do not intend to controvert so much the doctrine which I have endeavored to maintain, and which, I think, rests upon settled authority, as the application of it to the particular case. They suppose that the patentees have claimed only the combination of the different parts of the machinery described in their specification, and, therefore, are tied down to the maintenance of that as the novelty of their invention. I have endeavored to show that this is a mistaken interpretation, and that

they claim the combination, only, when used to embody and give a practical application to the newly discovered property in the lead, by means of which a new manufacture is produced, namely: wrought pipe out of a solid mass of lead; which, it is conceded, was never before successfully accomplished.

For these reasons, I am constrained to differ with the judgment they have arrived at, and am in favor of affirming that of the court below.

*ORDER.

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This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of New York, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to award a *venire facias de novo*.

Rev'g—2 Blatchf., 174.
S. C., 22 How., 132.
Cited—15 How., 117, 132, 342; 10 Wall., 124; 6 Blatchf., 304; 7 Blatchf., 477; 2 Cliff., 374; 4 Cliff., 251, 352.

THE UNITED STATES, *Appellants*,
v.

THE HEIRS OF VINCENT RILLIEUX,
Deceased.

Military commandant of West Florida no power to make grants of land—District Court cannot adjudge upon naked evidence of possession—effect of failure to record title papers.

This court again decides, as in 11 Howard, 580, that under the Acts of Congress of 1824 and 1844, the District Court had no power to act upon evidence of mere naked possession, unaccompanied by written evidence conferring, or professing to confer, a title of some description.

By the Treaty of 1763, the land in question passed from France to Great Britain; and the certificate of two French officers in 1765, certifying that the claimant had been for a long time in possession, furnished no evidence of title. No application was made to the British government for a grant.

A purchase from the Indians, whilst the province was under French authority, conveyed no title unless sanctioned by that authority.

In this case, also, there is no proof that the claimants are the heirs of the party originally in possession.

THIS was an appeal from the District Court of the United States for the Eastern District of Louisiana. The petition was filed in that court by the heirs of Rillieux, under the Act of June 17th, 1844 (5 Stat. at Large, 676), which court decreed in favor of the petitioners. The United States appealed to this court, where it was argued by Mr. Bibb and Mr. Crittenden (Attorney-General) for the appellants. No counsel appeared for the appellees.

Mr. Justice Catron delivered the opinion of the court:

The petitioners aver that they are the lawful heirs of Vincent Rillieux and Marie Tronquet, his wife; and, as such heirs, are the true and lawful owners of a tract of land in the Parish of St. Tammany, State of Louisiana, "bounded

on the south side by Lake Pontchartrain; on the east by Pearl River; on the west by the bayou Bonfouca; and on the north by a line running from the western source of said bayou, and from the head waters of the same to Pearl River"—containing an extent of about one hundred thousand acres.

It is alleged that this tract of land was purchased [190*] chased in part by *Vincent Rillieux and his wife, the ancestors of the petitioners, from the Biloxi Indians residing thereon, in 1761, by consent of the French government, as appears from a copy of the title annexed to the petition, given by C. P. Aubry and D. N. Foucault, bearing date March 16th, 1765. The said tract of land, at the time the title was given, and before having been in the possession of Vincent Rillieux, and so continued to be possessed by him and those claiming under him, with consent of the French, Spanish and American governments, without interruption; and which was used, inhabited and cultivated as private property."

The District Court gave a decree for the land, to the extent claimed by the petition.

Occupancy and cultivation, from an early date, of comparatively small portions of the land claimed, is established by proof; and, also, that the land was claimed by Rillieux's heirs, as property derived by descent from their ancestors; but the extent of claim was indefinite.

Several considerations present themselves in advance of the paper title set up. In the first place, the District Court was exercising a special jurisdiction, created by the Act of 1824, where none existed before, and could only take cognizance of such description of claims as the statute allowed. It embraced those who claimed by virtue of any French or Spanish grant, concession, warrant or order of survey. And the Act of June 17th, 1844, added similar claims originating with the British authorities. Jurisdiction to adjudicate written evidences of title, was alone conferred by Congress on the District Courts. It follows, that no decree can be founded on mere possession; we so held in the case of *Power's Heirs*, 11 Howard, 580. Congress reserved to itself the power to provide for actual settlers. The Act of March 3, 1819, for adjusting claims to lands east of the Island of New Orleans, provided for such claimants as the widow and heirs of Rillieux were; and which Act, with its various amendments, continued in force until after the Act of 1824 expired, and the District Courts ceased to have jurisdiction by virtue thereof. The various Acts of Congress, bearing on claims founded on occupancy and cultivation, are enumerated in the case of *The United States v. Power's Heirs*, 11 Howard, 580.

In the next place: By the Treaty of 1763, between France and Great Britain, there was ceded to Great Britain all the country east and north of a line running through the River Iberville, Lakes Maurepas and Pontchartrain to the sea; and as the land claimed lies to the left of this line, the jurisdiction of France over it ceased with the Treaty of Peace. And the King [191*] of Great Britain having, by his proclamation of 1763, established the government of West Florida, the colonial Governor exercised the King's power; and, therefore, on the 18th of March, 1765, the widow of Vincent Rillieux

addressed the Governor, saying that she had ascertained what the necessary proceedings and submissions on her part were, in order that she might remain in the peaceable enjoyment of her property, situate in the part of the Province where she resided; and therefore prayed the Governor to accept that letter as her oath of fidelity and submission to the British authority; she being advised by Captain Campbell that the letter would suffice in her case. She further proceeds to state: "I have the honor to annex hereto a certificate from Messieurs, the Commandant and Intendant-Commissary of this Province, as a title, which proves the peaceable enjoyment and possession of my said property, believing it to be necessary: my widowed state and my numerous family, give me ground to hope from your goodness all the protection of which I have need, and for which I shall always feel the deepest gratitude."

The certificate of Aubry and Foucault, the Commandant and Intendant, bears date two days earlier than the widow Rillieux's letter, to which the certificate purports to be annexed; and these two papers furnish the only written evidence of title presented to the District Court. These French officers state that Madame Rillieux had been in peaceable possession and enjoyment for twenty-four years preceding, of lands "situate in the direction north of Lake Pontchartrain, between the bayou Bonfouca and Pearl River; a great portion of which tract consists of *prairies tremblantes* (trembling prairies) quite valueless; and not having a sufficient extent in front, she, Mrs. Rillieux, was compelled in 1761 to purchase from the Biloxi Indians, all that part of the good lands belonging to that nation, lying between the land which she owned and Pearl River, in order to procure the necessary pasturage for at least one hundred cows, so that the land the said lady was in possession, as well by her late husband, as by her, for the last twenty-four years; also what she acquired by purchase from the Biloxi Indians in 1761, as explained above, form to-day a peninsula (Presque Isle), bounded by the trembling and immediate lands which border Lake Pontchartrain, bayou Bonfouca and Pearl River. In faith of which (say Aubry and Foucault) we have delivered the foregoing certificate to the said widow Rillieux, to be used by her in such manner as she may think proper."

The certificate is not addressed to the Governor of West Florida, but "to all whom it may concern." No power to grant land is assumed by the certificate; neither was application made to the British Governor [192*] for a grant. Nor does Madame Rillieux's letter or the certificate of these French officers at New Orleans, assert that any paper title had ever issued to Vincent Rillieux, or to his widow, for the land claimed; but only that they had been in peaceable possession and enjoyment for twenty-four years preceding.

That portions of the land had been purchased from the Biloxi Indians, amounted to nothing, unless the purchase had been made with the assent of the French colonial government.

This is the true state of the case, admitting that the foregoing certificate was competent evidence for any purpose. But, as it was given by individuals having no more authority to act in the premises than any other third person, it

can have no validity or credit attributed to it; and this reduces the case to a naked statement in the petition, with proof of great length of possession and continual claim.

That the District Court had no power to decree on such proof, we have already stated.

The petitioners claim as heirs of Vincent Rillieux and his wife. No proof was introduced to establish the heirship. This of course was necessary before a decree could be made to these individual claimants, as was held by this court in the case of *The United States v. Le Blanc et al.*, 12 Howard, 436.

It has also been urged, on the part of the United States, that no decree could be made for any specific tract of land, as no description was given in the certificate of Aubry and Foucault, from which boundaries could be ascertained. But as that paper is of no value, we do not deem it necessary to examine this question.

For the reasons above stated, we order that the decree of the District Court be reversed, and that the petition be dismissed.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said District Court in this cause be, and the same is hereby reversed and annulled; and that this cause be, and the same is hereby remanded to the said District Court, with directions to dismiss the petition of the claimants.

Cited—14 How., 193.

193*] THE UNITED STATES, *Appellants*,

v.

JOHN GUSMAN.

THIS, like the preceding case of *The United States v. The Heirs of Rillieux*, was an appeal from the District Court of the United States for the Eastern District of Louisiana. In fact, it was a part of it, because Gusman claimed under the title of Rillieux.

Mr. Justice Catron delivered the opinion of the court:

Gusman claims under the heirs of Rillieux, and relies on the same evidences of title that they do; and his vendors having had no title when they assumed to convey the land, it is ordered that the decree in this case be also reversed, and the petition dismissed.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said District Court in this cause be, and the same is hereby reversed and annulled; and that this cause be, and the same is hereby remanded to the said District Court, with directions to dismiss the petition of the claimant.

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THE TROY IRON AND NAIL FACTORY, *Appellant*,

v.

ERASTUS CORNING, JOHN F. WINSLOW, AND JAMES HORNER.

Infringement of patent—Assignment to plaintiff and agreement with defendant by patentee construed.

In 1834 Burden obtained a patent for a new and useful improvement in the machinery for manufacturing wrought nails and spikes, which he assigned to the Troy Iron and Nail Factory, and also covenanted that he would convey to that company any improvement which he might thereafter make.

In 1840 he made such an improvement, for making hook and brad-headed spikes, with a bending lever, which he assigned to the Troy Iron and Nail Factory in 1843.

Before this last assignment, however, viz.: in 1845, Burden made an agreement with Corning, Horner, and Winslow, in which, amongst other things, it was agreed that both parties might thereafter manufacture and vend spikes of such kind and character as they saw fit, notwithstanding their conflicting claims.

Owing to the peculiar attitude of the parties to each other at the time of making this agreement, and the language used in it, it cannot be construed into a permission to Corning, Horner, and Winslow, to use the improved machinery patented by Burden in 1840; and the right to use it having passed to the Troy Iron and Nail Factory, a perpetual injunction upon Corning, Horner, and Winslow will be decreed.

THIS was an appeal from the Circuit Court of the United States for the Northern District of New York.

*The facts are all stated in the opinion. [*194]

ion of the court.

The bill was filed in the Circuit Court, by the Troy Iron and Nail Factory against Corning, Winslow, and Horner, to restrain them from violating a patent issued to Henry Burden on the 8th of September 1840, for new and useful improvements in the machinery for making hook, or brad headed spike, which patent had been assigned to them; and also to account for the profits.

After the proceeding, mentioned in the opinion of the court, the Circuit Court passed the following decree:

This cause having heretofore been brought to a hearing upon the pleadings and proofs, and counsel for the respective parties having been heard, and due deliberation thereupon had, and it appearing to the said court that the said Henry Burden was the first and original inventor of the improvement on the spike machine in the bill of complaint mentioned, and for which a patent was issued to the said Henry Burden, bearing date the 2d of September, 1840, as in said bill of complaint set forth, and that the said complainants had a full and perfect title to the said patents for said improvements, by assignment from the said Henry Burden, as is stated and set forth in the said bill of complaint.

But it also further appearing to the court, on the pleadings and proofs, that the instrument in writing, bearing date the 14th of October, 1845, stated and set forth in the said bill of complaint, and also in the answer of the said defendants thereto, entered into upon a settlement and compromise of certain conflicting claims between the said parties, and among others of mutual conflicting claims to the improve-

ments in the spike machine in said bill mentioned, and when said instrument was executed by the said Henry Burden of the one part, and the said defendants of the other; the said Henry Burden, at the time, being the patentee and legal owner of the said improvements, and fully authorized to settle and adjust the said conflicting claims, did, in legal effect, and by just construction, impart, and authorize and convey, a right to the defendants to use the said improvements in the manufacture of the hook-headed spike, without limitation as to the number of machines so by them to be used, or as to the place or district in which to be used.

Therefore, it is ordered, adjudged and decreed, that the said bill of complaint be, and the same is hereby dismissed, with costs to be taxed, and the defendants have execution therefor.

From this decree, the complainants appealed to this court.

It was argued by *Messrs. Johnson and Stevens* for the appellants, and *Messrs. Seward and Seymour* for the appellees.

195*] *As the case turned mainly upon the construction of the agreement of October 14th, 1845 (which is inserted in the opinion of the court), only such of the arguments of counsel will be given as relate to that construction.

The counsel for the appellants contended:

Third. It is respectfully submitted, that the instrument of the 14th of October, 1845, does not convey to the defendants any right or title to said invention, or give them any authority to use it in manufacturing hook-headed spikes. Such was not the object or intention of the parties.

This instrument was executed under the following circumstances:

At the June Term of the Circuit Court, 1843, Mr. Burden recovered a judgment for \$700, against the defendants, for violating this patent.

On the 2d of October, 1843, Mr. Burden filed his bill in equity in said Circuit Court, to restrain the defendants from further infringing the patent, and for an account.

After this bill was filed, the defendants ceased using the invention, for a short time; and then commenced using it again, as Mr. Burden was informed. Mr. Burden, therefore, on the 13th November, 1844, made a new affidavit, to obtain an injunction upon his bill previously filed; and, on the 20th of November, obtained an order for an injunction by default.

On the 25th of November, 1844, the defendant Winslow, and two men by the name of Osgood and Blanchard, made affidavits in said cause, for the purpose of moving the court to open the order granting an injunction; in which affidavit they all swear that defendants did not use Mr. Burden's invention in making hook-headed spikes, but made them with machinery entirely different in principle and mode of operation.

The machinery, by which defendants claimed to make the hook-headed spike, after the bill was filed, is described in two patents, granted to the defendants, or some of them.

Prior to these legal proceedings, in November, 1844, the parties had been endeavoring to settle, but did not succeed; subsequently, negotiations for a settlement of the suit were re-

newed. Mr. Burden claimed that he had the exclusive right to manufacture the hook-headed spikes by machinery, and insisted that defendants should cease making such spikes by machinery. Defendants insisted that they had a right to make such spikes by their own machinery, which they insisted, in their affidavits, made November 25th, 1844, was entirely different, in principle and mode of operation, from that patented to Mr. Burden.

*Mr. Burden claimed, that defend- [*196 ants had violated his patent for machinery for making horseshoes, and told defendants, if they did not immediately desist from using his horseshoe machine, he would prosecute them, and they did desist and stop, six months before the settlement was made.

It is necessary and proper to take these facts and circumstances into consideration, in giving a construction to the agreement of the 14th of October, 1845.

"It is well settled, that in the construction of all contracts, the situation of the parties, and the subject matter of their transactions, may be taken into consideration, in determining the meaning of any particular sentence or provision. Extraneous evidence is admissible, so far as to ascertain the circumstances under which the writing was made, and the subject matter to be regulated by it." (*Sumner v. Williams*, 8 Mass., 214; *Foule v. Bigelow*, 10 Mass., 354; *Wilson v. Troup*, in the Court for the Correction of Errors of N. Y., 2 Cow., 228-229; *Neemith v. Calvert*, 1 Wood. & M., 40.)

1. This agreement does not, by its terms, convey, or purport to convey, or in any manner to give or invest the defendants with any interest in, or right or authority to use the machinery patented in September, 1840, to make hook-headed spike.

1st. It was contended by the defendants (and, as we understand the decree, so decided), that the 2d clause in the agreement, in legal effect, did impart, authorize, and convey to the defendants a right to use the said improvements, without limitation as to the number of machines used by them, or as to the place or territory where they might be used.

The 2d clause of the agreement is in these words: "And it is further agreed, that the said parties may each, hereafter, manufacture and vend spike of such kind and character as they see fit, notwithstanding their conflicting claims to this time."

After the judgment at law, in 1843, there was no conflict as to the right of defendant to use Mr. Burden's improvement in manufacturing hook-headed spike. That had been fully settled against the defendants, by the suit at law, and conceded by them.

The defendants did not claim the right to use Burden's invention, but only the right to make said spike by machinery, which they claimed was different from Mr. Burden's, both in principle and operation. Mr. Burden denied this right claimed by the defendants, and claimed that he had the exclusive right to make such spike by machinery. This was the only conflicting claim, as to the right to make spike at the time of the settlement. By this clause in the agreement, Mr. Burden relinquished his pretensions to the exclusive right to make hook-headed spike by machinery; but he [*197

gave no right to the defendants to use his improvement in manufacturing such spike.

Whether Mr. Burden was right or wrong in his pretension to the exclusive right to make such spike by machinery, can in no manner affect the construction of the agreement.

The intention of the parties, as expressed in the agreement, taken in connection with the state of facts and circumstances under which it was executed, and the subject matter intended to be regulated by it, must control the construction of this clause. Mr. Burden supposed he had such exclusive right, and simply relinquished it, without the most remote idea that he was conveying to the defendants any right to use his improvement, much less, that he was conveying an interest in his patent equal to one half of it.

The settlement of the equity suit—the relinquishment by Mr. Burden of his pretension to exclude the defendants from making hook-headed spike by machinery—and the settlement, by defendants, of Mr. Burden's claim against them, for infringing his horseshoe patent, for which he had threatened them with a suit—fully satisfies every clause in the agreement; and it cannot be stretched to the enormous extent claimed by defendants, without interpolating other important provisions, which cannot at law be accomplished by parol evidence. An assignment, or any other conveyance of any part of a patent, or of any interest in or under it, must be in writing. Contracts, which by law are required to be in writing, cannot rest partly in writing and partly in parol. Is it not most extraordinary that the defendants did not have this agreement recorded in the Patent Office until the 21st of August, 1848, if they had had the least idea that it conveyed to them such an important right as they now claim? (Patent Act of 1836, sec. 11; Curtis on Patents, p. 478.)

This instrument has neither the form nor substance of a license or assignment, or any other conveyance of an interest in a patent heretofore in use or known.

If the parties had intended this instrument as a conveyance of any interest in Mr. Burden's improvement, it would have been very easy to have said so. (*Nesmith v. Calvert*, 1 Wood. & M., 40; *Iggulden v. May*, 7 East, 242.)

The court below fell into the mistake, that the cause depended upon the question, whether the agreement authorized the defendants to make hook-headed spike.

The opinion of the court, after stating the 2d clause in the agreement, proceeds: "Why stipulate that the defendant may thereafter manufacture and vend spikes of any character and description, without regard to previous claims to 198?" the contrary "if it was not intended to admit or concede the right to manufacture hook-headed spikes? And how can we say that this particular spike is not embraced in the stipulation?"

"What is meant by the agreement, that the defendants may manufacture spikes of such a kind and character as they see fit, notwithstanding their (the parties) conflicting claims to this time, if it was intended to exclude hook-headed? The argument is quite as strong and well founded, to exclude spikes of any other description. Indeed, stronger, if it were possible, as

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this particular spike was the principal item in controversy at the time of the compromise or settlement, and a suit was pending in respect to it.

"The language of the instrument is certainly most remarkable, if it was intended by the parties to exclude the defendants from the right to make this particular spike, as there are not only no words of exclusion or prohibition, but an express admission of the right, in terms so full and specific, that no argument can make it clearer. We are asked to interpret a stipulation, to make any kind of spike the parties see fit, to mean any kind except hook-headed; and spikes, too, in the case of a compromise of a disputed right to manufacture spikes of this character and description, among other matters, this being regarded as the principal one. We think it impossible to come to any such conclusion, without a disregard to the clear import of the agreement."

The counsel for the appellant in the court below must have been exceedingly unfortunate, if his language presented any such idea. The bill does not claim it, and the written points handed to the court do not pretend it. On the contrary, it was conceded that Mr. Burden relinquished his pretensions to the exclusive right to make those spike by machinery, but insisted that he had given no right to defendants to use his improvements for that purpose.

2d. The decree assumes that among the conflicting claims settled by the agreement of 14th October, 1745, were the mutual conflicting claims to the improvements in the spike machine, patented by Mr. Burden.

This is mere assumption, founded wholly in mistake. No such conflicting claim is stated in the instrument, and none such was proved to exist at the time of the settlement. The very reverse was sworn to the year before, by the defendant, Winslow, himself, and by two other witnesses, by his procurement. The correspondence which took place before the settlement, shows that no such claim was set up or pretended by the defendants. The judgment at law had fully and definitely settled and determined that the defendants had no such right.

*But if such conflicting right to Mr. [199 Burden's improvement had existed at the time of the settlement, the terms of the agreement would not confer any right upon the defendants to use it.

"The agreement concedes the defendants' right to make any kind of spike they see fit, which of course embraces hook-headed spike; but it does not, directly or indirectly, give or concede the right to defendants to use Mr. Burden's improvement for that purpose. "The said parties may each, hereafter, make and vend spike of such kind and character as they see fit." But how manufacture? The agreement does not specify how; but the plain construction is, that it should be done as it had been done from the recovery of the judgment at law, up to the time of the settlement—that Mr. Burden should manufacture the spike with his machine, and the defendants with their machine, which they claimed and swore was totally different from Mr. Burden's in principle and mode of operation. Can it be pretended

that the defendants gave Mr. Burden any right to use their machine? Had Mr. Burden ever claimed any such right? Had it been shown that hook-headed spike could not be made without the use of Mr. Burden's improvement, it might have furnished some ground for an argument that, by implication, such right was given by the agreement.

But such was not the fact. Hook-headed spike could be made, and were made by hand, prior to Mr. Burden's invention; and the defendants show that as early as the fall of 1844 they had machinery by which they made hook-headed spike, which was wholly different, both in principle and mechanical operation, from Mr. Burden's improvement; and the only right they claimed, after the judgment at law up to and at the time of the settlement, was to make such spike by that machinery, and disclaimed all right or desire to use Mr. Burden's improvement.

3. Mr. Burden could not have intended to convey such an interest to the defendants.

It would have been a violation of his duty to, and his contract with, the appellant; and would have deprived him of the benefit of a contract from which he received more than \$10,000 annually.

4. There was no adequate consideration for the conveyance of such an extensive interest in this patent.

The defendants allege, in their answer, that the purchase by them of the appellant, of half of a dock, was a part of the same transaction, and a part of the consideration for this agreement.

This pretense is fully disproved. The evidence clearly shows *that the agreement to purchase the dock, although made at the same time with the other agreement, had no connection with it, and that the one half of said dock was worth more than the \$1,500 which defendants paid for it.

The defendants also set up in their answer, that their agreement not to make horseshoes, was a part of the consideration of the agreement on the part of Mr. Burden.

The evidence shows the facts to be, that prior to this settlement, the defendants had been infringing Mr. Burden's patent for a machine to make horseshoes—were threatened with a suit if they did not desist, and they did desist six months before the settlement. The defendants had a patent for machinery to make horseshoes, but it was worthless.

Mr. Burden did not claim that the defendants should not make horseshoes with the machinery they had patented, but that they should not use the machinery he had patented for that purpose. If horseshoes could have been made by the machinery patented by defendants, the agreement gives neither Mr. Burden nor the appellant any right to use that machinery, nor does it restrict the defendants from selling to others the right to make horseshoes, with the machinery patented by them. There is nothing in the agreement which would prohibit the defendants, or their assignees, from maintaining a suit against the appellant, or any other person, for infringing defendants' patent, should the appellant or any other person use the invention thereby patented.

The defendants also allege, in their answer, that they had used the improvement in question, to make hook-headed spike since said settlement, and appellant never requested them to cease using the same, or to account for any profits for such use.

The fact thus alleged, the defendants insisted in the court below, was a circumstance to show that the appellant and Mr. Burden understood and considered the said agreement, as conveying to the defendants the right to use said improvement.

The answer to this is:

1. The answer does not allege that the appellant, or any of its officers or agents, knew that said defendants were using said improvement.

2. It is proved that neither Mr. Burden nor any other of the officers or agents of the appellant knew that defendants were using said improvement, until August, 1847.

Defendants also insist that Mr. Burden, by his letters, bearing date between the 9th of March, 1846, and 29th December, 1846, both inclusive, requesting defendant, Winslow, to agree upon the price for which they would sell hook-headed and other spike, recognizes the defendants' right to use said improvement.

*The answer to this position is, that [*201 just such an arrangement as requested in those letters had existed between the appellant and defendant for nine years before the settlement of 14th October, 1845, and at the time Mr. Burden wrote those letters, he did not know that defendants were using his improvement to manufacture hook-headed spike.

The letters were also written by Mr. Burden before he knew defendants were using his improvement in making hook-headed spike.

Indeed, none of the letters in any manner intimate that the defendants were using or had any right to use the improvement.

The counsel for the defendants in error contended that the decree of the Circuit Court should be affirmed, because.

1. The agreement of October 14th, 1845, was a valid agreement, binding upon the parties.

1. It was made by parties fully competent to contract in reference to the subject matter of the contract.

Burden was patentee, and as such, could contract for himself as the owner of the patent. He was also at the time a large stockholder in the complainants' corporation, and their agent, and as such could contract for them.

The allegation made by the complainants in their bill of complaint, that Henry Burden "had no power or authority to give such license, your orator having been the legal and equitable owner of the said last-mentioned patent, and the rights and privileges granted and secured thereby, from the time said patent was granted," is not sustained by the proof.

The only proof tending to show that on the 14th October, 1845, the complainants were the owners of this improvement of the bending lever, and that therefore Burden had no authority to grant a license or make a contract as to the use of the same, is to be found in the agreement between Burden and complainants as to the patents for the spike machine and the horseshoe, and dated 2d December, 1836.

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In reference to this agreement, the defendants insist as follows:

1. The agreement between the plaintiffs and Henry Burden, of December 2d, 1836, did not even purport to convey to the plaintiffs any interest or right to the patent of 1840, or to the bending lever, the thing patented. It first gives the right to use the machines for manufacturing wrought nails or spikes, then on the premises of the Company; and second, the exclusive right to construct other machines for the manufacturing wrought nails or spikes, after the method invented by Burden, with all the improvements which he had made, or should make, in the same, in any other part of the [202*] United States; and third, a *covenant that he, Burden, would obtain a patent for any improvements which he should afterward make in his nail and spike machine; and then provides that "the license hereby granted to the party of the second part, shall be deemed to extend to all such improvements." It only contemplates the granting of a license; and the statement in the assignment of June 19, 1848, that Burden had agreed to transfer and assign the improvement, is not true.

The bending lever, patented by the patent of 1840, was not then in existence. It was a mere contingent possibility, and therefore was not susceptible of being conveyed. There was nothing to convey. (Phillips on Patents, 354; Curtis on Patents, sec. 189.)

The privilege of assigning, given by the eleventh section of the Patent Act of July 4, 1836, implies that the thing assigned shall be then in existence, and the subsequent requirement in the same section, as to recording the assignment, supports the same idea.

2. Even if this agreement did purport to grant and assign a future improvement thereof, such grant could not apply to the bending lever, for the reason that the bending lever is not an improvement upon either of the patented machines mentioned in the agreement of December 2d, 1836, but is a distinct and independent article, or invention, equally applicable to any spike machine, and in fact, used upon various other machines.

The plaintiffs consider the agreement of December 2d, 1836, as merely a covenant to convey the improvement alleged to have been patented on the 2d of September, 1840, and have accordingly resorted to a special assignment of it, which was made on the 19th of June, 1848, and which, in terms, refers to the agreement of December, 1836, as merely a covenant to convey subsequent improvements, and purports to have been given in performance of such covenant.

The right of the plaintiffs to this improvement of the bending lever is based in their bill upon the assignment of the 19th June, 1848. This right is therefore subject to any rights that were acquired by the defendants by the agreement of October 14, 1845.

But if the complainants had, previous to the 14th October, 1845, become the owners of the improvement called the bending lever, and the patent therefor, still, as general agent of the corporation, Burden had a right to enter into the agreement of October 14, 1845, and it binds his principals.

3. The agreement of October 14, 1845, was founded upon a good and valuable considera-

tion, as between the parties; 1st, the settlement of the suit then pending between them; and *2d, the relinquishment by the defend [203] ant, Winslow, in behalf of himself and his co-partners, of the right to manufacture the patent horseshoe, an advantage worth to the other contracting party, \$10,000 per annum.

3. The agreement, too, was carried out by the parties; first, by the conveyance of the dock property by the plaintiffs, and its occupation by the defendants; second, by the payment of the consideration of the dock property by the defendants; third, by the relinquishment by the defendants, of the horseshoe business, from that time to the present, and the enjoyment of it as a monopoly ever since by the plaintiffs; fourth, by the continued use by the defendants of the bending lever in making hook-headed spikes, from the 14th of October, 1845, to the 8th July, 1848, two years and about nine months, without objection, they having made, during that period, hook-headed spikes to the value of over \$137,000.

III. The agreement of October 14, 1845, was a contract for the settlement of conflicting claims to two patented machines, one for the bending lever, and the other for the horseshoe machine, and it not only gives rights to make the spikes and the horseshoes, but to use the respective patented machines in making them.

The agreement of October 14, 1845, does not, in terms, give the right to the defendants to use the machines patented by Burden, by his patent of 1840, but it does give it by the strongest implication. It releases all claims for violation of patent rights, up to that date, and gives the right to both parties, thereafter, to manufacture and vend spike of such kind and character as they see fit, notwithstanding their conflicting claims to that time.

Defendants' exhibits show that those conflicting claims related only to the use of the patented machinery. This is also shown by Burden's letters. The subject matter of this general settlement was, therefore, their conflicting claims to the use of the patented machinery. The agreement gives the right to make the spike, which could be made for sale in market only by the use of the bending lever, or of some analogous device. (1 Washington's C. C., 168, *Rutger v. Kanowers & Grant*; Phillips on Patents, 346.)

A construction of the agreement of October 14, 1845, which would allow the defendants only the privilege of making the hook-headed spikes, and would deny them the use of the bending lever in making them, would render the instrument senseless, absurd and inoperative.

For, if it is held that the defendants obtained under the agreement only the privilege of making hook-headed spikes, either by hand *or by the use of any machinery which [204] they might choose, other than that which should infringe upon Burden's patent, then it results that the defendants relinquished the patent horseshoe business, worth, as is proved by the testimony of Mr. Davidson, \$10,000 per annum, for the privilege of doing just what they had a right to do before, and what everybody else had the right of doing, that is, making those spikes by hand, or with any machinery not infringing on Burden's patent. Such a con-

struction would be contrary to the well-settled rule in the interpretation of contracts, that, when a clause is capable of two significations, it should be understood in that in which it will have some operation, rather than in that which it will have none, "*ut res magis valeat quam pereat.*" (Pothier, cited in 2 Comyn on Contracts, 533; *Parkhurst v. Smith*, Willes, 332; *Archibald v. Thomas*, 3 Cowen, 290.) An agreement or contract must have a reasonable construction, according to the intent of the parties, as if a man agree with B. for twenty barrels of ale, he shall not have the barrels after the ale is spent. (Comyns' Digest, title Agreement, C.) So, if a man promise payment, without saying to whom, it shall be intended to him from whom the consideration comes. (Cro. Eliz., 149.) And upon a promise of payment, according to the rate of forty shillings per ton, it shall be intended that payment will be made for the odd pounds, according to the same rate. (Yelverton, 134.)

The practical construction of both parties has been in conformity to the interpretation on which the defendants insist. "*Contemporanea expositio est fortissima lex.*"

If the construction were a doubtful one, it should, under the circumstances, be held to be against that set up by the plaintiffs, whose grantor, Henry Burden, is the contractor. In a case of doubt, the words of a promise, or covenant, are to be taken most strongly against the promisor or contractor. (Coke Litt., 183, a.) This rule should be applied, in this case especially, for two very apparent reasons: First, because it was well understood, by both parties, with what machinery alone these hook-headed spikes could be successfully made for sale in market, and that the defendants were then using that machinery in their works; and, second, because Burden had a strong pecuniary motive to deal in generalities, and not to grant, specifically and clearly, a license to use the bending lever. He feared he might jeopard the thirty per cent., secured to him by the agreement of December 2d, 1836, and which was afterwards in controversy, and was claimed by the plaintiffs to have been forfeited by him; and yet he desired to obtain the monopoly of the horseshoe business.

The contemporaneous exposition of the agreement [205*] ment, by Burden, *is in accordance with the position of the defendants. See his letter of December 15th, 1845, and his letter of December 11th, 1846. In this latter letter, Burden speaks of his intention to share the spike business with defendants. He very well knew that could not be done, except by uniform prices, and that we could have no uniform price with him, unless we used the bending lever.

But there was an actual sharing between appellant and respondents, of contracts for spikes. Burden declared that it was his intention to share with respondents the spike business, and this was done, as is shown by his letters. Such was the practical contemporaneous construction of the agreement, and it appears, by Burden's letter of February 10th, 1848, that not only was there to be an uniform price for hook-headed spikes, but that the whole field was to be occupied by the parties in common, and to the exclusion of all others.

The whole object of this letter was to tell respondents what he had been doing to protect their common rights. Can there be anything more needed to show that it was the understanding of both parties, that by the agreement of October 14th, 1845, respondents had the right to use the bending lever?

Winslow's letters, written in January, 1845, show that respondents were using the bending lever at that time, and that Burden then knew it. In Burden's letter of January 10th, 1845, and in Winslow's reply to it, of January 13th, 1845, they both refer to "the machinery in question," which can only mean the bending lever.

IV. But whatever might have been the construction which a court would, under other circumstances, have put upon this agreement—a court of equity will not now grant an injunction, as is prayed for in the complainants' bill, after an acquiescence in the use of the patented machinery, under this agreement of October 14th, 1845, for near three years before the commencement of this suit. (*Wyeth v. Stone*, 1 Story, 273; *Rundle v. Murray*, Jacob, 311; *Williams v. The Earl of Jersey*, 1 Craig & Phil., 91; *Warwick v. Hooper*, 3 Eng. Law and Eq., 233, cited; U. S. Dig., Appendix, Vol. V., 1851, title Patent.)

Mr. Justice **Wayne** delivered the opinion of the court:

This is an appeal from the Circuit Court of the United States for the Northern District of New York.

The appellants are a manufacturing company, incorporated by the laws of the State of New York. They aver that Henry Burden was the inventor of a new and useful improvement in the machinery for manufacturing wrought nails and spikes, for which letters patent were granted to him, on the 2d of December, *1834. They allege that it was [*206 assigned to them, for a valuable consideration, and also, that Burden covenanted with them, if he should thereafter make any improvement upon his invention, that he would convey the same to them. Burden afterwards did make a new and useful improvement in machinery for making hook or brad-headed spikes, for which a patent was granted to him, on the 2d of September, 1840. He assigned it to the complainants, in virtue of his covenant, where by they became the exclusive owners of the patent. They then complain that the defendants had infringed the same, by having erected and put in use, in their iron and nail works, in the City of Troy, four or five machines for the manufacture of hook or brad-headed spikes, containing the improvements in their assigned patent, and had used them for manufacturing hook or brad-headed spikes, since the 15th of October, 1845.

It is also stated that Burden brought an action at law against the defendants, for an infringement, secured by the patent of September 2d, 1840. The defendants resisted a recovery, upon the ground that Burden was not the first inventor of the improvements for which that patent had been obtained. A trial of this case, upon the merits, resulted in a verdict for Burden, for seven hundred dollars, which was carried into a final judgment against the de-

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defendants, after a motion which they made for a new trial had been overruled.

The defendants are then charged with again using the improvements in the patent of 1840, under the pretense that they have a license from Burden to do so. This is denied by the complainants; and they say, if such license had been given by Burden, that it was in contravention of his assignment to them of his patent, by which they became the legal and equitable owners, from the time it was granted, on September 2d, 1840.

The bill is then concluded, with a prayer that the court would enjoin the defendants, Corning, Horner and Winslow, their attorneys, and agents, and workmen, to desist from making, using or vending, any machine containing the improvements, for which letters patent were granted to Burden, on the 2d of September, 1840; and from selling or using any spikes which they then had on hand, which had been manufactured by their machines containing the improvements of that patent. An account of the profits, which they had derived from the use of such patented improvements, is also called for.

The letters patent granted to Burden, on the 2d day of September, 1834, and that of the 2d of September, 1840, describing an improvement called a bending lever, in the machinery for making hook or brad-headed spikes, are made exhibits to the bill.

207*] *This bill was answered by the defendants.

It admits that the complainants were an incorporated body, under the style of the Troy Iron and Nail Factory Company; also, that Henry Burden was the inventor of the improvements in the machinery for making nails and spikes, for which letters patent were granted to him in December, 1834, and that he assigned the same to the complainants two years thereafter. But they deny that there was any covenant in the assignment, or in any other agreement then recorded in the Patent Office, or any agreement between Burden and the complainants, obliging him to convey to them any improvement which he might make upon his invention. And they insist, if such an agreement was made, that, as it was only a covenant to convey a contingent possibility, which would be inoperative and void, and could not affect them. The defendants also admit that Burden obtained the patent of 2d September, 1840; but they deny its validity. They declare that the bending lever, described in the specification of it, or one similar to it in form and principle of construction or operation, had been invented and had been used by several persons in making spikes for several years before the patent had been obtained by Burden for his improvement of the bending lever. They state that it was invented by Thomas and William Osgood, and used by them in the years 1835, '36, '37, '38, upon one of their spike machines, to make hook or brad-headed spikes, which they sold during those years in Philadelphia. It is also stated by the defendants, that the bending lever, patented by Burden, was the invention of one Ebenezer Hunt, whilst he was in the employment of the former. It is then admitted that Burden assigned to the complainants his patent for the

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bending lever, in June, 1848; but it is said to have been fraudulently done, and that the appellants have no right, legal or equitable, to that improvement, under that assignment, or by that of the agreement between the complainants of Burden, of December, 1836. And, it is added, should they have any right or interest in the patent for Burden's bending lever, that the defendants have also the right to use the same under an agreement with Burden of the 14th October, 1845, which was made for himself, and in behalf of the appellants, as their agent, before he had assigned it to them in 1848.

The defendants then aver, that this agreement of the 14th October was made with the understanding of both parties; that it would finally settle all differences between themselves and Burden and the complainants, which had arisen out of counter claims by both parties to a patent for making horseshoes, and also to a patent right for making hook or brad-headed spikes, each party claiming the right to manufacture and vend *such horse- [208 shoes and such spikes, under their respective counter claims and patents, without the permission of either to the other, and to use, in the manufacture of the brad-headed spike, Burden's bending lever.

The consideration of the agreement is said to have been a purchase by the defendants from the complainants, of an undivided half part of a dock on the Hudson River, for \$1,600—a grant by the defendants to them for the exclusive manufacture of patent horseshoes—and a mutual relinquishment of their counter claim to the patents for making hook-headed spikes by a bending lever. It is averred that they had used Burden's bending lever in the manufacture of such spikes, from the date of the agreement, with his knowledge, without objection by him or by the appellants, and that Burden had discontinued the suit against them. It is not necessary to state more of the pleadings. The abstract given, discloses what had been the relations between these parties for several years before this suit was brought, and their views and conduct respecting the patent for the bending lever.

We will now turn to the evidence in the case. It shows, first, that every allegation in the bill has either been proved or admitted by the answer of the defendants, excepting such as they respectively make concerning the agreement of the 14th of October, 1845, which will hereafter have our attention.

The letters patent obtained by Burden, in 1834, which describes a machine for making nails and spikes, is annexed as an exhibit to the bill, and so is that afterwards granted to them, in 1840, for his improvement on the first, for making hook or brad-headed spikes. The answer admits that he was the inventor of the first, and that he had a patent for it. It also admitted that he obtained a patent for the other; but it is denied that he was the inventor of it. This the defendants have failed to prove; and in our opinion, the evidence given by them on that point rather serves to establish the originality of the invention than to impair it. We think so, because it is uncertain and conflicting, and, as our learned brother said concerning it in the court below, is irreconcilable. The appellants stand upon that patent as the

first which was granted for the bending lever, and they may well do so, until other evidence than that in this record shall be given to disprove its originality. It is admitted that Burden assigned that patent also to the appellants; but it is said to have been fraudulently done, and that it was not made, because Burden had covenanted, in his assignment to them of his first patent, to convey to the appellants any improvements he might thereafter make upon that machine during the time that the patent had to run. The 209* assignment by Burden to the appellants of his patent for making wrought nails or spikes is dated in December, 1836, just two years after it was obtained. It contains, after the transferring clause, and in connection with it, these words, "with all the improvements which he hath made or shall make in the same, in any other part of the United States, as the said parties of the second part shall deem expedient, during the term for which the same are or may be patented by the said party of the first part." The assignment itself being admitted by the defendants, this, as a part of it, must also be included in the admission. It is, in our opinion, a covenant which bound Burden to convey to the appellants his improvement upon his machine of the bending lever. Though the assignment of it was not made until several years after it was patented, the appellants were equitably entitled to it before. Without something besides to sustain them, than the delay in making the assignment, the defendants had no ground for stating that it was a fraudulent device to overreach and defeat the agreement between themselves and Burden, of the 14th October, 1845. The defendants also admit that they were sued by Burden in 1842, for an infringement of the rights secured to him by his patent for the bending lever. That, though they had resisted it, upon the ground that Burden was not the inventor, the jury, who tried the case upon its merits, had returned a verdict against them for the infringement, with \$700 damages; and that it was carried into judgment. This was in the year 1843.

In November, 1844, Burden, believing that the defendants were again using his bending lever, for making brad-headed spikes, brought against them a bill, to enjoin them from doing so, and asking for an account. They had notice of it; but, from some accidental cause, they did not appear to resist the application, and an injunction was granted until the further order of the court.

In a few days, with the view to be released from it, Mr. Winslow, in behalf of himself and his associates, filed an affidavit, with another made by Thomas Osgood and Israel Blanchard. In each of them, they swear that the defendants were not using Burden's invention in their manufacture of hook or brad-headed spikes, but that they made them with machinery altogether different in principle and mode of operation from that which they were using when Mr. Burden sued them in 1842 for an infringement of his patent, and when he obtained a judgment against them. Mr. Winslow states that the machinery they were then using is entirely different in principle and operation from the machine used by Burden in making hook and brad-headed spikes. Osgood and

Blanchard, after stating that they had been in the employment of the defendants for [*210 several years, say that they were well acquainted with the process used by the defendants in making hook-headed spikes, and with that which they were using when the defendants were prosecuted for an infringement of Mr. Burden's patent, and that they were well acquainted with the improvement claimed to have been invented by Burden; that the machinery then used by the defendants not only differed from that which they used when they were prosecuted for an infringement of Burden's patent, but also that the process then in use by the defendants, by which the hook head is formed, is entirely new and different, in principle and use, from the bending lever described by Burden in his patent. They proceed to say, that Burden's patent, in their opinion, is in no manner violated by the manufacture of hook-headed spikes in the mode in which they are now made by the defendants. The process mentioned by them, and by Mr. Winslow, is not stated in their affidavits. What it was, we do not know with certainty.

These affidavits show the attitude in which the defendants put themselves, on the 25th of November, 1844, in the suit then pending with Burden.

It was this, that as a defense against that suit, they claimed the right to manufacture hook or brad-headed spikes, by machinery entirely differing, in principle and operation, from Burden's bending lever for the same manufacture.

So it continued, until the agreement of the 14th of October, 1845, was made. Then, and the day after, all of the new processes mentioned in the affidavits of Winslow, Osgood and Blanchard, for making brad-headed spikes, and such as are described in the patents obtained by the defendants, were set aside in their factory, for Burden's more manageable and efficient bending lever.

This brings us to the consideration of the agreement. We give it, *totidem verbis*.

Agreement, made this fourteenth day of October, 1845, between Henry Burden of the one part, and Erastus Corning, James Horner and John F. Winslow, of the other part. Whereas, a suit is now pending in the Circuit Court of the United States, in the Northern District of New York, in favor of the said Henry Burden, against the said Corning, Horner and Winslow, arising out of the alleged violation and infringement of a patent right, claimed by said Burden for making spike, both parties claiming the right to make said spike: It is now agreed, between the said parties, that the said suit shall be, and is hereby discontinued, each party paying their own costs. And it is further agreed, that the said parties may each hereafter manufacture and vend spikes, of such kind and character as *they see fit, notwithstanding their [*211 conflicting claims to this time. And the said John F. Winslow, claiming as patentee, to have the right for the benefit of the said Corning, Horner, and himself, to manufacture the patent horseshoe. And the said Henry Burden also claiming such right exclusively. It is severally agreed, by said Corning, Horner, and Winslow, that said Burden may manufacture said patent horseshoes, and that said Corning

Horner, and Winslow, will not manufacture them. And each party, in consideration of the premises, hereby releases to the other, or others, all claim, demand and cause of action, by reason of any violation of the patent rights claimed by them, as aforesaid, to the date hereof.

Dated October 14th, 1845. H. BURDEN.

It contains, besides its premises, which will be seen are not unimportant for the construction of it, four substantive clauses.

First, the discontinuance of the suit then pending between the parties, each party to pay their own costs. Next, that each party might, thereafter, manufacture spike of such kind and character as they see fit, notwithstanding their conflicting claims to that time. Then the concession by the defendants to Burden, that he may manufacture the patent horseshoes, and that they will not do so, though they had claimed the right to make them, notwithstanding Burden's exclusive claim for that purpose. And this is followed by releases by each party to the other, of all claim, demand, and causes of action, by reason of any violation of the patent rights claimed by them, as aforesaid, to the date hereof.

The defendants contend that, in virtue of this agreement, they have a right to use the Burden bending lever, upon their spike machines. That it was made for the settlement and compromises of all differences and claims then existing between themselves and Burden, on account of their counter claims for making patent horseshoes and brad-headed spike. And that the consideration of the agreement on their part, was, that they had given to these appellants fifteen hundred dollars, for an undivided half part of a dock on the Hudson River; had conceded to them an exclusive privilege to make patent horseshoes; and that each party had relinquished to each other their patents for making hook-headed spikes by a bending lever, so that both might use that of the other. It is further stated, by the defendants, that they had fully performed their obligations of the agreement, and that they had, from the date of it, used Burden's bending lever, in making spike, with the knowledge of Burden and the appellants, without any objection by either of them.

From the premises of the agreement, it appears that the suit *to be discontinued was one which Burden had brought against Corning, Horner and Winslow, for an alleged infringement of his patent for making spike, each party in the suit claiming the right to do so. What their counter claims were, are not given in the agreement. They are, however, distinctly recited in the bill, and in the answer of the defendants, as they say they existed at the date of the agreement. Each party, at that time, claimed a right to make brad-headed spikes by different machines. Burden's claim is put upon his patent for the bending lever. The defendants denied that they had infringed it by the machine which they had in use, and swear that it was different, in principle and operation, from Burden's patent bending lever. It is also said by them, in their answer, that there were differences between them as to a patent for making the horseshoe. The differences, however, on that account, were never litigated by the parties, and the subject is only before us because it is mentioned in the agree-

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ment, and in the answer of the defendants in this suit.

Having ascertained, from the agreement itself, and from the pleadings in this suit, what were the conflicting claims between the parties when the agreement was made, we are prepared to give our construction to that clause of it from which the defendants claim the right, or a license, to use Burden's bending lever for making brad-headed spikes.

It is in these words: "And it is further agreed, that the said parties may each hereafter manufacture and vend spike of such kind and character as they see fit, notwithstanding their conflicting claims to this time"—that is, up to the date of the agreement.

The limitation as to time, clearly indicates, as the existing litigation between them in the suit had been the rights claimed by both in it, to manufacture brad-headed spike, with a bending lever, operating differently in the machines which they were respectively using in their factories, that each thereafter could make and vend them, notwithstanding the claim made by Burden, in his bill, that he had, by his patent, the exclusive right to make them. The words are, "that the said parties may each hereafter manufacture and vend spike, of such kind and character as they see fit." Burden had obtained at law one verdict against the defendants, for a violation of his patent, and the suit then pending was another, which he had brought in equity, to restrain the parties from continuing the infringement. They deny that the judgment against them, in the suit at law, had settled the validity of Burden's patent. That that question was still open in the second suit, as they say it is in this, the third suit; but in no one of them did they ever claim the right *to [213 use Burden's invention as such, or as they now claim to do, under the agreement, but they claimed, in all of them, only a right to make brad-headed spikes, by machinery which was different, in principle and operation, from Burden's patent. When the parties were adjusting a compromise of the second suit, and up to the time when it was done, Burden had claimed an exclusive right, from his patent, to make brad-headed spike with a bending lever. The defendants claimed also that right, and it was because they exercised it, that Burden sued them for an infringement of his patent. Both parties were making brad-headed spike; Burden, under an unquestioned right, growing out of his patent; the defendants under a controvertible claim which the suit was brought to settle judicially. They had already almost obtained a monopoly for the supply of such spike for the railroads of the country. It was with the hope of doing so entirely, and with the expectation of dividing the spike business of the United States between them, notwithstanding the threatening competition of other persons, who claimed the right to make brad-headed spike, and were making them with a bending lever, that Mr. Burden and these defendants were induced to compromise their litigation. It was a mere matter of interest, which actuated them, without any other sympathies between them than the disinclination of all persons to have the relations of social life and of business broken up by pro-

tracted litigation. But each party, business-like, alive to his own interest, did not mean to make any sacrifice to the other, except such as their common object might require; that was, to drive all others out of the brad-headed spike trade. Burden had obtained one verdict against the defendants, for infringing his patent. He was suing them for doing so again, and had obtained no injunction *nisi*, to restrain them from continuing it. They continued to make spike with a machine, alleging it to be no infringement of their competitor's patent. That was the point of controversy. It was believed, by both of them, that their common interest required a relinquishment of it by Mr. Burden, and he made it, intending that each might thereafter make brad-headed spike himself, as he had a right to do, from his patent, and the defendants, as they represented themselves to be doing, by the machine which they swear was different, in principle and operation, from his, and no infringement of it. Brad-headed spike could be made with either of them, and that being the case, it was agreed that each might thereafter manufacture and vend spike of such kind and character as they might "see fit" to do.

It was admitted, in the argument of this case, and had it not been, it is certain that the **214***] agreement of October 14, 1845, *does not, in terms, give to the defendants the right to use the machines patented by Burden in 1840. But, it is said, it does give that right by implication; that such was the understanding and intention. And that is inferred from matters in the agreement and from a circumstance out of it, which are said to determine its construction in favor of the claim made by the defendants to use Burden's patent. We proceed to examine it.

In the agreement it is said, "Each party, in consideration of the premises, releases to the other all claim, demand, and cause of action, by reason of any violation of the patent rights claimed by them as aforesaid, to the date hereof." Those are its words.

By the premises, of course, in its use here, is meant all of the deed which precedes the releases, making every part or clause the consideration for which the releases are given. The release is a relinquishment by both parties of all claim, demand and cause of action, for the violation of patent rights claimed by them, to that date. It is imperfectly expressed, as to the subject matters in controversy, which were then to be compromised as they appear in the suit. That such was the intention, appears from the language of the release, it being for any violation of the patent rights claimed by them. The defendants never charged Burden with any violation of any patent of theirs in their pleadings. They make but two claims: the first, that they had as good a right to make brad-headed spikes as Burden had, notwithstanding his suit against them for infringing his patent; and, as patentee, that they had the right to manufacture the patent horseshoe, against the exclusive claim of Burden, under his patent, to make them. Now, though the release, as it is expressed, may imply that there had been between the parties other claims than such as we find in the suit and in the agreement, we think the words in the release,

"claimed by them, as aforesaid," fixed its meaning to what is expressed. And if this was not so, we should say, without these words, "claimed by them, as aforesaid," that the general words would be restrained by the particular occasion of using them; and that its meaning is, that Burden releases to the defendants, for the considerations of the agreement, all claim and causes of action up to that date, for any violation of his patent rights for the horseshoe and bending lever, for which they asserted a claim as well as himself. (T. Raymond, 399; 3 Mod., 277; 1 Lev., 235; 3 *Id.*, 273; 2 Shower, 47.)

Besides, the releases being operative only up to that date, it is very difficult to admit that it was meant to provide prospectively for the defendants to use a particular machine, for any *previous violation for which they were ***215** then to be released. It is a bar to any right of action for the past for the causes stated, and not a limitation upon the releases for anything of a like kind which may be done thereafter.

But it was also urged, that the rights of the defendants, under the agreement, to use Burden's bending lever, might be inferred from their relinquishment to the appellant of their right to make the horseshoe. The proofs in the case disclose, that Burden had obtained, in November, 1835, a patent for a new and useful improvement in the machine for making horseshoes, and that he also patented another improvement upon that in 1843. In May, 1844, Mr. Horner and Mr. Winslow bought from Eli-sha Tolles and Nathaniel B. Gaylord, for \$1,000, a patent for making or bending horseshoes, claimed by Tolles as his invention, of which Gaylord became the owner of an undivided half, by assignment from Tolles, before the latter obtained his patent, in 1834. In the agreement for the purchase, it is recited that, the patent having been lost, a new patent was issued to Tolles, in May, 1844. The view taken by Winslow and Horner of their purchase of that patent is shown by covenants in the agreement. It is that, in case it shall at any time appear, by the decision of any court having competent jurisdiction, that the patents conveyed to Winslow and Horner were not valid and effectual to secure to them the exclusive privileges thereby granted, whether for the reason that Tolles was not the original inventor of the machine, or otherwise, then, that the purchase money was to be returned to Horner and Winslow, with interest from the time it was received; both Tolles and Gaylord being only responsible for the portions of the money that they might receive, Gaylord guaranteeing to the purchasers \$100 of the \$375, which it appears he did receive from Mr. Winslow, Gaylord having, on the same day, received from him \$575. Such was the claim of the defendants for a patent for bending horseshoes, and no more. The defendants had the right to buy such a patent, with an undertaking to pay the expenses of a law suit, if they pleased to do so. And they had a right to use the patent which they bought, if it had really been obtained, and was not an infringement of another patent. But, having shown their own apprehension of its invalidity, and provided that they were to lose nothing by it, in case it should

prove to be the right, which they asserted under it in the agreement of 14th October, 1845, can only be viewed by us as a relinquishment of a very doubtful claim to make the patent horse shoe, to the exclusive claim made by Burden, to make them under his patent, which formed an inducement with the latter to enter 216* into the release contained *in that agreement. As to the circumstance out of the agreement upon which the defendants state formed in fact the consideration, it is only necessary to say, it sufficiently appears that the undivided half of the dock, which they bought from the appellants, was fully worth the sum paid for it when the purchase was made, and, therefore, the price given cannot be a consideration for anything else.

We have so far construed the agreement from what is expressed in it, in connection with the claims made by the parties in the suit which Burden agreed to discontinue. There are other reasons which would bring us to the same conclusion.

Though no form has been prescribed, either for assignments of patents or for licenses to use them, we have judicial decisions concerning both which are to determine what language will make either, and how they are to be distinguished from each other. The clause of the agreement from which the defendants wish it to be inferred that they have the right to use Burden's bending lever, gives nothing definitely. The claim made by them in their answer is uncertain. It is difficult to distinguish whether they mean to claim by assignment or by a license; and when it was urged, in the argument, that they did so by license, it was equally uncertain whether they did so upon a claim which they might assign or use for others who might become owners in their factory, or which they could only personally use without being transmissible by them to others. The difference is well understood. A mere license to a party, without having his assigns or equivalent words to them, showing that it was meant to be assignable, is only the grant of a personal power to the licensees, and is not transferable by him to another. (Curtis on Patents, sec. 198; 2 Story, 525, 554.) It is true that, in the argument, the claim was for a license to use Burden's bending lever; but to what extent, or where, or for what time, was not said; nor can it be collected from their answer. Such uncertainties we cannot affirm of an agreement which definitely states what they may do. Further, we cannot adopt the construction of the agreement contended for by the defendants, because they gave no such consideration for such an interest in Burden's patent. We do not say an inadequate one, but no consideration. We can find none in the agreement, nor any in what is said in their answer to have been a consideration. It has already been shown, that the dock bought by them from the appellants could not have been any part of a consideration, because the proofs in the cause show that their use of it is a convenience in their business, and that the interest which they acquired in that property was fully worth the price given by them for it. In addition to what has already been said concerning the 217*) *relinquishment of the horseshoe manufacture, or that Burden might manufacture

them, and that they would not, we cannot see how that, as a part of the agreement, can be made by any implication to mean more than this: that it was a surrender to the exclusive claim of Burden to make them, of a very equivocal right upon their part to do so, for the discontinuance of the pending suit, for the allowance to them to make brad-headed spike, which it was the purpose of the suit to prevent, and for the releases, mutually given against any future claim for the past violations of the patent rights claimed by them in their pleadings. We think, from the agreement, that such was the intention of the parties to it, notwithstanding the declaration of the defendants that it was otherwise. We do so, because there is no proof of it in the case, and because it is not permitted to a party to control a written agreement by parol testimony of declarations or conversation, at the time it was completed or before, which would contradict, add to, or alter the written agreement, either in the case of a latent or patent ambiguity, though in either, collateral facts, and the circumstances in which the parties were placed when the agreement was made, may be given in evidence. In the first case, to ascertain something extrinsic or matter out of the instrument where there is no ambiguity from the language of it; and in the other when, from defective terms, the intention of the parties may not be collected from them. In this agreement, we can see no such ambiguity of expression to make it doubtful, or anything extrinsic connected with it to make it uncertain.

The proofs in this case disclose, that Burden's bending lever is a valuable invention. So much so, that the appellants gave to him for the assignment of it, with its improvements, and for the assignment of the horseshoe patent, thirty per cent. upon the net gains of the manufacture of both, with a like interest in the value of all the machinery of both which might be on hand when the contract shall be at an end—and with the same interest in all the real estate, the additions and improvements of it, which shall be bought and made out of the earnings of the assigned machinery, with this further stipulation upon the part of the appellant, that his interest, as they have been stated, should commence six months before the date of his assignments. With such advantages, it cannot be supposed that it was understood by the parties to the agreement of 14th October, 1845, that Burden meant to put a rival establishment in possession of an interest in his patent equal to that of the appellants, for making brad-headed spike, and that for nothing.

Before concluding, we will remark, that there is no proof in the cause to maintain the averment in the answer of the defendants, that *they used the bending lever of Burden [*218 with his knowledge and that of the appellants, from the date of the agreement until the suit was brought, without any objection or complaint from either of them.

In every point of view which we can take of this case, we think that the defendants have infringed the patent for making hook or brad-headed spike with Burden's bending lever. We shall direct the decree of the court below to be reversed, and shall order a perpetual injunction to enjoin the defendants from using the machine with Burden's bending lever in the

manufacture of brad-headed spike, and shall remand the case to the court below, with directions for an account to be taken as is prayed for by the appellants.

Mr. Chief Justice Taney and Mr. Justice Nelson dissented.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Northern District of New York, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with instructions to enjoin the defendants perpetually from using the improved machinery with the bending lever for making hook and brad-headed spikes, patented to Henry Burden, the 2d September, 1840; and assigned to the complainant as set forth in complainant's bill, and to enter a decree in favor of the complainants, for the use and profits thereof, upon an account to be stated by a master, under the direction of the said Circuit Court, as is prayed for by the complainant, and for such further proceedings to be had therein, in conformity to the opinion of this court, as to law and justice may appear.

Rev'g—1 Blatchf., 468.
Cited—15 How., 464; 18 Blatchf., 58.

HORACE C. SILSBY, WASHBURN RACE,
ABEL DOWNS, HENRY HERRION, AND
CHARLES D. THOMPSON,

v.

ELISHA FOOTE.

Sickness of juror—withdrawal and replacement during trial—Erroneous reason for a correct rejection of evidence not ground for review—Patent for combination, sufficiency of specifications—Reference to dictionary without specifying place not sufficient notice of special matter.

NOTE.—Decision in this case examined and explained by Judge Grier, dissenting, in *Silsby v. Foote*, 20 How., 378.

Jury; of what number; practice in regard to; illness or insanity of one; thirteen or eleven jurors; wrong person serving as juror by mistake.

A petit jury must be composed of twelve men, according to the meaning of the term in the common law. *United States v. Insurgents of Pennsylvania*, 2 Dall., 385; *Bonaparte v. Camden and Amboy R. R. Co.*, Baldw., 205; 6 Metc., Mass., 231; 4 Ohio St., 177; 2 Wisc., 22; 3 Wisc., 219; *Conger v. Hudson River R. R. Co.*, 12 N. Y., 2 Kern, 190; *Wynemamer v. People*, 13 N. Y., 427; *De Lolme on Const.*, 121, 124, 250; 3 Bl. Com., 358, 365, 375, 376; 2 Hale's Hist. Com. L., 137, 141, 149, 150; 1 Reave's Hist. Eng. L., 83-85; *Dowling v. The State*, 5 Sm. & Marsh., 664.

Before a jury is made up incompetent jurors who have been summoned and sworn may be discharged, and others summoned in their places. *United States v. Dickinson*, Hempst., 1.

A juror who has a cause at issue which he expects will be tried at the same term will be discharged, and if not discharged may be challenged. *Claggett's case*, 2 Cranch C. C., 247.

Upon a trial in New York, a juror became ill, and was discharged before any evidence was given, and before the plaintiffs' counsel had concluded his opening address. The court ordered another juror to be sworn, and proceeded with the trial. The defendant cannot object to this. It is the practice in New York, and the Circuit Court had a right to follow it.

*The court having erroneously refused to [*219 allow the plaintiff to offer a paper in evidence as a disclaimer of part of a patent, afterwards refused to allow the defendants to offer the same paper in evidence for the purpose of prejudicing the plaintiffs' rights. This last refusal was correct. The reason given was erroneous, but this is not a sufficient cause for reversing the judgment.

The courts of the United States have not the power to order a nonsuit against the wishes of the plaintiff.

Under a notice given by the defendant, that the invention claimed by the plaintiff was described in Ure's Dictionary of Arts, Manufactures and Mines, and had been used by Andrew Ure, of London, it was not competent to give in evidence a very large book. The place in the book should have been specified.

Nor, under the notice, was the book competent evidence, that Andrew Ure, of London, had a prior knowledge of the thing patented. The notice does not state the place where the same was used.

One of the specifications of the patent being for a combination of certain parts of mechanism necessary to produce the desired result, it was proper for the court to instruct the jury that the defendants had not infringed the patent, unless they had used all the parts embraced in the plaintiffs' combination; and the jury were to find what those parts were, and whether the defendants had used them.

When a claim does not point out and designate the particular elements which compose a combination, but only declares, as it properly may, that the combination is made up of so much of the described machinery as effects a particular result, it is a question of fact which of the described parts are essential to produce that result; and to this extent, not the construction of the claim, strictly speaking, but the application of the claim, should be left to the jury.

THIS case was brought up by writ of error from the Circuit Court of the United States for the Northern District of New York.

The facts are stated in the opinion of the court.

It was argued by *Mr. Seward* for the plaintiffs in error, and by *Mr. Foote*, in proper person, for the defendant in error.

Mr. Justice Curtis delivered the opinion of the court:

This is an action on the case for the violation of a patent right granted to the defendant

After the counsel had commenced to open the cause, but before evidence had been offered, a juror fell ill and was discharged. Thereupon, no objection being made, the court ordered another juror to be summoned and sworn, and the trial then proceeded: Held, that there was no error in this. *Young v. Marine Ins. Co. of Alexandria*, 1 Cranch C. C., 566. This agrees with the doctrine of the above case of *Silsby v. Foote*.

Even on a trial for a capital offense, a jury may be discharged, on account of the insanity of one of the jurors, without the consent of the prisoner or his counsel. Such a discharge is in the discretion of the court, and cannot form the subject of a plea in bar to further trial of the prisoner. *United States v. Haskell*, 4 Wash. C. C., 402; 2 Wheel. Cr. Cas., 101.

If one of the jurors be sick so that he cannot deliberate, and a verdict be taken, it is the verdict of the other eleven, and will be set aside. *Dea v. Baldwin*, 2 Penn., 493.

It has been held that the legal number of jurors cannot be dispensed with even by consent, and a cause cannot be tried by eleven jurors. *Mitten v. Smock*, 2 Penn., 811; *Briant v. Russell*, 1 Penn., 149.

If a juror already sworn be excused for sickness

in error on the 26th day of May, 1842, for "a new and useful improvement in regulating the draft of stoves." On the trial in the Circuit Court for the Northern District of New York, the defendants took exceptions to the rulings of the District Judge, who presided at the trial, and have brought the case here by a writ of error.

The first exception shows the following facts: After the counsel for the plaintiff had begun his opening address to the jury, a juror became ill, applied to the court to be discharged, and was discharged from the panel on account of physical inability to sit on the residue of the trial. Thereupon the court ordered another juror to be drawn and sworn, and the panel being thus full, the trial proceeded, and the plaintiffs' counsel concluded his address. The plaintiff assented to this proceeding; the defendant objected, and excepted to the order of the court.

We think it was not erroneous for the presiding judge to treat the physical inability of the juror as simply creating a vacancy on the panel, and proceeding to fill it in the usual [220*] way by having *a twelfth juror drawn and sworn. We understand it to have been the practice of the courts of the State of New York so to treat such a withdrawal of a juror, when the presiding judge in his discretion has thought proper to do so, and under the Act of July 20, 1840 (5 Stat. at Large, 394), the Circuit Court might properly conform to that practice. Of course it must be confined to cases like the present, in which it is apparent the party objecting received no injury. The defendant cannot be supposed to have been prejudiced by the failure of the twelfth juror to hear a part of the opening argument for the plaintiff, no evidence having been given, and he did not make known to the court that he desired to attempt to exercise any right of challenge of the other eleven jurors, to which he might have been restored if any cause existed, and the panel had been treated as broken up. (*Rex v. Edwards*, 4 Taunt., 309; *Green v. Norville*, 3 Hill, S. C., 262.) In such a case we think it rested in the discretion of the court whether the withdrawal of a juror should be treated simply as occasioning a vacancy on a still existing panel, or as breaking up the panel

altogether, and it being a matter of discretion, no error could be assigned upon it, even if there were reason to believe, what in this case there is not, that the discretion was not wisely exercised.

The next exception was to the refusal of the judge to allow the defendant to put in evidence to the jury an indorsement on the original letters patent. The plaintiff had previously offered in evidence a duly certified copy of the following disclaimer:

To the Commissioner of Patents, the petition of Elisha Foote, of Seneca Falls, in the County of Seneca, and State of New York, respectfully represents:

That your petitioner obtained letters patent of the United States for an improvement in regulating the draft of stoves, which letters patent are dated on the 26th day of May, 1842. That he has reason to believe that, through inadvertence and mistake the claim made in the specification of said letters patent, in the following words, to wit: "What I claim as my invention and desire to secure by letters patent, is the application of the expansive and contracting power of a metallic rod, by different degrees of heat, to open and close a damper which governs the admission of air into a stove, or other structure in which it may be used, by which a more perfect control over the heat is obtained than can be by a damper in the flue," is too broad, including that of which your petitioner was not the first inventor.

Your petitioner, therefore, hereby enters his disclaimer to so much of said claim as extends the application of the expansive and contracting power of a metallic rod, by different degrees of *heat, to any other use or purpose [221] pose than that of regulating the heat of a stove, in which such rod shall be acted upon directly by the heat of the stove or the fire which it contains; such disclaimer is to operate to the extent of the interest in said letters patent vested in your petitioner, who has paid ten dollars into the Treasury of the United States, agreeably to the Act of Congress in that case made and provided. ELISHA FOOTE.

Witnesses—Morris Newton, Edwin L. Balcink.

The defendants objected upon the ground that the instrument did not state "the extent

before the trial is begun, the court may select a new one, and the trial may proceed. *Punnell v. State*, 29 Geo., 681.

At any time before evidence is given to the jury, the court may, of its own motion, remove a juror incompetent from partiality. *Guire v. State*, 37 Miss., 5 George, 369.

Pending the selection of the jury, and before the jurors had been charged with the trial of the prisoner, two of them were discharged by the court, with the consent of the Attorney-General and the prisoner. In this there was held to be no error. *Solen v. State*, 2 Head, Tenn., 520.

An agreement for trial with a jury of less than twelve, in a trial for misdemeanor, is valid, and a judgment on the verdict is not erroneous. *Murphy v. Commonwealth*, 1 Met. Ky., 365.

Where it was discovered during the examination of the first witness, that there were thirteen jurors in the box, and the court discharged them, and drew another jury, and tried the cause by it: *Held*, regular. *Muirhead v. Evans*, 2 L. M. & P., 294; 6 Exch., 447; 15 Jur., 355; 20 L. J. Exch., 211.

Where one, not summoned, answered by mistake to the name of a jurymen summoned, and served in his stead, and defendant objected to taking the verdict which they gave for plaintiff: *Held*, a mis-

trial. *Doe d. Ashburnham v. Michael*, 16 Q. B., 320; 15 Jur., 677; 20 L. J. Q. B., 266; *Devey v. Hobson*, 6 Taunt., 490; *Willes*, 488; *Russel v. Bull*, Barnes, 455.

It is in the discretion of the court to grant a new trial where one not impaneled or sworn has served by mistake upon the jury. *Amherst v. Hadley*, 1 Pick., 38; *Howland v. Gifford*, 1 Pick., 43, n.; *Wells v. Cooper*, 20 L. T. N. S., 721; *Hardenburgh v. Crary*, 15 How. Pr., 307; *Hill v. Yates*, 12 East, 229, 231; *Falmouth v. Roberts*, 1 Dowl. N. S., 633.

If one of the jury happens to be taken suddenly ill, so as to be incapable of remaining until the verdict is agreed on, the court may discharge that jury and charge another with the cause. *Ann sealbert's case*, Leach, 706; *Rex v. Edwards*, 4 Taunt., 309; 3 Camp., 207.

One of the jury, after he had been sworn, and had heard part of the evidence, fell sick, and another was sworn in his place by consent of both parties: it was held a good verdict. 5 Bac. Abr., 382; *Palm*, 411.

A cause cannot be tried by eleven jurors. 1 Penning, 146; 2 Penning, 911, 945.

A judgment was reversed, when the case had been tried by thirteen jurors. *Whitehurst v. Davis*, 2 Hayw., 112.

of his interest in such patent." (5 Stat. at Large, 193, sec. 7.) The court sustained the objection, and refused to permit the instrument to be read by the plaintiff as a disclaimer. At a subsequent stage of the trial the defendant offered to read to the jury a copy of this instrument indorsed on the original letters patent, not as a disclaimer under the Act of Congress above referred to, but as a confession by the plaintiff that he was not the original and first inventor of a part of the thing patented. The plaintiff objected, because the indorsement on the letters patent was not in his handwriting, nor signed by him, and the defendants had already caused a duly certified copy of the same instrument to be rejected. The court sustained the objection.

We are of opinion the court erred in not allowing the plaintiff to put this instrument in evidence as a disclaimer, under the 7th section of the Act of March 3, 1837. (5 Stat. at Large, 193.) This section authorizes not only the patentee, but his executors, administrators and assigns, whether of the whole or of a sectional interest in the patent, to make disclaimer, "stating therein the extent of his interest in such patent." This instrument states that the plaintiff was himself the patentee, and having thus shown a grant to himself of the whole interest, it is silent respecting a transfer of any part of it. The fair implication is that he still owns the whole; and this implication is sufficient without an express declaration that he had parted with no interest. It has been argued that the words "such disclaimer is to operate to the extent of the interest vested in your petitioner," imply that he had not the whole title. But the interest previously described as vested in him was the entire title as patentee, and this reference to that interest, accompanied by a declaration that the disclaimer was intended to operate upon it to its whole extent, strengthens, rather than weakens the implication that he owned the whole patent. This being so, it follows, that when the defendants offered to put a copy of the instrument in evidence, not as a disclaimer, but as a confession of the defendant, to prejudice his rights, it was properly rejected. It is true the rejection of the evidence was placed on a **2222*** different *ground by the judge below. But if the defendants were not deprived of any right by the rejection of the evidence, it is not cause for reversing the judgment that an erroneous reason was given for rejecting it; and they were not deprived of any right, if the paper was not legal evidence upon the particular point for which alone it was offered, or if its reception, accompanied by proper instructions to the jury concerning its legal effect, must necessarily have assisted the opposite party.

The next exception is to the refusal of the judge to order a nonsuit. But, as it has been repeatedly decided that the courts of the United States have no power to order a peremptory nonsuit, against the will of the plaintiff, it is not necessary to examine the grounds of the motion. (*Doe v. Grymes et al.*, 1 Pet., 469; *D'Wolf v. Rabaud et al.*, 1 Pet., 476; *Crane v. Morris et al.*, 6 Pet., 598.)

In the course of the trial, the defendants offered to put in evidence two articles contained in Ure's Dictionary of Arts, Manufactures and

Mines, to prove that the patent declared on was not valid. The plaintiff objected, and the evidence was excluded. It is incumbent on the defendants to show their right to introduce this evidence. To do so, they rely on the fifteenth section of the Act of July 4th, 1836. (5 Stat. at Large, 123.) This section enables the defendant, in any action on the case founded on letters patent, to give in evidence, under the general issue, any special matter of which notice in writing may have been given to the plaintiff, or his attorney, thirty days before the trial, tending to prove, among other things, that the patentee was not the original and first inventor of the thing patented, or of some substantial and material part thereof claimed as new, or that it had been described in some public work anterior to the supposed discovery thereof by the patentee; and whenever the defendant relies, in his defense, on the fact of a previous invention, knowledge, or use of the thing patented, he is required to state, in his notice of special matter, the names and places of residence of those whom he intends to prove possessed a prior knowledge of the thing, and where the same had been used. The notice given in this case was as follows:

"The patentee was not the original and first inventor or discoverer of a substantial and material part thereof, claimed as new. That it had been described in a public work, called 'Ure's Dictionary of Arts, Manufactures and Mines,' anterior to the supposed invention thereof by the patentee; and also, had been in public use and known before that time, and used by Andrew Ure, of London; the late M. Bonnemair, of Paris, and George H. McClary, of Seneca Falls, New York."

Ure's Dictionary contains upwards of thirteen hundred pages, *and the articles [*223 which the defendants offered to read were entitled "Thermostat" and "Heat Regulator." The first question is, whether this was a sufficient notice of the special matter, tending to prove that the thing patented, or some substantial part thereof, claimed as new, had been described in a printed publication. We are of opinion it was not. The act does not attempt to prescribe the particulars which such a notice shall contain. It simply requires notice. But the least effect which can be allowed to this requirement, is that the notice should be so full and particular as reasonably to answer the end in view. This end was not merely to put the patentee on inquiry, but to relieve him from the necessity of making useless inquiries and researches, and enable him to fix with precision upon what is relied on by the defendants, and to prepare himself to meet it at the trial. This highly salutary object should be kept in view, and a corresponding disclosure exacted from the defendant of all those particulars which he must be presumed to know, and which he may safely be required to state, without exposing him to any risk of losing his rights. Less than this would not be reasonable notice, and, therefore, would not be such a notice as the act must be presumed to have intended.

Now, we do not perceive that the defendants would be exposed to the risk of losing any right, by requiring them to indicate, in their notice, what particular things, described in the

printed publication, they intended to aver were substantially the same as the thing patented. This they might have done, either by reference to pages or titles, and perhaps in other ways, for the particular manner in which the things referred to are to be identified, must depend much upon the contents of the volume, and their arrangement. It has been urged that a defendant may not have access to the book in season for the notice. But it must be remembered that, some considerable time before it is necessary to give such a notice, the defendant has begun to use the thing patented, which, *prima facie*, he has no right to use, and it would seem to be no injustice, or hardship, to expect him, before he begins to infringe, to ascertain that the patentee's title is not valid, and if its invalidity depends on what is in a public work, that he should inform himself what that work contains, and, consequently, how to refer to it. We do not think it necessary so to construe this Act, designed for the benefit of patentees, as to enable the defendant to do, what we fear is too often done, to infringe first, and look for defenses afterwards.

Nor does a notice, that somewhere, in a volume of thirteen hundred pages, there is something which tends to prove that the thing patented, or some substantial and material part 224*) thereof *claimed as new, had been described therein, relieve the patentee from the necessity of making fruitless researches, or enable him to fix with reasonable certainty on what he must encounter at the trial. Upon this ground, therefore, the exception cannot be supported.

But, it is further urged that the book ought to have been admitted as evidence; that Andrew Ure, of London, had a prior knowledge of the thing patented. This view cannot be sustained. For, although the name of Andrew Ure, of London, is contained in the notice of persons who are alleged to have had this prior knowledge, yet the defendants have not brought themselves within the Act of Congress, because the notice does not state "where the same was used," by Andrew Ure. Besides, inasmuch as the same section of the statute provides that a prior invention in a foreign country shall not avoid a patent, otherwise valid, unless the foreign invention had been described in a printed publication, the defendants are thrown back upon that clause of the Act which provides for that defense, arising from a printed publication, which has already been considered.

The next exception was to the charge of the presiding Judge to the jury. The defendants requested the Judge to charge the jury, 3d, that it was erroneous to consider as constituent parts of the combination claimed by the plaintiff only those points which were requisite to the operation of opening and closing the damper; but that, on the contrary, the jury must consider as constituent parts of the combination all the parts of the machine, as described in the specification, by which the regulation of the heat of a stove, or the other structures, is effected.

4. That the index is a constituent part of the combination patented by the plaintiff.

5. That the detaching process of the lever is a constituent part of the combination patented by the plaintiff.

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6. That the pendulum is a constituent part of the combination.

And, in this connection,

7. That if the defendants do not use all the constituent parts of the combination patented by the plaintiff, a verdict must be rendered for the defendants.

As to the 2d, 3d, 4th, 5th, 6th, and 7th of the instructions prayed for by the defendants, the judge charged the jury, that it was true as insisted by the defendants' counsel, that the third article of the summary of the plaintiff's specification, on which alone, if at all, he was entitled to recover, was for a combination; and unless it appeared by the evidence that the defendants had used all the parts of the plaintiff's stove embraced in such combination, he was not entitled to recover. That the "com- [*225 bination claimed in the article in question was of such parts of the mechanism described in the specification as are necessary to regulate the heat of the stove. And unless it appeared by the evidence that some parts of the mechanism, not shown to have been used by the defendants, were necessary to perform that office, or that, according to the just construction of the specification, such parts were intended to be claimed by the plaintiff as a part of such combination, they are not to be considered as embraced within it. That inasmuch as by the fourth article of the plaintiff's summary, he made a distinct and separate claim to what had been called the detaching apparatus, there seemed to be good reason to infer that it was not his intention to claim this in the third article as a part of the combination therein mentioned. But the judge observed, that the question relative to the extent of the combination, had been treated by the defendants' counsel as a question of fact, and he had no disposition to withdraw it from the consideration of the jury; and he therefore submitted it to the jury to decide, from the evidence, whether the parts of the mechanism described in the specification, which were not shown to have been used by the defendants, were necessary to regulate the heat of the stove; and instructed the jury that if they should so find, the defendants would be entitled to a verdict. And the judge refused to charge otherwise in relation to such instructions, or any of them.

To this charge and refusal of the judge, as the 2d, 3d, 4th, 5th, 6th, and 7th of the instructions prayed by the defendants, the defendants' counsel then and there excepted.

The substance of the charge is, that the jury were instructed by the Judge that the third claim in the specification was for a combination of such parts of the described mechanism as were necessary to regulate the heat of the stove; that the defendants had not infringed the patent, unless they had used all the parts embraced in the plaintiff's combination; and he left it to the jury to find what those parts were, and whether the defendants had used them.

We think this instruction was correct. The objection made to it is, that the court left to the jury what was matter of law. But an examination of this third claim, and of the defendants' prayers for instruction, will show that the judge left nothing but matter of fact to the jury. The construction of the claim was undoubtedly for the court. The court rightly

construed it to be a claim for a combination of such of the described parts as were combined and arranged for the purpose of producing a particular effect, viz.: to regulate the heat of a stove. This was in accordance with the defendants' third prayer. But the defendants also desired the judge to instruct the jury that 226*) the *index, the detaching process, and the pendulum, were constituent parts of this combination. How could the judge know this as matter of law? The claim is in these words: "I also claim the combination, abovedescribed, by which the regulation of the heat of the stove, or other structure in which it may be used, is effected." The writing which the judge was to construe, calls for all such elements of the combination as are actually employed to effect the regulation of the heat, according to the plan of the patentee, described in the specification; and it therefore became a question for the jury, upon the evidence of experts, or an inspection by them of the machines, or upon both, what parts described did in point of fact enter into, and constitute an essential part of this combination. When a claim does not point out and designate the particular elements which compose a combination, but only declares, as it properly may, that the combination is made up of so much of the described machinery as effects a particular result, it is a question of fact which of the described parts are essential to produce that result; and to this extent, not the construction of the claim, strictly speaking, but the application of the claim, should be left to the jury. The defendants themselves so treat this matter in their third prayer, and we are satisfied the judge did not err in so treating it.

The defendants' counsel exhibited to the court the models of the machines to the defendants and the plaintiff, for the purpose of satisfying the court the jury must have understood they were at liberty to construe the claim, and that they did in truth so construe it, as to exclude from the combination claimed by the plaintiff, what is called the detaching process. But we can draw no such inference from an examination of those models. And while we do not think it proper to express any opinion on what is really a matter of fact, yet we think it pertinent to say, that an examination of the models has satisfied us that a jury might fairly come to the conclusion that the defendants did use a detaching process, not substantially different from the plaintiff's, and occupying in their combination the same place, and answering substantially the same purpose, as the plaintiff's detaching process does in his combination; and therefore we can draw no inference such as is contended for.

We have examined all the exceptions, and no one being found tenable, the judgment is affirmed.

Mr. Justice McLean dissented.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the 227*) United States for the Northern District of New York, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and

the same is hereby affirmed, with costs and interest until the same is paid, at the same rate per annum that similar judgments bear in the courts of the State of New York.

Aff'g—1 Blatchf., 445. S. C., 20 How., 378; *aff'g* 2 Blatchf., 260. Except as to costs and interest.

Cited—20 How., 391; 23 How., 183; 8 Wall., 428; 11 Wall., 376; 13 Wall., 56; 14 Wall., 201; 19 Wall., 430, 645; 21 Wall., 117; 6 Blatchf., 101; 8 Blatchf., 82, 83; 9 Blatchf., 371; 1 Sawy., 386; 2 Cliff., 365.

E. P. CALKIN AND SAMUEL JONES, trading under the Firm and Style of E. P. CALKIN & COMPANY, *Plaintiffs in Error*,

v.

JAMES H. COCKE.

Revenue laws of Texas—seizure under, after admission, Dec. 29, 1845, illegal.

The State of Texas was admitted into the Union on the 29th of December, 1845 (9 Stat. at Large, 108), and from that day the laws of the United States were extended over it.

Consequently on the 30th of January, 1846, the revenue laws of Texas were not in force there, and goods seized for a non-compliance with those laws were illegally seized.

THIS case was brought up by writ of error from the Supreme Court of Errors and Appeals for the State of Texas, under the 25th section of the Judiciary Act.

Calkin & Company were merchants of the County of Galveston, Texas, and Cocke was collector of Galveston under the Republic of Texas.

By a joint resolution of Congress, approved on the 1st of March, 1845, the President of the United States was authorized to submit one of two alternative propositions to the Republic of Texas, as an overture for her admission as a State into the Union. One of these contemplated the completion of this measure and the adjustment of its terms, by legislation, and the other by negotiation. The President selected the former, and presented to Texas the proposals contained in the first and second sections of the said resolutions. The first section declared "that Congress doth consent that the Territory of Texas may be erected into a State, to be called the State of Texas, with a republican form of government, to be adopted by the people of said Republic, by deputies in convention assembled, with the consent of the existing government, in order that the same may be admitted as one of the States of this Union."

And the second section declares that this consent on the part of the United States was given upon several conditions, one of which required the Constitution, which was to be framed by the Convention, to be transmitted, with the proper evidences of its adoption by the people of the said Republic of Texas, to the President of the United States, to be laid before the Congress of *the Union for its final action, on or before [*228 fore the first day of January, one thousand eight hundred and forty-six. This consent, with the conditions on which it was given, was communicated to the Republic of Texas, and in the course of the following summer and autumn the people of Texas, by deputies in Con-

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vention assembled, with the consent of the then existing government, erected it into a new State, with a republican form of government, as shown by the Constitution then adopted by them for its government, and declared and ordained that they accepted the proposal contained in the resolutions just spoken of, and assented to the conditions on which it was made. The Constitution adopted by the people of Texas, with the evidence of its adoption, and of their acceptance of the proposal made by Congress, and their assent to the conditions with which it was accompanied, was laid before Congress at the opening of the session of 1845-1846, and on the 29th of December, 1845, the Congress of the United States, after taking cognizance of the acceptance of the proposal and of the conditions annexed to it by the people of Texas, and of the Constitution adopted by them, declared that the State of Texas "shall be one, and is hereby declared to be one, of the United States of America," &c.

This Constitution of Texas, thus adopted by that State and laid before Congress, contained, amongst others, the following provisions: By the first section of the twelfth article of the said Constitution, it was declared that "all process which shall be issued in the name of the Republic of Texas, prior to the organization of the State government under this Constitution, shall be as valid as if issued in the name of the State of Texas." In the second section of the same article it was provided, that "all criminal prosecutions or penal actions which shall have arisen prior to the organization of the State government under this Constitution, in any of the courts of the Republic of Texas, shall be prosecuted to judgment and execution in the name of the State," &c. The sixth section contained a provision that if it should appear, on the second Monday of November, 1845, from the returns, that a majority of the votes polled of the people of Texas were given for the adoption of the Constitution, the President should make proclamation of that fact, and thenceforth the Constitution was ordained and established as the Constitution of the State, to go into operation, and be of force and effect, from and after the organization of the State government under the said Constitution. By section ten, it was declared "that the laws of this Republic relative to the duties of officers, both civil and military, of the same, shall remain in full force, and the duties of their several offices shall be performed in conformity with the existing [229] laws, until the organization of the government of the State under this Constitution, or until the first day of the meeting of the Legislature," &c.

On the same day that Congress declared that Texas shall be, and is hereby declared to be one of the United States, viz.: on the 29th of December, 1845 (9 Stat. at Large, 108), Congress passed an Act extending the laws of the United States over Texas, and declaring them to have full force and effect within the State. It provided also for the establishment of a court of the United States, with its necessary officers. And on the 31st of December, 1845, another law was passed, constituting Texas a collection district, and making Galveston a port of entry.

The Legislature of Texas did not meet, nor was the State government completely organized

under its new Constitution, until the 16th of February, 1846.

On the 30th of January, 1846, Calkin & Company imported into Galveston, from New Orleans, a large amount of merchandise, principally the growth and manufacture of the United States.

These goods were seized by Cocke, claiming one thousand dollars as duty, under the revenue laws of Texas. Calkin & Company protested against this, and demanded that the goods should be delivered to them in accordance with an Act of Congress of the United States, of the 31st December, 1845, and of a circular of the Secretary of [the] Treasury of the United States, of 9th January, 1846, declaring that "vessels and their cargoes arriving in any port of the State of Texas, either from a foreign port or a port in any other state or territory of the United States, are to be placed on a similar footing with vessels and their cargoes arriving at ports in any of the States of the Union."

On the trial of the case in the District Court of the State of Texas, on the 5th of January, 1847, a judgment was rendered therein in favor of plaintiffs, restraining the defendant from claiming any duties on the merchandise, and condemning him to pay to the plaintiffs the sum of \$250, the damages assessed by the jury, as damages for the unlawful detention of the merchandise, and the costs of the suit. From this judgment a writ of error was prosecuted to the Supreme Court of Texas, and by that tribunal the judgment was reversed, and one given in favor of the defendant for the sum of \$916, the amount of duties unpaid, and the amount of costs expended in and about the suit.

A writ of error brought this judgment up to this court.

The case was argued, in printed arguments, by *Mr. Miles Taylor* for the plaintiff in error, and *Mr. Harris* for the defendant in error.

**Mr. Taylor*, after reciting the laws [*230] and other proceedings relative to annexation, continued:

Now, it is an undoubted truth, that when a proposition, made by one party to another, is accepted as made, there is, from the instant of the acceptance, a valid contract, which from that moment is obligatory upon both, and must, to the full extent of its provisions, thereafter regulate the respective rights and obligations of the respective parties. Here the proposition was, that Texas should be admitted a member of the Union, on her compliance with certain terms and conditions. She complied with the terms and conditions, and accepted the proposition, and the Congress, in which the power to admit was vested, admitted her as a State into the Union, and on the 29th day of December, 1845, declared that she "is one of the United States." Was she not so? I believe she was, and that whilst this necessarily results from the terms of the proposition to admit her into the Union, and of its acceptance, it is further shown by the action of Texas herself.

Texas regarded the contract for her admission into the Union as complete, when she had given her assent to the proposition submitted to her in relation to it, and had acceded to the specified conditions. This is at once evident from the fact that immediately after her assent

was given, she called on the executive of the United States to employ the military force of the nation to protect her from hostilities threatened by Mexico. I have not the public documents before me, so as to be able to refer to the precise date of this application. It was made, however, some time before the meeting of Congress, in the autumn of 1845, and was based upon the obligation imposed on the national government by the Constitution, of exercising its power to protect every member of the confederacy from invasion. That this construction given by Texas to the effect of her acceptance of the proposition submitted to her is correct, cannot be doubted. The contract was complete from the time of her acceptance. She was entitled, from that moment, to all the advantages growing out of it, and was subject to all the burdens resulting from it. It is true, there was a new state of things created, not contemplated by the existing laws, and that some action on the part of Congress was necessary to give effect to the new rights and obligations, and to extend the laws of the nation over Texas. That was the case with respect to the judiciary, the revenue system, the operations of the postoffice, &c. But whilst something was necessary for these purposes on the part of the Congress of the United States, there was nothing which was required to be done by Texas. The Constitution of the United States, and the laws 231*) made in pursuance thereof, is the supreme law of the land, and when Congress exercised the power delegated to it by the Constitution, on the 29th day of December, 1845, by Act of Congress, and said that all the laws of the United States were thereby "declared to extend to and over, and to have full force and effect within the State of Texas, admitted at the present session of Congress into the confederacy and Union of the United States," the revenue and other laws were extended *proprio vigore*, and not because of anything contained in the Constitution of Texas, which had just been adopted, for "the Constitution of the United States, and the laws made in pursuance thereof," being the supreme law of the land, if anything had been contained in the Constitution of Texas, which conflicted with them, it would have been absolutely null and void, and have no more force or effect than if not written.

The pretensions set up by the defendant, in his pretended capacity of collector, under the authority of the revenue laws of the late Republic of Texas, are understood to be based on the 10th section of the twelfth article of the Constitution of Texas, in which it is declared "that the laws of this Republic, Relative to the duties of officers, both civil and military, of the same, shall remain in full force, and the duties of their several offices shall be performed in conformity with the existing laws, until the organization of the government of the State under this Constitution, or until the first day of the meeting of the Legislature."

An attentive consideration of this section, and of the other sections embraced in the same article of the Constitution of Texas, will, I think, make it apparent that no such consequence as that now contended for was contemplated, or could legitimately flow from it. The different sections contained in that article were designed to provide for the transition from an independ-

ent government to one adapted to the new order of things, and were not intended or designed to limit or restrain the rightful authority of the Constitution or laws of the United States, within the Territory of Texas, or to fix a time when the independent authority of Texas should yield and give place to the national authority of the United States. By the first section of this article, it was declared, that "all process that should be issued in the name of the Republic of Texas, prior to the organization of the State government under the Constitution, should be as valid as if issued in the name of the State of Texas." The second section provided, "that all criminal prosecutions or penal actions" which should have arisen prior to the organization of the State government under the Constitution, in any of the courts of the Republic of Texas, should "be prosecuted to judgment and execution in the name of the State," &c. *The sixth section directed, [*232 that, "if it should appear on the second Monday of November, 1845, from the returns, that a majority of the votes polled of the people of Texas, were given for the adoption of the Constitution, the President should make proclamation of that fact, and thenceforth the Constitution was ordained and established as the Constitution of the State, to go into operation and be of force and effect from and after the organization of the State government under the Constitution. And then in the tenth section of the same article, is found the provision before recited, to the effect that the laws of the Republic relative to the duties of officers, both civil and military, of the same, should remain in full force, and the duties of the several offices be performed "in conformity with the existing laws, until the organization of the government of the State," under the Constitution, or "until the first day of the meeting of the Legislature," &c.

These various provisions were introduced into the Constitution of Texas, not, as I before remarked, to bind or restrain the rightful authority of the Constitution and laws of the United States within the Territory of Texas, or fix a time when the independent authorities of Texas should yield to and give place to the national authorities of the United States, but to obviate the inconveniences which might otherwise have grown out of the change from one constitution to another. In the absence of any declaration to the contrary, it cannot be presumed that any limitation or condition, on the contract just completed by their formal assent, was intended by these general expressions, because full effect can be given to them without adopting such a construction. But if it were otherwise, and it were the design of the people of Texas to impose such a limitation, the provision would have produced no such effect. If Texas ever has been an integral part of the Union, she was so when Congress declared her to be so, on the 29th day of December, 1845, after her acceptance of the proposition submitted to her in relation to it. If she were so at that time for any purpose, she was so for all purposes; and then it would of necessity follow, that as the Constitution of the United States, and the laws adopted under its authority, are the supreme laws of the land, the Constitution and laws of the Republic of Texas, wherever they conflicted with them, were at once

abrogated, and that the people of Texas could not at any future time give validity or binding force to any new constitutional or legal provision which conflicted with it.

Mr. Harris, for the defendant in error:

It is obvious that the main question presented **233*** by the record "is, whether Texas was annexed to the United States, on the 26th of December, 1845, or on the 16th of February, 1846; and, as a consequence, at which of these periods the right of the late Republic to collect import duties terminated. It is contended by the plaintiffs, that this right ceased on the 29th of December, 1845, when the joint resolution of Congress was passed for the admission of Texas as one of the States of the Union; while it is contended, on the part of the defendant, that it did not cease until the 16th day of February, 1846, the day on which the State government was organized.

For the settlement of this question, resort must be mainly had to the terms of the joint resolution "for the annexation of Texas," &c., approved March 1, 1845; to those of the Constitution of the State of Texas, and of the joint resolution of the 29th of December, mentioned above.

It is submitted that the first of these amounts to nothing more than a proposition, on the part of Congress, for the annexation of Texas, and this resolution may be said to be only preliminary to that object. The first and second sections, it is contended, clearly show that it was not the intention of Congress to concede to Texas the power to consummate annexation by any act of her own; for it provides that the Constitution of the proposed State, "with the proper evidence of its adoption by the people of the said Republic of Texas, shall be transmitted to the President of the United States, to be laid before Congress, for its final action, on or before the first day of January, one thousand eight hundred and forty-six." This is entirely consistent with the preamble of the joint resolution "for the admission of the State of Texas into the Union."

The last section of the Constitution of Texas provides that "the ordinance passed by the convention on the fourth day of July, assenting to the overtures for the annexation of Texas to the United States, shall be attached to the Constitution, and form a part of the same." They were transmitted to the President, to be laid before Congress together, and the meaning of the ordinance was restrained and limited, not only by the intention of the first joint resolution, but also by the spirit and terms of the Constitution itself.

This Constitution, containing the conditions upon which Texas consented to be annexed, and having been accepted by Congress, must, with all its terms and conditions, be regarded as a part of the contract, or treaty of annexation. It having been adopted by Congress, it is supposed that its provisions became a portion of the laws of the United States, and that the Constitution of Texas, and the joint resolution of the 29th of December, 1845, should be taken **234*** and construed together. *Under this view, attention is most respectfully invited to several articles of that instrument.

The first section of the 12th article of the Constitution provides, that "all process which
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shall be issued in the name of the Republic of Texas, prior to the organization of the State government under this Constitution, shall be as valid as if issued in the name of the State of Texas." In the second section, it is provided, "that all criminal prosecutions, or penal actions, which shall have arisen prior to the organization of the State government, under this Constitution, in any of the courts of the Republic of Texas, shall be prosecuted to judgment and execution, in the name of the State." &c. The sixth section, under the same article, among other things, provides, that if the Constitution be adopted by the people, it shall "go into operation, and be of force and effect, from and after the organization of the State government, under said Constitution," &c.

By the 10th section it is declared, "that the laws of the Republic relative to the duties of officers, both civil and military, of the same, shall remain in full force, and the duties of their several offices shall be performed in conformity with the existing laws until the organization of the government of the State under this Constitution, or until the first day of the meeting of the Legislature."

It is most respectfully submitted, that these provisions furnish cumulative and convincing evidence, that the people of Texas (one of the contracting parties) intended and stipulated that the government of the Republic of Texas, and all its laws should remain in full force until the 16th of February, 1846, "the first day of the meeting of the Legislature." It is also submitted, that the other party, by accepting this Constitution, became bound by all its terms and stipulations, as portions of the contract of annexation.

For the convenience of the argument, it may be supposed that Texas proposed to be annexed upon the terms and conditions contained in her State Constitution, and that this proposition was accepted by the government of the United States. Had such been the case, it is easy to see that the effect of the contract would not be changed. If it had been so consummated, it is equally obvious that no diversity of opinion would have arisen in regard to its construction.

Then the condition, that the sovereignty and laws of the Republic should remain unimpaired until the 16th of February, 1846, was proposed by Texas and assented to by Congress.

It may be further remarked, that Congress must have understood this to be one of the stipulations of the contract. By reference to the Act of Congress of the 29th of May, 1846 (see *Acts of 1845, '46, page 23), it will **235** be seen that the 3d section provides that the Postmaster-General was not authorized to pay the expenses incurred for carrying the mail in Texas, prior to the 16th of February, 1846. When the contract of annexation was one and indivisible, was it the intention of Congress to receive its benefits from the 29th of December, 1845, and to postpone its burdens to the 16th of February, 1846?

Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error, to the Supreme Court of the State of Texas. The suit was originally brought by the plaintiffs in error before the District Court of Galveston County, to recover

the possession of a stock of goods from the defendant, who had seized them at Galveston, as Collector of that port, under the authority of the Republic of Texas, for non-payment of duties. They recovered a judgment in that court; but, on a writ of error from the Supreme Court, the judgment was reversed, and the goods held liable to the duties.

The case was this: The plaintiffs shipped from New Orleans into Galveston the stock of goods, on the 30th January, 1846, and the defendant, claiming to act as Collector under the Republic of Texas, and also that the revenue laws of that government were then in force, charged them with a rate of duty in conformity with those laws, and for the non-payment by the plaintiffs, they insisting that the goods were not liable to any rate of duty since the admission of Texas into the Union, he seized and took possession of, and detained them, until they were re-delivered to the plaintiffs, by the order of the District Court.

The question in the case is, whether the revenue laws of this government were in force in the State of Texas at the date of the importation, or those of the former government of that country. The Supreme Court held the latter were in force, and charged the goods with the customary duties.

The State of Texas was admitted into the Union on the 29th December, 1845, on an equal footing with the original States, in all respects whatever. (9 Stat. at Large, p. 108.) And by the 1st section of an Act of Congress, passed the same day, all the laws of the United States were declared to be extended over, and to have full force and effect within, the State. And, by the 2d section, the State was declared to constitute one judicial district, called the District of Texas, for which a judge should be appointed, and should hold the first term of his court at Galveston, on the first Monday of February then next. The remaining part of the section confers upon the court the usual powers belonging to a district court, and also of a circuit court of the United States. The 3d section provides for the appointment of a district attorney and marshal for the district, and for a clerk of the court. (*Id.*, pp. 1, 2.)

On the 31st December, 1845, the next day after the admission into the Union, Congress passed an Act declaring the State to be one collection district, and making the City of Galveston a port of entry, and to which was annexed several other places, as ports of delivery. The 2d section provides for the appointment of a collector for the port of Galveston, and the 3d section for the appointment of a surveyor for each port of delivery.

Now, it is quite apparent, from the joint resolution of Congress, admitting the State of Texas into the Union, and the Acts passed, organizing the Federal Courts and revenue system over it, that the old system of government, so far as it conflicted with the federal authority, became abrogated immediately on her admission as a State. This is clearly so, unless some provision is found in the Act of admission postponing the time when it shall take effect; and, as applied in the case before us, postponing it until after the 31st January, 1846, when these goods were shipped to the port of Galveston.

This has been attempted on the part of the defendant in error.

We have been referred to the 1st section of the 18th article of the Constitution of Texas, which provides, "that all process which shall be issued in the name of the Republic of Texas, prior to the organization of the State government under this Constitution, shall be as valid as if issued in the name of the State of Texas." And also to the 2d section of the same article, which provides that "all criminal prosecutions or penal actions, which shall have arisen prior to the organization of the State government under this Constitution, in any of the courts of the Republic, shall be prosecuted to judgment and execution in the name of the State." And also, to the 6th section, which provides, upon its appearing that a majority of the votes of the people given is for the adoption of the Constitution, "it shall be the duty of the President (of the Republic of Texas) to make proclamation of the fact, and thenceforth this Constitution shall be ordained and established as the Constitution of the State, to go into operation, and be of force and effect, from and after the organization of the State government." And also, to the 10th section, which declares, "that the laws of the Republic, relative to the duties of officers, both civil and military, of the same, shall remain in full force, and the duties of the several offices shall be performed in conformity with the existing laws, until the organization of the government of the State under this Constitution, or until the first day of the meeting of the Legislature."

It is supposed that these several provisions of the Constitution of Texas, and which is the one accepted, when she was admitted into the Union by Congress, have the effect to postpone and fix the period of admission to the time of the first meeting of the Legislature of the State and organization of the government under the Constitution, which was on the 16th February, 1846; and, of course, to postpone the operation of the laws of the Union over her till that period.

But the obvious answer to this view is, that these several provisions in the Constitution were designed and intended, and had the effect, to organize a government at once, on the adoption of the Constitution by the people, and thereby to avoid an interregnum between the abrogation of the old and the erection of the new system, and until the legislative body could meet, and put the government in operation in conformity with the requirements of the organic law.

The whole of the 10th section, a part of which has been already referred to, affords an illustration of the design of the framers of the Constitution. It is as follows: "That no inconvenience may result from the change of government, it is declared that the laws of the Republic, relative to the duties of officers, both civil and military, of the same, shall remain in full force, and the duties of the several offices shall be performed in conformity with existing laws, until the organization of the government of the State under this Constitution, or until the first day of the meeting of the Legislature." This section, taken in connection with the 3d section of the same article, completed an organization which effectually pre-

vented any interval between the old and new systems, when the laws did not operate, or an organized government was not in force. That section provides, that "all laws and parts of laws, now in force in the Republic of Texas, which are not repugnant to the Constitution of the United States, the joint resolutions for annexing Texas to the United States, or to the provisions of this Constitution, shall remain in force, as the laws of this State, until they expire by their own limitation or are repealed by the Legislature.

This section, as it will be seen, also negatives the idea that the Constitution and laws of the Union were not in force within the State as soon as her admission into the Union took place.

This subject was very fully considered in *Benner et al. v. Porter*, 9 How., 235, which involved an inquiry into the affect of the admission of Florida into the Union as a State. Some of the questions there were very similar to those raised in this case, as the machinery of the territorial government had been adopted by an ordinance in the Constitution until the organization was effected under the Constitution by the Legislature.

238*) *We there said, "that on the admission of Florida as a State into the Union, the organization of the government under the new Constitution became complete; as every department became filled, at once, by the adoption of the territorial laws, and the appointment of the territorial functionaries for the time being." That "the convention being the fountain of all political power, from which flowed that embodied in the organic law, were, of course competent to prescribe the laws and appoint the officers under the Constitution, by means whereof the government could be put into immediate operation, and thus avoid an interregnum that must have intervened, if left to an organization according to the provisions of that instrument. This was accomplished in a few lines, adopting the machinery of the territorial government for the time being, and until superseded by the agency and authority of the Constitution itself."

An argument is attempted to be drawn against the conclusion that the laws of the Union were extended over Texas as soon as she was admitted into it, founded upon certain Acts of Congress concerning the establishment and regulation of the postoffice system over the State. On the 6th February, 1846, various post routes were established in Texas, and the Postmaster-General was authorized to contract for conveying the mail on them as soon as could be conveniently done, after the passage of the Act. A joint resolution was also passed on the 20th May, 1846, authorizing the Postmaster-General to continue the mail service existing in the State under the laws and authority of Texas; or such part as, in his judgment, the public interest required, from the time that Texas became a State in the Union, and until contracts could be made, and the mail service put in operation on post routes established by Congress at its then session. And on the 29th of the same month, another Act was passed establishing several post routes, and repealing the Act of the 6th of February, referred to. The second section of this Act authorizes the Post-

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master-General to continue in operation the existing mail service in Texas, established under its former laws, upon any of the routes mentioned as he may deem expedient, not to extend, however, beyond the 30th June, 1850. And the third section provides for the payment of mail contractors in Texas for service performed by them since the 16th February, 1846, and also the officers employed in superintending the mail service, with a proviso, that such payment shall in no case exceed the compensation agreed upon with the late authorities of Texas. The Act then provides, that the several postmasters in Texas, appointed by the late government, shall account to the Postmaster-General for all balances accruing at their offices respectively, after the 16th February, 1846.

*We perceive nothing in these several [*239 Acts expressing or implying that Congress possessed no power to extend the system of mail service over the State from the time of its admission into the Union, or that the date of the admission is to be limited to the 16th February, 1846.

There was necessarily some delay in putting the system into practical operation; and to avoid any inconvenience in the mean time, the existing system under the laws of the former government was recognized and adopted, until the several post routes were designated by Congress, and contracts made for the performance of the service in the usual way. The period fixed when the payment of the old contractors and superintendents of the service should commence; and also, when the existing postmasters should begin to account to the Postmaster-General for the money collected, and the allowance of compensation, to wit: the 16th February, 1846, relate simply to the arrangement as to compensation; and as to the adjustment of the accounts of these several officers. The system, as established under the Republic of Texas, was recognized, and not interfered with in the adjustment down to the period mentioned; after that it was placed under the laws and regulations of the Postoffice Department of the general government.

That these Acts do not admit the want of powers in Congress to extend the postoffice laws over Texas until the 16th of February, 1846, is shown by the Act passed the 5th of that month, designating several post routes, and conferring the power upon the Postmaster-General to enter into contracts for conveying the mail over them. This Act continued in force until repealed on the 29th of May following, when a new and somewhat different arrangement of mail routes was provided for.

Without pursuing the case further, our opinion is, that the admission of Texas into the Union is to take date from the 29th of December, 1845, the time of its admission by Congress, and that the laws of the Union extended over it from that time; and consequently, the seizure of the stock of goods in question by the defendant under the revenue laws of the Republic, on the 30th of January, 1846, was without authority of law.

The judgment of the Supreme Court below must therefore be reversed, with costs; and that the proceedings be remitted to that court, with directions that the judgment of the District

Court be affirmed with costs in Supreme Court and District Court.

ORDER.

This cause came on to be heard on the transcript of the record from the Supreme Court of [240*] Errors and Appeals for the *State of Texas, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court of Errors and Appeals in this cause be, and the same is hereby reversed with costs; and that this cause be, and the same is hereby remanded to the said Supreme Court of Errors and Appeals, with directions to affirm the judgment of the District Court for the County of Galveston in said cause, with costs in said Supreme and District Courts.

Cited—4 Dill., 257.

JAMES W. DOWNEY, Executor of SAMUEL S. DOWNEY, Deceased, Plaintiff in Error,

v.

MARY M. HICKS, Executrix of JOSEPH T. HICKS, Deceased. 1

Verdict, informal, sufficiency of—Objection to evidence not made, and exception taken below, not considered here—Check on bank not considered payment unless so agreed.

Where the declaration, in an action of *assumpsit*, contained the following counts: 1. On a promissory note; 2. *Indebitatus assumpsit* for the hire of slaves; 3. An account stated; 4. *Quantum valebat* for the services of slaves; 5. Work and labor, goods sold and delivered, and money lent and advanced; 6. Money had and received; 7. An account stated; 8. A special agreement for the hire of slaves: And the defendant pleaded: 1. The general issue; 2. Statute of Limitations; 3. Payment; and the jury found a verdict for "the defendant upon the issue joined as to the within note of \$456, and the within account"—this verdict, although informal, was sufficient to authorize to enter a general judgment for the defendant.

An objection cannot be made in this court to a release under which a witness was sworn, unless the objection was made in the court below, and an exception taken.

Where a certificate of deposit in a bank, payable at a future day, was handed over by a debtor to his creditor, it was no payment, unless there was an express agreement on the part of the creditor to receive it as such; and the question, whether there was or was not such an agreement, was one of fact to be decided by the jury.

The bank being insolvent when the certificate of deposit became due, there was no ground for imputing negligence in the collection of the debt by the holder, as no loss occurred to the original debtor.

If the evidence showed that, after the maturity of the certificate, the original debtor admitted his liability to make it good, the jury should have been instructed that this evidence conduced to prove that the certificate was not taken in payment.

THIS case was brought up by writ of error from the Circuit Court of the United States for the Southern District of Mississippi.

1.—Mr. Chief Justice TANEY did not sit in this cause.

NOTE.—What particularity in exceptions is necessary in order to review in appellate court. General exception or objection, when not sufficient. See note to Moore v. B'k of Metropolis, 18 Pet., 302.

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There were three bills of exceptions taken upon the trial in the Circuit Court, which extended over more than one hundred pages of the printed record. The last one included the whole of the evidence. The substance of the case is given in the opinion of the court, to which the reporter refers the reader.

It was argued by Mr. Badger, with whom was Mr. William A. Graham, for the plaintiff in error, and Mr. Volney E. Howard, with whom was Mr. Walker, for the defendant in error.

The argument of the counsel for the plaintiff in error was so *intermingled with [241 their statement of the facts in the case, that it will be necessary to insert the whole.

The declaration of the plaintiff in error, who was the plaintiff in the court below, is an *assumpsit*, and contains eight counts.

The first is on the promissory note of testator, in the name of Hicks & Arnold, for \$456; the second is *indebitatus assumpsit* for hire of forty slaves; the fourth a *quantum valebat* for the services of forty other slaves; the third and seventh, each upon an account stated; the fifth for work and labor, goods sold and delivered, and money lent and advanced, and the seventh for money had and received; the eighth and last count is upon a special agreement of testator to hire from the plaintiff certain slaves mentioned in the count, and to pay the same rates of hire as the testator had agreed to pay Williams & Mills for the same slaves, &c.

The defendant pleaded, 1st, the general issue; 2d, the Statute of Limitations; 3d, payment, upon which plea issues were joined, and the cause tried. The jury found a verdict in these words: "That they find for the defendant upon the issues joined, as to the within note of \$456, and the within account," and upon this finding, the court gave a general judgment for the defendant.

It is insisted, on the part of the plaintiff in error, that the verdict is imperfect, irresponsible to the issues, and does not dispose of the whole matter submitted by the pleadings; that upon the most favorable interpretation which can be given of it, it passes only on the first count on the note, and the third and seventh upon accounts stated, and leaves the matters arising upon the five other counts entirely undisposed of. That this verdict being thus imperfect, partial and irresponsible to the issue, and consequently illegal, does not support the judgment, which is therefore erroneous.

The first bill of exceptions states, that the plaintiff objected to the reading of the deposition of Andrew Arnold, taken for the defendant, on the ground of his incompetency; but the objection was overruled, and the deposition read to the jury. Arnold was at one time plainly interested and incompetent.

In order to meet the objection, the defendant, by his 16th interrogatory, asks the witness, "Are you interested in this case? If you have any release from the executrix of Joseph T. Hicks, please mark it, and inclose it" To which the witness answers, "I am not interested in this case; I have a release from Mary M. Hicks, the surviving executrix of Joseph T. Hicks, deceased, which is marked with the letter A, and is hereto attached." By reference to the paper set out in the second, it

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appears to have been attested as a witness by one John Curan.

242*] *It is insisted, for the plaintiff in error, that the deposition ought not to have been read, because there was no legal evidence of the execution of the release.

1. The subscribing witness ought to have been produced, or his absence accounted for, and his handwriting proved, or other proper matter shown, to let in secondary evidence of the execution of the deed. This rule is of general application to all instruments attested, or appearing to have been attested, by a witness, whether produced to support the action, or used collaterally in evidence, and that no acknowledgment of the party, however solemn though made on oath, will supply the want of evidence as to the subscribing witness. (2 Phillips, Ev., ch. 6, p. 201 to 203; *Call v. Dunning* 4 East, 53.)

The rule is very well and forcibly stated by Mr. Starkie. (1 Stark. on Ev., part 2, sec. 139, p. 330.)

In order to render a witness competent by a release, it must be produced and proved as in other cases. (2 Stark. Ev., part 4, p. 759; *Corking v. Jarrard*, 1 Camp., 37.) And it is then evidence in the cause for all purposes. (Starkie, *ut supra*; *Gibbons v. Wilcox*, 2 Stark. Cas. 39.)

2. There is no evidence of the execution of the release at all. The witness says, "I have a release, which I annex." He does not swear to the execution or the handwriting or the acknowledgment of it. Suppose it a forgery, how could he be indicted for perjury?

Another bill of exceptions, is to the admission by the Judge, of A. W. Brien as a witness for the defendant. Brien, in his *voir dire*, stated that he was the husband of a daughter of Sarah Curan, to whom, by the will of defendant's testator, a legacy was given; that he and his wife had received \$1,500 in full of his share of the estate, and had released to the defendant.

It is insisted that the witness was liable to refund to the defendant, and without her release was not competent. (*Moffit v. Lane*, 2 Ired., 254.)

The same bill states that the defendant produced an account book, kept by the testator, and the said witness having deposed that a certain portion of the book was in the handwriting of John R. Hicks, that portion of the account was allowed by the Judge to be read to the jury, notwithstanding objection taken thereto by plaintiff's counsel.

It is insisted, on the part of the plaintiff, that this account was not competent evidence, because the said John R. Hicks was not a general agent of plaintiff, nor his agent to state the account, nor in any other manner so connected with the plaintiff as to make his statement evidence against plaintiff.

By the third bill of exceptions, it appears 243*] that the defendant's testator was, in 1836, the agent of plaintiff to receive the hires of certain slaves, owned by him in Mississippi; that he collected large sums on account thereof; that he afterwards took the slaves into his own employment, as hirer, to execute a contract on the Mississippi Railroad; that subsequently, in 1838, having formed a partnership

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with one Arnold, he continued the slaves in the employment of this firm of "Hicks & Arnold."

The said testator, and Hicks & Arnold, being thus indebted to the plaintiff in a large amount, Dr. John R. Hicks, a neighbor of of plaintiff's in North Carolina, and a brother of the testator, visited Mississippi, in June, 1839, to collect hires due for his own negroes, and took with him a letter from plaintiff, desiring the testator to send him whatever was due him, to the amount of \$12,000, if possible. An account was then stated, showing a balance due plaintiff, 1st January, 1839, of nearly \$10,000. The testator thereupon drew a check upon the Mississippi Railroad Bank, for the amount, which the witness Arnold deposes was received by John R. Hicks, as plaintiff's agent, in payment, but Hicks himself deposes that he had no authority to bind the plaintiff, merely acting as his friend. The said testator and John R. Hicks then went to Natchez, to make further arrangements respecting the business, where the check was converted into a certificate of deposit for the same amount, dated 10th January, 1840, and payable with eight per cent. interest, on the 1st of November following. This certificate is copied in the record.

It was proved, by the deposition of Eli Montgomery, president of the bank, that this certificate was not issued upon any deposit, but in settlement of a debt due to Hicks & Arnold, and made payable on the 1st of November, by which day it was supposed the bank would have funds to meet it; that, in March, 1840, it was admitted by the testator, Andrew Arnold, and the plaintiff, that "Hicks & Arnold" owed plaintiff a large debt, for the hire of negroes, and had sent this certificate to him on account of their debt, and that plaintiff had refused to accept it in payment or satisfaction of any part of the debt; that Hicks & Arnold were bound to plaintiff to pay the debt (if the bank did not pay the certificate) in the same manner and to the same extent as if the certificate had not been sent. It was proved that the credit of the bank had greatly sunk at the maturity of the certificate, became continually worse, and by April, 1840, it had stopped payment; that a suit was brought, by concert between Hicks & Arnold and plaintiff, against the bank, Hicks & Arnold admitting their own liability, and no satisfaction was ever obtained from the bank.

The plaintiff's counsel prayed the Judge to instruct the jury: (See the substance of the prayer in the opinion of the court.)

*These instructions the Judge refused [244 to give, as prayed, and by the instructions actually given, he manifestly erred, by substantially repudiating proper instructions, and by leaving to the jury to decide questions of law which he ought to have decided himself.

The acceptance of the certificate by plaintiff was not in law an extinguishment of the debt, unless there was an express agreement so to accept it; and the burden of proof, that the certificate was given and received as a satisfaction or extinguishment of the preceding debt, was upon the defendant.

A bill or note, given for a preceding debt, is not deemed payment, unless so expressly agreed, or it has been negotiated, and is outstanding

against the defendant. (*Burden v. Halton*, 4 Bing., 454; *Rott v. Watson*, *Ibid.*, 278; *Raymond v. Merchant*, 3 Cam., 147; *Owenson v. Morse*, 7 T. R., 64; *Hickly v. Hardy*, 7 Taunt., 312; *Mussen v. Price et al.*, 4 East, 147; see, also, *Greenwood v. Curtis*, 6 Mass., 358; *Johnson v. Johnson*, 11 Mass., 361; *Murray v. Gouverneur*, 2 Johns. Cas., 438; *Johnson v. Weed*, 9 Johns., 310.)

Nor is the receipt of a note as cash, evidence that it was taken as an absolute payment. (*Tobey v. Barber*, 5 Johns., 68.)

It is but a suspension of the right of action, until the maturity of the note. (*Putnam v. Lewis*, 8 Johns., 389.)

In the absence of proof that a draft or check was received in absolute payment, it is regarded but as a means whereby the creditor may obtain payment—as payment provisionally, until dishonored; and if dishonored, it is no payment. (*The People v. Howell*, 4 Johns., 296; *Cromwell v. Lovett*, 1 Hall, N. Y., 56; *Olcott v. Rathbone*, 5 Wend., 490; *Everett v. Collins*, 2 Camp., 515; *Puckford v. Maxwell*, 6 T. R., 52.)

What is true of notes, checks and bills, is true also of the certificate; and yet the judge refused the instructions prayed to this effect.

The judge, after some general and immaterial statements of the duty of an agent, proceeds to leave to the jury to decide what was reasonable diligence on the part of the plaintiff in endeavoring to obtain payment of the certificate from the bank.

But what diligence is reasonable, is a question of law (the facts of the case being ascertained), to be decided by the Judge, and not by the jury. (1 Stark. part 3, sec. 27, page 414; *Battle v. Little*, 1 Dev., 387.)

Besides, the rule as to the kind of diligence necessary, on the part of the plaintiff is erroneous.

The bank, at the maturity of the certificate, was failing; shortly after, stopped payment. Hicks & Arnold paid nothing for the certificate, but took it on account of a debt which [245*] the *bank could not pay. All the facts were fully known to them, but not to the plaintiff. Under these circumstances, nothing but such gross and long-continued negligence, on the part of the plaintiff, as would amount to a fraud, would discharge Hicks & Arnold, considered as guarantors. (*Goring v. Edmonds*, 6 Bing., 94, 19 E. C. L., 14.)

This case is to be tested, not by the rules applying to negotiable instruments. If no loss was sustained for want of notice or suit, want of notice or suit does not affect the plaintiff's right. (See *Shewell v. Knox*, 1 Dev., 412, and cases there cited.)

Again, the judge informs the jury that the plaintiff was bound by the act of Hicks, his agent, "if ratified" by him; whereas, he should have informed the jury what acts or declarations of plaintiff would amount to a ratification, and left them to decide, as their proper function, whether those acts or declarations had been proved.

The judge ought to have told the jury, as prayed by the plaintiff, that bringing suit on the certificate to the first court after it became due, &c., was reasonable diligence. But to leave a matter of law to the jury, is itself error. (*Panton v. Williams*, in error, 2 Adolph. &

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Ellis, N. S., 169; *Beale v. Roberson*, 8 Ired., 276.)

The judge ought to have instructed the jury that the acknowledgment of Hicks & Arnold, after the certificate fell due, if made by them, was evidence that it was not taken as absolute payment, &c., as prayed by the plaintiff.

The counsel for the defendant in error made the following points:

1. Joseph T. Hicks was the agent of Downey, and even if he took the certificate of deposit in good faith, exercising the care which a prudent man should do in the management of his own affairs, he could not be held liable for the subsequent failure of the bank. He had reason to believe the bank was solvent; and as the certificate bore interest, it was considered better than specie as a remittance.

2. The proof on the record is sufficient to show that John R. Hicks was the agent of Downey at the time of the settlement in 1839, but the subsequent reception of the certificate from Dr. John Hicks, by Downey, was an ample satisfaction of all he had done, even if he had no power to make the settlement in the first instance, and equivalent to an original authority. (Story on Agency, sec. 589; Dunlap's *Pailey*, 171, note O.; *Lawrence v. Taylor*, 5 Hill, 107, 118.)

3. It was the duty of Downey to have dissented from the arrangement, *and re- [246 fused the certificate of deposit at the time it was tendered to him; but at all events, it was gross negligence, and not a reasonable time, to wait three or four years without notifying J. T. Hickey that he could not receive it as a payment. (*Pailey's Arg.*, 172, note; 2 Kent, 127; *Cairnes v. Blecker*, 12 Johns., 300.)

4. John Hicks proves that Downey took the certificate as absolute payment; and being thus accepted, was a good discharge of the debt; especially as it was in the name of Downey. (Story on Contracts, sec. 998; 2 Greenleaf, Ev., sec., 523; *Whitbeck v. Van Ness*, 11 Johns., 409; 15 *Id.*, 241.)

Whether it was accepted in satisfaction, was a question for the jury. (15 S. & R., 163; 9 Johns., 310.)

5. The rulings of the court, it is submitted, were correct. It will be seen that the questions are not leading, if he apply to them the test which the rules of evidence establishes as a criterion. (Greenleaf's Ev., sec. 434.)

It will be admitted that several of the instructions asked for by plaintiff, did not apply to the proof in the record, especially the first. It is submitted that the instructions given covered every legal proposition asked for by the plaintiffs.

Mr. Justice McLean delivered the opinion of the court:

This case was brought before us by a writ of error to the Circuit Court for the Southern District of Mississippi.

An action of *assumpsit* was commenced by the plaintiff, on a note for \$456, and a large sum for the hire of slaves.

The declaration contained ten counts, to which the defendant pleaded *non assumpsit*, the Statute of Limitations and payment, on all of which issues were joined. The jury "found for the defendant upon the issues joined as to

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the within note of \$456 and the within account." This finding, it is contended, is imperfect, irresponsible to the issues, and does not dispose of the whole matter submitted by the pleadings.

A verdict is bad if it varies from the issue in a substantial matter, or if it finds only a part of that which is in issue; and though the court may give form to a general finding, so as to make it harmonize with the issue, yet if it appears that the finding is different from the issue, or is confined to a part only of the matter in issue, no judgment can be rendered upon the verdict. (*Patterson v. United States*, 2 Wheat., 221.) The verdict rendered was informal, but there was sufficient to authorize the court to enter it in form. The matter in controversy was the note stated and the hire of the negroes, [247] the amount claimed *for which, was stated in an account; and on both these the jury found for the defendant, on the issues joined. We think this was sufficient.

Andrew Arnold, a copartner of the testator, was offered as a witness, and being objected to on the ground of interest, a release was given in evidence, which, on its face, appeared to be duly executed; on which the witness was sworn. Objection is made that the execution of the release was not proved. The answer to this is, that there was no exception taken to the paper on that ground.

From the facts, it appears that Joseph T. Hicks, now represented by his executrix, was indebted to the plaintiff on the 10th January, 1839, on a settlement, \$9,799.89, for the hire of negroes, which John R. Hicks, the friend of Downey, received in a certificate of deposit from the Mississippi Railroad Bank, situated at Natchez, payable on the 1st of November ensuing, for which he executed a receipt. He was not authorized to act as the agent of Downey, but he acted as his friend in the business. Being assured by his brother, Joseph T. Hicks, and others, that the bank was good (and as a reason for this opinion it was stated that wealthy men had an interest in the bank), and as eight per cent. interest was paid for deposits, the certificate was preferred, believing it would be satisfactory to the plaintiff. At the time of this transaction the bank was indebted to Joseph T. Hicks and Arnold, for labor on the railroad, a sum exceeding twenty thousand dollars. The mode of payment was by drawing a check on the bank for several claims, and then crediting on the books of the bank, as a deposit, the sum due to each claimant.

In February ensuing, when John R. Hicks returned to North Carolina, where he and the plaintiff resided, he handed over to Downey the certificate of deposit, who received it, saying he would have preferred the gold and silver; but said nothing further in repudiation or confirmation of the act of Hicks. In a letter dated the 3d of March, 1839, from J. T. Hicks and Arnold, to the bank, they say: "We have ever entertained the kindest feeling towards your institution, and every disposition of indulgence to the utmost of our ability. The time has now arrived when ruin awaits us, from a total inability to use your post notes to meet our engagements;" and they proposed to take some money and negroes for the money due them from the bank, or to take the whole in negroes, if the money could not be paid.

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For a short time after the date of the certificate of deposit, the bank continued to pay small notes in specie, but evidence was given conducing to show it was unable to meet its engagements, *and that in a short time it [*248] failed. Suit was brought by Downey against the bank on the certificate of deposit, in the spring of 1840; and also for other sums, due him for Hicks & Arnold, by arrangements with them. But nothing could be recovered from the bank.

Evidence was offered with the view of showing that Downey considered the certificate of deposit as good, and that he said he could not complain of Hicks, in receiving the certificate, as he had received a similar one on his own account.

Evidence was also given to show that on the eleventh of March, 1840, Joseph T. Hicks and Arnold admitted the certificate of deposit was given as collateral security, and that they considered themselves bound to pay the debt due the plaintiff, including the certificate of deposit, and other demands. Evidence was also given to explain this conversation as referring exclusively to other demands, not including the certificate of deposit.

The testimony being closed, the plaintiff prayed the court to instruct the jury, 1. That the acceptance by the plaintiff of the certificate of deposit for a precedent debt due him by Hicks or Hicks & Arnold, was no payment or extinguishment of such debt, unless there was an express agreement to accept it as such payment; and to take the risk of the solvency of the bank.

2. That the certificate of a bank due at a future day, like the note of any third person, if given for a pre-existing debt, is not payment and discharge thereof, unless specially agreed to be so taken; and if a receipt in full be given, it is still a question of fact for the jury to decide whether there was such an agreement or not; and that unless the certificate be afterwards paid by the bank, it is *prima facie* no satisfaction of the pre-existing debt.

3. That if the jury believe, from the evidence, that Hicks & Arnold or Hicks, after the maturity of the certificate, admitted their liability to make it good, such admission is evidence that the certificate was not taken as payment absolutely, but as conditional payment only, and that they had notice of all the facts necessary to hold them responsible.

The court charged the jury that "an agent is bound to act in accordance with his authority, to make his acts binding on his principal. If the agent exceeds his authority, his principal is not bound by his act, so exceeding his authority, unless the principal afterwards ratify his acts. If a principal, after he is informed what his agent has done, ratify his acts, he is bound by the acts of his agents, although the agent may not have had any authority to do the act so ratified at the time it was done. An act done as an agent by one having no authority, it is obligatory on his principal; if, in a reasonable time after, he is fully *in [*249] formed of what has been done, he does not object thereto, he is presumed to ratify the acts, and is bound thereby."

That, "if Downey received the certificate, conditioned that he would receive the money in

discharge of the debt, if the bank should pay it, then Downey was bound to use reasonable diligence to collect the money due on the certificate. Reasonable diligence consists in such exertions as a prudent man would use in his own case in the collection of the certificate; and if Downey failed to use such diligence to collect the money, the defendants are not liable and the jury should find for the defendant."

In ordinary transactions, a check on a specie-paying bank, payable on demand, is payment. And, if the holder of the check present it to the bank, and direct the amount to be placed to his credit as a deposit, and the bank should fail, the loss would be the depositor's. The deposit was at his option and for his benefit. But the transaction of Downey and Hicks was not of this character. Doctor Hicks, who acted for Downey, was not authorized to make the arrangement; he acted, in his own language, "without authority, as the friend of the plaintiff." There was no money, in fact, deposited in the bank. It was indebted to J. T. Hicks and Arnold, who were in partnership, in a large sum; and to pay Downey, Hicks drew a check for the amount, which was charged to his account in bank and a certificate of deposit for the same amount was given to Downey. This arrangement was strongly recommended by the debtor, Hicks, to his brother, the friend of Downey. Eight per cent. was allowed on the certificate of deposit, which was payable in ten months.

A note of the debtor himself, or of a third party, is never considered as a payment of a precedent debt, unless there be a special agreement to that effect. Had Downey received the certificate of deposit himself, it could not have been considered a payment unless it was so agreed. The transaction, in fact, was only a dealing with credits. No money was drawn from the bank, or deposited in it. By the certificate, the credit of the bank was given in addition to the credit of the original debtor. Such a transaction, without a special agreement to receive the certificate in payment, would make it a collateral security only. A receipt for the amount, executed at the time, would not affect the question. In this view, it was error in the court not to give the first and second instructions asked by the plaintiff, unless the charge given substantially embraced the points stated.

In the charge given it is nowhere stated that, to make the certificate of deposit a payment, there must be an agreement to that effect. The jury are informed, that where an agent exceeds **250*** his authority, or acts without authority, the principal is not bound, unless he ratify such acts. But the jury are not informed what amounts to a ratification. They are told, where acts are done, of which the principal is informed, if he does not in a reasonable time object thereto, he is presumed to ratify the acts, and is bound thereby.

This, in all probability, misled the jury. Doctor Hicks, in receiving the certificate of deposit, did not pretend that he was authorized to receive it—much less that he was authorized to receive it as payment. The receipt of the certificate, under such circumstances, by Downey, without any express agreement on the subject, could not operate as payment. In this respect, therefore, unless such an agreement

was shown and connected with this part of the charge, it was erroneous.

The jury were instructed, that if the certificate was received on condition, the deposit, if paid by the bank, should be applied as payment. Downey was bound to use reasonable diligence. But the jury were not informed what that kind of diligence was, except "that it consisted in such exertions as a prudent man would use in his own case in the collection of the certificate." Where a note is received as collateral security, and this certificate of deposit is only the obligation of the bank, and does not, in principle, in this respect, differ from a note, the holder is not bound to active diligence. If the note have an indorser, and it matures in his hands, he may be bound to take such steps as shall charge the indorser as a bank is bound, where a note is sent to it for collection. But he is not bound to bring suit. He is only chargeable with a negligence, which shall operate to the injury of the owner of the paper.

As, in less than three months from date of the certificate of deposit by the showing of the defendant, the post notes of the bank answered him no valuable purpose in satisfying the demands against him, there is no ground to allege that the defendant suffered by any want of diligence in the plaintiff. The bank was insolvent, if not when the certificate was given, before it became due. The above instruction was erroneous.

We think the court erred, also, in refusing to give the third instruction, as prayed by the plaintiff. If the evidence showed, after the maturity of the certificate, that Hicks & Arnold, or Hicks, admitted their liability to make it good, the jury should have been told by the court, that if they believed such an admission was made, it conduced to prove that the certificate was not taken in payment.

For the above reasons, the judgment of the Circuit Court is reversed, and the cause is remanded for further proceedings.

Messrs. Justices Daniel and Grier dissented.

**Mr. Justice Daniel (Mr. Justice [251 Grier concurring):*

It is my opinion that the judgment of the Circuit Court, in this case, should be affirmed, upon the questions raised in the argument; 1st, upon the sufficiency of the finding by the jury, as being responsive to all the issues, or otherwise; 2d, as to the admissibility in evidence of the release to Arnold, in the absence of the subscribing witness to that release, there is an entire concurrence amongst the judges. But with the views announced as those of the court with respect to the authority and the acts of Doctor Hicks, as the agent of Downey, and as to the consequences deducible from those acts, I am constrained to disagree.

And here I must remark, that according to my apprehension of the evidence upon the record, as to the authority vested in Doctor Hicks, as agent, and his acts under that authority, and with respect to the conduct of Downey, as principal, in confirmation of those acts—that evidence has not been accurately stated. It is said by the court, that Doctor Hicks did not act as the agent, but merely as

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the friend of Downey. There seems to be some difficulty, and even confusion, in this attempt to discriminate between these two characters. True it is, that the agent, however confided in, does not always prove the best friend of his principal; but it is equally true, that the principal would rarely select, as his agent, one whom he regarded in any other light than that of a friend. But the record, according to my apprehension of the evidence, discloses the most ample and explicit authority to Doctor Hicks, to settle the claims of Downey upon the firm of Hicks & Arnold, and exhibits instructions equally clear to Doctor Hicks, to transmit to Downey the amount which this agent, upon the settlement made by him, should ascertain to be owing from Hicks & Arnold to Downey. The record discloses these further facts: 1. The settlement made by Doctor Hicks with Hicks & Arnold; 2. The drawing of a check by these persons in favor of Doctor Hicks, the agent, upon the bank at Natchez, for the amount ascertained to be due to Downey; 3. The presentation of that check by the agent, at the bank at Natchez; 4. The proffer by the bank, of payment in specie of the amount of the check; and the express agreement of the agent with the bank, to commute that check and proffer of immediate payment in money for a certificate of deposit, or post note, payable at a deferred period, bearing an interest of 8 per centum. So much, then, for the acts of the agent in virtue of the authority originally vested in him; and if there could arise a doubt as to their validity, that doubt could apply only to the transmutation of the demand for the money into a certificate of deposit, or deferred payment, bearing interest. But, supposing 252*] there had been room for doubt in this respect, on the ground that the agent had transcended his power, that doubt must be entirely dispelled when the conduct of the principal is considered. Upon being informed, by the agent, of the measure he had taken, and upon having the certificate transmitted to him, the principal said, in reply, that although he would have preferred a payment down in money, yet as the agent had acted for himself as he had done for his principal, he could not find fault with the arrangement. He expressed no apprehensions as to the prudence or safety of the arrangement, but ratified it expressly; and in fact the proof is clear, that at the time, and for some months after, the bank was paying specie; and that its certificates, like the one in question, commanded a premium in the market. In this mode were the entire proceedings of the agent explicitly ratified.

If this apprehension of the testimony be correct, then it is difficult to conceive how the jury could have been misled by the instructions which were given them by the court. Indeed this court, so far as those instructions covered the relation of principal and agent, have not questioned the correctness of those instructions. But it is said that the court erred in the opinion it expressed upon the subject of the diligence requisite in the application for payment of the certificate of deposit. Let it be conceded that this opinion of the court upon the subject of reasonable diligence was not the law; still it should not affect the decision in this case, because that opinion had no connection with the

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true character of the case, which depended upon a phase of the evidence to which that instruction had no application, and could not influence. If the agent of Downey was authorized to settle, and had settled with the debtors of Downey, and the latter had accepted from his debtors what he acknowledged was payment, at this point the transaction closed; and unless the parties making payment could be affected by showing fraud or bad faith, the whole matter was terminated by the agreement between the parties. Downey had an indisputable right to receive payment in any medium he might choose, and it is not in the power of a court to control his first choice and give him the right to a second, or to visit upon those who have applied their means to his satisfaction, and by so doing prevented them being available to themselves to any other possible purpose, the mischiefs resulting from his choice.

But it is said by the court, that Hicks & Arnold, subsequently to the failure of the bank, admitted their liability to Downey for this demand. Here, again, I conceive that the evidence in this cause has been greatly misapprehended, and that a correct understanding of the testimony will show that the admission [*253 which has been brought to bear upon this transaction, related to a posterior and wholly different liability of the same parties—to a transaction in which Hicks and Arnold had deposited a certificate of deposit of this bank as collateral security for a debt from Arnold; and that security turning out not to be available, they held themselves bound to satisfy the demand it was designed to secure. This subsequent transaction had no connection whatever with that in which the check in question was given, and on which payment in money was proffered, but for which the certificate of deposit was, by express agreement of the agent, ratified by his principal, taken in full satisfaction.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is, hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to award a *venire facias de novo*.

Cited—1 Cliff., 421; 2 Cliff., 16; 3 Bank. Reg., 141; 8 Bank. Reg., 119; 13 Bank. Reg., 463; 1 Sawy., 53; 2 Sawy., 358; 1 Filippin, 470.

PHILIP H. DeLANE, JOHN M. CHILES,
MARTHA C. CHILES, JOHN E. LYKES,
AND GRACE A. LYKES, *Appellants*,

v.

ANDREW B. MOORE AND JAMES L.
GOREE, Executors of JAMES L. GOREE.
Deceased.

Secondary evidence of written paper, when admitted—South Carolina law—Ante-nuptial contract, validity—recording—laches—equity will not relieve after great lapse of time.

Where an ante-nuptial contract was alleged to have been made, and the affidavits of the parties claiming under it alleged that they never possessed or saw it; that they had made diligent inquiry for it, but were unable to learn its present existence or place of existence; that inquiry had been made of the guardian of one of the children, who said that he had never been in possession of it, and did not know where it was; that inquiry had been made at the recording office in vain, and that the affiants believed it to be lost; secondary proof of its contents ought to have been admitted.

Whether recorded or not, it was binding upon the parties. If recorded within the time prescribed by statute, or if re-acknowledged and recorded afterwards, notice would thereby have been given to all persons of its effect.

If it was regularly recorded in one State, and the property upon which it acted was removed to another State, the protection of the contract would follow the property into the State into which it was removed.

But where no suit was brought until eight or nine years after the death of the husband, and then the one which was brought was dismissed for want of prosecution; another suit against the executors who had divided the property, comes too late.

THIS was an appeal from the District Court of the United States for the Middle District of Alabama.

254*] *The case is fully stated in the opinion of the court.

It was argued by *Messrs. Johnson and Butler* for the appellants, and *Messrs. Bradley and Davidge* for the appellees.

The counsel for the appellants, after stating the case, proceeded:

It appears, from the record, that the defendants objected to the reading of the papers of the marriage settlement, because the affidavits of the complainants did not make out such a case of the loss or destruction as would dispense with the production of the original. The objection was sustained by the presiding judge. By the ruling of the judge, the complainants' bill was ordered to be dismissed.

It is submitted, that the ruling of the judge was erroneous; and if it should be sustained here, the complainant must fail in any attempt to recover their rights, because they cannot be allowed to introduce the only evidence on which they rest.

The evidence offered by the complainants, and rejected by the court, was both competent and sufficient to satisfy a judge, when discretion must, on such questions, regulate his judgment; and especially so in the chancery jurisdiction of the court, where it is usual to receive with a liberal latitude, *sub modo* at least, all evidence that can lead to a competent judgment on the rights of the parties. The bill was filed by those who were seeking their rights by discovery, and against the acts of those who had a temptation to destroy the evidence against them. But it is submitted, that the question has been authoritatively ruled by the court; and according to the adjudged cases on the same subject in Alabama, where this case was tried, the evidence rejected should have been admitted. (*Taylor v. Riggs*, 1 Pet., 591, 596; *S. C.*, 9 Wharton, 483; *Winn v. Patterson*, 9 663, 676; *S. C.*, 5 Pet., 233, 240, 242; *Sturdevant v. Gaines*, 5 Ala., 435; *Sierge v. Clapton*, 6 Ala., 589.)

NOTE.—Marriage settlements or conveyance for benefit of wife and child, when good or void as to creditors. See note to *Sexton v. Wheaton*, 8 Wheat., 223.

If the evidence rejected by the judge, as to the reading of the marriage settlement, should have been received, as we think it should, then it may become necessary to bring in review the questions made by the defendants' answer.

Was the marriage settlement duly and legally recorded in South Carolina. By the laws of South Carolina (see Act of 1786 and 1823) marriage settlements, according to the first Act, are required to be recorded in the office of the Secretary of State, and by the second Act, also, in the office of Register of Mesne Conveyances, within three months after their execution, otherwise they will be regarded as void at law. The marriage settlement, in this case, was executed on the 20th May, and if *recorded before the 20th of August, would have been duly recorded, according to the requirements of the Act of 1786. It appears from Guignard's official certificate, that the paper was recorded in the Register of Mesne Conveyances, on the 31st day of July, 1816, the day on which it was proved by Young, one of the witnesses to it.

The certificate of Arthar, the Deputy-Secretary of State, is not definite as to the time when the paper was recorded in the office of the Secretary of State. There is no doubt, however, that it had been first recorded in that office, as such should have been done, according to the Act of 1786 (which is the only Act affecting this case). We think such must be the conclusion of the court, as scarcely any other fair inference could be drawn from the premises. If such should be the holding of the court, a second proposition arises, was it necessary that it should have been recorded in Alabama?

According to the tenor of the decisions of this court, it was not necessary that there should be such a recording to protect the rights of the complainants against the claims of a subsequent purchaser.

"A marriage settlement or deed, in favor of the wife, duly executed and recorded in Virginia, will be good against the creditors in the District of Columbia, although they may have had no express notice. (*Bank v. Lee*, 13 Peters, 119, 120.) Such has been the current of decisions in South Carolina and Alabama.

But the complainants have a right, from the proof in the record, to take refuge in the equity of their rights.

According to the evidence of W. R. Hamilton, Goree, the testator of defendants, who seems to have been a shopkeeper, purchased the slave in question, with express notice of complainants' title, by the marriage settlement of their mother with Yancey. The testimony of Hamilton was duly taken; for, if defectively taken in the first instance, the defendants had an opportunity, and were required, to retake it, if they chose, by an express agreement of the parties.

Such being their condition—that is, purchasers with express notice—he, Goree, took the property subject to acknowledged claims of the complainants, and having taken under their title he should not be allowed to claim against it.

The doctrine of notice is well established. He who acquires a legal title, having notice of the prior equity of another, becomes a trustee for that other to the extent of his equity. (1 Cranch, 100.)

If a man will purchase, with notice of another's right, giving a consideration will not avail him. (2 Bridgman's Digest, Vendors and Purchasers, IX., 691.)

256*] *With respect to the operation of the Statute of Limitations upon cases of trust in equity, the distinction is, if the trust be constituted by act of the parties, the possession of the trustee is the possession of the *cestui que trust*, and no length of such possession will bar; but if a party is constituted a trustee by the decree of a court of equity founded on fraud, or the like, his possession is adverse, and the Statute of Limitations will run from the time that the circumstances of the fraud were discovered. (2 Bridgman's Digest, 252.)

In the case of *Müller v. Kershaw*, marriage settlement was held void at law; in equity, however, the party claiming under the settlement would be protected where the purchaser had actual notice of the settlement. (Bayley's Equity, 481.)

If the foregoing propositions can be sustained, another question arises, and that is, can the defendants claim to be protected by the Statute of Limitations? The complainants allege, in their bill, that they were minors at the death of their mother, and could not assert their rights, under the marriage settlement, as remaindermen, after the death of Yancey, their step-father. They aver, furthermore, that they were ignorant as to the time of Yancey's death, from their distant and separated situations. It is also stated expressly in their bill (and it is a bill of discovery), that they were not informed as to the time when a fraud had been committed upon their rights, to wit: when Yancey sold, and Goree purchased, with a full disclosure and knowledge of their title. This reduces the parties to the relation of trustee and *cestui que trust*, and exempts the complainant from the operation of the Statute of Limitations.

Purchaser from mortgagor, with notice, cannot claim by possession against a mortgagee. (*Thayer v. Craner*, 1 McCord, 395.)

Court of Equity, bound by statute, upon legal title and demands, except in cases which are excepted upon purely equitable principles, such as trust, fraud, &c. (*Van Rhyne v. Vincent*, 1 McCord, 314.)

In cases of fraud, it runs from the time the fraud has been discovered. (*Id.*, 4 Des., 480.)

If one intrudes upon the rights of an infant, and takes the profits, he will be treated as a guardian. His character is fiduciary: the Statute of Limitations is inapplicable; and lapse of time will not bar account. (*Goodhue v. Barnwell*, Rice, Equity, 239.)

The ruling of the Judge below was evidently in reference to a single question, in which he clearly was in error. But, independently of his decision, it may become the plaintiffs to satisfy this court, that if he had all these questions before him, the defendants, *in any point of view, would have been entitled to a decree in their favor.

Therefore, it becomes the complainants to show that they were entitled to a decree in their favor, upon the entire merits of their case.

The counsel for the appellees made the following points:

First point omitted.

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II. The court was right in rejecting the copy of the marriage contract.

1. The affidavits of the complainants were insufficient to prove the loss of the original, which they had never seen, and which had never been seen by any witness in the cause.

The foundation that is the existence of an original, was not laid, unless it is shown by the copy.

This distinguishes it from the case of *Winn v. Patterson*, 9 Pet., 663, and all the other cases; 5 Pet., 233, *et al.*

2. If this foundation was laid, they do not show a search for the original such as is required by the court.

They state where have searched; but Yancey removed from South Carolina to Alabama, carrying the personal property with him. His right, according to the theory of complainants, depended upon this agreement. He would have carried it with him. It would have been among his papers. There was no search there. See the cases cited on appellant's brief.

3. The copy from the records in South Carolina cannot rest on the principle of an ancient deed. The possession and acts of Yancey, as represented by complainants, were inconsistent with any limitation on his title, and therefore with this deed. Nor does the rule apply to copies, unless some other proof of the existence, of the deed is given. There must be proof *ab initio* that there was an original. (*Winn v. Patterson*, 9 Pet., 675, 676, and the cases cited by appellant.)

4. The affidavit of Lykes and wife was properly rejected by the court; and in order to lay the foundation for the secondary proof, all the complainants should have purged themselves from any concealment or laches.

III. The copies could only be admitted on the ground of their having been duly and lawfully recorded in South Carolina.

1. The title is set up in a married woman residing in Alabama, in personal property, openly under the control of her husband, which title depends on a marriage contract made in South Carolina. The case of *Lee v. The Bank of the United States*, 13 Pet., shows that such a title may be supported, notwithstanding there is *no record in Alabama, nor any badge [258 or token to distinguish it from the general property of the husband.

If the action had been in the State Court, the law of South Carolina must have been proved, as any other fact in the cause. But this court has said, in *Leland v. Wilkinson*, 6 Pet., and *Owings v. Hull*, 9 Pet., that the general laws of the several States will be judicially noticed in the courts of the United States.

We are, then, to inquire what the law of South Carolina was in 1816. It required the record to be made within three months after the date of the deed, and after the execution had been proved according to law, in the office of the Secretary of State only.

This disposes of the copy from the Richland district.

2. No statute of South Carolina is produced, showing how the deed was to be proved. But, admitting that this deed was executed and proved according to law, the proof of the recording does not sustain the claim.

The law of South Carolina will be found in

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James's Dig., 275, 276; 3 Brev. Dig., 45, 46; 6 Stat. at Large, App., 636, 637; and 5 Stat. at Large, 203.

That law required the record to be made within three months, or the deed was void.

One of these copies appears to have been recorded on the 31st of July, 1816, in the Richard office; the other, between the 30th of July and the 14th of November, in the Secretary's office. The presumption, then, is, that the former was first recorded; for it could hardly be that it was recorded in this last office on the 30th, and in the former on the 31st.

Again; the law authorizing the record in the Register's office, was not passed until 1823. How, then, came this deed to be recorded there seven years in anticipation of such a law? Is it not evident that the parties placed it there first, by mistake, and discovering their error, afterwards had it placed in the Secretary's office? Then, when was it put there? They must show it was within three months after its date. They have failed to do so.

So that whether the affidavits were, or not, sufficient to admit the secondary proof, the secondary proof itself is wholly insufficient, by reason of the failure of complainants to show the record under the statute.

IV. The defendants have pleaded the Statute of Limitations of six years.

It would be a complete bar, in any action at law. (Aik. Dig., tit. Limitation, pp. 270, 271.)

The disabilities are coverture, infancy, *non compos*, and absence of defendant beyond seas. 259*] *In this case, the slave was sold in 1821; the coverture terminated in 1823; the husband survived to 1834, with the right of possession and enjoyment only. In 1834, complainants' right was complete, if they had any. The youngest must have been of full age in, or before, the year 1837. They are all children of the widow DeLane, before her marriage with Yancey, in 1816. A suit in Equity against these defendants was pending in 1843, for this very property, and dismissed for want of prosecution. It was as if it had never existed. In 1847, when this suit began, more than twice the period of limitation had elapsed since the right, if any, accrued.

Courts of equity will not encourage such demands. There must be some diligence, some activity, some movement, by the party. (*Piatt v. Vuttier*, 9 Pet., 405; *McKnight v. Taylor*, 1 How., 161.)

V. Such activity was peculiarly necessary in this case. It is a suit against executors, bound to close their office with reasonable despatch. A suit pending against them in 1843 had been dismissed. They had gone on to settle their trust; the debts had been paid and the assets distributed, when this suit was brought, and courts of equity will protect them. The claim should have been presented within eighteen months. (Aik. Dig.; Clay's Dig., 195, sec. 17.)

VI. Finally, the presumptions of fact are all against the claim set up.

The marriage contract authorizes a sale by the husband, with the consent of the wife. They are residing together, apparently in not a very prosperous condition, and both purchase, for their own support and the support of their family (of these very complainants), the goods of the defendants' testator. They are unable

to pay for them, and one or both of them sell the slave to him for these very things. Honesty and fair dealing required that the wife should out of her means aid the husband in supporting the children of her prior marriage, and this court will presume that she did what common honesty required of her, and that she did unite in the sale. At all events, it was a sale and delivery of possession made in her lifetime for her benefit, and this court could compel her to ratify it now if she had not done so before.

This contract was made in South Carolina in 1816; the parties removed to Alabama before 1820. It is to be interpreted by the laws then in force in South Carolina.

In 1811 (*Ewing v. Smith*, 3 Desaus., 417, 455, 457, 462, 463) the Court of Appeals of that State declared the common law of England was not applicable to cases of married women having separate estates in that State. This was followed by *Carter v. Ecceleigh*, 4 Desaus., 19, and *James v. Maysant*, *Id.*, 501.

*From these cases it appears, 1st. [*260 That a married woman, having a separate estate, can only change, encumber or dispose of it, strictly according to the provisions of the settlement. 2d. That an estate limited to the joint use of husband and wife during coverture, with power to her to dispose of it by deed or will, and to go to her sole and absolute use in case of her surviving him, is a separate estate. 3d. The separate estate will be liable for debts contracted for the purposes for which it was created.

In this case the conditions necessary to raise a separate estate to her out of the joint estate, do not exist.

1. There is no power of disposition given to her, but it is given to the husband only with her consent.

2. There is no sole and absolute use reserved to her; but the right of survivorship, without any power of disposal, is mutual.

3. The debt in this case was contracted for the purposes of the trust, and on the credit of the trust estate.

The cases of *Cooke v. Kennedy and Smith*, 12 Ala., 42; *Bender v. Reynolds*, 15 Ala., 446, are directly in point, that such an estate, with the property in the possession of the husband, is subject to the husband's debts. See, also, *Moss v. McCall*, 12 Ala., 630.

Here acquiescence may be inferred. (*Square v. Dean*, 4 Bro. C. C., 326; *Beresford v. Ar. Bis. Armagh*, 13 Sim., 643.)

Mr. Justice Daniel delivered the opinion of the court:

The appellants, in the year 1847, filed their bill in the court aforesaid against the appellees, seeking of them a discovery as to certain slaves charged to have come to the possession of their testator, and also an account and a recovery of the value, increase, hires and profits of those slaves, and claiming by name a negro woman named Linda or Linder, together with her children.

The bill charges that in the year 1816, Mrs. Ann Wood De Lane, a widow lady residing in the State of South Carolina, and possessed of valuable real estate, and of sundry slaves, being about to intermarry with one John Yancey, an ante-nuptial contract was entered into and

executed between these parties. The stipulations in this contract, which is made an exhibit with the bill, are to the following effect: That "all the estate of the said Ann, real and personal, should be and remain for the joint use, support and enjoyment of the said John and Ann during their joint lives, and to the survivor of them during his or her life; that the same should be free from any debts, dues, demands or contracts of said Yancey, unless it should be under the following restrictions: That the said **261*** John Yancey *should not have the right to dispose of any portion of the estate or property, real or personal, unless the said Ann should consent thereto. That the said John should have the right to dispose of the property upon his obtaining such consent. That the said Ann should have the right of granting or withholding her consent without resorting to the aid of a court of equity, or to the intervention of a trustee. That all transfers by the said John of any portion of the property with the consent of the said Ann, should be valid, whether made for his separate use and benefit, or for the joint use of himself and wife; and that the said John should not be compellable to settle any equivalent for property so transferred, unless there should be a stipulation between the parties to that effect. That all of the estate, real or personal, which should remain undisposed of during the joint lives of the parties, should be for the use and benefit of the survivor; and at his or her death should be equally divided amongst all the children of the said Ann, both of this and of the former marriage. That none of the aforesaid estate, real or personal, should be liable for any debts, judgments or executions, that might be in existence at the date of the contract, or at any time thereafter against the said John, unless by mutual consent of the parties. The bill further charges that the marriage having taken place between the said Ann Wood De Lane and John Yancey, they removed to the State of Alabama, where the said Ann having died, the said Yancey, who survived her, sold to James L. Goree, deceased, either during the lifetime or after the death of the said Ann, but without her consent, and in violation of the ante-nuptial agreement, several of the slaves mentioned in that agreement. That the said Philip H. De Lane, Martha Chiles, and Grace Lykes, who are the children of Ann W. De Lane, by her first marriage, and her only heirs, were, at the date of the sale aforesaid by Yancey, infants of tender years.

The bill makes no persons defendants, and seeks relief against none others, except the said Andrew B. Moore, and James L. Goree, the executors of James L. Goree, deceased.

The respondents deny all personal knowledge of a purchase of slaves by their testator, of Yancey, but state that they have been informed and believe, that the decedent did, in his lifetime, and in the lifetime of Ann W. Yancey, obtain from the said John Yancey, in the year 1822, a negro woman slave, named Lindy, and her child Becky, in payment of a store account contracted with the decedent, whilst a merchant in Alabama, by said John and Ann Yancey, for sugar, coffee, pork, butter, clothing, and other necessities for the support of the said John and Ann, and of the complain-

ants, the children of the said Ann, *and [***262** of the slaves conveyed in the marriage settlement. The respondents deny that any slave mentioned in that agreement, except the woman Lindy, ever came to the possession of their testator, and after naming the offspring of Lindy, they aver that this female slave and her offspring were never held by the respondents in any other right than as the executors of James L. Goree, deceased; that long before the institution of this suit, the respondents, as such executors, had delivered over to the distributees of their testator, all the slaves held by them, had settled their account as executors, and received a discharge, viz. on the 2d day of January, 1846. Having made the above statements in answer to interrogatories put by the bill, the respondents propound these separate averments, and claim to be allowed the benefit of them as if specially pleaded.

1. That their testator was a *bona fide* purchaser of the slave Lindy for valuable consideration, without notice of the alleged marriage settlement.

2. That more than six years had elapsed between the death of Yancey, who survived his wife, and the commencement of this suit, and therefore the suit is barred by the Statute of Limitations.

3. That the said marriage settlement was made in the State of South Carolina, and was not recorded according to the laws of that State, and is therefore void, both as to the respondents and to their testator, who was a *bona fide* purchaser without notice.

4. That if the marriage settlement had been properly recorded, or was otherwise valid, the sale of the slave Lindy was made with the assent of the said Ann Yancey.

5. That the respondents received the said slaves as the executors of the last will and testament of decedent, as a part of his estate, and had, before this suit was commenced, disposed of them according to the provisions of said will, by distribution and delivery to the legatees of said estate, and that long before the commencement of this suit, had made a final settlement of said estate, and had been discharged from said executorship.

To the answer of the respondents, the complainants filed a general replication, and upon the pleadings and proofs in the cause, the District Court, on the 7th of December, 1849, pronounced a decree, dismissing the bill of the complainants, with costs. The correctness of that decree we will proceed to consider.

The first question which presents itself, in the natural order of investigation of the proceedings of the District Court, is that which was raised upon the admissibility in evidence, of an authenticated copy of the ante-nuptial contract, upon the sufficiency *of the [***263** cause assigned for the non-production of the original. The cause so assigned, was this: The three children of Mrs. De Lane, with the husbands of the two daughters, depose that they never possessed, nor ever saw the original contract; that they have made diligent inquiry for it, but have been unable to learn either its present existence or place of existence—and believe that it has been lost or destroyed. And the son, Philip De Lane, states further, that he had made inquiry for it,

first of John Partridge, his guardian, who informed him that he had never been in possession of it, and did not know where it was; that deponent had also made inquiry for it at the Office of Mesne Conveyances, and at the Office of the Secretary of State, of South Carolina, but upon search and inquiry it could not be found at either of those places; and he believes that this instrument was either destroyed by said Yancey, or by fire when the court house in Monroe County, in Alabama, was burned in 1838—that the subscribing witnesses to the agreement, he believes, after diligent inquiry, are dead. That Yancey died in 1836, in Mississippi, utterly insolvent, and no person ever administered on his estate. In disregard of these affidavits, the District Court refused to consider the copy of the ante-nuptial contract as legal or admissible in the absence of the original, and in this refusal, we think that court has erred. Upon the most obvious principles of reason and justice, we think that the complainants could not have laid a stronger foundation for the introduction of the secondary proof. The custody of the original document, or the duty of preserving it, could in no view be brought home to them. And its absence, therefore, over which they could have had no control, and produced by no default of theirs, should not have deprived them of the effect of that document to avail for whatever it might be worth. This view of the question before us, is strengthened by the obvious considerations, that no suspicion justly attaches to the complainants from the non-production of the original agreement, and that its exhibition was calculated rather to corroborate than to weaken their claims. The instances in which secondary evidence is to be admitted, and the requisites demanded by the courts to warrant its introduction, are treated of in the elementary works on evidence, as for instance, in 2 Saunders on Pleading and Evidence, 833, *et seq.* But in a decision of this court, this subject has been dealt with in a manner so strikingly apposite to the question now before us, as to warrant particular notice thereof, as being in all respects decisive of that question. We allude to the decision of *Taylor v. Riggs*, reported in 1 Peters, 591. That case presented by no means so strong a claim for the introduction of secondary evidence as does the *one now under consideration, for that was an application for leave to substitute parol for written evidence, and not for the substitution of an authenticated copy of a written and recorded document in lieu of the original. In *Taylor v. Riggs*, the Chief Justice lays down the law as follows:

"The rule of law is, that the best evidence must be given of which the nature of the thing is capable; that is, that no evidence shall be received which presupposes greater evidence behind in the party's possession or power. The withholding of that better evidence raises a presumption, that if produced, it might not operate in his favor. For this reason, a party who is in possession of an original paper, or who has it in his power, is not permitted to give a copy in evidence, or to prove its contents. When, therefore, the plaintiff below offered to prove the contents of the written contract on which this suit was instituted, the

defendant might very properly require the contract itself. It was itself superior evidence of its contents to anything depending on the memory of a witness. It was once in his possession, and the presumption was that it was still so. It was necessary to do away this presumption, or the secondary evidence must be excluded. How is it to be done away? If the loss or destruction of the paper can be proved by a disinterested witness, the difficulty is at once removed. But papers of this description, generally remain in possession of the party himself, and their loss can, in most instances, be known only to himself. If his own affidavit cannot be received, the loss of a written contract, the contents of which are well known to others, or a copy of which can be proved, would amount to a complete loss of his rights, at least in a court of law. The objection to receiving the affidavit of the party is, that no man can be a witness in his own cause. This is undoubtedly a sound rule, which ought never to be violated. But many collateral questions arise in the progress of a cause, to which the rule does not apply. Questions which do not involve the matter in controversy, but matters auxiliary to the trial, which facilitate the preparation for it, often depend on the oath of the party. An affidavit of the materiality of the witness, for the purpose of obtaining a continuance, or a commission to take a deposition, or an affidavit of his inability to attend, is usually made by the party, and received without objection. So affidavits to support a motion for a new trial are often received. These cases, and others of the same character, which might be adduced, show that in many incidental questions that are addressed to the court, and which do not affect the question to be tried by the jury, the affidavit of the party is received. The testimony which establishes the loss of the paper is addressed to the court, *and does [*265] not relate to the contents of the paper. It is a fact which may be important as letting the party in to prove the justice of the cause, but does not of itself prove anything in the cause. As this fact is generally known only to the party himself, there would seem to be a necessity for receiving his affidavit in support of it."

The law, as thus clearly declared by this court in *Taylor v. Riggs*, is in strictest accordance with the rule prevailing in the Supreme Court of the State within which the case before us was decided. Thus in the case of *Sturdevant v. Gaines*, reported in the 5th vol. Alabama Reports, p. 435, that court thus announces the rule by which they are governed with respect to the introduction of secondary evidence: "In the recent case of *Jones v. Scott*, 2 Ala., 61, it is stated, that no fixed rule can be laid down as applicable to this class of cases; that, in general, search must be made where the lost paper was last known to be. These remarks are quite applicable to this case. Search was made where the paper was last known to be only three days before." Again: "We cannot say that half an hour's search in a lawyer's office was not sufficient to ascertain whether the paper was not where it was left, nor, in the absence of any fact indicating that it might be found elsewhere, can

we perceive that there was any necessity to search elsewhere for it. If the admission that the paper, on further search where it was last known to be, or elsewhere, might still be discovered, would preclude the secondary evidence, it would annihilate the rule in all cases where the lost paper was not proved to be destroyed as well as lost, as otherwise there must always be a possibility that it may be found." With regard to the position insisted upon in the answers, that the ante-nuptial contract was void for the failure to record it within three months from its date, in conformity with the law of South Carolina; that position, however maintainable it might be, so far as the instrument was designed to operate by mere legal or constructive effect on creditors and purchasers, becoming such before it was recorded, or, in the event of its never being recorded, cannot be supported to the extent, that by the failure to record it within the time prescribed by the statute, the deed would thereby be void to all intents and purposes. Such a deed would, from its execution, be binding at common law *inter partes*, though never recorded; and if, after expiration of the time prescribed by statute, it should be re-acknowledged and then recorded, either upon such re-acknowledgment, or upon proof of witnesses, it would from the period of that re-acknowledgment and admission to record, be restored to its full effect of notice, which would, by construction, have followed from its being recorded originally within the time prescribed [266] *by law. These conclusions are sustained by numerous decisions. We refer, in support of them, to the cases of *Turner v. Stip*, 1 Wash., 319; *Currie v. Donald*, 2 Wash., 58; *Eppes v. Randolph*, 2 Call., 125; *Guerrant v. Anderson*, 4 Ran., 208; *Roanes v. Archer*, 4 Leigh, 550; *Woods v. Owings & Smith*, 1 Cranch, 239; *Lessee of Sicard v. Davis*, 6 Peters, 124.

The ante-nuptial agreement between Ann Wood De Lane and John Yancey, is proved to have been executed on the 20th day of May, 1816; if it was admitted to record at any time before the 20th of August, in the same year, it operated as notice to all creditors and purchasers becoming such subsequently to the execution of that agreement; if it was not recorded until the 14th of November, in the year 1816, it could by construction operate as notice from the latter period only; but as between the parties, and with regard to subsequent creditors and purchasers with notice, it operated from the period of its execution. The sole purpose of recording the deed, is that those who might deal with the parties thereto, or with the subjects it comprised, should have knowledge of the true condition of both, and if such knowledge is presumed, nay, established by legal inference from the fact that the deed has been recorded, *a fortiori*, it must be established by actual notice.

It has been made a ground of defense, in the answers in the court below, and it has also been insisted upon in argument here, that admitting the ante-nuptial contract to have been recorded in the State of South Carolina, and, in consequence thereof, to have been so operative as to affect with notice creditors and purchasers within that State, yet, that upon the removal of

the parties, carrying with them the property into another state or jurisdiction, the influence of the contract, for the protection of the property, would be wholly destroyed, and the subject attempted to be secured, would be open to claims by creditors or purchasers subsequently coming into existence. The petition here advanced is not now assumed for the first time in argument in this court. It has, upon a former occasion, been pressed upon its attention, and has been looked into with care, and unless it be the intention of the court to retrace the course heretofore adopted, this may be now, as it formerly was, called an adjudged question. The case of *The United States Bank v. Lee et al.*, reported in the 13th of Peters, p. 107, brought directly up for the examination of this court, the effect of a judgment and execution, obtained by a subsequent creditor in the District of Columbia, upon property found within that district, but which had been settled upon the wife of a debtor, by a deed executed and recorded in Virginia, according to the laws of that state, the husband and wife being, at the time of *making the instrument, inhabit- [267] ants of the State of Virginia. The question was, by *Mr. Justice Catron*, who delivered the opinion of the court, elaborately investigated and the cases from the different states, founded upon their Registry Acts, carefully collected. The cases of *Smith v. Bruce's Administrator*, from 2d of Harris & Johnson, and of *Crenshaw v. Anthony*, from Martin & Yerger's Reports, p. 110, cited by the learned Judge, fully sustains his reasoning upon the point. This court come unhesitatingly and clearly to the conclusion, that the deed of settlement, executed and recorded in favor of Mrs. Lee, in conformity with the laws of Virginia, protected her rights in the subject settled, against the judgment of the subsequent creditor, in the District of Columbia. We should not be disposed to disturb the doctrine laid down in the case of *The Bank of the United States v. Lee*, and in the decisions of the state courts of Maryland and Tennessee, above mentioned, if the rights of the parties turned upon the operation of the contract as constituting notice; or upon the proof of knowledge on the part of Goree, the purchaser from Yancey, of the existence of the marriage contract. But we think that the rights of the parties to this controversy should not be made to depend upon any such incident as the existence of notice of the contract, either actual or constructive.

It has been premised, in the statement of the pleadings in this case that the only defendants in the court below, were the executors of James L. Goree, deceased, called upon in their representative character, and in no other. The marriage contract between Ann W. De Lane and John Yancey, was executed in 1816. It is proved that Yancey died in 1833 or 1834. The complainants are the children of Mrs. Yancey, by her first marriage; so that, at the time of the death of Yancey, the youngest of those children, if born immediately preceding the second marriage, could not have been younger than seventeen years; the elder children were then probably nearly or fully at majority. After the death of Yancey, the record discloses no claim on the part of the complainants, nor any effort by them to recover the

property settled by the contract, earlier than 1842, eight or nine years after Yancey's death; at which last period, it was said, there was a suit pending in one of the state courts, against the testator of the appellees, but which suit, after being revived against the appellees, subsequently to the death of their testator, was, in the year 1843, dismissed for the want of prosecution. The bill in this suit was filed in January, 1847, at an interval of thirty-one years after the execution of the marriage agreement, and of fourteen years after the death of Yancey; from which last event, the complainants had an undoubted and unobstructed **268*** power to seek their rights under that contract, whatever they were.

If mere tardiness in asserting their pretensions were all that could be imputed to the appellants, this, of itself, would place them in a position which could not commend them the countenance of courts of justice; but this delay is by no means the only or the least imputation, resting upon the course of the appellants; for we see that, after calling upon the appellees for satisfaction of their demand, the appellants abandoned that demand, proclaiming thereby to the representatives of Goree (if indeed they were then in possession of the subject) permission to apply it in conformity with the will of their testator. The appellants, it is not pretended, ever held or claimed the subject in dispute, except in their representative capacity, and in trust for the creditors and legatees of their testator. In the interval between the abandonment of their first and the institution of their second demand by the complainants, those executors have, in fulfillment of their trust, handed over the subject to those for whom they held it under the will; have accounted with the authorities to whom they were responsible, and have received from those authorities a full acquittance. Under these circumstances, to hold them liable to the demands of the appellants, would in effect be to render penal the regular discharge of their duty.

This aspect of the cause we regard as fully warranting the decree of the District Court, dismissing the bill of the complainants; that decree is therefore affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Middle District of Alabama, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said District Court in this cause be, and the same is hereby affirmed, with costs.

Cited—1 Cliff., 203; 6 Sawy., 529.

THE BOARD OF TRUSTEES FOR THE VINCENNES UNIVERSITY, *Plaintiffs in Error*,

v.

THE STATE OF INDIANA.

Indiana Territory—Act reserving land for use of seminary of learning—selection—title, where vested—power to incorporate seminary—Indiana Legislature no power to divest title.

In 1804 Congress passed an Act (2 Stat. at Large, 277) "making provision for the disposal of the public lands in the Indiana Territory, and for other purposes," in which it reserved from sale a ***269** township in each one of three districts, to be located by the Secretary of the Treasury, for the use of a seminary of learning.

In 1806 the Secretary of the Treasury located a particular township in the Vincennes district, for the use of that district; and when, in 1808, the territorial government incorporated a "Board of Trustees of the Vincennes University," the grant made in 1804 attached to this Board, although, for the two preceding years, there had been no grantee in existence.

Under the ordinance of 1787, made applicable to Indiana by an Act of Congress, the territorial government of Indiana had power to pass this Act of Incorporation.

The language of the Act of Congress, by which Indiana was admitted into the Union, did not vest the above township in the Legislature of the State.

The Board of Trustees of the University was not a public corporation, and had no political powers. The donation of land for its support was like a donation by a private individual; and the Legislature of the State could not rightfully exercise any power by which the trust was defeated.

THIS case was brought up from the Supreme Court of the State of Indiana by a writ of error issued under the 25th section of the Judiciary Act.

The manner in which the case arose, and the laws relating to it, are stated in the opinion of the court.

It was argued by *Mr. Judah*, with whom was *Mr. Dunham*, for the plaintiffs in error, and *Mr. O. H. Smith* for the State of Indiana.

The counsel for the plaintiff in error contended:

1. That the effect of the reservation in the Act of Congress passed in 1804 was a grant.

The defendant and Judge Smith, of the Supreme Court of Indiana, assert that this is not a grant, because there was not a grantee *in esse*; and that the reservation could only become effectual to pass the title by an appropriation, to be made by Congress, or under its authority.

In *Wilcox v. Jackson*, 13 Peters, 498, this court, at page 512, define "appropriation" as follows: "That is nothing more nor less than setting apart the thing for some particular use." And afterwards, in the same case (page 518, the court say: "But we go further, and say, that whensoever a tract of land shall once have been legally appropriated to any purpose, for that moment, the land thus appropriated becomes severed from the mass of public lands, and that no subsequent law or proclamation or sale, would be construed to embrace it, or operate upon it, although no reservation was made of it."

Was the Gibson township so appropriated? It was reserved for a special purpose. It was located in pursuance to the reservation. Was there anything more necessary to set it apart for the particular use?

But, say the counsel for the State and Judge Smith, though ***appropriated**, it was ***270** not granted, because there was no grantee *in esse*.

If, as a general rule, it is true that there cannot be a grant without a grantee *in esse*, it is as true that there are exceptions.

A grant, in case of a charity, or of the dedication of land to a public use, is good without a grantee *in esse*. *Town of Pawlet v. Clark*, 9

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Cr., 292; *Beatty v. Kurtz*, 2 Pet., 566; *Cincinnati v. White*, 6 Pet., 435; and in *Vidal v. Girard's Executors*, 2 How., 127, at pages 192, 196, it is stated, that donations given to the establishment of colleges, &c., are charities in the sense of the common law.

2. That the Territorial Legislature had the power to apply to use the township appropriated by Congress, and did apply it by the Act of Incorporation.

The counsel for the State of Indiana made the following points:

First. The complainants have no such corporate existence as would authorize and empower them to sue. (2 B. A., 482, note a, last edition, and see the extracts from their records in evidence.)

Second. The suit is barred by the Statute of Limitations. (R. S., 1843, pp. 795, 799; Act of 1845-1846, explanatory of Rev. Stat.)

Third. The suit is barred by twenty years' adverse possession, as the State, and those claiming under the State by purchase and lease, had held adversely more than twenty years before any suit was brought by the University to recover the possession, even if the former actions which were dismissed could aid this suit, which is denied.

Fourth. The case does not come within the principles of an executory devise, and would not avail the complainants even if it were an executory devise. (17 Serg. & Rawle, 88; 5 H. & J., 392; 9 Ohio, 203; 12 Mass., 537; 16 Pick., 107; 3 Pet., 101; 4 Dana, 355; 3 Pet., 146; 9 Ves., 399; 9 Mass., 419; 7 Ves., 69; 9 Ves., 399; 10 Ves., 522.)

Fifth. The Act of Congress of 1804, was a mere reservation from sale, to be afterwards appropriated to educational purposes, and neither vested the same in the complainants, nor devested the United States of the legal title. (P. L. L., 104; 2 McLean, 416; P. L. L., 2d part, 69; 1 Johns., 303; 9 Johns., 74; Wright's Ohio, 144.)

Sixth. The case does not embrace the principles of a dedication to public or pious uses, so as to sustain this claim. (2 Pet., 566; 6 Pet., 431, 498; 6 Paige, 639; 6 Wend., 667; 4 Paige, 519; 7 Ohio, 219.)

Seventh. The Act of Congress of 1816, vested the legal title to these lands in the State of Indiana, as a trustee, with power to direct to what object or institution, being "a seminary of learning," the trust fund shall be applied; and the State, having designated the State University, at Bloomington, as the "seminary of learning" to which the trust fund shall go, the complainants have no claim whatever, either in law or equity, against the State, the trustee of the fund. See Act of Congress of 1816, Act of 1818, and the several Acts for the admission of the other new States into the Union.

Eighth. The doctrines of estoppel, in their most rigid application, can only permit the complainants to retain what they have already received, and for this the State will not contend.

Ninth. In any and all events, the funds were public funds, and the Legislature of the State had competent authority to change their direction to any other seminary of learning at will. Had the funds been the private funds of

the complainants, and had they been vested with them, there might have been some pretext for the assumption, that the Acts of the Indiana Legislature, endowing the State University, were unconstitutional. (4 Wheat., 430; 4 Pet. Con. Rep., 536.)

Mr. Justice McLean delivered the opinion of the court:

This case is before us on a writ of error to the Supreme Court of the State of Indiana, under the 25th section of the Judiciary Act of 1789.

The bill was filed under an Act of the Legislature of Indiana of 1846, which authorized the trustees of the Vincennes University to file a bill in chancery, in the nature of an act of disseisin against the State, to try their right to the seminary township in Gibson County. The facts stated in the bill are substantially as follows:

The Indiana Territory was organized by the Act of Congress of the 7th of May, 1800, with the powers to legislate given by the ordinance of 1787. On the 26th of March, 1804, an Act of Congress was passed, for the survey and disposal of the public lands, by which three land districts were established, and an entire township in each was reserved for the use of a seminary of learning, to be located by the Secretary of the Treasury. The boundaries of the Vincennes land district were the same as designated in a late treaty with the Wabash Indians. The Secretary of the Treasury, by letter of the 10th of October, 1806, located township No. 2 south range, No. 11 west, in Gibson County, for the use of a seminary in that district.

The Act of the 29th November, 1806, and the supplement thereto, passed the 17th of September, 1807, established the *Vincennes University, and incorporated the same by the name of "The Board of Trustees of the Vincennes University." The corporation was duly organized at Vincennes, on the 6th of December, 1806, under the Act, and has since continued. The second section of the Act of Incorporation, after reciting the seminary lands under the Act of Congress, provided, "that the trustees, in their corporate capacity, or a majority of them, should be legally authorized to sell, transfer, convey and dispose of any quantity, not exceeding four thousand acres, of said land, for the purpose of putting into immediate use the said university; and to have on rent the remaining part of said township to the best advantage, for the use of said public school or university."

In virtue of the above Acts, the complainants became possessed of the said township of land, and so continued during the territorial government. The same rights and powers in the corporation, as they existed under the territorial government, were secured by the 1st section of the 12th article of the Constitution of Indiana. Between the years 1806 and 1820, complainants sold 4,000 acres of the land, and rented a part of the residue. A college building was constructed by them at Vincennes.

On the 22d January, 1820, a joint resolution of the Legislature of Indiana was approved, appointing a superintendent for the seminary township, with power to rent the improved

lands, to collect the rents, and to account to the State. And, on the 2d of January, 1822, the Legislature appointed commissioners to sell the lands in that township. This seems to have been done, on the assumption that the board of trustees had expired through their own negligence. The lands were sold, and the money received was paid into the State Treasury. A part of the consideration money on this sale had not been collected when this bill was filed.

The complainants pray that an account may be taken of the proceeds, and interest of the sales of the lands and the rents received by the State; and that the same may be paid to the complainants, &c.

The defendant's answer denies the equity of the bill, and relies upon the Statute of Limitations. It also denies that the territorial government had any power to incorporate the plaintiffs; that the title remained in the United States, it never having been appropriated to any special grantee; that under the Act of Congress of the 19th of April, 1816, for the admission of the State of Indiana into the Union, the title to the land in question became vested in the State.

The Act of Congress, which organized the Territory of Indiana, provided, that so much of the ordinance of 1787 for the government of the territory of the United States northwest of 273* the *Ohio River, as relates to the general assembly therein, and prescribes the powers thereof, shall be in force, and operate in the Indiana Territory, &c. The ordinance declares, "that the Governor and Judges, or a majority of them, shall adopt and publish in the district, such laws of the original States, criminal and civil, as may be necessary, and best suited to the circumstances of the district, and report them to Congress, from time to time; which laws shall be in force in the district until the organization of the general assembly therein, unless disapproved of by Congress." Provision is made in the ordinance for the appointment of a legislative council, and it is then provided, that "the Governor, Legislative Council, and House of Representatives, shall have authority to make laws, in all cases, for the good government of the district, not repugnant to the principles and articles in this ordinance."

Under the ordinance, the Legislature of the territory was vested with general legislative powers, restricted only by the articles contained in that instrument. It had power to grant an act of incorporation, with all the functions necessary to effectuate its objects. There can be no question, therefore, that the corporate powers vested in the plaintiffs, by the Legislature of the territory, were legitimately conferred. And these powers were not affected, and could not be affected by the Constitution of the State. It provided that "all rights, contracts and claims, both as respects individuals and bodies corporate, shall continue as if no change had taken place in this government."

If the Board of Trustees, by a failure to elect when vacancies occurred, or through any other means, became reduced to a less number than was authorized to act by the charter, the corporation was not thereby dissolved. In such a case, its franchises would be suspended

only, until its functions were restored by legislative action. This was done by the Act of the Legislature of the 17th of February, 1838. In that Act the Territorial Act of incorporation is recognized, the existence of six of the trustees admitted, the vacancies supplied, and the board, thus constituted, was organized. If, therefore, the corporation by *non user* had become liable to a judicial process of forfeiture, after this Act, such a procedure could not be instituted.

The proviso in the Act of 1838 could only operate so as to secure any rights which the State might be supposed to have, in the Gibson township.

The reservations for the seminaries of learning and for schools, are made in the same terms, and in some respects must rest on the same principles. In all the Western States, north of the Ohio, similar reserves for schools and seminaries of learning have been made. In the case of *Wilcox v. Jackson*, 13 Pet., 496 *this court held, that a reservation set [*274 apart the thing reserved for some particular use; and that "whenever a tract of land shall once have been legally appropriated to any purpose, it becomes separated from the public lands."

In the States where school lands have been reserved, the Legislatures have enacted laws to carry out and effectuate the benign policy of the general government. Special authority has been given to individuals elected, in the respective townships, to lease the lands, sue for rents, &c., exercising, to some extent, corporate powers. The citizens within the township are the beneficiaries of the charity. The title to these lands has never been considered as vested in the State; and it has no inherent power to sell them, or appropriate them to any other purpose than for the benefit of schools. For the exercise of the charity under the laws, the title is in the township. No patent has been issued by the federal government, in such cases, as it has not been considered necessary. For the sale of school lands, the consent of Congress has been obtained, as that changes the character of the fund.

The title to the seminary lands, it is contended, did not vest in complainants, as they are not named in the reservation, and had no existence for two years afterwards.

This question is not to be decided on the principles which apply to an ordinary grant from one individual to another. The title partakes of the nature of an executory devise, or a dedication of property to public use. In the case of *Inglish v. The Sailor's Snug Harbor*, 3 Pet., 126, this court say: "What objection can there be to this as a valid executory devise, which is such a disposition of lands, that thereby no estate vests at the death of the deviser, but only on some future contingency?" If the words, "reserved for the use of a seminary of learning," were indorsed on a town plat when made, there is no doubt that the title would vest in a corporation created afterwards for the establishment and government of such an institution. If it be reserved for the public use, the title would vest in the public, so soon as a public should exist in the town. (*Trustees of the McIntyre Poor School v. The Zanesville Canal Company*, 9 Ohio, 203; *Cincinnati v. The Lessee of White*, 6 Pet., 435; *Barrilly et al. v.*

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Howell's Lessee, 6 Pet., 498; *New Orleans v. The United States*, 10 Pet., 682.)

Land, at common law may be granted to pious uses, before there is a grantee in existence competent to take it; and in the mean time, the fee will be in abeyance. (*The Town of Pawlet v. Clark et al.*, 9 Cranch, 292; *Witman v. Ler*, 17 Serg. & Rawls, 88.)

"When a corporation is to be brought into [275*] existence by some *future acts of the corporators, the franchises remain in abeyance, until such acts are done; and when the corporation is brought into life, the franchises instantaneously attach to it. There is no difference between the case of a grant of land or franchises to an existing corporation, and a grant to a corporation brought into life for the very purpose of receiving the grant. As soon as it is in *esse*, and the franchise and property become vested and executed in it, it is as much an executed contract as if its prior existence had been established for a century." (*Dartmouth College v. Woodward*, 4 Wheat., 518.)

There was no uncertainty in this appropriation. The township was designated, and the purpose stated, for which it was reserved. And there can be no doubt, from the authorities, that the right vested, so soon as a capacity was given to the corporation to receive it; prior to this it remained in the federal government. This is the settled doctrine on that subject.

If, on general principles, the title to this township cannot be considered as vested in the State of Indiana, it is contended it so vested by the provision in the sixth section of the Act of the 19th of April, 1816, which admitted the State into the Union. The provision is, "That one entire township, which shall be designated by the President of the United States, in addition to the one heretofore reserved for that purpose, shall be reserved for the use of a seminary of learning, and vested in the Legislature of the said State, to be appropriated solely to the use of such seminary by the said Legislature."

The words of the Act seem to be so clear as to admit of but one construction. A township, in addition to the one formerly reserved, is appropriated and vested in the Legislature. The former township is only referred to, to show that the one then appropriated was in addition to it. The Gibson township had before been appropriated. A part of it had been sold, and a part was held under leases. Whether we regard the words used, or their grammatical arrangement, the intention of Congress seems to be clearly expressed.

In the Act of the 18th of April, 1818, for the admission into the Union of the State of Illinois, a different phraseology is used in giving an additional township to the State. "That thirty-six sections, or one entire township, shall be designated by the President of the United States, together with the one heretofore reserved for that purpose, shall be reserved for the use of a seminary of learning, and vested in the Legislature of the State," &c. Here both townships are as clearly vested in the State, as that one only is vested under the Act admitting Indiana into the Union.

By this latter Act, the Gibson Township Seminary was recognized, and its present government sanctioned.

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*It is argued that this is a public corporation, and that, consequently, the Legislature of Indiana have a right to modify its charter, or abolish it, at its discretion. If the position assumed be sustainable, the consequence stated will not be controverted.

In the case of *Dartmouth College v. Woodward*, 4 Wheat., 629, Chief Justice Marshall says: "If the Act of Incorporation be a grant of political power, if it create a civil institution to be employed in the administration of the government, or if the funds of the college be public property, or if the State of New Hampshire, as a government, be alone interested in its transactions, the subject is one in which the Legislature of the State may act, according to its own judgment, unrestrained by any limitation of its power, imposed by the Constitution of the United States." Again, he says (634): "So far as respects its funds, it is a private corporation. Do its objects stamp on it a different character? Are the trustees and professors public officers, invested with any portion of political power, partaking in any degree in the administration of civil government, and performing duties which flow from the sovereign authority?" He continues: "The character of civil institutions does not grow out of their incorporation, but out of the manner in which they are formed, and the objects for which they are created." "The right to change them is not founded on their being incorporated, but on their being the instruments of government, created for its purposes." "The trustees are not public officers, nor is it a civil institution, participating in the administration of the government; but a charity school, or a seminary of education, incorporated for the preservation of its property, and the perpetual application of that property to the objects of its creation."

In the same case, Mr. Justice Story says: "Public corporations are generally esteemed such as exist for public political purposes only, such as towns, cities, parishes and counties; and in many respects, they are so, although they involve some private interests; but strictly speaking, public corporations are such only as are founded by the government for public purposes, where the whole interests belong to the government."

The seminary township in question, was not a donation from the State, but from the United States. It was reserved and designated out of the public lands, before they were offered for sale, and consequently so munificent an endowment for a literary institution must have increased the value of the public lands in that part of the State, and made them more desirable. And this consideration, no doubt, induced Congress to have designated, for seminary purposes, a township of land in each land district. Every purchaser of the public lands, in each district, "acquired an interest [277 in the reservation. And if these reservations had been judiciously managed, they would have constituted a fund, at this time, of at least two hundred thousand dollars each. This would have afforded the means of educating, in each land district, as many students, free of charge, as would ordinarily desire classical instruction. Such an advantage was too obvious to be overlooked, or not to be appreciated, by

the purchasers of the public lands in these districts.

The legislative power of the Territory and State, in advancing the public interests, was bound to afford all the facilities necessary to carry out and secure the beign objects of Congress, in making these township reservations. This was done by a wise and liberal act, in regard to the Gibson township. The corporations were vested with all the necessary powers to carry out the trust. And for the purposes of the trust, the title became vested in them, as soon as they acquired a capacity to receive it. This corporation had no political powers, and could in no legal sense be considered as officers of the State. They were not appointed by the State. Their perpetuity depended upon the exercise of their own functions; and they were no more responsible for the performance of their duties, than other corporations established by the State to execute private trusts.

So far as regards the trust confided to the complainants, there is nothing which, by construction, can make it a public corporation. The donation in no sense proceeded from the State. It was made by the federal government, and is no more subject to state power, than if it had been given by an individual for the same purpose. An Act of Incorporation being necessary, would not be withheld to give effect to a private donation of land, for the purpose of establishing a literary institution. Its benefits would be enjoyed by the public generally, but this would not make it a public corporation.

The complainants, by accepting and exercising their corporate powers, acquired certain rights, and made certain contracts, which could not be impaired by the Legislature. They constituted an eleemosynary corporation, in which the State has no property, and can exercise no power to defeat the trust. But this has been done by the Legislature, not only by appointing an agent to collect the funds due to the corporation, and paying them into the State Treasury; but, by selling the lands, they have diverted the fund, for the preservation and management of which, the corporation was instituted. This was an extraordinary proceeding, and was wholly without authority. The result is, that the complainants are stripped of their powers, and the University which they established, with the sanction of the Legislature, is left without revenue.

278*] *The dismissal of the bill, in this case, by the Supreme Court of the State of Indiana, was erroneous, and it is hereby reversed; and the cause is transmitted to that court for further proceedings.

Mr. Chief Justice Taney, Messrs. Justices Catron and Daniel dissented.

Mr. Chief Justice Taney:

I dissent from the opinion of the court.

I do not propose to enter fully into the argument of the case, because I concur entirely in the opinion of the Supreme Court of the State, which is set out at large in the record; and shall therefore briefly state the principles upon which my own opinion is founded.

1. It must be admitted that the State Court had no jurisdiction in this case beyond that which

the law of the State authorized it to exercise. And in revising their judgment, our jurisdiction is equally limited. The law, under which this suit was brought, authorized the Board of Trustees of the Vincennes University, to file a bill in chancery against the State, in the nature of an action of disseisin, for the purpose of trying the right of the trustees to the lands in question.

The trustees, therefore, are not entitled to a decree in their favor, unless they can show a legal title to the lands, such as would enable them to maintain the common law writ of entry, *sur disseisin*; that is, they must be seized of the lands in fee simple.

2. Indiana was created a separate Territory, and its powers and rights, as a territorial government, defined by the Act of 1800. This Act certainly gave no power over the public lands, for it has no reference to that subject. It merely establishes the territorial government.

The Act of 1804, under which the lands in question were reserved for the use of a seminary of learning; has no reference to the powers or duties of the territorial government, in relation to the lands reserved, or to anything else. It merely provides for the sale of the public lands in the Territory, reserving from sale this and other portions of them. But it does not transfer them to the territorial government which was then in existence. It retains them. I do not see how these laws, taken separately or together, can be construed to give the territorial government a right to dispose of them in any way, or divest the title which the United States held, and which this law directed to be retained.

3. This reservation from sale, as well as the reservation of the *school sections in [*279 the several townships, undoubtedly dedicated them to the uses for which they were reserved; and they cannot be appropriated by the State to any other purpose. But the fund dedicated belonged to the United States, and they alone had the power to transfer it, and to designate the body by whom the trust, created by the Act of Congress, should be administered. The law of the State complained of, does not attempt to appropriate the land to a different purpose from that to which it was dedicated. It has been sold and conveyed by the State, and the proceeds appropriated to the support of a seminary of learning in the State. And the only question before us is, whether the trustees have the legal title to these lands, and can recover them back from the persons to whom they were sold by the State, for the purpose of appropriating them to a different seminary.

4. The Act of the territorial government of 1807, incorporating this board of trustees, does not grant nor profess to grant the lands to the board. And if it had done so, the Act would have been void and inoperative, because the Territorial Legislature had no right to grant lands which belonged to the United States; nor to exercise any power over them, without the authority of Congress.

5. The Act of Congress of 1816, by which Indiana was admitted into the Union as a State, grants these lands to the State for the purposes for which they were reserved. The State is made the trustee.

My brethren have put a different construction on this clause of the law of 1816, and regard this grant as extending only to the additional township mentioned in the law. But with every respect for their opinion, it appears plain to me that this township, as well as the additional one, are both granted to the State by Congress. And I am confirmed in this opinion, because, with all the research I have been able to make, I have not found a single instance in which lands reserved in a territory for the purposes of education, were not afterwards granted to the State, as the trustee to administer the trust the school sections in the several townships, as well as others.

6. Upon these grounds, I think the plaintiffs in error have not a legal title to this land, and had no right to sell or dispose of it, nor in any way to control the proceeds; and that under the grant from Congress, in the Act of 1816, the title and the right to administer the trust was vested in the State of Indiana.

7. The error in the opinion appears to me to have arisen from regarding the reservation from sale for the purposes of education, as divesting the legal title of the United States, and putting it in abeyance, until some new body ^{280*} was brought into existence. *capable of taking the title as grantee, and administering the trust.

It is not necessary to this opinion to discuss the doctrine of abeyance, upon which so much learning and talent has been displayed by Mr. Fearn, in his treatise on Contingent Remainders. It is sufficient to state under what circumstances the title, in the eye of the law, is said to be in abeyance. And Comyns, in his Digest, tells us, that "when the fee or freehold of the land is not vested in anyone, but stands solely in consideration of law, it is said to be in abeyance, or *in nubibus*."

I cannot regard the title to lands reserved from sale by Congress, for the purposes of education, as standing in this condition. A reservation is not a grant. It does not pass the title out of the United States, but leaves it where it was before. The uniform practice of the government, and of judicial decision also, appears to have proceeded on the ground that the title remained in the United States, until it was afterwards transferred by the authority of Congress. It is not usual, it is true, to issue patents for these lands, but they have been granted by Acts of Congress, which the courts have always recognized as valid conveyances. And I am not aware of any case in which the validity of these conveyances of reserved lands has been doubted by the court; or in which it has been suggested that the title was out of the United States, and in abeyance from the time of the reservation. If such be the result of a reservation, the subsequent conveyance of Congress is of no value. And who is to protect the reserved lands from trespasses and depredations, while the title is in abeyance?

In the case of *Guines et al. v. Nicholson et al.*, reported in 9 Howard, 356, the title to a section reserved for schools, was the matter in dispute. It did not, it is true, involve the question now before us. But it appears, in that case, that the section was one of those reserved for schools in the different townships in the Territory of Mississippi, by an Act of Congress

passed in 1803; and that afterwards, as late as the year 1815, another Act was passed, authorizing the County Court of each county in the territory to lease the sections so reserved, in order to improve them, and to apply the rents to purposes of education within the township; and also to proceed and recover damages against any persons found trespassing upon them. And this law contains an express provision that every lease, in virtue of this Act, shall cease to have any force or effect after the first day of January next, succeeding the establishment of a State government. The trustees of the schools, who were parties to this suit, were appointed under a law of the State, and claimed under that appointment. The point in dispute, was *whether the opposing party had not a right prior and superior to the State, by virtue of an Indian reservation, made in the treaty by which the territory had been ceded to the United States. And in deciding the question, this court treated the Acts of Congress granting the land to the State, and also the law of the State appointing the Commissioners, as valid and constitutional; and it is not suggested, in the opinion, that the inhabitants of the township had a legal title to the school section, or any right to appoint Commissioners to control and administer the fund, unless authorized to do so by a law of the State. In the case before us, therefore, if the Act of 1816 does not vest the title in the State, it still remains in the United States, and not in the trustees.

8. If, however, these lands were conveyed to the trustees, by virtue of the Act of the Territorial Legislature of 1806, yet they were but agents of the State, without any private individual interests, and have no ground therefore for this proceeding in equity against the State. The whole fund was created by the public for public purposes. And in the case of *The Dartmouth College*, 4 Wheat., 629, the court said: "If the Act of Incorporation be a grant of political power, if it create a civil institution to be employed in the administration of the government, or if the funds of the college be public property, or if the State of New Hampshire, as a government, be alone interested in its transactions, the subject is one in which the Legislature of the State may act according to its own judgment, unrestrained by any limitation of its power imposed by the Constitution of the United States." Here the funds are contributed entirely by the public for a public purpose, and these appellants have no private individual interest, and allege none in their bill in behalf of themselves or others, which entitles them to maintain a suit against the State. They are public agents for a public purpose, and nothing more, and so describe themselves. The laws of the State, which directed the appropriation of the fund to the uses for which it was dedicated, are therefore constitutional and valid, under the decision above referred to, and in my opinion the decree of the Supreme Court of the State ought to be affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Indiana, and was argued by

counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Supreme Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and 282*] the same *is hereby remanded to the said Supreme Court, in order that such further proceedings may be had therein, in conformity to the opinion of this court, as to law and justice may appertain.

Rev'g—2 Ind., 293.
Cited—3 Wall., 682; 13 Wall., 214; 5 Otto, 313.

WILLIAM CHRISTY, Plaintiff in Error,

v.

WILLIAM T. SCOTT.

WILLIAM CHRISTY

v.

JAMES D. FINDLEY.

WILLIAM CHRISTY,

v.

WILLIAM YOUNG.

WILLIAM CHRISTY v. HIRAM HENLY.

Ejectment—prior peaceable possession is sufficient to oust a mere intruder—Pleading—plea to supposed evidence is bad—plea bad for indefiniteness.

In Texas, the technical forms of pleading, fixed by the common law, are dispensed with, but the principles which regulate the merits of a trial by ejectment and the substance of a plea of title to such an action, are preserved.

Therefore, where the plaintiff filed a petition alleging that he was seised in his demesne as of fee of land from which the defendant had ejected him, and the defendant pleaded, that if the plaintiff had any paper title, it was under a certain grant which was not valid, this plea was bad.

So also was a plea denying the right of the plaintiff to receive his title, because he was not then a citizen of Texas. These pleas would have been appropriate objections to the plaintiff's title when produced upon the trial.

So also where, under a plea of the Statute of Limitations, the defendant claimed certain lands by metes and bounds, and disclaimed all not included within them. There is nothing to show that the land so included was part of the land claimed by the plaintiff.

So also where the plea was in substance that the plaintiff had no good title against Texas, no title in the defendant being shown. For the action may have been maintainable, although the true title was not in the plaintiff.

THESE four cases were brought up by writ of error from the District Court of the United States for the District of Texas.

They all involved the same principles, and were covered by the decision in *Scott's* case. It is necessary, therefore, to set out the pleadings in that case.

Christy filed his petition, alleging that he was seised in his demesne as of fee, in a certain tract or parcel of land (which he described by metes and bounds), from which Scott ejected him; and praying judgment for damages, and for the recovery of the lands.

Scott filed the following answer: And now comes the said defendant, and answering the petition of the plaintiff, says, that he denies all and singular the allegations in the said petition, and prays that the plaintiff be held to strict proof of the same.

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2. And as to the trespasses and ejectments, or either or any of them, complained of by [the] plaintiff in his petition, the defendant says he is not guilty, and puts himself upon the country, &c.

3. And the defendant further says, that as to the pretended grant or title of the plaintiff to the land described in his petition (if any paper title he has) the same bears date, to wit: the twentieth day of September, A. D. 1835, and the land described *in said pretended [*283] grant or title, and in said petition, is, and was at the date of said grant, situated in the twenty frontier leagues bordering on the United [States] line; and said pretended grant was made without the approbation or assent of the executive of the national government of Mexico.

4. And the said defendant further answers, and says, that if any such grant or title was made, as by said plaintiff is pretended, the same was made (as by said plaintiff's pretended grant appears), on, to wit: the twentieth day of September, A. D. 1835, and was not made by any public officer, commissioner or authority, then, to wit: at the date of said pretended grant or title, existing in the State of Coahuila and Texas, competent to make the same.

5. And the said defendant further says, that the plaintiff claims the land sued for under and through a pretended grant from the government of the State of Coahuila and Texas, made to one Miguel Arceneiga, as a Mexican and purchaser, and purporting to have been procured for the said Arceneiga by one William G. Logan, as his agent. And the defendant says, that the said pretended grant or title of the plaintiff to the land sued for is not valid in law, because the same was procured from the government of the State of Coahuila and Texas by fraud, in this, that the said Miguel Arceneiga and the said William G. Logan combined and confederated together for the purpose of evading the law; then in force, allowing the sale of lands to Mexicans, and to them only; and falsely and fraudulently represented to the said government that the application by said Arceneiga for the said grant of land was really and bona fide made for him by the said Logan, and that the said Arceneiga was to be the real purchaser of said land, and to hold and enjoy the same as a Mexican citizen; while, in truth, the said Arceneiga fraudulently permitted the said Logan to use his name, and in his name procure the said grant solely for the use and benefit of him, the said Logan, who was not, at the time of procuring said grant, a Mexican citizen; and who, by the false and fraudulent practices aforesaid, procured the said grant, and appropriated the land granted to his (the said Logan's) own use and benefit.

6. And the said defendant says, that the plaintiff claims the premises described in his petition by a pretended grant, purporting to have been made by authority of the government of the State of Coahuila and Texas to Miguel Arceneiga, bearing date, to wit: the twentieth day of September, A. D. 1835; and that the said pretended grant was made upon the conditions that the said Arceneiga, or the person or persons to whom he might alienate the land in said grant described, should cultivate the same within six years from the acquisition thereof by said *pretended title, [*284]

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and pay for said land the price established by law. And the defendant says, that the said Arceniga, and those claiming said land under him, wholly failed to comply with said conditions.

7. And the said defendant says, that the said plaintiff claims the land described in his petition under and through a pretended grant purporting to have been made to one Miguel Arceniga by authority of the government of the State of Coahuila and Texas, bearing date, to wit: the twentieth day of September, A. D. 1835, and under and through a pretended claim of transfers from said Arceniga to plaintiff; and that within six years from the date of said pretended grant, and before the annexation of Texas to the United States, the said pretended transfers were made to said plaintiff; and that the plaintiff was not, at the date of said pretended grant to him, and previous thereto had never been, a resident citizen of Texas or Mexico, but was then, and thence hitherto continued to be, a resident and citizen of the United States of America, owing and paying allegiance to the government thereof.

8. And the said defendant further answering says, that he is the owner of the following tracts or parcels of land, to wit: (setting out a tract of land by metes and bounds, but without saying whether or not it was the land claimed by the plaintiff) and the defendant says that his possession of the said land is by virtue of the authority and title of the said John Graves, and as claimant under said Graves; and the said defendant says, that he and the said Graves, under whom he claims as to the said last-mentioned tract of land, and that he, in his own right and those under whom he claims, as to the several parcels of land above described, have had peaceable adverse possession of said several tracts of land, claiming the same by virtue of the certificates and files aforesaid, and the surveys aforesaid, with chains of legal transfers from the government down to this defendant, and to those under whom he claims, for more than three years next before the commencement of this suit; and the defendant disclaims ownership and possession of any portion of the land described in plaintiff's petition, not included in the metes and bounds of the several tracts and parcels above set forth.

9. Said defendant further says, that the land claimed by plaintiff in his petition is located within the territory designated as the twenty frontier leagues, bordering on the United States of the North, in the Act of the Congress of the Republic of Texas, approved January 9th, 1841, and entitled "An Act to quiet the land titles within the twenty frontier leagues bordering on the United States of the North," and is claimed by plaintiff by virtue of said location made prior to the seventeenth day of March, 285*] *A. D. 1836; and that said plaintiff, and those under whom he claims said land, did not commence an action to try the validity of said claim within twelve months from the passage of the Act aforesaid.

And the defendant suggests to the court that he has had adverse possession in good faith of the said several tracts or parcels of land, for more than one year next before the commencement of this suit; and that, during said possession, he has made permanent and valuable im-

provements in the same, consisting of, to wit: one thousand acres, cleared and fenced, and divers good dwelling houses, gin houses, barns, corn cribs, orchards, outhouses, &c., of great value, to wit: of the value of \$10,000.

The plaintiff then filed the following replications and demurrers:

2. And the plaintiff, by attorney, comes, and as to the plea by the defendant, secondly by him in his answer pleaded, whereof said defendant puts himself upon the country, he, said plaintiff, doth the like.

Demurrer [to 3d plea].

And the said plaintiff, by attorney, comes and says, *precludi non*, by reason of anything in the defendant's third plea, in his said answer pleaded; because he says the said plea, and the matters and things therein contained, are not sufficient in law to bar and preclude him from having and maintaining his action aforesaid, and this he is ready to verify; wherefore, he prays judgment, &c.

And for cause of demurrer, according to the form of the statute in such case made and provided, the said plaintiff sets down and shows the following, to wit:

1. The said plea in bar of plaintiff's action attempts to set up the want of the approbation or assent of the executive of the national government of Mexico, to the issuance of a grant within the twenty border leagues, when the national colonization law, under which is sought the benefit of this bar, contains no prohibition to the issuance of said grant; but if, at the time of the issuance of said grant, there was any such prohibition, it only extended to making settlements within said border leagues.

2. The said plea in bar of plaintiff's action attempts to set up the issuance of a grant under which the plaintiff claims, dated 20th September, 1835, without the approbation of the supreme executive of Mexico, within the border leagues; but does not show the nature or kind of said grant, so as to enable the court to judge of its validity.

*3. And the said plea is in other respects defective, informal and insufficient, &c.

Replication [to 4th plea].

4. And for replication to the fourth plea by the said defendant in his said answer pleaded, the said plaintiff says, *precludi non*, because he says the grant under which the plaintiff claims was issued by an authority, at the time of the issuance of the same, in the State of Coahuila and Texas, existing and competent to issue the same, and this, he prays, may be inquired of by the country.

Replication [to 5th plea].

5. And for replication to the fifth plea, by the said defendant in his said answer pleaded, the said plaintiff says, *precludi non*, because he says that the said grant, under which the said plaintiff claims, was not obtained or procured to be issued by fraudulent misrepresentations, as in the said plea alleged; and this, he prays, may be inquired of by the country.

Demurrer [to 6th plea].

6. And as to the sixth plea, by the said defendant in his said answer pleaded, the said plaintiff says, *precludi non*, because he says the said plea, and the matters and things therein

contained, are not sufficient in law to bar and preclude said plaintiff from having and maintaining his action aforesaid, and this he is ready to verify; wherefore he prays judgment, &c.

And for cause of demurrer, according to the form of the statute in such case made and provided, the said plaintiff sets down and shows the following, to wit:

1. The conditions set forth in the said plea, as those upon which said grant was issued, as is manifest by the said plea, were conditions subsequent, of which the defendant cannot take advantage upon a failure in their performance.

2. A failure to perform the conditions in said plea set out, might have been cause of the forfeiture of the estate passed by said grant in said plea, set out on a proceeding in behalf of the State; but this is no reason why the defendant, before forfeiture declared, should, against the plaintiff, retain possession of the estate in said grant mentioned.

3. And the said plea is, in other respects, defective, informal and insufficient, &c.

Demurrer [to 7th plea].

7. And as to the seventh plea, by the said defendant in his said answer pleaded, the said plaintiff says, *precludi non*, because he says the said plea, and the matters and things therein **287*** contained, are not sufficient in law to bar and preclude him from having and maintaining his action aforesaid, and this he is ready to verify; wherefore he prays judgment, &c.

And for cause of demurrer, according to the form of the statute in such case made and provided, the said plaintiff sets down and shows the following, to wit:

1. The said plea in bar avers, that the estate in the premises, in the said petition mentioned, was transferred to said plaintiff while and during the time he was a citizen of the United States of America, and owing allegiance to the same, and an alien to the Republic of Texas; yet shows no forfeiture declared, on office found, so as to divest the estate vested by said transfer.

2. And the said plea is in other respects defective, informal and insufficient, &c.

Replication [to 8th plea].

Withdrawn, and the following demurrer substituted:

And now, at this term, comes the plaintiff, by his attorney, and by leave of the court first had and obtained, withdraws his replication to the eighth plea, by the defendant in this behalf pleaded, and says, *precludi non*, by reason of anything in the said defendant's eighth plea in this behalf pleaded, because he says the said plea, and the matters and things therein contained, are not sufficient in law to bar and preclude him from having and maintaining his action aforesaid, and this he is ready to verify; wherefore he prays judgment, &c.

And for causes of demurrer, according to the form of the statute in such case made and provided, the said plaintiff sets down and shows the following, to wit:

1. The said plea avers, that the said defendant, and a certain John Graves, under whom he, the said defendant, claims, as to a part of the land in said plea mentioned, had and still held peaceable possession of the same, for more than three years next before the commencement of

this suit under color of title; when, to produce a bar within the statute in such case made and provided, a possession, under the circumstances, and within the time prescribed by said statutes, by said defendant alone, should have been set up.

2. The said defendant, by said plea, avers that, as to a part of the lands in said plea specified, the title is yet outstanding in a certain John Graves; yet the said defendant, by his said plea as to said land, attempts to set up in bar, by reason of possession of the same for three years, under color of title, next before the commencement of plaintiff's action.

3. The said defendant, by his said plea, avers, that a portion of the land in said plea specified, and of which he, said defendant, ***288** claims to be the owner, by virtue of his, said defendant's own head right certificate, has not been surveyed, as by law required, to vest title in the same in said defendant; yet said defendant, as to the same, by his said plea, attempts to set up in bar an adverse possession, for three years next before commencement of plaintiff's action, under color of title.

4. The said defendant, by his said plea, does not aver, that he, said defendant, was ever an actual settler upon the said land, of which, by his said plea, he claims to be in adverse possession.

5. Though the said defendant, by his said plea, attempts to set up in bar an adverse possession, under color of title, for three years next before commencement of plaintiff's action herein, yet he does not show that said color of title was duly proven and recorded.

6. The said defendant, by his said plea, attempts to set up in bar of plaintiff's action adverse possession, under color of title, for three years next before the commencement of said plaintiff's said action, when, by the purview of the statutes in such case made and provided, there can be no such bar; but if any, the bar must be by such adverse possession, under such color of title, for three years next after cause of action accrued, and before commencement of action.

7. The said plea, though in bar, does not make any case by which the plaintiff is barred of his action, by reason of any possession adverse, within the terms of the statute in such case made and provided.

8. And the said plea is, in other respects, defective, informal and insufficient, &c.

Demurrer [to 9th plea].

9. And as to the ninth plea, by the said defendant in his said answer pleaded, the said plaintiff says, *precludi non*, because he says the said plea, and the matters and things therein contained, are not sufficient in law to bar and preclude him, said plaintiff, from having and maintaining his action aforesaid, and this he is ready to verify; wherefore he prays judgment, &c.

And for cause of demurrer, according to the form of the statute in such case made and provided, the said plaintiff sets out and shows the following, to wit:

1. The Act of Congress, referred to in said plea, at the time of the approval thereof, since and now, was not, and is not, the law of the land.

2. The said Act of Congress was made and intended to impair the obligation of contracts.

3. And the said plea is, in other respects, defective, informal and insufficient, &c.

289*] *In this state of the pleadings, the cause was called for trial, when the following judgment was rendered:

This day came the parties aforesaid, by their attorneys, and the questions of law arising upon the demurrers of the plaintiff to the third, sixth, seventh, eighth and ninth pleas, by the defendant in his answer pleaded, having been argued and submitted, because it seems to the court that the law is for the defendant; it is therefore considered by the court, that the said demurrers be overruled and the plaintiff stating that he intended to abide by his demurrers, it is further considered by the court, that the defendant go hence without day, and that he recover of the plaintiff his costs, by him about his defense in this behalf expended, to be taxed by the clerk, &c.

The counsel for the plaintiff then filed the following argument of errors:

1. The defendant's third plea, by him in his answer pleaded, attempts to set up, in bar of plaintiff's action, the issuance of the grant under which the plaintiff claims, without the approbation of the executive of the Republic of Mexico; when, by the law of the State of Coahuila and Texas, under which said grant was issued, there was no prohibition to the issuance of said grant without such approbation, and the said fact pleaded is no bar; yet the said court overruled the plaintiff's demurrer to said plea, and gave judgment for defendant, when said demurrer, according to the rules of law, should have been sustained.

2. The said defendant, by his sixth plea in his said answer pleaded, attempts to set up, in bar of the plaintiff's action aforesaid, the non-performance of conditions subsequent, without showing re-entry, or other mode of enforcing a forfeiture of the estate granted; yet the court overruled the plaintiff's demurrer to said plea, when, according to the rules of law, the same should have been sustained.

3. The said defendant, by his seventh plea in his answer pleaded, attempts to set up, in bar of plaintiff's action, the fact, that the lands claimed and sued for by the plaintiff, in his petition described, were sold and transferred to the said plaintiff, while and during the time he was a citizen of the United States of America, owing allegiance to the same, and an alien to the Republic of Texas, without showing any office found, or forfeiture declared in any manner whatever; yet the court overruled the plaintiff's demurrer to said plea, when, according to the rules of law, the same should have been sustained.

4. The said defendant, by his eighth plea in his said answer pleaded, insists upon a bar, by and under the fifteenth section of an Act of Congress of the Republic of Texas, entitled "An Act of Limitations," approved February 5th, 290*] 1841; but, by said *plea, does not show or allege that he was a settler on the land in question, having had and held continuous adverse possession of the same, under title duly proven and recorded, or under color of title, for three years next after cause of action accrued, and before action brought, as by the HOWARD 14.

rules of law he should have done; yet the said court overruled the plaintiff's demurrer to said plea, when, according to the rules of law, it should have been sustained:

5. The said defendant, by his ninth plea in his answer pleaded, attempts to set up, in bar of plaintiff's action, the failure to commence action within twelve months after the passage of an Act by the Congress of the Republic of Texas, entitled "An Act to quiet land titles within the twenty frontier leagues bordering on the United States of the north," to try the validity of the grant under which plaintiff claims, when it is apparent that said grant, under which plaintiff claims, was a perfect, and not an imperfect or inchoate title, and as to which the government of the Republic of Texas had no legitimate power or authority to require or prescribe the commencement of any suit in the form or manner the same was prescribed, to try the validity of the title vested by said grant, or create a bar in consequence of a failure to commence said suit; yet the demurrer to said plea was overruled by said court, when the same, according to the rules of law, should have been sustained.

The plaintiff then sued out a writ of error, and brought the case up to this court.

It was argued by *Mr. Bibb* and *Mr. Crittenden* (Attorney-General), with whom was *Mr. Hughes*, for the plaintiff in error, and *Mr. Hill*, with whom was *Mr. Henderson*, for the defendant in error.

The argument, of course, turned entirely upon the validity or invalidity of the plea; but the discussion was so much involved with the laws and facts in the case, that a report of it is postponed until the record shall be brought up again in the shape suggested by the court.

Mr. Justice Curtis delivered the opinion of the court:

This is a writ of error to the District Court of the United States for the District of Texas.

The plaintiff in error filed a petition, in which he avers, that on the 1st day of June, 1839, he was seised in his demesne as fee of three tracts of land, described in the petition by metes and bounds, and that the defendant, with force of arms, ejected him therefrom, and has thenceforward kept him out of possession thereof; and he prays judgment for damages and costs, and for the lands described. The defendant filed what is styled an *answer, containing [*291] nine distinct articles, or pleas, each of which seems to have been intended, and has been treated, as a substantive defense. The plaintiff demurred to the third, sixth, seventh, eighth and ninth of these pleas. There was no joinder in demurrer by the defendant, but the District Court treated the demurrers as raising issues in law, and gave judgment thereon for the defendant. The plaintiff has brought the record here by a writ of error.

Upon this record, questions of great difficulty, and understood to affect the titles to large quantities of land, have been elaborately argued at the bar. These questions involve and depend upon the interpretation of the Colonization Laws of the Republic of Mexico, and their practical administration; the relative rights and powers of the central government, and of the State of Coahuila and Texas, in ref-

erence to the public domain; the modes of declaring and vindicating those rights, and exercising those powers under the constitution of the Mexican Republic; the effect of the separation of the State of Coahuila and Texas from Mexico, by the revolution of 1836, upon titles made by the State authorities before the revolution, and alleged to be defective for want of the sanction of the central government; as well as several important laws of the Republic of Texas, framed for the protection of the public domain, and for the repose of titles in that country.

It is impossible that the court should approach an adjudication of a case, involving elements so new and difficult, without much anxiety, lest they should have failed entirely to comprehend and fitly to apply them. And it is obvious, that before it is possible to do so, all the facts constituting the title of each party, and essential to a complete view of the case, and especially the documentary evidences of those titles, should be placed before us, in a determinate form.

This record is far from being sufficient in these substantial, and, indeed, necessary particulars. The petition avers a seisin in fee, on a particular day, and an ouster by the defendant. The defendant shows no title in himself to the land demanded, but asserts that the plaintiff claims title by a pretended grant, made on the 20th day of September, 1835; that the land was within the twenty frontier leagues bordering on the United States; that the approbation of the executive of the national government of Mexico was not given; and in other pleas, avers other facts, to show that if any such grant had been made it would not have been valid. But no grant, under which either party claims, appears on the record, nor is the court informed, through an exhibition of any title papers, by what authority, or through what instrument, or for what consideration, or upon what conditions *the title to these lands, originally passed from the State; or whether more than one title thereto has, in fact, been made by the State; nor how or when, if at all, any title came from the State to either of the parties.

Having thus stated what the record fails to show, we proceed to declare our judgment on each of the issues in law raised by the demurrers.

The first plea which is demurred to, is in the following words: "3. And the defendant further says, that as to the pretended grant or title of the plaintiff, to the land described in his petition (if any paper title he has), the same bears date, to wit: the twentieth day of September, A. D., 1835, and the land described in said pretended grant or title, and in said petition, is, and was, at the date of said grant, situated in the twenty frontier leagues bordering on the United States line, and said patented grant was made without the approbation or assent of the executive of the national government of Mexico.

According to the settled principles of the common law, this is not a defense to the action. The plaintiff says he was seised in fee, and the defendant ejected him from the possession. The defendant, not denying this, answers, that if the plaintiff had any paper title, it was under a certain grant which was not valid. He shows

no title whatever in himself. But a mere intruder cannot enter on a person actually seised, and eject him, and then question his title, or set up an outstanding title in another. The maxim that the plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's, is applicable to all actions for the recovery of property. But if the plaintiff had actual prior possession of the land, this is strong enough to enable him to recover it from a mere trespasser, who entered without any title. He may do so by a writ of entry, where that remedy is still practiced (*Jackson v. Boston & Worcester Railroad*, 1 Cush., 575), or by an ejectment (*Allen v. Rivington*, 2 Saund., 111; *Doe v. Read*, 8 East, 356; *Doe v. Dyball*, 1 Moody & M., 346; *Jackson v. Hazen*, 2 Johns., 488; *Whitney v. Wright*, 15 Wend., 171), or he may maintain trespass (*Cutter v. Cooper*, 4 Taunt., 548; *Graham v. Peat*, 1 East, 246).

Nor is there anything in the form of a remedy, in Texas, which renders these principles inapplicable to this case.

By the Act of February 5th, 1840 (Hartley's Digest, 909), it is proved that the method of trying titles to lands shall be by action of trespass, and that the action shall be tried on its merits, conformably to the principles of trial by ejectment; and where the defendant sets up title to the land, he is required to plead the same. We understand that the technical forms of *pleading, fixed by the common law, [*293] are dispensed with; but the principles which regulate the merits of a trial by ejectment, and the substance of a plea of title to such an action, are preserved. Tested by these principles, this plea is bad.

Without setting up any title in the defendant, it pleads certain evidence or source of title, which, it avers, the plaintiff relies on, and then states facts, to show that such title is invalid. This is not admissible.

The office of a plea is, to state on the record the answer of the defendant to the allegations of the plaintiff, but not to the evidence by which the defendant conjectures the plaintiff will endeavor to support those allegations. We cannot conceive that such a mode of pleading could be admissible under any system. At the common law, if the allegation that the plaintiff's paper title is under a grant mentioned in the plea, had been traversed, it would have led to an issue which, if found for the plaintiff, would determine nothing, and therefore the plaintiff cannot be required to answer such a plea. And where pleadings are so conducted as to terminate in issues, as in Texas, such an answer neither confesses and avoids, nor denies the seisin, or trespass, alleged in the declaration. (*United States v. Girault*, 11 How., 29.)

There are cases in which such allegations, showing the source or nature of the plaintiff's title, are a necessary part of a defense. Whenever the defendant must plead specially any matter which is a good defense to one title, and not good to others, and the declaration does not show on what particular title the plaintiff relies, the defendant must, by proper averments, set out the plaintiff's title and the answer to it; these averments then become material and traversable as part of the defense, and if found for the plaintiff, the defense fails. An instance of this is the defense of a Statute of

Limitations, barring only particular titles. In such a plea, it would be necessary to show, if it did not appear in the declaration, that the plaintiff had only such a title. But this rule has no application to the defense under consideration. If the plaintiff really relies on such a title as is alleged, whenever he shows it in support of his petition, the defendant will have opportunity to object to it, and to give in evidence any collateral facts bearing upon it. He has no occasion, nor is it regular, to plead specially, for his general denial of the plaintiff's title compels the plaintiff to produce his title, and thus opens to the defendant all legal objection to it. Moreover, this article in the answer does not admit or deny that the plaintiff had any grant, or any paper title whatever, but says, if he had any, it was of a certain description. If it was intended to make the case turn on the validity of a particular grant, its [294*] existence ought to be admitted; for why should the court be called upon to determine the sufficiency in law of such a grant, when it does not appear it exists?

These objections are equally applicable to the sixth plea, which is therefore also insufficient.

The next plea is as follows:

"7. And the said defendant says, that the said plaintiff claims the land described in his petition under and through a pretended grant purporting to have been made to one Miguel Arceneiga, by authority of the government of the State of Coahuila and Texas, bearing date, to wit: the twentieth day of September, A. D. 1835, and under and through a pretended chain of transfers from said Arceneiga to plaintiff, and that within six years from the date of said pretended grant, and before the annexation of Texas to the United States, the said pretended transfers were made to said plaintiff; and that this plaintiff was not, at the date of said pretended grant to him, and previous thereto, had never been a resident citizen of Texas or Mexico, but was then, and thence hitherto continued to be, a resident and citizen of the United States of America, owing and paying allegiance to the government thereof."

This plea also, is subject to the same objections as the others so far as it attacks the plaintiff's title; and if it was intended as a plea to the action of the alienage of the plaintiff, it is manifestly bad, for the plaintiff, being a citizen of the United States, is capable of maintaining an action to recover lands in the State of Texas, to which he has title.

The eighth plea sets up a Statute of Limitations. In order to bring himself within it, the defendant avers, "that he is the owner of the following tracts or parcels of land, to wit;" and he then gives the metes and bounds of sundry tracts of land, and makes certain other averments as to his possession, and concludes, "And the defendant disclaims ownership and possession of any portion of the land described in plaintiff's petition, not included in the metes and bounds of the several tracts and parcels above set forth."

The court cannot treat this plea as an answer to the declaration. It is not averred therein, nor is there anything on the record to show that the tracts of land described in it are parcel of the demanded premises. The defendant says

he disclaims ownership and possession of any portion of the land described in the petition, and not included in the bounds he sets out. For aught we can know, this disclaimer may cover the whole of the land described in the petition. And as it does not appear, by any direct traversable averment, that the disclaimer does not apply to all the lands demanded, or that the defense applies to *any, or if any, to what [*295 part of them, the court cannot know for what to give judgment, or whether it should be for the one party or the other.

The ninth plea is as follows:

"9. Said defendant further says, that the land claimed by plaintiff in this petition, is located in the territory designated as the twenty frontier leagues, bordering on the United States of the North, in the Act of Congress of the Republic of Texas, approved January 9th, 1841, and entitled "An Act to quiet the land titles within the twenty frontier leagues bordering on the United States of the North," and is claimed by plaintiff by virtue of said location, made prior to the seventeenth day of March, A. D. 1836; and that said plaintiff, and those under whom he claims said land, did not commence an action to try the validity of said claim within twelve months from the passage of the Act aforesaid."

Assuming what we do not decide, that this plea shows, that if the plaintiff claims under such a location as is mentioned, his title is not good as against the State of Texas, still it is not a defense, because no title in the defendant is shown. If the plaintiff, as his petition avers, was actually seised, and the defendant being a mere intruder, ejected him, it was an unlawful act, and the action is maintainable, notwithstanding the State of Texas may have the true title, or may have granted it to another.

For these reasons, we are of opinion the demurrer to each of these pleas must be sustained, the judgment of the District Court reversed, and the cause remanded; and as it will undoubtedly become necessary to amend the pleadings, we think it proper to suggest, that in a case involving questions so new and of so much magnitude and importance, it would be more satisfactory, and more conducive to a just decision, for the parties to exhibit fully their respective titles, and all collateral facts bearing upon them, and have them placed upon the record, either by bill of exceptions or a special verdict, to the end that the court may consider their title papers in connection with the extraneous facts, and not be required to decide upon partial or abstract views, which may occasion substantial injustice, not only to the one party or the other, but possibly to third persons having similar titles.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Texas, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this *court, that the judgment of the [*296 said District Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said District Court; for further proceedings to be had therein in conformity to the opinion

of this court, and as to law and justice shall appertain.

Cited—14 How., 296, 297; McAll., 19, 118, 165, 232; 5 Sawy., 479.

WILLIAM CHRISTY, *Plaintiff in Error*,
v.
JAMES D. FINDLEY.

MR. JUSTICE Curtis:

The amended pleas in this case, being five in number, are demurred to, and the demurrers are sustained for the reasons assigned in the opinion in the case of *Christy v. Scott*.

The judgment of the District Court is reversed, and the case remanded for further proceedings.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Texas, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said District Court, for further proceedings to be had therein in conformity to the opinion of this court, and as to law and justice shall appertain.

WILLIAM CHRISTY, *Plaintiff in Error*,
v.
WILLIAM YOUNG.

MR. JUSTICE Curtis:

In this case, the sixth, eighth, ninth, and tenth pleas, are demurred to, and the demurrers are sustained for the reasons assigned in the opinion in the case of *Christy v. Scott*. The tenth plea in this case of the 'Ten Years' Limitation Law of Texas, is bad, for the same reasons as the plea of the 'Three Years' Statute pleaded in that case.

The judgment of the District Court is reversed, and the case remanded for further proceedings.

297*] *ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Texas, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said District Court, for further proceedings to be had therein in conformity to the opinion of this court, and as to law and justice shall appertain.

Cited—14 How., 297.

WILLIAM CHRISTY, *Plaintiff in Error*,
v.
HIRAM HENLEY.

MR. JUSTICE Curtis:

In this case, the fourth, sixth, seventh, 428

eighth, ninth and tenth pleas are demurred to, and the demurrers are sustained for the reasons assigned in the opinion in the cases of *Christy v. Scott*, and *Christy v. Young*.

The judgment of the District Court is reversed, and the case remanded for further proceedings.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Texas, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said District Court, for further proceedings to be had therein in conformity to the opinion of this court, and as to law and justice shall appertain.

STEPHEN W. DOSS AND STEWART NEWELL, *Appellants*,
v.

WILLIAM TYACK AND LINDLEY MURRAY.

Court of Equity may set aside its decree at same term in which rendered.

A court has a right to set aside its own judgment or decree, dismissing a bill in chancery, at the same term in which the judgment or decree was rendered, on discovering its own error in the law, or that the consent of the complainants to such dismissal was obtained by fraud.

*A verdict on an issue to try whether a [298 sale was fraudulent, finding the same to be fraudulent, will not be set aside on a certificate or affidavit of some of the jurors, afterwards made, as to what they meant.

A chancellor does not need a verdict to inform his conscience, when the answer denies fraud in the abstract, whilst it admits all the facts and circumstances necessary to constitute it, in the concrete.

THIS was an appeal from the District Court of the United States for the State of Texas. A statement of the facts is contained in the opinion of the court.

It was argued by Messrs. Allen and O. F. Johnson, with whom was Mr. Hale, for the appellant, and Mr. Sherwood for the appellee.

The points raised by the counsel for the appellant, were the following:

I. The complainants having utterly failed to make out their case, by proving the material allegations and charges contained in the original and amended bills of complaint, the defendants were entitled to a decree of dismissal.

II. The property of the copartnership confided to Newell, and especially the goods sold to Edgar, were not misapplied, but disposed

NOTE.—Impeachment of verdict by jurors; by affidavit of parties, or third persons; affidavits of jury to sustain verdict.

Affidavits or testimony of jurors will not be received to impeach their verdict, or to explain the grounds of their verdict. *Messenger v. Fourth Nat. B'k*, 6 Daly (N. Y.), 190; 48 How. Pr. 192; *Ladd v. Wilson*, 1 Cranch C. C. 305; *Cline v. Brig*, 1 Cr. 90; *Valse v. Delaval*, 1 Term R. 11; *Murdock v. Sumner*, 22 Pick., 156; *Rex v. Wooller*, 6 Maule & S.

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of in conformity with the intendment of the co-partnership agreement. By this it is manifest that the partnership was not intended as a pure mercantile establishment, but one for the transaction of a "commission, general and auction business." Part. Agree't. Art. 1, P. R. 2; of a business "new and experimental in its nature"—*Id.*, art. 9; a business connected with the operations of the "Galveston Company," which Newell, by more than two years' labor and great expense, had "paved the way for;" and which the fifth article of the said agreement refers to (there being nothing else in the case to which it could by possibility refer), in express terms, viz.: that, in consideration of "the expense and labor heretofore incurred by Stewart Newell, in paving the way for the contemplated business, he shall be entitled to one quarter of the net profits, before division."

III. The creditors, in their instructions, refer to "agreements and understandings" of Newell, with his partners and themselves; thereby, admitting themselves to be privy to the said partnership agreement; and that they gave credit to the copartners, in the business thereby contemplated. The case contains no proof of any other agreement or understanding, to which they could pretend to refer.

IV. The creditors obtained, by a species of moral coercion, which their position enabled them to use, the primary concurrence 299* of Tyack & Murray with themselves, in the appointment of William E. Warren as their mutual agent, and in their instructions, which Tyack approved, prescribing the management to be used by Warren, in his interviews with Newell, and in conducting the business confided to him, after his arrival in Texas. The suit was manifestly the result of a conspiracy between the creditors and complainants; the object being to obtain a dissolution of the partnership, a distribution of the assets in Newell's hands, or to cause him "to place the merchandise in the hands" of Warren, "as trustee for the creditors, or Captain Tyack;" the creditors, on their part, agreeing not

to proceed against the firm of "William Tyack & Co.," in New York, for the space of sixty days; and that the interests of Tyack should be protected, and his instructions, touching the suit against Newell, strictly followed.

V. The purchase of the goods by Doss was for a valuable and adequate consideration, without notice of any intended fraud, on the part of Newell, made for the benefit of all the partners, and within the scope of the "new, experimental and general" business, described in the partnership agreement. The verdict does not find the purchaser guilty of any fraud, and the jurors depose that they did not intend to charge him with fraud. It declares the "sale," but not the purchase, fraudulent as to the complainants. (*Anderson & Wilkins v. Tompkins et al.*, 1 Brock., 456.) This finding did not authorize the annulling of the sale.

VI. Referring to the direction of the creditors, requiring their agent to be governed by the instructions of Captain Tyack, the several letters of Tyack & Murray to Newell, advising and urging him to sell the goods; their subsequent approval of the sale, after ample time to judge, and referring to their confederacy against Newell, before mentioned; the sale was authorized before, sanctioned at the time, and confirmed, after it was consummated, in the most deliberate manner by both the complainants and the creditors.

VII. All matters of complaint, embraced in the bill in this cause, excepting the said sale, were included and adjudicated in the suit of these complainants against Newell, commenced and tried in the State Court. The judgment decides the merits of the cause, is conclusive of all the said matters, and remains in full force. It directed a restoration of the goods to Newell—they having been taken out of his hands by process in the cause. After such restoration, the said goods were sold to Doss, and this judgment was a full authority for him to purchase them.

VIII. The price paid by Doss for the goods was near \$2,000 *more than their value, [*300

395; *Hannum v. Belchertown*, 19 Pick., 311; *Dorr v. Fenno*, 12 Pick., 521; *Coleman v. State*, 28 Geo., 78; *Brown v. Stat.*, 28 Geo., 199; *Grinnell v. Phillips*, 1 Mass., 530; 4 Mass., 391; 14 Mass., 245; *Cook v. Sypher*, 3 Clarke (Iowa), 484; *State v. Douglass*, 7 Clarke (Iowa), 413; *People v. Hartung*, 4 Park. Cr. (N. Y.), 254; *Chun v. Smith*, 5 Hill, 560; *Green v. Bliss*, 12 How. Pr., 428; *Dana v. Tucker*, 4 Johns., 48; *Smith v. Cheetham*, 3 Cal., 56; *Brownell v. McEwen*, 5 Den., 367; 4 Bos. & P., 329; *People v. Columbia Com. Pleas.*, 1 Wend., 297; *Jackson v. Dickinson*, 15 Johns., 309; *Exp. Caykendoll*, 6 Cow., 53; *State v. Freeman*, 5 Conn., 345.

When a jury separate after a case is committed to them, not having agreed on a verdict, and afterwards return a verdict, neither the jurors nor the officer to whose care they were committed, can be compelled to testify to such separation. *Howard v. Cobb*, 3 Day, 300.

Proofs of declarations of jurors made after verdict, or of information from them, cannot be received for the purpose of impeaching it. *Hollingsworth v. Dane*, Wall. C. C., 147, 171; *Holmes v. Corcoran*, 2 Cranch C. C., 119; *Straker v. Graham*, 4 Mees. & W., 721; 7 Dowl. P. C., 223; 1 Horn. & Hurst., 449; *Burgess v. Langley*, 1 Mann. & Gr., 721; 1 Dowl. & L., 21; 6 Scott, N. R., 518; 12 L. J. C. P., 257; *Aylett v. Jewell*, 2 W. Bl., 1299; *Davis v. Taylor*, 2 Chit., 288; *Clark v. Stevenson*, 2 W. Bl., 89; *Wilson v. People*, 4 Park. Cr. (N. Y.), 619; *People v. Barker*, 3 Wheel. Cr. C., 19; *Taylor v. Everett*, 2 How. Pr., 23; *Cium v. Smith*, 5 Hill, 560; *Gale v. N. Y. Cent. R. R. Co.*, 53, How. Pr., 385; 13 Hun, 1; 76 N. Y., 504.

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But the court will receive the affidavit of a party who actually saw the jury draw lots or commit any other misconduct, or take the necessary steps for that purpose. *Straker v. Graham*, 4 Mees. & W., 721; 7 Dowl. P. C., 223; 1 Horn. & Hurst., 449.

The affidavits of third persons as to what passed within their knowledge as to the delivery of the verdict, and the dissent at the time of some of the jurors, are admissible. *Rex v. Wooller*, 8 Maule & S., 306.

Affidavits of a juror as to what took place in open court on the delivery of their verdict, are receivable. *Roberts v. Hughes*, 7 Mees. & W., 399; 1 Dowl. N. S. 82; *Everett v. Youells*, 1 Nev. & Man., 530; 4 B. & Ad., 681.

Also, to explain the circumstances under which he came into the jury box on the trial of cause affecting his own interest. *Bailey v. Macauley*, 13 Q. B., 815; 14 Jur., 80; 19 L. J. Q. B., 73.

In Iowa, the affidavit of a juror to show the misconduct of the jury in the manner of making up their verdict, is admissible (Code, sec. 1810.) *Muniz v. Malony*, 7 Clarke, 81; *Ruble v. McDonald*, 7 Clarke (Iowa), 81; *Schauler v. Porter*, 7 Clarke (Iowa), 482.

Affidavits of jurors are admissible to sustain their verdict, although they are not always regarded as a very reliable species of evidence. *Dana v. Tucker*, 4 Johns., 487; *Nesmith v. Clinton Fire Ins. Co.*, 8 Abb. P., 141; *Eastwood v. People*, 3 Park. Cr., 25; *Dorr v. Fenno*, 12 Pick., 521, 525.

And to show improper conduct of party in approaching them. *Reynolds v. Champlain Transportation Co.*, 9 How. Pr., 7.



as estimated by the complainants, and near \$4,000 more than that estimated by the witnesses. It consisted of \$4,000 equivalent to cash advanced, and the remainder in lands, amounting to 6,485 acres, and worth much more than \$7,753, as testified by the witnesses. One of the tracts, containing 177 acres, is estimated by Mr. Thompson, a witness well qualified to judge, as worth \$30 per acre. Newell, in the exercise of a sound discretion, arising from his business connections with the complainants, and expressly devolved upon him by their advice and directions, and acting in conformity with the professed desire of the creditors contained in this 5th instruction, declaring that they wished "no wanton sacrifice of property for the immediate payment of the whole or a portion of their claims," could not have made a sale of the goods more beneficial to all the parties interested than the one negotiated with Mr. Doss.

IX. It is respectfully insisted, that the issue directed by the court "to determine whether the sale of the goods was or was not fraudulent as to the complainants," was defective and immaterial and, for this cause, improperly granted.

The verdict must conform to, and correspond with, the issue—that is, find its affirmative or negative, and nothing else. If the jury find the former, viz.: that the sale was fraudulent as to the complainants, it would be incompetent for them, under this issue, to go further, and determine also which of the defendants perpetrated the fraud, or whether they combined together, and were jointly chargeable. Such a finding could not authorize a decree setting aside the sale, nor in any way properly influence the conscience of the court. Such a decree would have to rest on proof in the cause, *dehors* the verdict, that the purchaser was a party to the fraud; and whether such proof existed or not, the verdict could be of no possible service or utility to the court.

Hence the court will reverse or disregard the order directing the issue, and determine itself the character of the sale. (*Nichol v. Vaughan*, 2 Dow & Clark, 420; *Townsend v. Graves*, 3 Paige, 457; *Belknap v. Trimble*, 3 Paige, 601; *Gardiner v. Gardiner*, 22 Wendell, 526.)

X. The verdict, viz.: "In this case, we, the jury, find the sale fraudulent," does not determine or satisfy the issue, and is for this cause void. It does not find as to whom the sale was fraudulent, and may as reasonably be construed to apply to the creditors or to one of the defendants as to the complainants.

XI. If the verdict could be so interpreted as to charge either or both of the defendants with fraud against the complainants, which we deem impossible, it would be contrary to the entire body of evidence adduced at the trial, and is void at law.

301*] *XII. No effect can be given to the verdict prejudicial to the interests of Mr. Doss, without disregarding or inverting what the jury solemnly intended its effect to be, as appears by their affidavit. An application and construction of a verdict, opposed to the intention and moral sense of the jurors who found it, cannot quiet the conscience of a court of equity.

XIII. The issue, as tried, does not answer the purpose for which it was intended. In-

deed, it was so framed that the verdict throws no light upon the question for the determination of which it was directed. The whole matter is before the court with sufficient precision, and all the proofs to enable it to come to a decision, without another reference to a jury. The court, under these circumstances, will decide the matter at once, unless in its discretion some new issue or issues be deemed expedient in order to obtain substantial justice. (*Armstrong v. Armstrong*, 8 M. & K., 45; *Blackbourn v. Gregson*, 1 Bro. C. C., 423, 424; *Dan. Chan.*, 1816.)

XIV. The court below erred in setting aside the decree of the 8d of August, 1849, dismissing the cause. The decree was made by consent, and is not subject to appeal or review. (*Webb v. Webb*, 3 Swanst. Ch., 658; *French v. Shotwell*, 5 Johns. Ch., 564; *Atkinson v. Manks*, 1 Cowen, 691; *Kane v. Whittick*, 8 Wend., 219.)

1. Notwithstanding the position taken by counsel, viz.: that the powers of attorney, by the complainants and creditors appointing William E. Warren their mutual agent, the agreement and expenditures of money by the creditors in the prosecution of the cause, were sufficient to prevent the complainants, without the assent of the creditors, from dismissing the bill; and whether the suit be treated as a creditor's suit or not, under the authority of *Williamson v. Wilson*, 1 Bland, 418; still the complainants, until the final decree, retained absolute dominion over the suit, and might dismiss the bill at pleasure. (*Handford v. Story*, 3 Sim. & Stu., 196.)

2. The complainants, by their several powers of attorney, revocations and other instruments under seal, emphatically required and obtained the dismissal of said cause, through solicitors specially employed and instructed for that purpose, and for reasons fully declared. The decree of dismissal was a mere execution of those powers. At the moment of its rendition it became a vested right of the defendants, granted and confirmed by the respective deeds of the complainants. A power executed by decree is no more revocable than one executed by grant or conveyance of land.

3. The decree was opened upon motion, founded on the application of Murray alone—it was error to open it as to Tyack. The order could not properly vacate the *302 decree generally; besides, it was a regular decree on the merits, and could not be set aside by a motion. (*Radley v. Shuter*, 1 Johns. Ch., 200.)

4. Murray, excepting by his petitions, does not attempt to revoke his prior deeds. This is no revocation. He prays the court to restore the suit, and to declare those deeds null and void, alleging that the same were obtained by fraud practiced by Newell and others.

We respectfully insist that the court could not, so long as those deeds remained in force as executed powers, vacate the decree of dismissal or restore the suit; and that the deeds themselves, and the manner in which they were obtained or executed, could not be inquired into or pronounced void by the court, except by regular suit against the parties charged, whereby the alleged frauds could be put in issue, and the whole matter fairly tried.

The petitions of Murray and Tyack, and the

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supposed revocation of the latter, filed on the 7th of January, 1850, cannot obviate any objections to the said order of the previous term vacating the decree of dismissal.

6. The affidavits of Messrs. McGreal and Andrews, filed by the defendants in opposition to the said petitions of Murray, contradict all the essential statements therein contained, and effectually impeach their veracity, showing them untrue and not entitled to credit.

XV. The effect of the solemn admissions and declarations, deliberately made by both of the complainants in their several letters and instruments under seal, before referred to as evidence in favor of the defendants, is not affected or weakened by the last-mentioned petitions of the same parties contradicting and garbling these said admissions and declarations.

1. Because their said admissions and statements were opposed to their interests as complainants; whereas the contents of their said petitions tend to aid their recovery in this cause, and are justly liable to the suspicion of having been manufactured in order to accomplish their own purposes.

2. Because they are disingenuous and prevaricating in their character, and were manifestly made under influence which they, in their former statement, pronounced compulsory, coercive, and such as they were unable to resist.

3. Because they are not entitled, in law, to any weight or credit, as evidence for the complainants, who are estopped from denying or averring anything in contradiction to what they had before solemnly and deliberately acknowledged. (*Sprigg v. Bank of Mount Pleasant*, 10 Pet., 257; *Lajoie v. Priman*, 3 Miss., 529.)

[303*] *XVI. By the master's report, \$4,473.63 were allowed Tyack on account of capital paid in by him; whereas the amount he advanced did not exceed \$2,200. Nothing was allowed Newell on account of the \$7,000 standing to his credit on the books of William Tyack & Co. The report further finds him indebted to the firm on account of partnership property received and not accounted for by him. Exceptions filed by him for these causes were overruled, and in this and in the final decree in this behalf there are, as we conceive, error and injustice.

XVII. The master ought to have reported, fully and correctly, the proof on which the several items contained in it are found, and the claims of the alleged creditors ascertained and allowed, as suggested in the exceptions taken by Mr. Doss. The items making up the amount found against Newell cannot be gathered from the report. There can be no doubt, however, although it does not definitely appear, that Newell was charged with the \$2,000 he paid in goods to Edgar under the authority of the complainants, and in due course of the partnership business. These errors affect the final decree, and render it fatally erroneous and unjust. (*Williamson v. Wilson*, 1 Bland, 418.)

XVIII. The bill contains no prayer for ascertaining the names of the creditors or the amounts due them severally. It prays merely that the receiver be directed by the final decree to apply the property to the payment of the

said copartnership debts. This is deemed an insufficient basis for the specific provisions in favor of the alleged creditors embraced in the decree.

XIX. The decree annuls the sale made to Stephen W. Doss, as fraudulent against the complainants. But the restoration of the money and property paid by him for the goods, as sought by his motion (P. R., 324), is wholly denied. The copartners, by virtue of the decree, not only keep the goods they sold to Doss, but keep also the price or consideration they received for them, amounting to eleven thousand seven hundred and fifty-three dollars (\$11,753), without the possibility of his obtaining the slightest compensation or reimbursement at their hands, if the decree be affirmed.

Relying upon the points suggested, the appellants respectfully ask for a reversal of the decree and a dismissal of the cause; or, instead of an absolute dismissal, that the cause may be restored to the same condition that it was placed in by the procuration of the complainants themselves, under the decree of the 3d of August, 1849, dismissing the same. If this be done, the appellees cannot be prejudiced, since they would retain the right to bring suit by original bill, as they might at first, to vacate their powers of attorney, and the decree obtained in execution *of them, on account of the [304 pretended mistakes and frauds averred in their petitions subsequently filed, in order to attain their object in a too summary manner.

The counsel for the appellee made the following points:

1. So far as the question of fraud is concerned, the answers of both defendants, and the depositions used on the trial, are replete with the evidence of it. After putting forth the matters stated and admitted in the defendants' answers, and the exhibits made a part of them, no proof would have availed them, on the hearing, to escape the conclusion of fraud. The bad complexion of the whole transactions between Newell and Doss's agent, McGreal, is only equalled by the recklessness with which they attempted to take the property of the firm, divert it from its proper direction, and to place the proceeds of it beyond the reach of the copartners and creditors. The property, as copartnership property, was in the nature of trust property, and the principles declared in the case of *Wormley v. Wormley*, 8 Wheat., 422, apply fully to this case.

2. The contracts between Newell and McGreal were individual contracts. It was incompetent for them to vary them, as evidence, or their complexion by parol proof, or their sworn answers. They were estopped from setting up the pretense, that they fairly intended to create a *bona fide* trust in favor of complainants. The complainants might have brought the aspect of a trust over the property to be conveyed by McGreal, had they elected to take the lands agreed to be sold by McGreal to Newell. The character of the transactions, however, between Newell and McGreal, must be evidenced by the contracts they made. The same rule would hold in reference to the absolute assignment to Franklin, and the draft in favor of Knight. Under the circumstances, they will bear no other construction than intention, on the part of Newell and McGreal, to place the

copartnership property beyond the reach of complainants and the creditors.

3. So far as Newell was concerned, the payment of his individual debt, of \$1,400, to Edgar, out of the store of Stewart, Newell & Co., and his offering to mortgage the whole of the goods to Edgar, as security for his individual indebtedness, would have been sufficient cause for dissolving the copartnership.

4. Should the question be raised, whether His Honor, the District Judge, erred in setting aside the decree dismissing the bill, and in reinstating the cause, it may be replied, that the court below had power over the decree at any time during the term at which it was entered. **305***] The order, entered on the suggestion *of complainants, on motion, was a mere voluntary dismissal of the suit, under a delusion created by defendants, without trial on its merits, and without the effect of prejudicial laches. It was not in its nature *res adjudicata*, or final, as to the rights of the parties. No enrollment had taken place, nor had the minutes of the court been signed by the judge, at the time he vacated the order of dismissal.

5. No decree can be regarded in its effect as final, that has been obtained by fraud, practiced by one of the litigating parties on the other. Fraud will vitiate the judgment or decree of any court; and the court will set it aside, and allow a party to come in at any time, where the subject matter has not passed beyond the reach or control of the court. The proper way of applying to the court is by motion, where the order sought to be vacated has been obtained on motion.

6. It was entirely evident, in this case, at the time of the order dismissing the bill, that the complainants had been imposed upon, or that they were in collusion with the defendants. In either case, it was proper for the court to vacate its order, and re-instate the cause the moment the complainants requested it.

7. Should it be urged, that the complainants and defendants were in collusion on the application to dismiss the bill, it may be answered, that it matters not as to the extent of collusion or degree of turpitude, between parties *in pari delicto*, where one comes in and asks the court to take jurisdiction for the protection of creditors or innocent persons. In such case, it has been well said, "The fraudulent party is not entitled to a standing in court on his own account, but to subserve the purposes of justice towards those he has attempted to injure."

8. The best reason, perhaps, for setting aside the decree dismissing the bill is, that the judge erred in listening to the application and granting the order to dismiss it. At the time of the application it had been fully shown by the bill, answers, affidavits and depositions taken, what the character of the transactions were between Newell and McGreal. In addition to this, the complainants had asked, in the bill, that the property of the firm might be given to the creditors. They had asked for the appointment of a receiver, and prayed that the property might be delivered over to him. They had executed an assignment on their part to the receiver, that he might the better collect the assets. The creditors had paid a consideration for the protection of their interest through this suit. It was too late, therefore, for the com-

plainants to recall what they had done. (*Hunt v. Roumanier's Administrators*, 5 Cond. Rep., 401.)

9. What the complainants had done was equivalent to the execution of a power of attorney, coupled with an interest; *and **[*306** had all the effect of a contract or deed, with a trust ingrafted on the instrument. It was not revocable even by the death of the party. The trust had been created; the trust fund had been placed in the hands of the receiver under the order of the court; and no imposition on the complainants, nor collusion on their part, should have been permitted by the court to work a *devastavit* on the property placed in the custody of the court for the benefit of the creditors. The doctrine implied in the language of the court, in the case of *Williamson v. Wilson*, 1 Bland., 418, well applies to this case.

In aid of this would also come the rule, "That a naked license is not revocable where it has been once acted on, or where an encouragement to spend money has been given, and the expenditure has taken place."

Even in an action at law, where one man says to another, "Bring the suit in my name; let the property recovered be applied to the discharge of my indebtedness to you," has always been held to operate as an equitable assignment, not revocable. (*Canfield v. Munger*, 12 Johns., 346.) The creditor has also, in such case, the right to continue the name of the assignor as a party to the suit, notwithstanding the nominal plaintiff should attempt to countermand the license.

10. In general, persons not parties to a suit in equity, cannot come in and ask for relief or protection. There are exceptions, however, to this rule. Creditors are *quasi* parties to a suit brought for the dissolution of a copartnership, an accounting, and the distribution of the partnership property. They are entitled to come in under the decree for distribution, and prove up their demands before the master; and they thus become incidentally the objects of protection by the court. In the case of a creditor's bill suit, it is not necessary that all the creditors should be made parties complainants. It is sufficient that one creditor files the bill, with the suggestion that others who voluntarily come in and share the expenses, may participate of the proceeds on distribution. All the creditors, thus contributing, are entitled to equal favor, and it would not be insisted that collusion, between the complainant and defendants on the record, would be allowed by the court to work a defeat of the objects of the bill, by hastily dismissing the cause.

11. The bill in this case sets forth the names of the creditors prayed to be made the beneficiaries, and the respective amounts due each. The answer of the defendant, Newell, admitted them as stated in the bill. It is insisted, that this alone gave the demands of the creditors the effect of a judgment and lien on the assets in the hands of the receiver, the same as on a decree for an accounting, and the report of a master as to amounts due *credit- **[*307** ors, in a case where they had not been in form made parties to the suit. In such case, after decree for accounting, and the establishment of the demands of creditors on reference to a master, the suit cannot be dismissed by the consent

of complainants and defendants. (*Lashley v. Hogg*, 11 Vesey, Jr., 602.) What the creditors were entitled to by way of decree, as shown by the bill and answer, it is urged, could not be defeated by the fraud or collusion of the parties named as complainants and defendants on the record.

12. There is a large class of suits in equity where the power of the court must of necessity extend far beyond the immediate parties named as complainants and defendants. Of this class, are the bill for dissolution and accounting—the creditor's bill; bills against insolvent corporations, and others, where the proceedings are attended with the distribution of assets that have assumed the aspect and nature of trust property. The parties named in such suits as complainants, are considered as the representatives of all the interests that may be beneficially affected by the decree. After they have brought the matters into court, and invoked its aid and power, it would be too late to withdraw the subject matter of litigation from the court. Were it otherwise, there would often be no remedy, from the impossibility to make parties. The most a court of equity could possibly do, under a sound discretion, would be, to allow a complainant, acting in bad faith, to retire from the suit on terms, in the mean time retaining the fund, and allowing others to come in, whose fidelity could be better depended upon, in carrying the trust property to a fair distribution.

13. Copartnership property (more especially in cases of insolvency) is strictly regarded as trust property, and the creditors of the copartnership, the *cestuis que trust*, or beneficiaries; and this, independent of any instrument or agreement making an assignment, or declaring the trust; hence the uniform practice of courts of equity in extending protection to their interests.

14. In the case at bar, it will be seen that the copartnership property had been placed, and tied up, on the application of complainants, for more than one year, in the hands of the receiver, in a condition that made it invulnerable to the creditors, except through distribution by the court. It was in the custody of the law, and could not be levied on. The remedy of the creditors against the property was suspended. The dismissal of the bill and delivery of the copartnership property to Doss, would have given the effect of having used the court to delay the creditors, and then, of prostituting its powers to defeat them. It is believed that courts of equity have power to exempt themselves from being used as instruments for such purposes.

308* 15. It may be said, perhaps, that the case at bar is *sui generis*; that there is no precedent, in all respects, applicable to the questions involved in the motion to dismiss this cause in the court below. If so, it is respectfully submitted whether principles, applicable to the circumstances of this case, should not be declared, as well for the benefit of courts of original jurisdiction, as for the instruction of solicitors and counsel respecting their rights, duties and responsibilities.

Mr. Justice Grier delivered the opinion of the court:

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U. S., BOOK 14.

A short history of the facts of this case, extracted from the numerous allegations of the pleadings and the mass of testimony contained in the record, will better exhibit its merits than a more formal abstract of the pleadings and proofs.

The appellees, who were complainants below, entered into articles of agreement with Samuel Newell, one of the respondents below, on the 25th of September, 1847, in which they engaged to form a copartnership under the form and style of William Tyack & Co., in New York, and Stewart, Newell & Co., in Galveston, Texas. "The nature of the business to be transacted by said firm to be a commission, general, and auction business." The parties each to contribute towards the capital stock the sum of five thousand dollars, within ninety days; the capital to be augmented as the business required; Newell, "in consideration of his expense and labor in paving the way for the contemplated business, as well as his influence in the State of Texas, to be entitled to one fourth of the profits, and the balance to be equally divided between the three partners. Tyack & Murray to take charge of the business in New York, and Newell in Galveston.

At the time these parties entered into this contract of partnership, their several ability to perform their agreement of advancing capital and supporting the credit of the firm, as shown by the pleadings and evidence, would appear to be as follows: Tyack was worth, in all, probably twenty thousand dollars; Murray had nothing, and owed about five thousand dollars; Newell, while resident in Texas, "had become interested in a claim belonging to Alexander Edgar, to a league of land," on which it was supposed that the City of Galveston was built. He had come to New York, at this time, with a power of attorney for Edgar, to form a stock company of persons, who were to have an interest in this litigated claim. He had divided it into one thousand shares, to be sold at one hundred dollars each, payable in installments. He was to have half of all the money received for the stock, over twenty thousand dollars. A few persons had been persuaded to subscribe for some of this stock, and "among others, [*309 Tyack and Murray had each agreed to take a few shares; and Tyack was appointed treasurer of the company under the name of "The Galveston Land Company." Newell's property or capital consisted in the anticipated profits of this speculation, and some stock in another company, called the "Wilson Joint Stock Land Company."

The partners soon afterwards commenced business on about four or five thousand dollars, advanced by Tyack. Murray had nothing, and Newell's stocks would produce nothing in the market; those who had before subscribed for it, refusing to pay, on the plea or suspicion that it was good for nothing, as the citizens of Galveston had probably a better title to the land than the company. Thus the source from which Newell's capital was anticipated, wholly failed.

In the mean time a stock of goods was purchased for the house in Texas, costing about twenty thousand dollars, for the payment of which Newell had drawn bills on Tyack & Co. for some seventeen thousand dollars, which

Tyack had accepted, in expectation of remittances of cotton or other produce from Texas, by Newell, to meet the bills at maturity. The business expected to be transacted by Tyack & Co. in New York, was the disposal of these consignments from the Texas house—of cotton and other merchandise purchased with the funds of the firm in Texas.

In March, 1848, the acceptances in New York being near maturity, and the consignment received from Newell to meet these large liabilities, amounting only to about eight hundred dollars, Tyack, to avoid impending bankruptcy, if possible, called together the creditors of the firm and made a statement of its situation. In consideration of the creditors agreeing to give further time on the acceptances about to mature, Tyack & Murray executed a power of attorney to William E. Warren, an agent chosen by the creditors, authorizing him to take possession of the property and effects of the firm in Texas, and secure them for the benefit of the creditors. Warren was authorized by the creditors to act for them, and to collect, secure or compromise their claims, in any way he thought best; with instructions to proceed to Texas, and examine into the state of the firm, and if it was found that there was any probable prospect that the firm could eventually pay their debts, to make any reasonable arrangement for that purpose, and suffer Newell to continue the business: on the contrary, if Newell could hold out no such prospect, or if he was found to be wasting the goods of the firm, and appropriating them to any other purpose than the regular mercantile business of the firm, the agent was instructed to get possession, by all legal means, of the partnership assets, **\$10*** and hold them or dispose of them in the best manner for the interests of the creditors and all concerned.

In pursuance of this authority, Warren proceeded to Galveston. He there found the assets in Newell's possession insufficient to pay the debts, and that the firm was hopelessly insolvent; and moreover, that Newell had appropriated a portion of the assets of the firm to the payment of his personal debts, incurred in his land stock speculations, and was unwilling to comply with any reasonable terms of compromise, to secure the creditors or save his partner, Tyack, from insolvency and ruin.

Warren then instituted proceedings in the State Court on behalf of Tyack and the creditors, and obtained an injunction and a writ of seizure against Newell, on which the sheriff took possession of the property of the firm. On the 10th of July, 1848, on motion of Newell's counsel, the court, for some reason, set aside the injunction and writ of seizure. The counsel for Tyack and the creditors, immediately discontinued their proceedings in the State Court, and commenced proceedings in the District Court of the United States. While the bill for that purpose was being prepared, and application being made for an injunction and the appointment of a receiver, Newell and one Peter McGreal proceeded in hot haste from the court house, got possession of the goods from the sheriff, and had the following instrument of writing executed:

"Received, Galveston, July 10, from S. W. Doss, of Brazoria, the following amounts:

\$2,000, in good notes, mortgages, liens, and judgments, and \$7,758 in lands, full payment of the stock of goods, wares and merchandise now in our store in Galveston.

STEWART NEWELL.

Recap.—Cash, \$2,000; Notes, \$2,000; Lands, \$7,758—Total, \$11,758.

In presence of John Warrin, Isaac D. Knight."

No notes, judgments or liens, were in fact assigned by McGreal to Newell, nor any conveyances of land made; but McGreal gave his written promise to assign and convey securities and lands to that amount within thirty days. The production of the \$2,000 cash was also dispensed with, as the parties appear to have been in too great haste to be particular. The answer of Newell attempts to account for the cash as follows:

"This defendant states, that the said first payment in cash of \$2,000, mentioned in said receipt, was secured and made to this defendant by Peter McGreal, Esq., the agent of said Doss; that a portion of said sum of \$2,000, to wit: about \$1,200, was paid by the said McGreal, agent as aforesaid, to Benjamin C. *Franklin, Joseph A. Swett, and John [*311 B. Jones, in pursuance of, and in accordance with, an order given by this defendant to said McGreal for that purpose; that \$42.50 were paid upon the order of this defendant to J. A. Sauters for rent of said store, due by said firm; and the balance, to wit: about \$750, was directed by this defendant to be paid over or secured to Isaac D. Knight, to be by him held to the use of the firm of S. N. & Co., to be paid over for the said use upon the order of this defendant, in like manner as the said book debts and other choses in action assigned to said Franklin, as above mentioned."

What right Franklin, Swett, and Jones had, to receive this money, or how or why it was paid to them (if it was paid), or how Knight, the brother-in-law of Newell, became a trustee for the creditors of the firm, the answer does not disclose.

McGreal appears also to have treated Newell with the same unbounded confidence which Newell had reposed in him. He took the goods on trust, as to quantity and quality; required no invoice or schedule, being content with one which the sheriff had made; and immediately commenced to pack them up and seek for assistance and means for carrying them off. The transaction commenced after twelve o'clock in the day, and by twelve o'clock at night, a large portion of the goods were put on board the sloop Alamo, which set sail before morning. In the mean time the bill in this case had been filed, and a receiver appointed, who, on the following day (11th July), was enabled, by means of a writ of assistance, to arrest the sloop and get possession of the goods.

It is unnecessary to enumerate all the charges of the bill, and the answers thereto, as it is amply sufficient for the purposes of the decision in this case, that the facts we have already stated were either admitted by the answers, or undeniably proved.

The plaintiff in error, Stephen W. Doss, who claims to be the owner of the goods, thus alleged to have been purchased by Peter McGreal, was made a party to the suit. Both he

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and Newell deny, in their answer, all fraud in the transaction, and Doss avers, "that the said transaction was made in the regular mode of conducting such business, and at a time when there was no lawful restraint existing to prevent the sale and delivery of the goods."

On this case the court below, at the March Term, 1850, rendered a decree for the complainants, dissolving the partnership, setting aside the sale to McGreal, or Doss, as fraudulent, and ordering the receiver to pay over the proceeds of the goods (which had been previously sold by order of the court), to the creditors of the firm.

§12* But, in order rightly to apprehend the points relied on by the counsel for appellants, in claiming a reversal of the decree, it will be necessary to state some of the intermediate proceedings in the case, as exhibited by the record. During the pendency of the suit, Newell and McGreal had gone to New York, and persuaded Tyack & Murray to revoke the power of attorney given to Warren, and to execute one to the respondents' counsel, authorizing them to dismiss the bill; and a motion was made by them, for this purpose, in August, 1848. This motion was resisted, on the ground that the firm was wholly insolvent; that the power to Warren was given on a contract with the creditors, and for a valuable consideration, and was, therefore, irrevocable; as it would be a fraud in Tyack to dismiss the proceedings, for the benefit of the creditors, after the great trouble and expense incurred by them for the purpose of protecting Tyack from ruin. Notwithstanding these objections, the court ordered the suit to be dismissed; but, some days after, at the same term, vacated and set aside this order or decree, on proof, that the revocation of the power to Warren, and the order given to discontinue or dismiss the proceedings, were obtained from the complainants by gross misrepresentation and fraud. Afterwards, an issue was ordered, on prayer of respondents' counsel, to try the question of fraud. This issue was tried before a jury, who rendered a verdict that "the sale was fraudulent." Whereupon, the respondents moved for a new trial, on the ground that the verdict was given "under a misconstruction and misunderstanding of the charge of the court." This motion was founded on an affidavit of some of the jurors that, "on their retirement, they did not inquire into the right and power of Doss to purchase, nor of the question of fraud on Doss's part, but only into the right and power of Newell to make the sale."

We are now prepared to examine the points relied upon for the reversal of this decree.

They are, 1st. That the court had no power to set aside the order or decree, dismissing the bill, unless, on a new and original bill, filed for the purpose. 2d. That, on this certificate of the jury, the court should have granted a new trial on the question of fraud.

1. As regards the first point, we perceive no error in the action of the court, except in their first order dismissing the suit. It did not require an original bill, to authorize the court to vacate an order or decree, at the same term in which it was made, on discovering that they have committed an error, or that the consent of the complainants to such dismissal was obtained by

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the fraud of the respondents, or their agents. In fact, under "such circumstances, it [*313] cannot be said that the act was done by the consent or will of the complainants, at all. The court, in vacating the decree, were correcting an error both of fact and of law; and, during the term at which it was rendered, they had full power to amend, correct or vacate it, for either of these reasons.

2. The second point is equally without foundation. It is true, that the answers of the respondents denied fraud in the abstract, but they admitted all the facts and circumstances necessary to constitute it in the concrete. The general denial of the answer, only showed that the definition of fraud was much narrower, in the estimation of the respondents, than in that of courts of law and equity. In this case, a verdict was wholly unnecessary, to inform the conscience of the Chancellor; and, the verdict being perfectly correct, the court very properly refused to set it aside, on any representation from jurors thus obtained.

Any argument to vindicate the correctness of the verdict and the decree of the court below, after the exhibition of the merits of this case, which we have given, would be entirely superfluous.

The decree of the District Court of Texas is therefore affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Texas, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said District Court in this cause be, and the same is hereby affirmed, with costs.

Cited—18 Wall., 192; 11 Otto, 752; 6 Biss., 199.

JOHN PERKINS, *Appellant*,

v.

EDWARD P. FOURNIQUET AND HARRIET HIS WIFE, AND MARTIN EWING AND ANNE HIS WIFE.

Releases construed.

Releases given by the complainants, in the present case, decided to cover the matters in controversy, and, therefore, to put an end to all claim by them; inasmuch as there is no proof that they were obtained by fraud or circumvention.

THIS was an appeal from the Circuit Court of the United States for the Southern District of Mississippi.

The case, in some of its branches, had been before the court three times before. A motion to dismiss a case between the "same" [*314] parties, at January Term, 1848, is reported in 6 Howard, 206. It came up again at January Term, 1849, and is reported in 7 Howard, 160. Again, at December Term, 1851, a dispute, growing out of the same matters, was before this court, and the judgment of the court below affirmed by a divided court. Consequently, it was not reported; but the mandate, which was issued therein, gave rise to a diffi-

culty, which will be the subject of the succeeding case in this volume. Ewing and wife were parties, together with Fourniquet and wife, to the present suit, but the controversy cannot be distinctly understood, without a reference to the case in 7 Howard, 160. The family connection of the parties is there explained.

The present claim of Fourniquet and wife, and Ewing and wife, against Perkins, was founded on the alleged rights of the marital community of Mrs. Perkins (the mother of Harriet and Anne) with Mr. Perkins, according to the laws of Louisiana.

The bill alleges the marriage was consummated in Louisiana, where both the widow Bynum and the defendant Perkins were then citizens; and that the defendant always retained his legal and political domicile in Louisiana; though some time after the marriage, for the ostensible purpose of health, established a family residence near Natchez, in the State of Mississippi. The bill charges, that defendant, during the marriage, expended of community funds, in the State of Mississippi, in permanent investments of real estate, an amount of about \$39,600, which remained in kind at the dissolution of the marriage by the death of his wife in 1824, but which he has since sold and disposed of to his own use. That defendant had no revenues or resources in Mississippi from which these investments were made; but it was all derived from the revenues of his and his wife's property and cotton estates in Louisiana, and were partnership funds, in which complainants, as heirs of their mother's community, had rights of partnership, and now have right to hold defendant to account therefor. They charge, that if defendant intended and expected to get an advantage to himself, by investing the community funds in the State of Mississippi, rather than in Louisiana, then it was a fraud on his part, for which he is liable; or, if intended in good faith, yet such investment charged defendant with a trust, for which they pray he may be held responsible. But complainants aver, that as defendant has heretofore kept back and concealed from settlement this investment, and never accounted for the same, but in settlement with them obtained their receipts and release in full, in which this matter was not included, that said releases, so far as they may be **315*** invoked to *bar this claim, were obtained by fraud and circumvention. And they declare the matters of this bill were kept back by defendant, and never accounted for. And they call on defendant to produce the account and items rendered by him when he obtained these releases, and show for what they were given.

They aver, too, that Harriet's release was given while she was yet a minor.

They pray for an account of proceeds, or amount of said investment, with eight per cent. interest, and for general relief.

Answer.

Defendant, in his answer, admits the marriage in Louisiana, admits the parties, and admits substantially the investments made in the State of Mississippi. But qualifying and explaining, says: That same year of the marriage he and his wife removed to the State of

Mississippi, and continued their domicile there during all the time of their married life, which terminated by the death of his wife on the 12th August, 1824. That this removal was in pursuance of an understanding had between them before marriage with a view to health, and facilities of educating the children. Admits he retained some political rights in Louisiana after his removal till 8th of June, 1821; but says his civil domicile was changed as aforesaid, and on this allegation predicates his first and principal ground of defense, viz.: that by reason of this domicile "respondent has always acted under the belief that there was no community of acquets and gains of property, lying in Louisiana, between respondent and his said wife under the laws of Louisiana."

As a second ground of defense, he submits also, that if, as alleged in said bill, the domicile was not changed, yet, as head of the community, he was entitled to the absolute disposal of the acquets and gains, without accountability to his wife, or her legal representatives.

As a third ground of defense, denies that the investments in Mississippi were made with money to which his wife had any legal or equitable title whatever. And denies they were made to gain any unjust advantage over his wife or her heirs.

Fourth point of defense is matter in abatement, in which defendant assumes, that if liable to the demand made in said bill, it is only to an administrator of his wife's estate, and not to the complainants.

Fifth ground of defense is, that he has obtained the releases of complainants for all claims on account of the estate of their father and mother, and relies upon them as if formally plead in bar, denying they were obtained by fraud or concealment.

*Sixth ground of defense submits [***316** that if said investments were made with money in which his wife had an interest, yet that defendant is entitled to the property, as tenant by courtesy during his natural life; and he interposes this right as if pleaded in bar.

Upon the final hearing, the Circuit Court passed the following decree:

In Chancery. Final Decree.

The report of William H. Brown, Master in Chancery, made in the above-stated case, and filed herein on the 8d day of April, A. D. 1850, having been confirmed on a former day of this term; and the report of said Master made herein and filed on the first day of October, A. D. 1850, having also been confirmed on a former day of this term, except as to the said sum of five hundred dollars therein stated as having been paid by defendant subsequent to the death of Mrs. Perkins, wife of said defendant: It is now thereupon further ordered, adjudged and decreed, that the said complainants, the said Harriet J. Fourniquet, together with the said Edward P. Fourniquet, in right of his said wife, but to her sole and separate use; and the said Ann S. Ewing, together with the said Martin W. Ewing, in right of his said wife, but to her sole and separate use, do have and recover of the said defendant, John Perkins, the amount stated in said first named report, to wit: the sum of sixteen thousand nine hundred and sixty-eight dollars and seventy-six

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cents (\$16,968.76), to be paid to the said complainants by the said defendant within thirty days hereafter, together with interest thereon at the rate of eight per cent. per annum, from the first day of April, 1850, or in default thereof that said complainants have execution therefor. It is further ordered, adjudged and decreed, that said complainants do recover of the defendant all their costs hereby in this suit incurred and herein taxed.

November 20, 1850.

S. J. GHOLSON.

From this decree Perkins appealed to this court.

It was argued by *Messrs. Johnson and Soule* for the appellant, and *Mr. Henderson* for the appellees.

It is not necessary to state the points and arguments of the counsel relative to the community of acquets and gains under the law of Louisiana, and how far that law would reach investments in Mississippi; but as the decision of the court turned entirely upon the validity of the releases (one of which is inserted in 7 Howard, and both in the present opinion), the notice of the argument will be confined entirely to that subject.

[17*] *The counsel for the appellant considered the releases in the following point of view:

The bill charges that these releases were obtained by concealment, fraud, &c. The answer denies the charge in the most positive terms, and not a shadow of proof has been given of its truth:

The releases themselves are as full and thorough acquittances of all responsibility on the part of the respondent, as could have been drafted, as will be seen by reference thereto.

To the release of E. P. Fourniquet and wife to J. Perkins, dated Natchez, May 27, 1834.

To the release from M. W. Ewing and wife, dated April 11, 1828.

To the release of Benjamin S. and Mary C. Bynum (heirs, but not parties to this suit), April 10, 1829.

Act of confirmation by Mary C. and Thomas P. Eskridge, dated April 9, 1832.

For what were these releases made? Surely not to cover the land and slaves in Louisiana of the deceased parents of the releasors, because there had been previously (in 1827) a judicial partition and distribution of their patrimonial estate, which had been homologated, and had all the force of "the thing adjudged;" and Perkins had been fully discharged before any of these releases were executed. Then, these releases must have been wholly supererogatory in reference to the land and slaves in Louisiana; and the question arises; what could they have been designed to cover and include, unless it were such personal effects as may have remained, after all the debts and expenses of the marriage and the education and maintenance of the Bynum heirs had been defrayed.

As to the validity and effect of these releases, one of them has been attested and adjudicated, not only in the Ninth Judicial District of Louisiana, and before a jury, but in the Supreme Court of the United States.

Howard's Reports, Vol. VII., contains the recitals, in *Mr. Justice Daniel's* opinion, showing that Fourniquet and wife sued Perkins for large amounts of property, spoiliations, &c., in
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Concordia, Louisiana, in December, 1838, and that judgment was rendered against them in December, 1840; and that, having brought suit against him in 1844, in the United States Circuit Court for Louisiana, Perkins pleaded that judgment in bar, and prevailed both in the Circuit and Supreme Courts of the United States.

True, the opinion of *Judge Daniel* was rejected, as evidence, in the United States Circuit Court for Mississippi; but whether the objection was well taken or not, the weight of it, as an argument and an authority directly in point, could not be destroyed, *and it applies [*318 with equal force to the release of Ewing and wife. (See the case at large in 7 How., 160.)

"The gratuitous remission of a debt, is as valuable as a release for a valuable consideration, and may be express or implied." (Civil Code, art. 2195.)

"The *pactum remissionis, pactum de non petendo*, was binding under the Roman law; and all that was required to give it validity, was a simple convention. (*Mouton v. Noble*, 1 Annual Reports, 194.)

See, also, the case of *Morgan v. Morgan*, 5 Annual Rep., 230. [An authentic MS. copy of the record in this case is on file at the Supreme Court of the United States, showing remarkable coincidences between the release in that case and the case at bar.]

The law presumes the acceptance of the remission of a debt, and it cannot be revoked by creditors. (Civil Code, 21, 97; *Lee v. Ferguson*, 5 Annual Rep., 538.)

For the force, as testimony, of sworn answers in chancery, see 2 Story's Equity Jurisprudence, secs. 1528, 9, 30.

Mr. Henderson, for the appellees:

We come next to consider the question of the receipts and releases, interposed in bar.

The bill charges fraud and concealment in obtaining from complainants these receipts, and declares the matters sought to be recovered in this suit, were not, at the time of these receipts, or at any other time, ever accounted for, but by defendants were concealed and kept back; and they require and demand of defendant, should he offer said receipts in bar, that he produce the account, and the items thereof rendered, for which said receipts were given.

The defendant tenders the releases as exhibits with his answer, and states that he "relies upon said releases as if formally pleaded in bar," and denies, generally, they were obtained by fraud or concealment. They are found in the record, but in no form of plea. Now, while rule 39 permits a defendant to avail himself in his answer of matters in bar, if the matter be such as could be pleaded in bar, yet the rule does allow that to subserve as a bar in an answer, which could not have been plead in bar. The alleged release of Harriet Fourniquet is not good in bar, because the deed of a married woman, not proven or acknowledged on privy examination, and therefore void. (*Agricultural Bank v. Rice*, 4 How., 241, 242; 12 Pet., 375; 10 Pet., 20 and 22.)

This release is void, also, because executed by her while a minor, as charged in her bill, and admitted by defendant's answer [*319 to interrogatory 4. Her subsequent recognition

tion of it, before a judge in Louisiana (not on private examination), gave it no additional validity. Void as the deed of a married woman in its execution, it could not be validated by her subsequent recognition of it.

The receipt of Ewing and wife is not under seal, and therefore not good in plea of bar as a release. (Story, Eq. Pl., sec. 796; Mit. Pl., marg., 263.)

But complainants have impeached, by their bill, the integrity of these receipts, so far as offered by defendant to evidence a release, or settlement, of the community sued for, and call upon defendant for a disclosure of the consideration on which they were executed.

The defendant denies fraud generally in their procurement, but makes no disclosure of the matters or accounts settled by the receipts. Nor does he venture to affirm they were given on settlement of the community; yet tenders them as "releases, as if formally pleaded in bar," notwithstanding.

Such form of pleading and issue makes no ground of defense, and must be overruled and disregarded, as if not in the record. (Story, Eq. Pl., sec. 796, 797; Mit. Pl., marg., 261, 262, 263.)

If it be said, however, that these receipts were executed for the meridian of Louisiana, and not intended for common law instruments (though both made in Mississippi), their deficiency in this aspect is still more palpable. For, professing to evidence the settlement of Perkins' account as tutor or guardian of the Bynum heirs, they are "null and void," because they do not show, on their face, that a full account and a delivery of vouchers was rendered the wards, ten days previous to signing the receipts. (O. C., 72, art. 76; 4 How. U. S., 561; C. C., art. 355; 4 Rob., 296, 297.)

And the civil law doctrine of "transactions" and "remission" of debts, was never extended, and will not be in equity, to settlements of guardians with their wards.

And the defendant's answer in this case is quite demonstrative, that he never settled in any way with complainants for their mother's community. He says, "By reason of their domicile being in the State of Mississippi, respondent has always acted under the belief, and now submits to the court, by way of defense to the claim of complainants, that there was no community of acquets and gains of property lying in Louisiana, between respondent and his said wife Mary, under the laws of Louisiana."

If there be any meaning in language, this surrenders the fact, and admits the community not settled for.

For, if Perkins "always acted under this 320* belief," he so acted *when he obtained these receipts. It is conclusive, therefore, he did not settle with or compensate complainants for the community. And he waives such defense in this part of his answer, by submitting the question of community or no community to the court, and to abide that issue. If he has bought out this claim, why not show the evidence of his purchase, rather than submit the issue to the court that it never existed?

But the receipt of Ewing and wife is also express and conclusive, against this pretense of defendant. It particularly and exactly enumerates what things were settled for, and what

he received. And by reference to the inventories returned by Perkins himself, the eighteen slaves, specified in the receipt are found in inventories. The cattle, mules, and tools, all are there shown, and all of the Bynum estate. There can be no mistake in this proof. And it was no such grace on Perkins' part, that he relaxed his hold on this fraction of their father's estate, as thereby to absolve himself from community.

But the record, elsewhere, abounds with evidence on this point. On pages 71 to 76, defendant sets forth the several parcels of land purchased by him chiefly in Louisiana, during the coverture; and all such are community lands, if a marital partnership existed. And Mrs. Perkins' children were jointly seized of the title with him, at the instant of her death. Now, can such receipts as here exhibited, by any stretch of presumption, be regarded as transmissive of their joint title, with Perkins, to these lands? Even if intended as such, they obviously fail as relinquishments of title to real estate.

But had this been the purpose, it is incredible of belief they would have been so executed. For the title which the heirs of Mrs. Perkins have in her community, would sustain an ejectment against Perkins, or even against a third possessor under Perkins without notice. (See 5 Ann. Rep., 389; 2 *Id.*, 261.)

Now, these Mississippi investments of \$29,000, were but part of the whole, and with like certainty were not accounted for in these receipts.

They do not show they included or comprehended the community, but we think on their face they reasonably show the contrary, and the defendant shrinks from the avowment that they did or do include it. He offers no proof that they did, and he evades reply, when called on to show the matters and things on which they rested, and says he always acted under the belief there was no community, and submits that issue to the court. Aside from their defective execution to make them releases, and apart from the misleading them in bar, we think it impossible to believe they did settle for community, or were intended, by those who gave them, to comprehend that subject.

*The rule in equity, and of the most [*321 common justice, then applies, that these receipts shall be held valid only for the matters and things on which they computed. And this, with such legal distrust as the relations of the parties imply. (10 How., 185, 186; 8 How., 158; 4 How., 561; 16 Pet., 276, 7, 8, 9; 2 Sum., 11; 3 Story, 268, 9; 1 Ed. Ch., 38, 39; 1 Ch. & Lef., 226.)

The case of *Fourniquet and Wife v. Perkins*, 7 How., 160, is referred to and relied on as deciding these receipts valid against us. But the case quoted decides no such principle. It sustained a plea of *res judicata*. And the case plead in bar, did interpose these receipts, among other matters of defense, in a suit brought exclusively to obtain against Perkins a new account of his administration of the Bynum estates, but not for community. We were defeated in that case. And Judge Daniel said, from inspection of the record, that it did not appear we were defeated merely on the receipts, but on the merits. We admitted then,

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and admit now, these receipts were given to close Perkins' administration of the Bynum estate, but not community in the Perkins estate. The decision of that case does not therefore touch these receipts. They have only been decided in this case below, and in the case of *Perkins v. Fourniquet et al.*, 6 How., 206; and in both decisions it has been held that these receipts did not bar this action for community.

One other, and the last point, on this subject. Both these receipts recite and count on administrative settlements, by Perkins, of Benjamin Bynum's estate, or of Mrs. Perkins' separate estate, in his capacity of guardian, curator, or executor.

Now, it is familiar to the jurisprudence of Louisiana, as shown in the decisions herein quoted, that the formal and official administration of the wife's estate extends only to her separate estate, and not to her community. Perkins, in this case, as surviving partner, would, and did, have the settlement of community, and not as curator of the Bynum estate, or as administrator or executor of his wife's estate. His right, power and duty to settle the community, resulted wholly and exclusively from his being the surviving partner in community. And his accountability for the wife's share in community was directed with her heirs, and not her administrator. And this is manifest from the right of the heirs to renounce community. (O. C., 838, arts. 72, 75, 82, 84.)

And there is no fact or circumstance in this case that points, in the remotest degree, to any settlement made by Perkins as surviving partner of the community. No partition with the heirs is shown; no purchase from them of their undivided portion is shown; and, upon all known principles of human action, it is impossible to believe that either of these things was [322*] done, *and being done, that the evidence of it was incorporated in these receipts.

Mr. Justice Wayne delivered the opinion of the court:

This is an appeal from the Circuit Court of the United States for the District of Mississippi, the District Judge presiding.

The suit was brought in the Vice-Chancery Court of Mississippi, and was transferred to the Circuit Court, upon application of the respondent, under the 12th section of the Act of September 24th, 1789, to establish the judicial courts of the United States.

Harriet J. Fourniquet and Anne M. Ewing are the step-daughters of the respondent, from his intermarriage with their mother, Mary Bynum. She was the widow of their father, Benjamin Bynum.

The object of the suit was to recover their portion of \$39,600, alleged by them to be marital community gains of the respondent and their mother, which they charge he invested in Mississippi, and was in hand at the death of their mother. The respondent is charged with having had no means of his own to make such investments; that the money was derived from the cotton estate in Louisiana; that the same, by the laws of that State, became a community of acquets and gains, one half of which, upon the death of their mother, became theirs and her other heirs; and they charge him, further, with having fraudulently taken the money de-

rived from the Louisiana property, into Mississippi, to invest it there, in order to give him undue advantages over his wife's and their interest in the fund. It is said, that at the death of their mother there were then living four children of the first husband, and three by the respondent. Three of the four and two of the three are still living. Mary B. Eskridge, one of the survivors of the Bynum children, and John Perkins and William Perkins, adults and heirs of the complainant, do not concur with them in their suit, and for that reason are not made parties. The respondent, besides being charged generally with fraud, is especially so in reference to certain receipts and releases, which these complainants gave to him, which they now say were obtained by concealment and circumvention.

The respondent, in his answer to the bill, admits his marriage in Louisiana, at the time and place stated. That he removed to Mississippi with his wife in 1818; that their domicile was there continued to be kept during the coverture, and that their removal was not only with the consent of the wife, but in pursuance of an understanding between them before their marriage *took place. He denies that [323 any community of gains was established conventionally, or that it legally could occur under the law of Louisiana, on account of the residence of himself and wife in that State when they were married, because it was their intention, before the marriage took place, to remove into Mississippi. He denies that any money, invested by him in lands in Mississippi, belonged, either legally or equitably, to his wife in either State; and asserts, even if there was a marital community between them, he was entitled to dispose of the gains as he pleased, without any liability, under the law of Louisiana, to account for the same to his wife or her representatives. He denies the charge, that he was without productive property or available means to purchase the property in Mississippi. That property consists of several tracts of land and the improvements put upon them, as is said, by community funds. The tract upon which the improvements were put contained one hundred acres. It was bought from Arthur Mahan, on the 30th October, 1818, for \$9,926. It was improved for a residence for the respondent with his family, including the children of the wife by the first husband. There was another tract, containing 2,100 acres, bought by the respondent from Elihu Hall Bay, in January, 1819, for \$5,000. There were two other purchases—one of them, a lot in Natchez, bought from Walter S. Parker, in March, 1823, for \$600; and the other is a purchase from Sugar Zenor, in March, 1824, for \$1,000. The aggregate sum given for these lands, and the improvements upon the first, amount to \$39,600. The complainants allege, that they have a right to elect to take their interest in them in money, with interest upon the amount from the time of their mother's death.

To this answer, the complainants filed the general replication.

The case was tried, and the court below gave an interlocutory decree against the respondent. It declares that a community of gains had existed between the respondent and his wife during the marriage. That its resources were al-

together in Louisiana, and that the respondent had invested from the gains large sums in the purchase and improvement of real estate in Mississippi, and that it was held by him, in 1824, when the marriage was dissolved by the death of Mrs. Perkins. The court also referred the matter to a master, to take an account conformably to its decree. In the course of the reference, the master sustained an objection to an allowance for which the complainants contended. It was submitted to the court, whether he had properly refused it. He was instructed, that it was only necessary for him to ascertain the amount of the funds vested by the respondent in Mississippi during the community; and 324*] that, as to the source *from which Perkins derived them, the court would decide under all the proof. The master proceeded accordingly. He reported, without any proof of the source from which Mr. Perkins obtained the money, that \$16,968.76 was due to the complainants. The report was subsequently confirmed, and the court gave a final decree for them for the sum just stated, with interest, at eight per cent. from the 1st April, 1850.

It does not appear that the court's attention had been particularly directed to the releases which the complainants admit they gave to the respondent, and which he says were given to him with a positive denial of the statement, that he obtained them by fraud, concealment and circumvention.

If it had been, we think that court would have determined the effect of the releases upon the case before it gave its interlocutory decree, and that it would not have made a final decree upon the master's report.

We proceed to give our view of these releases.

The first, from Ewing and wife, was executed on the 11th April, 1828. Fourniquet and wife executed theirs on the 27th May, 1834, within a month of six years after the other.

They are as follows:

Release from E. P. Fourniquet et ux. to John Perkins.

Received, Natchez, May 27th, 1834, of John Perkins, on settlements of all accounts, debts, dues and demands, whatever, up to the present day, \$100 in full, having, on a previous occasion, received from him, as the guardian of my wife, Mrs. Harriet J. Fourniquet, late Miss Bynum, all the estate, portion and share, which she inherited by the death of her late father, Benjamin Bynum, late of Concordia, Louisiana, deceased, or her mother, Mrs. Mary Perkins, of the County of Adams, and State of Mississippi, and brother, Benjamin S. Bynum, of the County of Clairborne, and State last aforesaid, deceased; and do, by these presents, jointly with my said wife, release and forever discharge the said Perkins, from all and every claim which she, or either of us, might or could have against him, the said Perkins, either as guardian or otherwise, growing out of the estates aforesaid, or in any other matter and shape whatsoever, and forever exonerate him, by these presents, his heirs and executors and administrators therefrom.

[In] witness whereof, we have hereunto set our hands and seals, the day and year first above written, to wit: in the year of our Lord, one

thousand eight hundred and thirty-four, in the presence of Elijah Bell and John E. Maddux, whose names are hereunto subscribed, as witnesses hereunto, the said John Perkins being *also personally present, and by these [*325 presents accept.

E. P. FOURNIQUET, [SEAL.]
HARRIET FOURNIQUET. [SEAL.]
JOHN PERKINS. [SEAL.]

Witnessed, signed, sealed and delivered, in the presence of—

ELIJAH BELL,
JOHN E. MADDUX.

Release from M. W. Ewing to John Perkins.

Received of John Perkins two negro slaves, Lewis and Anderson, also his draft on A. Fisk, for \$470.34, in one hundred and twenty days, indorsed by R. M. Gaines; which, when paid, will be in full of all claims and demands, of every kind and description, which we, or either of us, may have against said Perkins individually, or against him as curator of the estates of Benjamin Bynum and Mary Perkins, in the Parish of Concordia, State of Louisiana, or as executor of the will of the said Mary Perkins, dated March 30, 1822, and in full of all claims of every kind, which we or either of us may have against said Perkins, in any way whatever; we having received from said Perkins, heretofore, the following named slaves, to wit: Judah Myers, aged 25 years; Edward, about 4 years; Harry, about 7 months; Little Daniel, about 16 years; Patrick, 13 years; Lewis, 5 years; Big Daniel, 50 years; Big Sarah Miambo, about 50 years; Ned, 16 years; Polly, 14 years; Frank, about 50 years; Maria, his wife, 37 years old; Frank, aged about 1 year; Fanny, about 7; Samuel, about 19 years. Also two mules, thirty head of cattle, and a chest of tools; and the said Perkins accepts hereof, as a full satisfaction and discharge from the said Martin W. Ewing, and Anne, his wife, in the premises.

Witness our hands, this 11th day of April, A. D. 1828.

MARTIN W. EWING,
ANNE EWING,
JOHN PERKINS.

Att. R. M. GAINES.

The operative words of these releases are as full as they can be, and they cover the subject matter for which the complainants brought the suit.

We have carefully examined and considered this record, without finding in it anything against the fairness of the releases. The complainants do not give any proof against it. Nothing is in proof from which it can be inferred that they were given in ignorance of their rights in the estates of Benjamin S. Bynum and Mary Bynum when the releases were made, or that they were in any way circumvented by the respondent. Their testimony in the case is exclusively upon the community of gains, and *upon the inability of the respondent [*326 to make such purchases and improvements from his own means.

It consists of copies of conveyances for the property bought; of depositions, in which there is not a word relating to the releases; and of answers by the respondent to other suits against him, one of which was a suit in equity brought by these complainants in the Circuit Court of the United States, in Louisiana.

In that answer may be found a narrative of the respondent's business connection, and dealings with the estate of Benjamin S. Bynum and that of his widow, afterwards the wife of the respondent. It shows that he rendered an account of both. That it was done in an open manner and with an intention that it should be examined by those who were interested. It is further shown, that after the accounts had been officially filed, that there was a partition of all the property among the heirs, and that it was consummated by receipts and acquittances from all of them, among them those given by Ewing and his wife, and by Fourniquet and his wife, as they have been already recited in this opinion. The respondent also denies in that answer the charge there made by these complainants, as it is repeated in this suit, that these acquittances were obtained by fraud, misrepresentation, and concealment, and avers that they were executed by the parties with a full knowledge of all their rights, and for a valuable consideration. In that case, as in this, there was no proof that those receipts or releases were fraudulently obtained. The witnesses, Henderson, Montgomery, and Walworth, in this suit, are not questioned as to the execution of the releases. The same interrogations were put to all of them. The answers of each are very immaterial for any purposes in this suit. No one of them knew anything concerning the respondent's pecuniary situation when he married, or when he removed into Mississippi, or of the sources from which the money came which was invested in Mississippi. The same may be said of Wren's testimony. Loria's testimony is as indefinite as that of the others, and he also was not questioned concerning the execution of the releases. On the other hand, the evidence produced by the respondent in this suit, shows that the releases were not precipitately made. That neither of the complainants gave them until after they had had time to examine his accounts, and not until they had examined them. Whatever they may have thought of the integrity of the respondent, they did not act then as if they suspected it. We see them receiving from him their portions of the estates, of which they were distributees, and other property besides, as gratuities from the respondent, and dealing with both, among themselves and with others, and acting towards 327*] the respondents as if they were *content with what he had done, and with what they had received.

There was an interval of five years and eleven months between the releases given by the complainants to the respondent. The accounts upon which they were given, were all that time accessible to them. The proofs show that Ewing had scanned them before he gave his release. His interest in the estates were the same as Fourniquet's. It was a family business, talked of, no doubt, among themselves, as such matters always will be, and it cannot be supposed that Fourniquet took his wife's portion of the estates without knowing that Ewing had given to the respondent a release when he took his wife's part, or without having had the same means as his associate to learn the condition of the estates, and the truthfulness of the respondent's official statement of them. Their acceptance of the portions of their wives must

be taken as an admission that the respondent had dealt fairly in the business, and that he meant to do so, until they shall prove that it was his design to cheat all of the heirs, including his own children, as well as the wives of the complainants. He may not have acted in his long management of the estates, with all caution and exactness, but nothing has been shown in this case, in his final settlement with the heirs, that he did not mean to act with fairness and liberality, or that any one of them did not think he had done so, when they made these releases.

With the view of these releases, we think that the court erred in giving its interlocutory order for an account to be taken. We are relieved by it from considering the points which were made in the argument concerning any community of gains between the respondent and his wife. However that may have been, the releases put an end to all controversy between these parties about it. They were fully argued by counsel, as they should have been, as they could not foresee what would be our view upon the effect of the releases. We could not add anything to the decisions of the courts of Louisiana upon connubial or legal communities of gains between husband and wife.

We are satisfied, whether it did or did not exist, that the releases given by the complainants are conclusive against them for any claim upon the respondent on account of the estates in which they were interested.

No proof having been given that these releases were obtained by any fraud or circumvention, *we shall order the decree of the court below to be reversed, and that the bill of the complainants shall be dismissed.*

Mr. Justice Curtis dissented.

*ORDER.

[*328

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to dismiss the complainant's bill.

S. C., 6 How., 206; 16 How., 82.
Cited—2 Wall., 442.

JOHN PERKINS, Appellant,

v.

EDWARD P. FOURNIQUET AND HARRIET, HIS WIFE.

Rule as to interest on judgments and decrees—appeal lies to correct mistake of Circuit Court in executing mandate of this court.

The sixty-second rule of this court (13 Howard) is as follows: "In cases where a writ of error is prosecuted to the Supreme Court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied from the date of the judgment below, until the same is paid, at the same rate that similar judgments bear interest, in the

courts of the state where such judgment is rendered. The same rule shall be applied to decrees for the payment of money, in cases in Chancery, unless otherwise ordered by this court. This rule to take effect on the first day of December Term, 1852.

Before this rule, interest was to be calculated at six per cent., from the date of the judgment in the Circuit Court to the day of affirmance here; and the confirmation of the report of the clerk, in the case of *Mitchell v. Harmony*, 13 Howard, 149, was under the rules then existing.

So, also, where a case from Mississippi was affirmed at December Term, 1851, the mandate from this court should have been construed to allow interest at six per cent. from the date of the decree in the court below, to the date of the affirmance in this court. Therefore, it was erroneous either to allow six per cent. until paid, or to allow the current rate of interest in Mississippi, in addition to the six per cent. allowed by this court.

The several rules upon this subject examined and explained.

THIS was an appeal from the Circuit Court of the United States for the Southern District of Mississippi.

It is stated, in the report of the preceding case, that, at December Term, 1851, a case of *Bourniquet and Wife* against *Perkins* came up from Mississippi, and the decree of the Circuit Court was here affirmed by a divided court. It was therefore not reported.

The proceedings under the mandate, and the questions which arose thereon, are set forth in the following opinion of the court.

Mr. Chief Justice Taney delivered the opinion of the court:

It appears in this case, that on the 22d of May, 1849, the Circuit Court for the Southern District of Mississippi passed a decree in favor of the appellees, against the appellant, directing **329** *him to pay the sum of \$16,496.61, within thirty days thereafter, with legal interest from the date of the said decree, or, in default thereof, the appellees to have execution against the appellant.

This decree was affirmed at the last term of this court, with costs and damages, at the rate of six per cent. per annum; and a mandate issued to the Circuit Court reciting the judgment of this court, and directing it to be carried into execution.

After this mandate was filed in the Circuit Court, the appellees obtained an execution against the appellant, by which the marshal was commanded to levy the amount of the original judgment in the Circuit Court, with the Mississippi interest of eight per cent., and damages at the rate of six per cent. in addition, making together, fourteen per cent., from the date of the original judgment, until paid.

The appellant insisted, that under the mandate, he was bound to pay nothing more than damages at the rate of six per cent. on the original decree, from the time it was rendered. And acting upon this construction of the judgment of this court, and supposing himself chargeable with the six per cent. damages, until the decree was satisfied, he paid the marshal, on the 12th of May, 1852, the amount he supposed to be due, calculating the interest up to that time, and by some error in the reckoning he paid a small sum over. And as the appellees still insisted upon levying the whole amount for which they had obtained process of execution, he moved the Circuit Court to refer it to a commissioner, to report the amount due

under the judgment of this court, and how much, if any, he had overpaid in his settlement with the marshal. It was admitted that the costs were all paid. The only controversy was about the interest and damages, as above stated.

The commissioner reported, that according to the basis of settlement claimed by the appellant, he had overpaid the amount due on the decree, \$61 50; but that, according to the construction of the mandate insisted on by the appellees, there was still due to them a balance of \$3,881.02.

Upon this report, the appellant moved the court to order satisfaction of the decree to be entered of record; or, to quash the execution then in the hands of the marshal, and order the clerk of the court to issue no further *fi. fa.* on the decree; and, also, for an order on the marshal, or the appellees, as might be proper to refund the money overpaid.

But the court overruled the motion, ordering, at the same time, that no further execution should issue, until the appellant had a reasonable time to present an appeal to this court. And this appeal was accordingly taken.

An objection has been made to the manner in which this case *has been brought [*330 before the court, and a motion made to dismiss, upon the ground that an appeal will not lie from this decision of the Circuit Court.

This objection to the form of proceeding involves nothing more than a question of practice. The mandate from this court left nothing to the judgment and discretion of the Circuit Court, but directed it to carry into execution the decree of this court, which was recited in the mandate. And if the decree of this court has been misunderstood or misconstrued, by the court below, to the injury of either party, we see no valid objection to an appeal to this court, in order to have the error corrected. The question is merely as to the form of proceeding which this court should adopt, to enforce the execution of its own mandate in the court below. The subject might, without doubt, be brought before us upon motion, and a *mandamus* issued to compel its execution. But an appeal from the decision of the court below, is equally convenient and suitable; and, perhaps, more so, in some cases, as it gives the adverse party notice that the question will be brought before this court, and affords him the opportunity of being prepared to meet it at an early day of the term. The appeal certainly would not stay proceedings. And it would be the duty of the Circuit Court, notwithstanding the appeal, to proceed to execute the judgment of this court, unless, as in this case, he entertained doubts of its construction and meaning, and deemed it, therefore, just and equitable to suspend its execution, until the decision of this court could be had in the premises.

In the case before us, however, there was substantially an equity proceeding and final decree, after the mandate was filed. It is true, they were summary, and necessarily so, as the matters in dispute under the execution were brought before the court by motion. But the claims of the respective parties were referred to a commissioner to examine and report; he made his report and the court decided upon it. This decision, although briefly stated, was, in

substance, a final decree upon the matters in controversy. It might, therefore, under the Act of Congress, be regarded as such, and revised accordingly, by an appeal to this court. Plenary and formal proceedings are not necessary, and never required, when the dispute is confined to matters arising under process of execution. They are more conveniently and as fully brought before the court, by a summary proceeding on motion.

The questions in controversy in the Circuit Court, and its decision upon them, are therefore regularly before us.

The difficulty in that court, seems to have arisen from supposing that the Act of 1842 applied to judgments and decrees in this court. And this, we presume, occasioned the error it committed, in the construction and execution of the decree and mandate in question.

The Act of 1842 does not embrace cases in equity; nor does it extend to either judgments or decrees, in this court. It is confined, in plain terms, to judgments at law, in the Circuit and District Courts. It places the judgments of these courts, in respect to interest, upon the same footing with the judgments of the State Courts. And where, by the law of the state, the judgment of a court carries a certain interest until paid, the former rule and the same rate of interest is to be allowed in the Circuit and District Courts of the United States. And the marshal is directed to levy it on process of execution, wherever it can be so levied on a judgment in the State Court. In such cases the judgment bears interest by force of the law, although, upon the face of it, it may not purport to carry interest. Upon common-law principles a judgment does not carry interest. It is true, that damages may be recovered for the detention of a debt, in an action on the judgment. But previous to the Act of 1842, neither interest nor damages, for the detention of the debt, could have been levied under process of execution, upon the judgment of a Circuit or District Court of the United States.

But the Act of 1842 does not speak of interest or damages upon the judgments of this court, nor does it repeal the 23d section of the Act of 1789. This section provides, that when a judgment or decree is affirmed here, this court is directed to adjudge or decree to the respondent in error, just damages for his delay, and single or double costs, at their discretion. Under this law there is no distinction made between cases in equity and at law. In either of them, the damages to be allowed, in addition to the amount found to be due by the judgment or decree of the court below, is confided to the judicial discretion of this court. And the 17th, 18th and 20th rules were adopted in pursuance of this power.

These rules have been in force, and acted on by the court, since 1807, when the 20th rule was adopted, until the new rule upon this subject was made at the close of the last term. And the change then made was not occasioned by any supposed repugnancy between them and the Act of 1842. But because the court deemed it just to place the judgments in this court upon the same footing with the judgments in the Circuit and District Courts; and that suitors in the courts of the United States should stand on the same ground with suitors

in the State Courts in its appellate, as well as in its inferior tribunals. In adopting the new rule this court exercised the same power which it had, exercised in adopting the former rules; that is, the discretionary power conferred by the Act of 1789, as hereinbefore mentioned.

The 17th rule provides, that when a case appears to be brought merely for delay, damages shall be awarded at the rate of ten per cent. on the amount of the judgment; and by the 18th rule, the damages are to be at the rate of six per cent. when it appears that there is a real controversy.

These two rules were passed in 1803. And as some difficulty arose as to the time for which these damages were to be computed, the 23d rule was afterwards (1807) adopted, and provides, that the damages allowed by the two former rules shall be calculated to the day of the affirmance of the judgment in this court.

The question as to the operation of the Act of 1842, upon the 18th and 20th rules, was brought to the consideration of the court at the last term, in the case of *Mitchell v. Harmony*. The judgment brought up by the writ of error, was rendered in the Circuit Court of New York, and was affirmed in this court. The sum recovered was large, and the interest, even for a short time, was therefore important. And the counsel for Harmony, the defendant in error, moved the court to allow him the New York interest of seven per cent. upon the amount of the judgment, and that the interest should run until the judgment was paid. But as the rules above mentioned were still in force, the court held, that he was entitled to only six per cent., to be calculated from the date of the judgment in the Circuit Court, to the day of affirmance here.

The case now before us, was decided in the early part of the last term, before the case of *Mitchell v. Harmony*, and consequently falls within the operation of the same rules, and damages upon the affirmance of the decree must be calculated in like manner.

Indeed, in the New York case, the claim for interest stood on stronger ground than in the present one, for that was an action at law. The Act of 1842, therefore, applied to the judgment in the Circuit Court, and it would have carried state interest until paid, if it had not been brought here by writ of error. But this is a decree in equity, and not embraced in the Act of 1842; and according to the settled chancery practice, no interest or damages could have been levied under process of execution, upon the amount ascertained to be due, and decreed to be paid, if there had been no appeal. (2 Ves., 157, 168, n. 1, Sumn. ed.; 2 Dan. Chan. Plead. and Prac., 1442, 1437, 1438.) Nor could any damages or interest have been given on its affirmance here, but for the discretionary power vested in this court by the Act of 1789. That discretion, as we have already said, extends to decrees in equity, as well as judgments at law. And the rules have always been applied to both, unless otherwise specially ordered.

It follows, from what we have said, that the appellees, upon the affirmance of the decree, were entitled to damages at the rate of six per cent., to be calculated from the date of the decree to the date of the affirmance; and

to no further interest or damages. The decree was passed by the Circuit Court, on the 22d day of May, 1849, for \$16,496.61, and was affirmed in this court on the 24th of December, 1851. The interest from the date of the decree to the time of affirmance in this court, is \$2,562.97, making together the aggregate sum of \$19,058.98. This amount, together with the costs, is all that the appellees were entitled to recover under the judgment and mandate of this court. It appears, however, that the marshal has received, under the process of execution, \$19,500, in addition to the costs, and paid it over to the solicitor of the appellees.

They have therefore received \$441.02 more than they were entitled, and that sum must be refunded to the appellant.

It is proper to say, that the mandate in question was in the usual form, and the same with the mandate in *Mitchell v. Harmony*, and indeed the same that has been used since the adoption of the rules above mentioned. And it never has been supposed by this court to sanction the collection of state interest on the judgment; and still less the unprecedented interest and damages claimed in this case, amounting together to fourteen per cent.

The decree of the Circuit Court, overruling the motion of the appellant, must therefore be reversed, and a mandate issued, directing the court below to enter the decree satisfied, and also to order and direct the appellees to repay to the appellant the sum of \$441.02, with the state interest thereon of eight per cent. from the time it was received by their solicitor from the marshal.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and was argued by counsel. On consideration whereof, it is ordered, adjudged and decreed, that the decree of the Circuit Court overruling the motion of the appellant, be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby, remanded to the said Circuit Court, with instructions to that court to enter the decree rendered by that court on the 22d day of May, A. D. 1849, for \$16,496.61, with legal interest from 33d*] said date, satisfied, and *to order and direct the appellees to repay to the appellant the sum of \$441.02, with the state interest thereon, of eight per cent. from the time it was received by their solicitor from the marshal.

S. C., 6 How., 206; 16 How., 82.
Cited—4 Otto, 102, 234; 4 Cliff., 615.

BENJAMIN D. HARRIS, *Plaintiff in Error*,
v.
WILLIAM HARDEMAN, HENRY R. W.
HILL, COTESWORTH P. SMITH, AND
HENRY A. MOORE.

Circuit Court may summarily set aside judgment rendered on default at former term, where defendant had no notice.

NOTE.—When service of notice to appear and defend is necessary to the validity of a judgment. See note to *Hollingsworth v. Barbour*, 4 Pet., 466.

A statute of Mississippi directs that where the defendant cannot be found, a writ of *capias ad respondendum* shall be served, by leaving a copy thereof with the wife of the defendant, or some free white person above the age of sixteen years, then and there being one of the family of the defendant, and found at his usual place of abode; or leaving a copy thereof at some public place, at the dwelling house or other known place of residence of such defendant, he being from home, and no such free white person being found there willing to receive the same.

The Circuit Court of the United States adopted a rule that the *capias* should be served personally, or if the defendant be not found, by leaving a copy thereof at his or her residence, or usual place of abode, at least twenty days before the return day thereof.

The marshal made the following return to a writ of *capias*: "Executed on the defendant Hardeman, by leaving a true copy at his residence."

This service was neither in conformity with the statute nor the rule.

Therefore, when the court gave judgment, by default, against Hardeman, and an execution was issued, upon which a forthcoming bond was given, and another execution issued, and at a subsequent day the court quashed the proceedings, and set aside the judgment by default, this order was correct.

When the judgment by default was given, the court was not in a condition to exercise jurisdiction over the defendant, because there was no regular service of process, actual or constructive.

The cases upon this point, examined.

Moreover, when the proceedings were quashed, they were still *in fieri*, and not terminated; and any irregularity could be corrected, on motion.

THIS case was brought up by writ of error from the Circuit Court of the United States for the Southern District of Mississippi.

The facts are stated in the opinion of the court.

It was argued by *Mr. Nelson* for the plaintiff in error, and *Mr. Freeman* for the defendant.

Mr. Nelson contended that the judgment of the court below was erroneous, and referred to the following authorities:

To show that the bond was regularly taken under the Mississippi Statute. (Hutch. Code, §10, art. 6, sec. 2; Howard & Hutch., 653, sec. 73.)

The ground of the motion made by the defendants in error, in the court below, was, that the original judgment was void for want of *notice; and that being void, the process [*335 issued upon it and the bond taken under that process, were nullities.

It may be true that the return of the service of notice was insufficient. (*Smith v. Cohen*, 8 Howard, Miss., 35; *Tomlinson v. Hoyt*, 1 Smedes & Marsh., 615; *Eskridge v. Jones*, *Id.*, 595.)

But that was matter to be considered and passed upon by the court rendering the judgment. (*Fatheree v. Long*, 5 Howard, Miss., 661; *Smith v. Bradley*, 6 Smedes & Marsh., 492.)

Besides, the defendants were estopped, by the execution of the bond, from denying the validity of the judgment and the execution. (*Bank U. S. v. Patton*, 5 Howard, Miss., 200; *Miller v. Patten*, 3 Smedes & Marsh., 463; *Keringham v. Seanland*, 6 Howard, Miss., 540; *Feld v. Morse*, 1 Smedes & Marsh., 347; *Conn v. Pender*, 2 Smedes & Marsh., 386; *Pender v. Felton*, 2 *Id.*, 535; *Clove v. Thorpe*, 3 *Id.*, 64; *McCoul v. Ellet*, 8 *Id.*, 505.)

The bond was regularly forfeited. (*Barker v. The Planters' Bank*, 5 Howard, Miss., 566; *Puckett v. Graves*, 6 Smedes & Marsh., 384;

Talbert v. Melton, 9 *Id.*, 9; *Dowd v. Hunt*, 10 *Id.*, 414.)

And the forfeiture of the bond extinguished the original judgment. (*Davis v. Dixon*, 1 *Howard*, Miss., 64; *Weatherly v. Proby*, *Id.*, 98; *Witherspoon v. Spring*, 3 *Id.*, 60; *Binny v. Stanton*, 2 *Smedes & Marsh.*, 457.)

Moreover, the return was in conformity with the rule of court.

To show the validity of said rule, the plaintiff in error relied upon the Act of Congress of the 24th September, 1789, sec. 34, Laws U. S., Vol. I., 93; Act of 2d March, 1793, sec. 7, Laws U. S., Vol. I., 335; Act of 19th May, Laws U. S., Vol. IV., 279; *Wayman v. Southard*, 10 *Wheaton*, 1; *Beers v. Haughton*, 9 *Peters*, 330, 360, 361; *Fullerton v. Bank U. S.*, 1 *Peters*, Sup. Ct., 612; *Williams v. Bank U. S.*, 2 *Id.*, 96; *Amis v. Smith*, 16 *Peters*, 303.

Mr. Freeman, for defendant in error:

In this case, a motion was made in the court below to quash the forthcoming bond and vacate the original judgment. It was sustained upon the ground of the judgment being a nullity, there having been no service of process upon Hardeman, and no appearance entered for him.

It will be conceded, that if there be no notice, actual or constructive, the judgment is a nullity. (4 *Peters*, 474; 2 *Yerger*, 484; 11 *Wendell*, 652; 15 *Johnson*, 141; 1 *Smedes & Marshall's Miss.*, 351.) There was no "actual service" of process on Hardeman, as is shown by the marshal's return. Did he have constructive notice? The Statute of Mississippi 336*] provides, when the defendant is not found, that constructive service may be made, and points out the mode. (*Howard & Hutchinson's Dig.*, 583, sec. 27.) The Statute was not complied with in executing the writ in this case. It was served by leaving a copy at defendant's residence. And is not even dated. In construing this Statute, the court of last resort in Mississippi have several times held such service to be bad. As, for example, in the case of *Smith v. Cohea*, 3 *Howard's Miss.*, 35, it is held that a return on a writ "executed by leaving a copy at the boarding house of the defendant," is insufficient. So, also, in the case of *Futhee v. Long*, 5 *Howard's Miss.*, 661, it is held that the return "executed by leaving a copy at the defendants house," is bad. And the court goes on to say, that when the service is not personal, the return must show that the requirements of the statute were complied with. A similar exposition of the statute was given in the cases of *Tomlinson v. Hoyt*, and *Esbridge v. Jones*, 1 *Smedes & Marshall*, 515 and 595.

Had this motion been made at the term next succeeding that at which the judgment was rendered, no one would doubt Hardeman's right to the relief sought by it. Does the giving and forfeiture of the forthcoming bond, and the lapse of time, bar his right?

It is believed that if the giving and forfeiture of the forthcoming bond does not bar, the mere lapse of time cannot. For there is no time limited by the statute within which such a motion may be made. That the giving and forfeiture of the forthcoming bond interpose no obstacle to the motion, is clear. Is it true, the court of last resort in Mississippi has frequently decided that a motion to quash a forthcoming

bond must be made at the term to which it is returnable. (6 *Howard's Miss.*, 540; 1 *Smedes & Marshall*, 347; *Id.*, 386.) Yet the same court has held that when the judgment is absolutely void for want of jurisdiction in the court rendering it, either of the subject matter or over the parties, the forthcoming bond is absolutely void also, and subject to be quashed, on motion, at any time, either at, or subsequent to the return term. (*Buckingham v. Bailey*, 4 *Smedes & Marshall*, 538.)

A stronger reason may be added in this court. Here the forthcoming bond is treated and considered as part of the process of the court. (16 *Peters*, 312, 313.) In this case, that process is founded upon a judgment confessedly void. The court can always control its own process; and will never permit void writs to be issued and executed, when brought to its attention. And it can make no difference whether the effort to resist the issuance [*337 and execution of such process is made within one, or after a lapse of ten years, from the date of the void judgment.

A rule of court, adopted by the District Judge (*Judge Adams*), is relied on to show that the execution of the process upon Hardeman was sufficient. Upon this, I remark:

1. That even if the rule be valid, the service is not good, for it has no date; and it does not appear, therefore, that it was executed "fifteen days" before court, so as to give jurisdiction of the person.

2. The District Judge has no power to adopt such a rule. (16 *Peters*, 314.) The decision of the Circuit Court should therefore be affirmed.

Mr. Justice Daniel delivered the opinion of the court:

The defendants in error moved the Circuit Court to quash a forthcoming bond, executed by the defendants to the plaintiff; and to set aside the judgment on which the bond was founded, upon the grounds that the forthcoming bond was taken in execution of a judgment entered against the defendant Hardeman, as by default, when in truth there had been no service of original or mesne process upon him to warrant such a judgment. The facts and proceedings in this case, as disclosed by the record, are as follows: The plaintiff in error, in March, 1839, instituted in the Circuit Court an action on a promissory note against the defendant and three others; and upon the writ sued out in that action, the marshal, on the 9th of April, made a return in these words: "Executed on the defendant Hardeman, by leaving a true copy at his residence." Upon this return of the officer, at the next succeeding or return term of the court, in May, 1839, a judgment by default for want of appearance was taken against the defendant Hardeman for the amount of the note, with interest and costs. Amongst other proceedings upon this judgment, a writ of *fiat facias* was sued out in March, 1840, was levied on sundry slaves, the property of Hardeman, and the forthcoming bond in question executed by him on the 20th of April, 1840. In pursuance of this forthcoming bond another *fiat facias* was sued out on the 11th of June, 1840, and upon this last writ was indorsed, on the 8th of October, 1840, a *cessat executio* by the plaintiff's attorney.

By the Statute of Mississippi regulating proceedings in courts of law, the following modes for the service of process in certain cases, are prescribed: "All writs of *scire facias* and *capias ad respondendum*, where no bail is required, may be served in the following manner: Where the defendant cannot be found, it shall be deemed sufficient service of such writ for 338*] the sheriff or *other officer to whom the same is directed, to leave a copy thereof with the wife of the defendant or some free white person above the age of sixteen years, then and there being of the family of the defendant, and found at his usual place of abode; or to leave a copy thereof at some public place at the dwelling house, or other known place of residence of such defendant, he being from home, and no such free white person being found there willing to receive the same.

On the 18th of June, 1838, the District Judge for the Southern District of Mississippi, in the absence of the circuit or presiding Judge, caused to be entered on the minutes of the Circuit Court, as a rule of proceeding in that court, an order in the following words, viz.: "The *capias ad respondendum* shall be served by arresting the defendant, unless bail be waived; or where bail be waived, or a summons shall issue, the same shall be served personally, or if the defendant be not found, by leaving a copy thereof at his or her residence, or usual place of abode, at least twenty days before the return day thereof, to entitle the plaintiff to a trial or judgment by default at the return term."

The action in this case was commenced by a summons, and the marshal's return of the service of that process, and the judgment thereupon by default at the return term, and the subsequent proceedings upon that judgment, were as have been already stated.

Upon the application of the defendant Hardeman, at the May Term of the Circuit Court, in the year 1850, until which time the proceedings in this case had been stayed, the court quashed the forthcoming bond and *fiert facias* sued out thereon, and set aside the judgment purporting to be a judgment by default against the defendant, as being unwarranted upon the face of the proceedings, and therefore void.

In reviewing the decision of the Circuit Court, it should be borne in mind, as a rule to guide and control our examination, that the judgment impugned before that court was a judgment by default, and that in all judgments by default, whatever may affect their competency or regularity, every proceeding indeed, from the writ and indorsements thereon, down to the judgment itself, inclusive, is part of the record, and is open to examination. That such cases differ essentially, in this respect, from those in which there is an appearance and a *contestatio litis*, in which the parties have elected the grounds on which they choose to place the controversy, expressly or impliedly waiving all others. In support of the rule just stated, many authorities might be adduced; we cite for it the cases of *Nadenbush v. Lane*, 4 Ran., 413, and of *Wainwright v. Harper*, 3 Leigh, 270.

Within the scope of this rule, two inquiries 339*] present themselves in connection with the decision of the Circuit Court. The first is this: whether the court in which the judgment

by default was taken, ever had jurisdiction as to the defendant, so as to warrant the judgment entered against him by default. And the second inquiry is, whether, upon the hypothesis that the court had not jurisdiction of the person of the defendant, and that the judgment against him was not binding, it was competent for the Circuit Court, in the mode adopted by it, to set aside the judgment, and to quash the proceedings consequent thereupon.

In reference to the first inquiry, it would seem to be a legal truism, too palpable to be elucidated by argument, that no person can be bound by a judgment, or any proceeding conducive thereto, to which he never was party or privy; that no person can be in default with respect to that which it never was incumbent upon him to fulfill. The court entering such judgment by default could have no such jurisdiction over the person as to render such personal judgment, unless, by summons, or other process, the person was legally before it. A court may be authorized to exert its powers in reference either to persons or things—may have jurisdiction either *in personam* or *in rem*, and the existence of that jurisdiction, as well as the modes of its exercise, may vary materially in reference to the subject matter to which it attaches. Nay, they may be wholly inconsistent; or at any rate, so much so, as not to be blended or confounded. This distinction has been recognized in a variety of decisions, in which it has been settled, that a judgment depending upon proceedings *in personam* can have no force as to one on whom there has been no service of process, actual or constructive; who has had no day in court, and no notice of any proceeding against him. That with respect to such a person, such a judgment is absolutely void; he is no party to it, and can no more be regarded as a party than can any and every other member of the community. As amply sustaining these conclusions of law, as well as of reason and common sense, we refer to the following decisions. In *Borden v. Fitch*, 15 Johns., 141, Thompson, Chief Justice, says: "To give any binding effect to a judgment, it is essential that the court should have jurisdiction of the person and the subject matter; and the want of jurisdiction is a matter that may always be set up against a judgment when sought to be enforced, or where any benefit is claimed under it. The want of jurisdiction makes it utterly void and unavailable for any purpose. The cases in the English courts, and in those of our sister States, are very strong to show that judicial proceedings against a person not served with process to appear, and not being within the jurisdiction of the court, and not appearing in person or by attorney, are [*340 null and void. In *Buchanan v. Rucker*, 9 East, 192 the Court of King's Bench declared that the law would not raise an *assumpsit* upon a judgment obtained in the Island of Tobago by default, when it appeared upon the face of the proceedings that the defendant was not in the island when the suit was commenced, and that he had been summoned by nailing a copy of the declaration on the court house door. The court said it would have made no difference in the case if the proceedings had been admitted to be valid in the Island of Tobago. In the Supreme Court of Massachusetts, Chief Justice

Parsons, in *Bissell v. Briggs*, 9 Mass., 464, lays down the principle very clearly and distinctly, that before the adoption of the Constitution of the United States, and in reference to foreign judgments, it was competent to show that the court had no jurisdiction of the cause; and if so, the judgment, if set up as a justification for any act, would be rejected without inquiring into its merits. After citing a number of cases, the learned judge proceeds to say: "We have refused to sustain an action here upon a judgment in another state, where the suit was commenced by attachment, and no personal summons or actual notice given to the defendant, he not being at the time of the attachment, within the state. In such cases, we have considered the proceedings as *in rem*, and only binding the goods attached, and the judgment having no force *in personam*. This principle is not considered as growing out of anything peculiar to proceedings by attachment, but is founded on more enlarged and general principles." It is said by the court, "that to bind a defendant personally by a judgment, when he was never personally summoned, nor had notice of the proceedings, would be contrary to the first principles of justice."

It is worthy of notice, in this place, that the cases from 9 East, and 9 Massachusetts, cited by Chief Justice Thompson, were not instances in which the validity of those judgments was examined upon appeal or writ of error, but were instances in which that validity was inquired into collaterally, before other tribunals in which they were adduced as evidence to sustain other issues there pending.

In the case of *Starbuck v. Murray*, 5 Wendell, 156, the Supreme Court of New York say: "The courts of Connecticut, Pennsylvania, New Hampshire, New Jersey, and Kentucky, have also decided, that the jurisdiction of the court rendering a judgment, may be inquired into, when a suit is brought in the courts of another state, on that judgment;" and after citing the cases of *Thurber v. Blackburne*, 1 N. H., 246; *Benton v. Bengot*, 10 Sergeant & Rawle, 240; *Aldrich v. Henney*, 4 Conn., 280; *Curtis 341** v. *Gibbs*, 1 Pa., 405, *they say: "This doctrine does not depend merely upon adjudged cases; it has a better foundation; it rests upon a principle of natural justice. No man is to be condemned without the opportunity of making a defense, or to have his property taken from him by a judicial sentence, without the privilege of showing, if he can, the claim against him to be unfounded." The court then proceed to say: "But it is contended, that if other matter may be pleaded by the defendant, he is estopped from asserting anything against the allegation contained in the record. It imports perfect verity, it is said, and the parties to it cannot be heard to impeach it. It appears to me that this proposition assumes the very fact to be established, which is the only question in issue. For what purpose does the defendant question the jurisdiction of the court? Solely to show that its proceedings and judgment are void, and therefore the supposed record is, in truth, no record. If the defendant had not proper notice of, and did not appear to, the original action, all the State Courts, with one exception, agree in opinion that the paper introduced as to him is no rec-

ord, but if he cannot show, even against the pretended record, that fact, on the alleged ground of the uncontrollable verity of the record, he is deprived of his defense, by a process of reasoning that, to my mind, is little less than sophistry. The plaintiffs, in effect, declare to the defendant—the paper declared on is a record, because it says you appeared; and you appeared, because the paper is a record. This is reasoning in a circle. The appearance makes the record uncontrollable verity, and the record makes the appearance an unimpeachable fact. Unless a court has jurisdiction, it can never make a record which imports uncontrollable verity to the party over whom it has usurped jurisdiction, and he ought not, therefore, to be estopped from proving any fact which goes to establish the truth of a plea alleging the want of jurisdiction."

By the same court, this doctrine is affirmed, in the case of *Holbrook v. Murray*, 5 Wendell, 161. In the case of *Denning v. Corwin & Roberts*, 11 Wendell, 648, it was ruled, "That a judgment in partition, under the statute, where part of the premises belonged to owners unknown, was not valid, unless it appear, upon the face of the record, that the affidavit required by the statute, that the petitioner, or plaintiff in partition, is ignorant of the names, rights or titles of such owners, was duly presented to the court, and that the notice, also, required in such cases, was duly published." And Chief Justice Savage, in delivering the opinion of the court, said: "On the part of the plaintiff, it is contended that the judgment in partition is void, for want of jurisdiction in the court, the requirements of the statute not having been complied with; and on the part of the defendants, it is insisted that it is [*342] conclusive until reversed or set aside, that it cannot be attacked collaterally, and that the defendants, being *bona fide* purchasers, are entitled to protection. That a judgment is conclusive upon parties and privies, is a proposition not to be denied; but if a court has acted without jurisdiction, the proceeding is void, and if this appear on the face of the record, the whole is a nullity." After quoting the opinion of Chief Justice Thompson, in *Borden v. Fitch*, 15 Johnson, 121, Chief Justice Savage goes on to say: "With respect to the proceedings in partition, now the subject of consideration, there can be no doubt that the court, in which the judgment was rendered, had jurisdiction of the subject of partition; but, to authorize a judgment of partition, the parties must be before the court, or it must be shown to the court that some of them are unknown; and this must appear by the record, where the proceeding is against owners unknown; it is a proceeding *in rem*, and nothing is to be taken by intendment. There is avowedly nothing like personal notice to the parties interested as defendants; they are not even named; and the right of the plaintiff depends entirely upon the fact, to be proved by affidavit, that the owners are unknown." The Chief Justice, after showing the insufficiency, by proof of the affidavit, according to the requisition of the statute, says: "The record then states, that at a subsequent day the plaintiffs appear, by their attorney, and the parties unknown being solemnly demanded, come not,

but make default. The statute gives the court no jurisdiction to take any steps against unknown owners, until notice has been published according to the statute. Should not the record, therefore, show that it had been made to appear to the court, by affidavit, that the owners were unknown to the plaintiffs, and that such notice as the statute requires had actually been given? Suppose a judgment record is produced, in which the plaintiff declares upon a promissory note, and the record does not show that the defendant is in custody, or has been served with process, and yet the court render judgment by default, would not such a record be an absolute nullity?" In the case of *Wilson et al. v. The Bank of Mount Pleasant*, reported in the 6th of Leigh, Tucker, President of the court, thus announces the law: "This is an action upon a judgment of the State of Ohio, which, it is contended, is conclusive in the courts of Virginia, upon the principles of the Constitution of the United States. It is unnecessary, in this case, to go into the question of the construction of that clause of the federal compact which relates to the effect of judicial proceedings of the several States in other states, for it seems to be agreed, on all hands, that the doctrine of the conclusiveness of the judgments of the several States, is to be taken with the qualification, that, where the court has no jurisdiction over the subject matter or the person, or where the defendant has no notice of this suit, or was never served with process, and never appeared to the action, the judgment will be esteemed of no validity." With this doctrine entirely agrees another doctrine of the Supreme Court of Virginia, in the case of *Wynn v. Wyatt's Adm'r*, 11 Leigh, 584, in which last case the court say, "That the appearance of the defendant, in term, and his motion to quash the attachment irregularly issued, and to set aside the proceedings at the rules, founded upon it, was not an appearance to the action, dispensing with further and proper process; that the award of the *alias* summons was proper and necessary; and that the proceedings on that subsequent process cannot be sustained, since, confessedly, it was not duly served." But the decision which should be decisive upon the question now before us, is a decision of this court, in the case of *Hollingsworth v. Barbour et al.*, in the 4th of Peters, p. 466. That was a case exhibiting the following features: A title had been made to land, by deed from a Commissioner, acting under a decree in chancery, in the State Court in Kentucky, in which the "unknown heirs" of a person from whom title was deduced, were made defendants, and the decree, as against those heirs, was taken by default, after order of publication. The grantee of the Commissioner filed his bill, to obtain possession of the lands, against various persons who had taken possession thereof. The Circuit Court of the United States dismissed the bill, upon the grounds that, at the date of the proceedings in the State Court (under which the conveyance of the Commissioner purported to have been made), there was no law of the State authorizing those proceedings against the unknown heirs of the original owner of the land, and the decree taken upon those proceedings, by default against them,

and as they never had personal notice of the suit, the decree by default and the title made by the Commissioner, were null, as respected either those heirs or the persons in possession of the lands. The very lucid argument of *Mr. Justice Trimble*, in the Circuit Court, which was adopted literally and *in extenso* by this court, is too long for insertion here, but one or two of the conclusions reached by him, and affirmed by this court, in the words of that Judge, may be noticed. "The principle," said that Judge, and said this court in confirmation, "is too well settled, and too plain to be controverted, that a judgment or decree, pronounced by a competent tribunal, against a party having actual, or constructive notice, of the pending of the suit, is to be regarded by every other co-ordinate tribunal; and that, if the judgment or decree be erroneous, the error can be corrected only by a superior appellate tribunal. The leading distinction is between judgments and decrees merely void, and such as are voidable only. The former are binding nowhere, the latter everywhere, until reversed by a superior authority. The suit and decree are against the unknown heirs of John Abel Hamblin. Instead of personal service of process upon the defendants in the suit, an order of publication was made against them; and upon a certificate of the publication of this order, for eight weeks, in an unauthorized newspaper, being produced and filed in the cause, the bill was taken *pro confesso*, and at the next succeeding term, the final decree was entered, directing the conveyance of the land to the complainant. Again, that Judge and this court speaking through him, say: "It would seem that the court acted without authority, and that the decree is void, for want of jurisdiction in the court. But if not void as being *coram non jure*, it is void and wholly ineffectual to bind or prejudice the rights of Hamlin's heirs, against whom the decree was rendered, because they had no notice, either actual or constructive. The principle of the rule, that decrees and judgments bind only parties and privies, applies to the case; for, though the unknown heirs of Hamlin are affected to be made parties in the bill, there was no service of process, nor any equivalent, to bring them before the court, so as to make them, in the eye of the law and justice, parties to the suit." Here, again, it should be borne in mind that this is not an instance of reversal by an appellate tribunal, for error or irregularity in an inferior court; but a test, collaterally applied by an independent authority, to the character of proceedings, as void or voidable in their nature.

At this point it is proper to advert to the character and effect of the process in the suit of *Harris v. Hardeman*, as constituting service upon the defendants in that suit, and thereby investing the court with jurisdiction over their rights. If the rule prescribed by the Statute of Mississippi, already referred to, is to govern in this case, it is presumed that a doubt will, or can hardly be raised as to the insufficiency of the service, as there are not less than three instances in which the requisites of the statute have not been complied with. In the first place, it is not shown, by the return, that

the defendant could not be found, which should have been shown, in order to justify the substitution of any other in lieu of personal service. Second, it is not shown that a copy of the process was left, either with the wife of the defendant, or with some other free white person above the age of sixteen years, being one of the family of the defendant. Third, it is not stated or proved that a copy was left at some public place of the dwelling house of the **345**] defendant, *he being from home, and no free white person, as above described, being found there, willing to receive the process. But it has been contended, that by a rule adopted by the Judge of the District Court, a mode for the service of process has been prescribed, differing from that ordained by the Statute of Mississippi, and dispensing with several of the requisites insisted on by the statute, and that the service in the suit in the Circuit Court was in conformity with the rule of the District Judge. Forbearing, for the present, any inquiry as to the validity of the rule made by the District Judge, under the decision of this court, in the case of *Amis v. Smith*, 16 Peters, 303, we proceed to compare the proof of service as apparent upon the return of the marshal, with the requirements of the rule in question. This rule has been already quoted. The return of the marshal has also been given *totidem verbis*. It will be seen that the reason assigned in the rule, as forming the justification for dispensing with personal service, is not stated in the return of the officer, and there is an entire omission to give the date or time preceding the term of the court to which the process was returnable, so as to show that the plaintiff was authorized to take a judgment by default, in virtue of a legal constructive notice, and a failure of appearance. Whether, therefore, the Statute of Mississippi, or the rule made by the District Judge, be regarded as operative, there was, in the suit in the Circuit Court, neither notice by personal service of process, nor notice by legal construction. The judgment by default, therefore, must be regarded as obnoxious to every impeachment of its efficacy which can flow from its having been entered against one who was never a party in court, with respect to the proceedings upon which that judgment was taken. But there is another view of the questions raised in this cause, which is equally, or even more conclusive in favor of the decision now under review. At the time of the motion to the Circuit Court to quash the forthcoming bond and set aside the judgment by default, that judgment was still unsatisfied, and was in the progress of execution, and the forthcoming bond, filed in the clerk's office, according to the laws of the State, was properly a part of the process of execution, the *feri facias* being sued out therein from the office without any order of the court. The proceedings then, still being as it were *in fieri*, and not terminated, it was competent for the court to rectify any irregularity which might have occurred in the progress of the cause, and to do this either by writ of error *coram vobis* or by *audita querela* if the party choose to resort to the latter mode. If this position be maintainable, then, there would seem to be an entire removal of all exception to the judgment of the Circuit

Court, *as it is believed to be the settled **[346]** modern practice, that in all instances in which irregularities could formerly be corrected upon a writ of error *coram vobis* or *audita querela*, the same objects may be effected by motion to the court, as a mode more simple, more expeditious, and less fruitful of difficulty and expense. In this case the cause was still under the control and correction of the court, for the enforcement of its judgment and the supervision of its own process, and in the exercise of this function, it was competent for it to look back upon the entire progress of the case, up to the writ and indorsements thereon, under the rule already stated, as applicable to judgments by default, and to correct any irregularities which might be detected. In the present case there is less show of objection to such action, on the part of the court, as it affects the rights of no third parties, but is limited in its consequences to the parties to the suit only.

We order the judgment of the Circuit Court to be affirmed.

Messrs. Justices McLean, Wayne, and Grier, dissented.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court, on the motion to quash the forthcoming bond and to set aside the original judgment as set forth in the record of this cause, be, and the same is hereby affirmed, with costs.

Cited—17 How., 509; 24 How., 205; 18 Wall., 496; 20 Wall., 7; 1 Otto, 510; 5 Otto, 732; 4 Hughes, 70; 1 Flippin, 344; 1 Abb., U. S., 308, 309; 2 Abb., U. S., 549; 1 Sawy., 331; 1 Curt., 461; 17 Blatchf., 242; 12 Bank. Reg., 150; 16 Bank. Reg., 246; 17 Bank. Reg., 279.

NATHANIEL HOYT AND JAMES BLANDIN, Administrators, &c., AND THE SAID JAMES BLANDIN, WILLIAM M. HUDSON, AND JOSEPHINE, HIS WIFE, Heirs of ANTOINE BLANDIN, Deceased, AND ELISHA M. PEASE, *Appellants*,

v.

GEORGE S. HAMMEKIN, AND ADELAIDE MATILDA, HIS WIFE.¹

Texas and Louisiana Law—Father cannot convey title of minor child.

Where a title to land in the State of Coahuila and Texas was obtained in 1833, by a mother for, and in the name of her daughter, and in 1836 the father of the daughter conveyed it away by a deed executed in Louisiana, this deed was properly set aside by the District Court of Texas.

It was not executed either according to the laws of Louisiana, or those of Coahuila and Texas.

***THIS** was an appeal from the District Court of the United States for the District of Texas.

1.—Mr. Justice CURTIS was necessarily absent when this case was considered and decided.

The facts are stated in the opinion of the court.

It was argued by *Mr. Allen* for the appellant, with whom was *Mr. Hale*, and by *Mr. Hughes* for the appellee.

Mr. Justice McLean delivered the opinion of the court:

This is an appeal in chancery from the District Court of the United States for the District of Texas.

The bill alleges that the States of Coahuila and Texas, on the 23d of November, 1833, granted eleven leagues of land, on the River Navasota, in the department of Nacogdoches, and of the value of \$50,000, to Adelaide Matilda Mexia; that on the 10th of February, 1836, her father, Antonio Mexia, upon some supposed necessity of having the legal title vested in a citizen of said State, and without consideration, sold and conveyed the land to John A. Merle, by authentic act before a notary public of Louisiana, and not according to any law in Texas, or in the State of Coahuila and Texas; and that the said Merle, by a like authentic act, declared that the said land was purchased by him with the funds of Antonio Blandin; that the said Antonio died intestate; that Nathaniel Hoyt and James Blandin have been appointed administrators of his succession, and that Josephine Hudson and James Blandin are his heirs at law; that the said Adelaide Matilda owns the same in her own right, but that the administrators and heirs of Blandin claim the same by descent.

An amended bill represents, that Antonio Blandin, ancestor of defendants, before his death, in order to carry out the trust created by the sale to him, and to prevent the land from being subject to his debts, and that the title might be vested in a resident of Texas, he expecting to be absent, without consideration or consent of complainants, conveyed all his right and interest in the land to Elisha M. Pease; that by reason of this conveyance, the land did not descend to the heirs of Blandin, but the title remains in Pease, who holds the same for the benefit of the complainants; that he does not claim title for his own benefit but for the benefit of those for whom the trust was created. And the complainants pray that Pease may be made a party; and that the sale by Antonio Mexia be declared void, or that the heirs of Blandin may be held trustees, &c., and compelled to convey, &c.

The heirs of Blandin pleaded in bar to so much of the bill as alleges the grant of the land to the said Adelaide Matilda, and a subsisting title in her, and seeks special or general relief. They allege, that in pursuance of a petition, bearing **348*** date the 27th of *January, 1830, presented to the Governor of the State of Coahuila and Texas, by, and in behalf of one Pedro Varela, a grant by way of sale, in conformity with the 24th article of the Colonization Law of the 24th of March, 1825, was made to him, by the said Governor, of eleven leagues of land in the vacant land of said State. That on the 29th of March, 1832, said Varela, by notarial act, in the City of Mexico, sold and transferred said land to one Charlotte Walker, wife of said Mexia, for the use of their daughter, the said Adelaide Matilda, then a minor, un-

married, and subject to the power of her father; in order that she might enjoy or alienate said land, as absolute proprietress of the same, that by said act she became bound to pay to the government of said State, the value of the land, according to the colonization law; that the sale and transfer were founded upon a valuable consideration in money, paid by Mexia to Varela; that said act was executed by Charlotte, wife of Mexia, acting for her husband, and in his absence, by virtue of the power granted to her, according to the laws of Mexico, by Alexander Alvarez Guitian, second constitutional Alcade of the City of Mexico, on the 10th of March, 1832; and that Mexia thereby became entitled to all the benefits of said act, and was bound by the same.

That on the 23d of November, 1833, a survey having first been made, a title of possession of the land was made by the Commissioner, Vicente Aldreto, to Adelaide Matilda; and that, on the 10th of February, 1836, said Adelaide Matilda remaining unmarried, and subject to Mexia, her father, he, by a notarial act, at the City of New Orleans, granted, sold and transferred the land, with the consent and authorization of his said wife, to said John A. Merle, then acting as trustee for Antonio Blandin, for the consideration of \$7,306.25 then paid to said Mexia by Merle, out of the funds of Blandin, in his possession. Other parts of the bill were denied in the plea.

The answer of Pease admits, that sometime in 1838, Antonio Blandin called upon him and stated that he held the title to three eleven league grants in Texas, one, as he believes, the grant in controversy; that said land had been conveyed to him by the owners, in order that he, as a resident of Texas, might hold the same for their benefit, &c.

The other defendants admit the conveyances alleged in the bill, but do not admit the trust in their ancestor, and they allege as a reason for his conveyance to Pease, that he was embarrassed, and was apprehensive his creditors would subject the land to the payment of his debts. The land, they assert, was conveyed in trust to Pease, for the benefit of the wife and children of Blandin.

A demurrer was filed to the amended bill, which was properly *overruled by the **[*349]** District Court. The case must be examined here on its merits.

The purchase from Varela was made by Mrs. Mexia, for the benefit of her daughter Adelaide Matilda. It was a concession to be located upon the unappropriated lands of the State. After the location and survey were made, the title of possession issued to Adelaide Matilda.

The 59th law of Toro provides, when the husband shall be absent, and no present prospect of his return, or where there be danger by reason of delay, the justice, with a knowledge of the cause, being legitimate, or necessary, or profitable to the wife, may give the license to the wife, which the husband might give, which thus given, shall be as good as if given by the husband. (3 *Novissima Recop.*, 404.) A license thus given by the judge, in consequence of the absence of the husband, does not authorize the wife to bind the husband, nor does it appear that she pretended to do so, in the purchase from Varela. From

the conveyance, it sufficiently appears that this property did not become a part of the community property of husband and wife.

The conveyance of the land by Mexia to Merle, as trustee for Blandin, for the consideration of \$7,306.25 expressed, does not contain the necessary formula for a transfer of title, under the laws of Louisiana. But those laws do not govern the right of Mexia to make the conveyance, or to make it in the form in which it was executed.

To show that this act was done by Mexia, with the consent of his wife, a letter of hers is appended to the transaction, and a part of it embodied in the conveyance. This letter bears date of November 1st, 1836, while the authentic act in which it is incorporated, is dated the 10th of February, 1836. It is not readily perceived how a letter, dated ten months after the conveyance, could constitute a part of it. From the instrument, it appears that Merle was a purchaser for himself, his heirs and assigns, when it is admitted that he purchased as the trustee of Blandin, and with his money.

But the facts in the case show that no money was paid on the purchase. The *Hon. P. Soulé* says, the sale was made by General Mexia to John A. Merle, without consideration, and for the sole purpose of protecting the property of his children, understanding that Texian citizens only could hold lands in Texas. The witness was well acquainted with Antonio Blandin, who consulted with the witness, and stated the land was confided to his care, never speaking of it as his private property, or as having paid any consideration for it. Blandin uniformly spoke of the land as a trustee, and not as owner.

The deposition of E. M. Pease, one of the 350*] defendants, was taken *by the complainants, but it was objected to by the defendants below, on the ground that Pease was a party, and that the commissioner of the United States who had taken the same, did not appear to have been sworn. The District Court refused to admit the deposition on both grounds. As the deposition was not taken with the leave of the court, it was properly overruled, on the ground that the witness was a party; but the other ground in regard to the commissioner not appearing to have been sworn, was not sustainable. The commissioner is an officer appointed by the courts of the United States, and his official acts are *prima facie* valid.

Had General Mexia power to make a conveyance to Merle? Was it executed according to the laws of Louisiana, where the act was done, or the laws of Texas, where the land is situated, and which must govern the act? The laws of Louisiana do not authorize the transfer of a child's property by parents or guardians, without an order from the judge, granted on the advice of a family meeting. (1 Civil Code, art. 834, 338.) No such ceremony was observed in the conveyance to Merle, as the law requires, and consequently the act was not operative by the Louisiana law. The letter of the wife, if it were genuine and bore the proper date, is not evidence of a family meeting, and that the sale was "of absolute necessity, or of evident advantage to the minor."

It is contended that the property in question came to Adelaide Matilda, through the means

of her father, and consequently, that he had the power to convey it. Such property under the civil law is called *profectitious*.

There is no evidence that the father paid any consideration for this property. It was purchased by the mother for the benefit of her daughter; and when the concession was located and arranged, the perfect title was made in the name of the daughter. The presumption that the consideration paid was paid by the mother, arises from the facts. Her marital rights under the civil law, as to property, were independent of her husband; and in this view it may well be presumed that she paid the consideration for the purchase.

The fact that no money was paid by Merle, although a large sum was inserted in the act of conveyance, shows the nature of that transaction; and that the step was taken, as sworn to by Mr. Soulé, to preserve the land by a legal ownership, for the benefit of his daughter.

The mother having procured the complete title to the property in the name of her daughter, she had no power to consent to or authorize the transfer of it by her husband. The pretense of the letter gives no validity to the act of conveyance. The transfer of the concession to the mother, by Varela, for her daughter, *was not made as a part of the marital [*351 community. The conveyance to the mother and the declared object of it, negatives such a presumption.

Acquired as the property was, the law denominates it *adventitious*. It came to their daughter through her mother. In this view, it is contended that the usufruct was in the father, "who is bound to defend and preserve it, both in court and out;" 3 *Las Siete Partidas*, 149, and that he had power to convey it.

From the terms of conveyance, it is clear that Mexia assumed to act, not in his own right, but in the character of father and natural tutor, and by authorization of his wife. The instrument purports to convey the title of his daughter, which admitted the right to be in her. The letter of the wife, as he supposed, was evidence of a family meeting required by law, and under which he assumed to act.

A guardian cannot dispose of the property of his ward without the permission of the judge of his domicil. (1 *White's Recop.*, 15 and 16, part. 4, l. 14, tit. 11, p. 4.) During the minority of the child, the only right of the father is, to take the usufruct. He has no power to sell the property of the minor, except for certain purposes, and under the sanction of the Judge. (2 Part., 1187.) The conveyance to Merle was not made as the law requires, and it was therefore void. It was not valid under the laws of Louisiana, nor under the laws of Texas and Coahuila.

The decree of the District Court is affirmed.

Mr. Justice Nelson concurred in the result to which the above opinion arrived.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Texas, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and

decreed by this court, that the decree of the said District Court in this cause be, and the same is hereby affirmed, with costs.

THE GENERAL MUTUAL INSURANCE
COMPANY, *Plaintiffs in Error*,

v.

EBENEZER B. SHERWOOD.

Marine insurance—Measure of damages—collision by negligence of owners or mariners, not recoverable under usual policy.

Under a policy insuring against the usual perils of the sea, including barratry, the underwriters are not liable to repay to the insured, damages [352] paid by him to the owners of another vessel and cargo, suffered in a collision occasioned by the negligence of the master or mariners of the vessel insured.

A policy cannot be so construed as to insure against all losses directly referable to the negligence of the master and mariners. But if the loss is caused by a peril of the sea, the underwriter is responsible, although the master did not use due care to avoid the peril.

THIS case was brought up by writ of error from the Circuit Court of the United States for the Southern District of New York.

It was an action of *assumpsit* brought by Sherwood against the General Mutual Insurance Company, upon a policy of insurance, dated New York, 17th of October, 1843, by which the company insured Sherwood to the amount of \$8,000, for the account of whom it might concern, loss payable to him, upon the brig Emily, from the 17th October, 1843, at noon, until the 17th October, 1844, at noon, the vessel being valued in the policy at \$16,000.

This policy was effected for the benefit, and to protect the interest of Frederick Sherwood and Abraham Sherwood, part owners of said vessel.

On the 13th March, 1844, the brig sailed from Charleston with a cargo of merchandise, bound for New York, being at the time provided with a skillful and experienced master, experienced and skillful mates, and a competent crew, and was in all respects seaworthy for the voyage.

About 5 o'clock in the afternoon of Tuesday, 19th March, a licensed pilot boarded them, and took the command and management of the vessel. The wind being unfavorable, the brig ran, close hauled, heading north and north by east, until the pilot considered himself up to the point of the Romer Shoals; he then tacked and stood in for Sandy Hook, heading to the southward and westward, close hauled. Between 7 and 8 o'clock at night, the pilot gave orders to go about; in attempting to execute this order, the brig misstayed, and the pilot then gave orders to wear ship. At this time, and whilst in the act of wearing, being very close to the shore, the rigging of the vessel having become entangled, and the crew being occupied with the maneuvering of their vessel, the first mate, who was on the top-gallant fore-castle, saw a schooner very close to them. Confused by this sudden appearance, his attention in keeping a

sharp lookout having been distracted by his attending to the working of the vessel, he, in this sudden emergency, exclaimed, "Helm hard down! luff! luff!" The man at the wheel obeyed, and almost instantaneously the brig struck the schooner, which proved to be "The Virginian," bound from Norfolk, with a full cargo of merchandise, for New York. The order given by the mate to "luff," was erroneous.

*The brig Emily was injured by the [*353 collision to the amount of \$300; the schooner Virginian was so much injured that she sunk, and with her cargo was totally lost.

On the 26th March, 1844, the owners of the schooner filed their libel in the District Court of the United States for the Southern District of New York, against the brig Emily, claiming that she was specifically liable for the loss and injury occasioned by the libel.

The owners of the Emily filed their answer, denying that the collision was occasioned by the fault of those in charge of her, and imputing the blame to the crew of the Virginian. On the 12th October, 1845, the cause was brought to a hearing, and witnesses examined on both sides.

On the 22d April, 1845, Judge Betts pronounced his opinion to be, that the brig Emily was to leeward of the Virginian when the latter was first seen; that no sufficient and proper lookout was kept on board her at the time; that the intermission, for the moment, of their precautionary vigilance on board the Emily, might very naturally spring out of a confusion likely to arise from the failure of the vessel to come round to the wind, her dangerous proximity to the shore, the entanglement of some of the running rigging which impeded her maneuver, and the distraction these circumstances were calculated to produce in the attention of the mate, who, at the moment, appeared to have been the only one acting as lookout forward; but that these circumstances did not relieve the vessel from maintaining these precautions, and from the consequences of the omission to do so; and the judge accordingly held that the collision occurred by the negligence or fault of the brig. He decreed in favor of the libelants for the value of the schooner Virginian, and of so much of the cargo as belonged to her owners. It was referred to the clerk to ascertain and report the amount of the loss and damage. The cause came on to be heard on the 3d of June, 1845, upon the clerk's report and exceptions thereto. The court ordered and decreed, that the libelants recover their damages by means of the premises, viz.: \$5,250.⁰⁰/₁₀₀ with their costs, and that the brig Emily be condemned for satisfaction thereof; the libelants' costs were taxed at \$704.⁰⁰/₁₀₀. On the 3d July, 1845, the owners of the Emily appealed to the Circuit Court, of the United States for the Southern District of New York, and in November, 1846, the appeal was argued before Mr. Justice Nelson.

On the 6th April, 1847, Judge Nelson delivered his opinion, and found, upon the proofs, in substance, that the Virginian was not in fault; that the mistaken order of the mate of the brig to the man at the wheel, in connection with the derangement of *the run- [*354 ning rigging of the vessel, and the confusion on board from her misstaying a few minutes be-

NOTE.—*Barratry, what is.* See note to *Waters v. Merchants' Ins. Co.*, 11 Pet., 213.

fore, had produced the collision. The Circuit Court affirmed the decree of the District Court, with costs. This decree was settled by compromise, and upon payment by the owners of a sum less than the decree, it was satisfied. Early notice of the pendency of the action in the District Court, and also of the appeal to the Circuit Court, was given to the Mutual Safety Insurance Company, with a request that they would unite in the defense, or take such measures as they might deem proper.

Owners of other parts of the cargo lost by the collision, filed their libels against the Virginian, which, after the decrees above mentioned, were settled by compromise; other claims were also made, and settled by compromise; in every instance, the sum paid being less than the claim. On the 23d August, 1847, the owners of the brig Emily, having previously presented to their various underwriters preliminary proofs of the loss, copies of the proceedings in the District and Circuit Courts, and of the payment and settlement of the demands aforesaid, commenced suits upon the policies of insurance, in the Circuit Court of the United States. The declaration filed in the present action contains two special counts, and the common money counts.

The special counts, set forth all the facts and circumstances with great particularity.

The defendants filed demurrers to each of the special counts, assigning as cause, that neither of the said counts showed any loss or damage by any peril covered by the policy of insurance. The plaintiff below joined in demurrer.

The cause was argued in April, 1848, before his Honor, Mr. Justice Nelson, and the Hon. Samuel R. Betts. Judgment was given upon the demurrer in favor of the plaintiff below. The defendants did not interpose any other answer to the two special counts, but to the common counts (III., IV., V. and VI.) they pleaded the general issue.

The court having decided the demurrers, ordered the damages to be assessed under the special counts. In May, 1849, the jury assessed the plaintiff's damages at \$4,526¹⁰/₁₀₀. Judgment was signed 5th June, 1849.

Upon the assessment of the damages, the defendant's counsel prayed the court to instruct the jury—

1. That the general objection to the recovery of the plaintiff, was, that [it] is apparent, on the face of the declaration, that the loss claimed was not occasioned by a peril insured against, but was to be attributed solely to the gross negligence of the agents of the assured; and therefore, that the loss was either an exception from the terms of the policy, or was not covered by them at all.

355*] *2. That the rule "*causa proxima et non remota spectatur*," in its proper application, relieves the defendants from all liability; since the proximate cause here was, according to the decree of the District and Circuit Court, "the fault of the Emily." The collision by itself did not create the liability to pay. The want of care, skill and vigilance on the part of the master and crew of the Emily were to be super-added to the collision.

3. That if the negligence and fault of the assured, and not the collision, were the proximate cause of the loss, such fault and negligence in this case (without which the decree would not have been made), should certainly excuse the underwriters.

mate cause of the loss, such fault and negligence in this case (without which the decree would not have been made), should certainly excuse the underwriters.

4. That even if the insurer is liable for the amount of the claim against the Emily for the loss of the schooner, it does not follow that he is also liable for the loss of the cargo on board the schooner Virginian. No case has yet carried the liability of the underwriter to this extent.

5. That the cost of defending the suits are not chargeable upon the underwriters.

6. That the counsel fees to the advocate are clearly inadmissible.

Whereupon his Honor, the Judge, charged the jury: It appeared, from the evidence, that the brig Emily sailed from Charleston, for New York, on the thirteenth day of March, in the year 1841, with a cargo of cotton and other merchandise; that on the afternoon of the 18th day of March, aforesaid, being near Barnegat, she took aboard a licensed pilot, and proceeded towards New York, the wind being boisterous, and blowing in flaws; that between 7 and 8 o'clock in the evening she stood over for the Romer Shoals, close hauled on a wind, heading for Sandy Hook. Finding that the brig could not fetch in to the Hook upon that tack, and having run as close to the beach as he deemed prudent, the pilot gave orders to tack ship; in consequence of the main topsail-brace being slackened the vessel did not go about, and orders were then given by the pilot to wear ship, and whilst in the act of wearing, the mate of the Emily discovered a sail close by, which proved to be the schooner Virginian, bound for New York, with a cargo on board; the mate cried out, "sail ahead!" but almost immediately thereafter the brig struck the schooner and sunk her, with her cargo. The owners of the schooner Virginian filed their libel in the District Court of the United States for the Southern District of New York, before referred to, against the brig Emily, alleging that the collision was occasioned by the fault and mismanagement of those having charge of the Emily. An answer was filed by the owners of the latter, denying that the collision was properly attributable to the Emily; and on the contrary, alleging that it was occasioned by the [*356] fault and unskillfulness of those on board of the schooner; proofs were taken in the District Court, and the cause having been heard upon the pleadings and proofs, an interlocutory decree was pronounced therein on the twenty-second day of April, in the year 1845, whereby, after reciting that it appeared to the court that the said collision, and the damages and loss incurred by the libellant in consequence thereof, occurred by the negligence or fault of the said brig Emily, it was considered that the libellants were entitled to recover the damages by them sustained thereby; and by which decree a reference was ordered, to ascertain the value of the said schooner Virginian, her tackle, &c., at the time of the collision, and of the cargo then on board of her, belonging to the libellants, and the amount of the loss in the premises sustained by the libellants by means of such collision; and afterwards, the said cause having again been heard upon exceptions to the report, and the proofs and allegations of the respective parties,

a final decree was pronounced thereon on the seventh day of June, in the year 1845, whereby it was ordered, adjudged and decreed by the said District Court, that the libelants recover in the said action their damages, by the means of the premises, the sum of \$5,254.70, together with their costs to be taxed; and that the said brig, her tackle and apparel, be condemned for satisfaction thereof, which said costs of the libelants were afterwards duly taxed at \$704.96. From this decree an appeal was taken, by the owners of the brig Emily, to the Circuit Court of the United States for the Southern District of New York, in the second Circuit, and after hearing the proofs and the arguments of counsel, the court affirmed the decree of the District Court, with the costs of the respondents to be taxed. After the decision of this court had been pronounced, another libel was filed by the owners of a portion of the cargo lost on board the Virginian, against the brig Emily, and claims were made, and libels threatened by others of the shippers of the cargo lost on board of the schooner, against the owners of the Emily, which action and claims by the owners of the said cargo were compromised and settled by the owners of the Emily. That if they should find, upon the evidence, that, at the time of sailing from Charleston, the brig Emily was a seaworthy vessel, properly equipped for the voyage, to New York, and that she had on board a skillful master, and a sufficient and competent crew, the defendants are liable upon the policy given in evidence for the one half of the loss to the brig Emily, arising from the collision with the schooner Virginian, not exceeding the sum insured, notwithstanding that it was occasioned by, or resulted from, the fault of the pilot, or **357** of the master and crew of the brig, either from want of keeping a sufficient lookout or from mismanagement of the vessel.

The direct and immediate consequence of the collision was that a lien was created on the brig, in favor of the owners of the Virginian, and of the owners of the cargo on board of her, to the extent of the value of the schooner, and of the cargo that was destroyed by the disaster; and the plaintiff is entitled to recover from the underwriters, not only the cost of the actual repairs of the injury done to the brig, but also the several sums that her owners have actually and in good faith paid to the owners of the schooner, and of the cargo lost with her, in order to discharge their vessel from the liens created by the said collision; that the plaintiff is also entitled to recover from the underwriters on the brig the actual expenses and costs, including reasonable advocate's fees, necessarily incurred in the defense of the brig from the aforesaid claim.

The policy of insurance, in this case, is subscribed for \$8,000, the vessel being valued therein at \$16,000; it was therefore an insurance upon one half of the vessel, and the defendants are consequently liable for one half only of the loss and damage sustained by the assured in consequence of the said collision, which the jury shall find, upon the evidence, was actually and properly paid by the owners of the Emily, in order to relieve their vessel.

The counsel for the defendant then and there excepted to said charge, so far as the same dif-

fered from, or did not conform to, the instructions prayed for by him, as above.

The jury thereupon rendered a verdict for the plaintiff, for \$4,536.84 damages, and six cents costs.

And because the said several matters so offered and given in evidence, and insisted upon by the defendants aforesaid, and the charge of the said judge, and the said exceptions taken to the same, do not appear by the record of the verdict aforesaid, the said defendants have caused the same to be written on this bill of exceptions, to be annexed to such record, and have prayed the said judge to set his hand and seal to the same. Whereupon the Hon. Samuel Nelson, the Associate justice before whom the said issues were tried, and said exceptions taken, and one of the judges of said Circuit Court, hath hereto set his hand and seal, this twenty-eighth day of November, in the year of our Lord one thousand eight hundred and fifty-one.

Upon this bill of exceptions and the judgment of the court upon the demurrers, the case came up to this court.

It was argued by **Mr. A. Hamilton, Jr.**, for the plaintiffs in error, and **Mr. [358] Butler**, with whom was **Mr. Cutting**, for the defendant in error.

The points made on the part of the plaintiff in error were the following:

I. The general objection to the recovery of the plaintiff is, that it is apparent, on the face of the declaration, that the loss that is claimed was not occasioned by a peril insured against; but is to be attributed solely to the gross negligence of the agents of the assured. Hence the loss is either an exception from the terms of the policy, or is not covered by them at all. (*Emerigon*, Vol. I., p. 429, ed. 1827, 329, 336; *Tanner v. Bennett*, 1 Ry. & Moody, 182; *Surdet v. Hall*, 4 Bing., 607; 2 *Arnold*, 775, 770, 777, cases cited.)

II. The rule "*causa proxima et non remota spectatur*," in its proper application, relieves the defendant from all liability, since the proximate cause here was, according to the decree of the District and Circuit Courts, "the fault of the Emily." The collision, by itself, did not create the liability to pay. The want of skill, care and vigilance on the part of the master and crew of the Emily was to be superadded to the collision. (*Paddock v. Franklin Insurance Company*, 11 Pick., 227; *American Insurance Company v. Ogden*, 20 Wend., 287; *Starbuck v. New England Marine Insurance Company*, 19 Pick., 198; *Robinson v. Jones*, 8 Mass., 536.)

III. If, then, the negligence and fault of the assured, and not the collision, were the proximate cause of the loss, such fault and negligence, in this case (without which the decree would not have been made), should certainly excuse the underwriters. (*Hazard v. New England Insurance Company*, 1 Sumn., 218; 3 Kent, 5th ed., p. 176, note a., 371, 373; *Copeland v. New England Insurance Company*, 2 Metcalf, 432; *Cleveland v. Union Insurance Company*, 8 Mass., 308; *Bradhurst v. Cyl. Insurance Company*, 9 Johns., 17-21; *Potter v. Suffolk Insurance Company*, 2 Sumn., 197; *Galbraith v. Gracie*, 1 Wash. C. C., 219.)

IV. But even if the insurer is liable for the amount of the decree against the Emily, for the

loss of the schooner, it does not follow that he is also liable for the loss of the cargo on board the schooner. No case has yet carried the liability of the underwriter to this extent.

The points made by the counsel for the defendant in error were the following:

I. The underwriters are responsible for losses by any of the perils insured against, although such losses may have been occasioned by, or have resulted from, the negligence or fault of the master or crew. If the assured has provided a seaworthy vessel, with a skillful master and a sufficient and competent crew, the underwriter takes the risks of navigation, and of the perils insured against, although caused by the negligence, carelessness or unskillfulness of the master and crew. (*Peters v. Warren Ins. Co.*, 14 Peters, 99; *Peters v. Warren Ins. Co.*, 3 Sumn., 389; *Waters v. Merchants' Ins. Co.*, 11 Peters, 218; *Columbia Ins. Co. v. Lawrence*, 10 Peters, 507; *Patapsco Ins. Co. v. Coulter*, 3 Peters, 222; *Hale v. Wash. Ins. Co.*, 2 Story, 176; *Smith's Mercant. Law*, Amer. edit., 347; *Sadler v. Dixon*, 3 Mees. & Welsby, 895; *Dixon v. Sadler*, 5 M. & Welsby, 406; *Bush v. The Royal Ex. Ins. Co.*, 2 B. & Ald., 73; *Walker v. Maitland*, 5 B. & Ald., 174; *Bishop v. Pentland*, 7 B. & C., 219; *Shore v. Bentall*, 7 B. & C., 798, n.; *Henderson v. Western Mar. & F. Ins. Co.*, 10 Robinson, 164; *Copeland v. N. Eng. Mar. Ins. Co.*, 2 Metcalf, 432; *Perrins, Adm'r, v. Protect. Ins. Co.*, 11 Ohio, 147; *Park Ins.*, 482, Eng. edit. of 1842, page 156.) *Grim v. Phantix Ins. Co.*, 13 Johns., 451, in this country, and *Lave v. Hollingsworth*, 7 Term R., 156, in England, and other cases decided about the same time, are not correct in principle, are now generally disapproved of, and are substantially overruled. (Opinion of Betts, J., in this case, 1 Blatchford, 251.)

II. A loss by collision is one of the perils insured against, as much so as loss by fire, stranding, capture, &c. If it occurs without fault on the part of the insured vessel, it is conceded that the underwriters are bound to indemnify the assured against loss; and upon principle and authority, the insurers are equally liable if the collision happens through the fault, mistake, error of judgment or carelessness of the vessel insured. (*Peters v. Warren Ins. Co.*, 14 Peters, 99; 3 Sumn., 389; *Hale v. Wash. Ins. Co.*, 2 Story, 176; 1 Phill. Ins., 636.)

III. The direct and immediate consequence of the collision was that, *eo instanti*, a charge, incumbrance or lien was created on the ship to the extent of the injury done to the Virginian and cargo. This charge caused the necessity of an expenditure by the assured, without which he could not extricate nor repossess himself of his vessel. This loss is as direct a consequence of the collision as if the Emily had been injured so as to have required repairs by carpenters to the same amount.

IV. The underwriters are liable not only for the amount of the lien or charge that was created in favor of the owners of the Virginian, but also for the lien or charge created by the destruction of the cargo, and for which the Emily was specifically liable *in rem*.

V. The defendants are responsible for all the [360*] costs, charges and expenses, fairly and reasonably incurred by the plaintiff below, in defending the vessel from the claims made

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against her; this is necessary to afford him a full indemnity; and the clause in the policy, rendering it proper and necessary to sue for labor and travel in and about the defense, safeguard and recovery of the vessel, contemplates and provides for it. (See 2 Phillips on Ins., 509, 749, 464; 1 *Id.*, 698.) *Hastie v. De Peyster*, 3 Caines, 190—a case of re-insurance; suit against the first insurer defended, and a recovery with costs—principal opinion by Kent, Ch. J.: “Such charges are allowed, as composing part of a claim for indemnity.” Per Livingston, J.: Plaintiffs gave notice to defendants, who took no steps to prevent the progress of the suit to judgment; all the costs of that suit, both plaintiffs’ and defendants’, are a proper charge in this: “not pretended that its defense was unnecessary or improper.” (1 Story, 458; *Hale v. Wash. Ins. Co.*, 2 Story, 176; *Peters v. Warren Ins. Co.*, 14 Peters, 99, p. 100, near the foot.) “Expenses of defending the suit for a collision, included in the adjustment. *Watson v. Marine Ins. Co.*, 7 Johns., 57—a case of capture and recovery for a total loss, and also expenses of the captain in endeavoring to obtain the release and restoration of the ship; traveling, board, wages and 1,105 livres left in the hands of the consignees, to prosecute an appeal to the Council of State; items were subject to opinion of court; another charge was deducted: the above allowed. *Jumel v. Marine Ins. Co.*, 7 Johns., 412, 426—case of capture, condemnation, appeal, compromise, sale; purchase by master; held, master not bound by appeal; only to act in good faith and sound discretion, &c. *Gardere v. Columbia Ins. Co.*, 7 J. R., 514, (same principles.) *Francis v. Ocean Ins. Co.*, 6 Cowen, 404, affirmed, 2 Wend., 64—seizure as for illicit trade—irregular condemnation and sale, no defense by master, &c. Expense incurred in prosecuting a claim for the proceeds of the ship. Held, “entitled to recover all the expense fairly incurred in obtaining a restoration of the proceeds of the vessel.” *Bridge v. Niagara Ins. Co.*, 1 Hall’s Sup. Ct., 423—salvage expenses, including costs of legal proceedings to ascertain validity and amount of salvage claims, storage of cargo, bottomry expenses, protests, surveys, wages and provisions, whilst seeking a port of refitting, and many other instances of charges and expenses, resulting from and incident to losses by perils insured against. 9 Wend., 416, *Rickett v. Snyder*—In an action for breach of covenant of seisin, the plaintiff is entitled to recover counsel fees as well as taxable costs incurred in defending the premises. The covenant of seisin is one of indemnity. (2 Phill. Ins., 464, 509, 749.) 1 *Id.*, 698—The defense in the District Court, and *on appeal in the Circuit Court, [*361 of the libel, by the owners of the Virginian (owners also of some of the cargo), and the decisions thereon, justified the plaintiff in compromising the other claims without litigation. By such compromises he greatly diminished the sum for which the defendants were liable. He was entitled to recover if he had paid the amounts without litigation. (*Hale v. Washington Ins. Co.*, 2 Story, 176.)

Mr. Justice Curtis delivered the opinion of the court:

This is a writ of error to the Circuit Court of

the United States for the Southern District of New York.

The action was *assumpsit* on a time policy of insurance, subscribed by the plaintiffs in error, upon the brig *Emily*, during one year from the seventeenth day of October, 1843, for the sum of \$5,000, the vessel being valued at the sum of \$16,000. The policy, described in the declaration, assumed to insure against the usual sea perils, among which is barratry of the master and mariners. The declaration avers, that during the prosecution of a voyage, within the policy, while on the high seas, and near the entrance of the harbor of the City of New York, by and through the want of a proper lookout, by the mate of the said brig, and by and through the erroneous order of the chief mate, who was stationed on the top-gallant fore-castle of the said brig, who saw the schooner, hereinafter named, and cried out to the man at the wheel, "helm hard down—luff"—whereas, he ought not to have given the said order; and by and through the negligence and fault of the said brig *Emily*, the said brig ran into a schooner called the *Virginian*, and so injured her that she sank, whereby the said brig *Emily* became liable to the owners of the said schooner and her cargo, to make good their damages; which liability was a charge and incumbrance on the said brig. The declaration then proceeds to aver, that the brig was libeled, by the owners of the schooner and her cargo, in the District Court of the United States; that a decree was there made, whereby it was adjudged, "That the collision in the pleadings mentioned, and the damages and loss incurred by the libelants, in consequence thereof, occurred by the negligence or fault of the said brig, and that the libelants were entitled to recover their damages by them sustained thereby;" that the same having been assessed, a decree therefor was made by the District Court, which, on appeal, was affirmed by the Circuit Court, which found, "That the hands on board the *Emily* failed to keep a proper lookout, and that the said brig might have avoided the collision, by the use of proper caution, skill and vigilance." The declaration further avers, that the plaintiff has paid divers \$62*] sums of money, to satisfy this decree and the expenses of making the defense, amounting to the sum of eight thousand dollars.

This statement of the substance of the declaration, presents the question which has been here argued, and sufficiently shows how it arose; for, although there was a demurrer to the first two counts in the declaration, and a trial upon the general issue pleaded to the other counts, and a bill of exceptions taken to the ruling at the trial, yet the same question is presented by each mode of trial, and that question is: whether, under a policy insuring against the usual perils, including barratry, the underwriters are liable to repay to the insured, damages paid by him to the owners of another vessel and cargo, suffered in a collision occasioned by the negligence of the master or mariners of the vessel insured.

The great and increasing internal navigation of the United States, carried on over long distances, through the channels of rivers and other comparatively narrow waters, where the

danger of collisions, and the frequency of their occurrence, are much greater than on maritime voyages, renders the respective rights of underwriters and insured, growing out of such occurrences, of more moment in this than in any other civilized country: and the court has considered the inquiry presented by this case, with the care which its difficulty and its importance demand.

In examining, for the first time, any question under a policy of insurance, it is necessary to ascertain whether the contract has received a practical construction, by merchants and underwriters; not through any partial or local usages, but by the general consent of the mercantile world. Such a practical construction, when clearly apparent, is of great weight, not only because the parties to the policy may be presumed to have contracted in reference to it, but because such a practice is very high evidence of the general convenience and substantial equity of it, as a rule. This is true of most commercial contracts; but it is especially true of a policy of insurance, which has been often declared to be an "obscure, incoherent and very strange instrument," and "generally more informal than any other brought into a court of justice" (Per Buller, *J.*, 4 T. R., 2:0; Mansfield, *Ch. J.*, 4 Taunt., 380; Marshall, *Ch. J.*, 6 Cr., 45; Lord Mansfield, 1 Burr., 347); but which, notwithstanding the number and variety of the interests which it embraces, and of the events by which it is affected, has been reduced to much certainty, by the long practice of acute and well-informed men in commercial countries; by the decision of courts in America and in England, and by able writers on the subject, in this and other countries.

And it should not be forgotten, that not only in the introduction of this branch [*363 of law into England, by Lord Mansfield, but in its progress since, both there and here, a constant reference has been had to the usage of merchants, and the science of insurance law has been made and kept a practical and convenient system, by avoiding subtle and refined reasoning, however logical it may seem to be, and looking for safe practical rules.

Now, although cases like the present must have very frequently occurred, we are not aware of any evidence, that underwriters have paid such claims, or that, down to the time when one somewhat resembling it was rejected by the Court of King's Bench in *De Vaux v. Salvador*, 5 Ad. & Ellis, decided in 1836, such a claim was ever made. And we believe, that if skillful merchants, or underwriters, or lawyers, accustomed to the practice of the commercial law, had been asked whether the insurers on one vessel were liable for damage done to another vessel, not insured by the policy, by a collision occasioned by the negligence of those on board the vessel insured, they would, down to a very recent period, have answered, unhesitatingly, in the negative.

As we shall presently show, such, for a long time, was the opinion of the writers on insurance, on the continent of Europe and in England and America. And this, alone, would be strong proof of the general understanding and practice of those connected with this subject.

But, although this practical interpretation

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of the contract is entitled to much weight, we do not consider it perfectly decisive. It may be, that by applying to the case the settled principles of the law of insurance, the loss is within the policy, and that it has not heretofore been found to be so, because an exact attention has not been given to the precise question. Or, it may be that the weight of recent authority, and the propriety of rendering the commercial law as uniform as its necessities, should constrain us to adopt the rule contended for by the defendant in error. And therefore, we proceed to examine the principles and authorities bearing on this question.

Upon principle, the true inquiries are: what was the loss, and what was its cause.

The loss was the existence of a lien on the vessel insured, securing a valid claim for damages, and the consequent diminution of the value of that vessel. In other words, by operation of law, the owners of the Virginian obtained a lien on the vessel insured, as security for the payment of damages, due to them for a marine tort, whereby their property was injured.

What was the cause of this loss? We think it is correctly stated by this court, in the case **364*** of *The Paragon*, 14 Peters, 109. *In that case, it was said: "In the common case of an action for damages for a tort done by the defendant, no one is accustomed to call the verdict of the jury and the judgment of the court thereon, the cause of the loss to the defendant. It is properly attributable to the original tort, which gave the right to damages consequent thereon." The cases there spoken of, were claims *in personam*. But the language was used to illustrate the inquiry, what should be deemed the cause of a loss by a claim *in rem*, and is strictly applicable to such a claim. Whether the owners of the Virginian would proceed *in rem* or *in personam*, was at their election. It affected only their remedy. Their right, and the grounds on which it rested, and the extent of the defendant's liability, and its causes, were the same in both modes of proceeding. And in both, the cause of the loss of the defendant would be the negligence of his servants, amounting to a tort. The loss consisting in a valid claim on the vessel insured, we must look for the cause of the loss in the cause of the claim, and this is expressly averred by the declaration to have been the negligence of the servants of the assured. From the nature of the case, it was absolutely necessary to make such an averment. If the declaration had stated simply a collision, and that the plaintiff had paid the damages suffered by the Virginian and her cargo, it would clearly have been bad on demurrer; because, although it would show a loss, it would state no cause of that loss. It is only by adding the fact, that the damage done to the Virginian was caused by negligence; that is, by stating the cause of damage, that the cause of payment appears, and, when it appears, it is seen to be the negligence of the servants of the assured.

We know of no principle of insurance law which prevents us from looking for this sole operative cause, or requires us to stop short of it, in applying the maxim *causa proxima et non*

remota spectatur. The argument is, that collision, being a peril of the sea, the negligence which caused that peril to occur is not to be inquired into; it lies behind the peril, and is too remote. This is true when the loss was inflicted by collision, or was by law a necessary consequence of it. The underwriter cannot set up the negligence of the servants of the assured as a defense. But in this case he does not seek to go behind the cause of loss, and defend himself by showing this cause was produced by negligence. The insured himself goes behind the collision, and shows, as the sole reason why he has paid the money, that the negligence of his servants compelled him to pay it. It is true that an expense, attached by the law maritime to the subject insured, solely as a consequence of a peril, may be considered as proximately caused by that peril. But where the expense is attached *to the vessel [**365** insured, not solely in consequence of a peril, but in consequence of the misconduct of the servants of the assured, the peril *per se* is not the efficient cause of the loss, and cannot in any just sense be considered its proximate cause. In such a case the real cause is the negligence, and unless the policy can be so interpreted as to insure against all losses directly referable to the negligence of the master and mariners, such a loss is not covered by the policy. We are of opinion the policy cannot be so construed. When a peril of the sea is the proximate cause of the loss, the negligence which caused that peril is not inquired into; not because the underwriter has taken upon himself all risks arising from negligence, but because he has assumed to indemnify the insured against losses from particular perils, and the assured has not warranted that his servants will use due care to avoid them.

These views are sustained by many authorities. Mr. Arnould, in his valuable Treatise on Insurance, Vol. II., 775, lays down the correct rule: "Where the loss is not proximately caused by the perils of the sea, but is directly referable to the negligence or misconduct of the master or other agents of the assured, not amounting to barratry, there seems little doubt that the underwriters would be thereby discharged." To this rule must be referred that class of cases in which the misconduct of the master or mariners has either aggravated the consequences of a peril insured against, or been of itself the efficient cause of the whole loss. Thus, if damage be done by a peril insured against, and the master neglects to repair that damage, and in consequence of the want of such repairs, the vessel is lost, the neglect to make repairs, and not the sea damage, has been treated as the proximate cause of the loss. In the case of *Copeland v. The N. E. Marine Ins. Co.*, 2 Met., 432. Mr. Chief Justice Shaw reviews many of the cases, and states that "the actual cause of the loss is the want of repair, for which the assured are responsible, and not the sea damage which caused the want of repair, for which it is admitted the underwriters are responsible." And the same principles were applied by Mr. Justice Story, in the case of *Hazard v. N. E. Marine Ins. Co.*, 1 Sum., 218, where the loss was by worms, which got access to the vessel in consequence of her bottom being injured by stranding, which injured the

master neglected to repair. So where a vessel has been lost or disabled, and the cargo saved, a loss caused by the neglect of the master to tranship, or repair his vessel and carry the cargo, cannot be recovered. (*Schiffelin v. N. Y. Ins. Co.*, 9 Johns., 21; *Bradhurst v. Col. Ins. Co.*, 9 Johns., 17; *Am. Ins. Co. v. Centre*, 4 Wend., 45; *S. C.*, 7 Cow., 504; *McGaw v. Ocean Ins. Co.*, 23 Pick., 405.) So, where con-366*] demnation of a neutral *vessel was caused by resistance of search (*Robinson v. Jones*, 8 Mass., 586); or a loss arose from the master's negligently leaving the ship's register on shore. (*Cleveland v. Union Ins. Co.*, 8 Mass., 808.) So, where a vessel was burnt by the public authorities of a place into which the master sailed with a false bill of health, having the plague on board (*Emerigon*, by Meredith, 348); in these and many other similar cases, the courts, having found the efficient cause of the loss to be some neglect of duty by the master, have held the underwriter discharged. Yet it is obvious that in all such cases, one of the perils insured against, fell on the vessel. And they are to be reconciled with the other rule, that a loss caused by a peril of the sea is to be borne by the underwriter, though the master did not use due care to avoid the peril, by bearing in mind that in these cases it is negligence, and not simply a peril of the sea, which is the operative cause of the loss. It may sometimes be difficult to trace this distinction, and mistakes have doubtless been made in applying it, but it is one of no small importance in the law of insurance, and cannot be disregarded without producing confusion. The two rules are in themselves consistent. Indeed, they are both but applications, to different cases, of the maxim, *causa proxima et non remota spectatur*. In applying this maxim, in looking for the proximate cause of the loss, if it is found to be a peril of the sea, we inquire no further; we do not look for the cause of that peril. But if the peril of the sea, which operated in a given case, was not of itself sufficient to occasion, and did not in and by itself occasion the loss claimed, if it depended upon the cause of that peril whether the loss claimed would follow it, and therefore a particular cause of the peril is essential to be shown by the assured, then we must look beyond the peril to its cause, to ascertain the efficient cause of the loss.

The case at bar presents an illustration of both rules. So far as the brig Emily was herself injured by the collision, the cause of the loss was the collision, which was a peril insured against, and the assured, showing that his vessel suffered damage from that cause, makes a case, and is entitled to recover. But he claims to recover not only for the damages done to his vessel, which was insured, but for damages done to the other vessel, not insured. To entitle himself to recover these, he must show not only that they were suffered by a peril of the sea, but that the underwriter is responsible for the consequences of that peril falling on a vessel not insured. It is this responsibility which is the sole basis of his claim, and to make out this responsibility he does not and cannot rest upon the occurrence of a collision; this affords no ground for this claim; he must show a particular cause for that collision; and aver

that by reason of *the existence of that [*367 cause, the loss was suffered by him, and so the underwriter became responsible for it.

This negligence is therefore the fact without which the loss would not have been suffered by the plaintiff, and by its operation the loss is suffered by him. In the strictest sense, it causes the loss to the plaintiff. The loss of the owners of the Virginia was occasioned by a peril of the sea, by which their vessel was injured. But nothing connects the plaintiff with that loss, or makes it his, except the negligence of his servants. Of his loss this negligence is the only efficient cause, and in the sense of the law it is the proximate cause.

The ablest writers of the continent of Europe, on the subject of insurance law, have distinctly declared, that, in case of damage to another vessel solely through the fault of the master or mariners of the assured vessel, the damage must be repaired by him who occasioned it, and the insurer is not liable for it. (*Pothier Traité d'Assurance*, No. 49, 50; *Boucher*, 1500, 1501, 1502; 4 *Boulay Paty*, *Droit Maritime*, ed. of 1823, 14, 16; *Santayra's Com.*, 7, 223; *Emerigon*, by Meredith, 387.) If the law of England is to be considered settled by the case of *De Vaux v. Salvador*, 4 Ad. & El., 420, it is clear such a loss could not be recovered there. Mr. Marshall is evidently of opinion that unless the misconduct of the master and crew amounted to barratry, the loss could not be recovered. (*Marsh. on Ins.*, 495.) And Mr. Phillips so states in terms. (1 *Phil. on Ins.*, 636.)

It has been urged, that in the case of *The Paragon* (*Peters v. Warren Ins. Co.*, 14 Pet., 99), this court adopted a rule which, if applied to the case at bar, would entitle the insured to recover. But we do not so consider it. It was there determined that a collision without fault was the proximate cause of that loss. Indeed, unless the operation of law, which fixed the lien, could be regarded as the cause of that loss, there was no cause but the collision, and that was a peril insured against.

We are aware that in the case of *Hall v. Washington Ins. Co.*, 2 Story, *Mr. Justice Story* took a different view of this question; and we are informed that the Supreme Court of Massachusetts has recently decided a case in conformity with his opinion, which is not yet in print, and which we have not been able to see. But with great respect for that very eminent Judge, and for that learned and able court, we think the rule we adopt is more in conformity with sound principle, as well as with the practical interpretation of the contract by underwriters and merchants; and it is the safer and more expedient rule.

We cannot doubt that the knowledge by owners, masters and seamen, that underwriters were responsible for all the damage done by collision with other vessels through their negligence, *would tend to relax their vigi- [*368 lance and materially enhance the perils, both to life and property, arising from this case.

The judgment of the Circuit Court must be reversed, and the cause remanded, with directions to render a judgment for the defendants, on the demurrer to the first two counts, and award a *verdict de novo* to try the general issue pleaded to the other counts.

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ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of New York, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to enter a judgment for the plaintiff in error, on the demurrer to the first two counts, and to award a *venire facias de novo*, to try the general issue pleaded to the other counts.

Rev'g—1 Blatchf., 251.
Cited—17 How., 111; 9 Wall., 684; 12 Wall., 199; 15 Otto, 636; 2 Cliff., 434; 10 Biss., 34.
Followed—11 N. Y., 9.

ELIJAH PEALE, Trustee of the AGRICULTURAL BANK OF MISSISSIPPI, Plaintiff in Error.

v.

MARTHA PHIPPS, AND MARY BOWERS,
wife of CHARLES RICE.

Jurisdiction—Mississippi—Receiver appointed by State Court cannot be sued as such in U. S. Circuit court—claim in reconvention no waiver of exception to jurisdiction.

Two Statutes of Mississippi, one passed in 1843 and the other in 1844, provide that where the charter of a bank shall be declared forfeited, a trustee shall be appointed to take possession of its effects, and commissioners appointed to audit accounts against it.

Where these steps had been taken, and the commissioners had refused to allow a certain account, the Circuit Court of the United States had no right to entertain a bill filed by the creditors to compel the trustee to pay the rejected account. There was a want of jurisdiction.

The case is upon this point examined.

A claim by the trustee, in re-convention, was not a waiver of the exception to the jurisdiction.

THIS case was brought up by writ of error from the Circuit Court of the United States for the Eastern District of Louisiana.

It will be seen, by reference to 4 Howard, 225, that Charles Rice, and Mary, his wife, and Martha Phipps recovered, in an action of ejectment against the Agricultural Bank of Mississippi, two undivided third parts of a lot of ground in the City of Natchez.

369*] In May, 1847, they sued out a writ of *habere facias possessionem*, and entered into possession of the property.

Under the laws of Mississippi, the charter of the Bank became forfeited, and Elijah Peale was appointed trustee.

In April, 1848, Martha Phipps, and Mary Bowers, wife of Charles Rice, filed their petition in the Circuit Court of the United States for the Eastern District of Louisiana, against Peale. They claimed rent of the property from 1839 to 1847, damages for injuries done to the property whilst in possession of the Bank, and the costs to which they had been put by the ejectment. Peale filed exceptions, and an answer. The second exception, upon which the judgment of this court turned, was as follows.

2. Because the charter of the Agricultural Bank was declared forfeited, and the said Bank

put in a course of liquidation as an insolvent corporation, and this defendant appointed trustee, for the purpose of collecting the assets thereof, by the Circuit Court of Adams County, in the State of Mississippi; and said trustee is not amenable to any other court than the one that appointed him, and of which he is the officer; and this court has no jurisdiction whatever of him in his said capacity.

The following agreement of counsel was filed in the case.

It is agreed between the parties in the above-named suit, by Prentiss and Finney, attorneys for the plaintiffs, and Robert Mott, attorney for the defendant, that the following facts shall be admitted upon the trial of the cause, and the same are hereby admitted:

1. That the President, Directors and Company of the Agricultural Bank of Mississippi, were in possession of the City Hotel, being the premises, the meane profits of which are sued for on the 1st day of December, 1839.

2. It is admitted that the said hotel and furniture rented, from said 1st day of December, 1839, until 1st November, 1842, for the sum of \$6,000 per annum, and from said 1st November, 1842, until plaintiffs took possession at the rate of \$4,000 per annum, and that said rates shall be considered as the fair annual rent of said property during said periods.

3. It is admitted, that the charter of the Agricultural Bank has been adjudged forfeited under the laws of Mississippi, and that the defendant, Elijah Peale, is the trustee appointed under and by virtue of said laws, to represent the said corporation.

4. It is admitted that the claim sued on was, before the commencement of this suit, presented to the commissioners appointed in Mississippi, to audit and allow claims against said Bank, to wit: to J. A. Van Dalsen and C. L. Dubuison, and they were *request- [*370 ed to audit and allow the same, but that they refused to audit, allow, or in any way recognize the same.

5. It is admitted that the claim sued on was, before the commencement of this suit, presented to the defendant, as trustee of said Agricultural Bank, and he was requested to allow the same as a just and valid claim against said Bank; but that said defendant, as trustee as aforesaid, refused to admit, recognize, or allow said claim, or any part thereof.

6. It is admitted that the fees of counsel employed by the plaintiffs in the prosecution of the suit of ejectment against the Agricultural Bank, for the recovery of said City Hotel, in the Circuit Court and Supreme Court of the United States, exceeded in value the sum of \$2,000, and that said sum of \$2,000 would be a reasonable fee for the conduct of said suit from its commencement to its termination.

It is admitted that the furniture of house, &c., on the premises, formed part of the rent in the proportion of one fourth to three fourths thereof.

It is admitted that the charter of the Bank was declared forfeited by law, and the assets of the Bank put in the possession of the defendant, who still holds the same as trustee or representative.

Ro. MOTT, Attorney.

PRENTISS & FINNEY,

For Plaintiffs.

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It is further admitted, that the Agricultural Bank had stopped specie payments previous to the time of the forfeiture of the charter, and did not afterwards resume.

PRENTISS & FINNEY,
Plaintiffs' Attorneys.

In January, 1849, the cause came on to be heard, when the Circuit Court decreed, that the plaintiffs do recover from Peale the sum of \$20,058, with interest at five per cent. until paid; and that they should have execution upon the assets of the Bank, which were then, or might be thereafter, in the hands of the trustee.

From this decree, Peale, appealed and brought the case up to this court.

It was argued by *Mr. Lawrence* for the plaintiff in error, and *Mr. Taylor* for the defendants in error.

Only that point will be mentioned upon which the judgment of this court turned.

Mr. Lawrence contended, for the plaintiff in error, that the action against Peale, who was a mere officer of the Adams County Court, Mississippi, for the purpose of collecting the assets of a bank in course of liquidation, could not be maintained in the United States Circuit **371**] Court for Louisiana. If the *plaintiff wished to bring suit, independent of the proceedings in the Adams County Court, the suit should have been brought against the corporation in its corporate name. (Hutch. Dig., secs. 10, 11, Act 1840, p. 326; sec. 8, Act 1843, p. 328; Act February 28, 1846, p. 332; 6 Howard, Miss., 674.)

Mr. Taylor, for the defendants in error:

The second ground of exception is partly based upon the assumption that the affairs of the Agricultural Bank were administered by the trustee, Peale, because of the declared insolvency of the Bank. This is neither admitted nor proved to be true; and in fact, the affairs of the Bank were taken from the management of her own officers, because those officers had violated the laws of its existence, whereby it ceased to exist. But it does not follow, as a necessary consequence, that because the charter of the Bank was declared, by the Circuit Court of Adams County, to have been forfeited, or because its affairs were put in liquidation by the order of that court, or because Mr. Peale was appointed trustee by that court, no court but the Circuit Court of Adams County can entertain jurisdiction of a suit against him, as trustee. An administrator or executor is appointed to represent the estate of a person deceased, after the Probate Court has found or adjudged the fact of his death, and put his affairs into a course of liquidation in the same manner. Such executors are liable to be sued in any court whatever; and even in cases where the state laws provide expressly that they shall not be sued, except in the court by which they are appointed, they are held liable to answer to the United States Circuit Court, notwithstanding such special exemption made by the state law. See case of *Depuy v. Bemiss*, where this question is fully argued (2 Annual, 509); and case of *Erwin v. Lowry*, 7 Howard, 172-181, reviewing and approving the doctrines, and even the reasonings, of the Louisiana court; and also 14 Pet., 75, examining the same questions; all settling the doctrine

that even where the representative of an estate is suable only in his own court by the state law, he may yet be sued in the United States Circuit Court, and there be held to answer, and compelled to pay a debt of the succession: because, in every case of a conflict between the laws made by Congress (in accordance with the Constitution of the United States) and the Acts of a State Legislature, the state laws must yield. We believe, that, in Mississippi, other courts besides the Circuit Court of Adams County could have entertained jurisdiction of a suit against this trustee, in his said capacity; and that even if it were shown that by the positive requirement of the laws of the State of Mississippi suit could have been brought against *Peale only in the Circuit Court [*372 of Adams County, which appointed him, we could, notwithstanding such requirement, sue Mr. Peale, as trustee, in the Circuit Court of the United States.

We also submit to the court whether the third and eighth admissions of counsel, found on the seventh page of the printed record, do not admit that the plaintiff in error, Mr. Peale, is the proper person to be sued for, and on account of, the debts due by the Bank, because if, as admitted, the Bank itself had ceased to exist, and Mr. Peale was in the actual possession of all its assets, and was its representative, he is the only person who can be sued on account of the liabilities of the Bank. We think the admissions themselves afford good ground for overruling the exception.

Mr. Chief Justice Taney delivered the opinion of the court:

This suit was brought by the defendants in error against the plaintiff in the Circuit Court of the United States for the Eastern District of Louisiana.

The proceeding was by petition in the usual form of Louisiana practice. It states that the plaintiff in error, in the capacity of trustee and assignee of the President, Directors and Company of the Agricultural Bank of Mississippi, which was located, until the term of its dissolution at Natchez, in the said State, is indebted to the petitioners in the sum of \$34,000, upon the grounds set forth in the petition.

They state that they were the owners of two undivided third parts of a certain lot in Natchez, in the County of Adams, in the State of Mississippi, upon which stands the City Hotel; that they were unlawfully expelled from it by the Agricultural Bank; that they afterwards recovered back the possession by an action of ejectment in the Circuit Court of the United States for the Southern District of Mississippi; and that they are entitled to the sum above mentioned, against the Bank, for damages and mesne profits while the Bank held them out of possession together with the costs they incurred in the suit to recover it.

They further state, that by the decree of the Circuit Court of Adams County, a court of competent jurisdiction in the premises, the charter of the Agricultural Bank was declared forfeited, and the corporation dissolved; and that Peale, the plaintiff in error, was appointed trustee and assignee of the Bank, and is the sole legal representative of the corporation; and they aver, that by operation of law all the as-

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sets of the corporation are vested in him as assignee, and that he became legally liable to the creditors to the extent of the assets which may [373*] come to his *hands; and that he has assets in his possession, sufficient to pay all the debts of the corporation.

The plaintiff in error filed sundry exceptions and an answer to this petition. His 2d exception denies the jurisdiction of the court, upon the ground that, as trustee for the Bank, he is not amenable to any other court than the one that appointed him. As we think this exception decisive against the jurisdiction of the Circuit Court of Louisiana, it is not necessary in this opinion to set out the other exceptions, or to notice the claims he set up by the way of answer and reconvention, if his exceptions were overruled.

There is an agreement between the counsel of the respective parties, which admits substantially the facts stated in the petition, as respects the possession and recovery of the hotel in the suit in ejectment, and the appointment of plaintiff in error as trustee upon the forfeiture of the charter of the Bank; and also that the defendants had presented this claim to the commissioners appointed in Mississippi to audit claims against the Bank, and that they had refused to allow it. There are other admissions, in relation to the annual value of the lot and hotel, and the costs and expenses of the suit in ejectment, and also in relation to other things which are not material to this decision, and need not therefore be particularly stated. The case proceeded; and at the hearing of the exceptions they were all overruled, and a decree was finally passed against Peale as trustee and representative of the President, Directors and Company of the Agricultural Bank, directing him to pay to the petitioners the sum of \$20,058, with interest thereon at the rate of five per cent. until paid—and that the petitioners have execution therefor, upon the property, assets, goods and chattels, rights and credits of the said President, Directors and Company of the Agricultural Bank of Mississippi, then in the hands of the said Peale, as trustee, or which might thereafter come to his hands.

It is to revise this judgment that the present writ of error is brought.

The power, duties and responsibilities of the plaintiff in error, as trustee, are regulated by the laws of Mississippi.

The Act of 1843 makes it the duty of every district attorney in the State, whenever he has good reason to believe that any incorporated bank, located in his district, has done anything that would work a forfeiture of its charter, to file an information against the bank in the Circuit Court of the county in which it is situated; and if, upon the trial, the charter is adjudged to be forfeited, it is made the duty of the court to appoint one or more trustees to take [374*] charge of its books and assets, *and to collect the debts and sell the property of the bank, and apply the proceeds in the manner which may be directed by law to the payment of the debts due from the corporation. And the trustee is required to give bond and security, to be approved by the court, for the faithful discharge of this duty.

The Act of 1846 contains more detailed provisions on this subject. Among others, it directs the trustee to return, under oath, to the

court by which he is appointed, an inventory of all the property and evidences of debt which shall have come into his possession; and is afterwards, under the direction of the court, to sell the same at public auction, and render an account of the sale so made to the court.

The Act of 1846 also directs, that at the term at which judgment of forfeiture is rendered, the court shall appoint three commissioners to audit claims against the corporation; and it is made their duty to report their proceedings to the court at the first term after the expiration of twelve months allowed for the presentation of claims; at which time all exceptions to the report are to be heard and determined, and the court thereupon required to direct the distribution of the money in the hands of the trustee, to be made in the order prescribed by the law.

It was under these Acts of the Legislature of Mississippi, that the charter of the Agricultural Bank was declared forfeited, and the plaintiff in error appointed trustee. Commissioners also, it appears, were at the same time appointed to audit the accounts, who rejected this claim. Upon their refusal to allow it, the defendants in error instituted these proceedings in the Circuit Court of the United States for the Eastern District of Louisiana.

We see no ground upon which the jurisdiction of the court can be sustained. The plaintiff in error held the assets of the Bank as the agent and receiver of the Court of Adams County, and subject to its order, and was not authorized to dispose of the assets, or to pay any debts due from the Bank, except by the order of the court. He had given a bond for the performance of this duty, and would be liable to an action, if he paid any claim without the authority of the court from which he received his appointment, and to which he was accountable. The property, in legal contemplation, was in the custody of the court of which he was the officer, and had been placed there by the laws of Mississippi. And while it thus remained in the custody and possession of that court, awaiting its order and decision, no other court had a right to interfere with it, or to wrest it from the hands of its agent, and thereby put it out of his power to perform his duty. The case falls within the principle decided by this court in *Vaughn v. Northrop*, 15 Pet., 1, in which it was *held, that an [*375] administrator 'could not be sued in another state for a debt due from his intestate, because he is bound to account for all the assets he receives, to the proper tribunals of the government from which he derives his authority. And that decision was made in a case where the assets, by reason of which the administrator was sought to be charged, were received in the jurisdiction of the government in which the suit was brought against him, but in which he had not taken out letters of administration.

The case of *Williams v. Benedict and others*, 8 How., 107, is still more in point. By a law of Mississippi, if it appeared to the Orphans' Court, that the estate of a deceased person was insolvent, it was made the duty of the court to direct the property to be sold by the executor or administrator, and to appoint commissioners to audit the claims of creditors; and to distribute the proceeds of the property (after deduct-

ing the expenses of the last sickness and funeral expenses) among the creditors, in proportion to the sum due to them respectively.

The appellant was the administrator of an intestate whose estate had been declared to be insolvent by the Orphans' Court. But the appellees had obtained a judgment against the administrator in the District Court of the United States for the Northern District of Mississippi, before the adjudication of insolvency by the Orphans' Court—and issued an execution, and laid it upon property upon which his judgment was a lien, in case the estate was not insolvent. And, upon a bill filed by the appellant to obtain an injunction staying proceedings upon this execution, the appellees insisted that the estate was not insolvent, but had been wasted by the administrator, and that the proceedings in the Orphans' Court, under the law of Mississippi, were no bar to his recovery in a court of the United States. And the District Court was of that opinion, and dismissed the appellant's bill. But the decree was reversed by this court upon the ground that the jurisdiction of the Orphans' Court had attached to the assets, and that they were *in gremio legis*, and could not be seized by process from another court.

And in the case of *Wiswall v. Sampson's Lessee*, decided at the present term, the court held that where certain lands were in the hands of a receiver, appointed by the Chancery Court of Alabama, in a case pending before it, they could not be sold by the marshal upon process of execution, issuing out of the Circuit Court of the United States, for that district, although the judgment upon which the process issued was a lien upon the land, and the execution was laid before the receiver obtained actual possession of the property. In the case of *Erwin v. Lowry*, 7 How., 181, referred to in the argument of the *counsel for the defendants in error, the proceedings in the Court of the United States were merely to enforce a lien created by the testator in his lifetime, and consequently could not interfere with the duties of the curator, or the authority of the State Court, under which he was acting, and to which he was bound to account.

It is suggested, also, in the argument, that the claim in reconvention made in the answer, is a waiver of the exception to the jurisdiction; because the claim in reconvention necessarily admits the jurisdiction of the court. But the article in the code of practice, and the case referred to, do not support the objection. The claim in reconvention is in express terms, made in case the exception to the jurisdiction is overruled, and not otherwise. It is made conditionally, the party at the same time denying the jurisdiction of the court in the matter in controversy.

Moreover, the facts stated in the petition of the defendants in error, show that the Circuit Court of Louisiana had no jurisdiction. And where that is the case, the general rule in all legal proceedings is, that the defendant may avail himself of the objection in any stage of the proceedings. We see nothing in the code of practice that leads us to suppose that a different rule prevails in the courts of Louisiana. And if it does, yet the exception to the jurisdiction was in this case pleaded *in limine* when

the plaintiff in error appeared to the suit, and the conditional claim in reconvention cannot, by any just construction of its terms, be held to be a waiver of the plea.

The judgment of the Circuit Court must therefore be reversed and a mandate issued directing the judgment to be entered for the plaintiff in error.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to enter judgment in favor of the plaintiff in error.

S. C., 8 How., 256.

Cited—17 How., 161, 475; 20 How., 596; 23 How., 107; 14 Otto, 136, 138; 5 Blatchf., 501; 7 Blatchf., 20; 9 Blatchf., 109; 4 Ben., 98; 1 Woods, 269, 270; 2 Bank. Reg., 169; 3 Bank. Reg., 131, 142, 162; 6 Bank. Reg., 160, 333; 8 Bank. Reg., 394; 16 Bank. Reg., 417; 2 Abb. U. S., 155; 4 Hughes, 352; 2 McCrary, 343.

*MATTHEW CUNNINGHAM, [*377
Plaintiff in Error,

v.

MARY W. W. ASHLEY, executrix and sole legatee of CHESTER ASHLEY, Deceased, AND WILLIAM E. ASHLEY, FRANCES A. ASHLEY (now FRANCES A. FREEMAN), AND HENRY W. ASHLEY, by MARY W. W. ASHLEY, his guardian, heirs at law of said CHESTER ASHLEY, Deceased, AND ROWELL BEEBE.

Arkansas lands—Pre-emption title under Act of 1830 better than title under floats under Act of 1832—Patent for latter set aside.

On the 25th of December, 1824, Cunningham applied to the Land Office at Batesville, in Arkansas, to become the purchaser of a quarter section of land under a Cherokee certificate which had become vested in him.

This application was refused, upon the ground that two New Madrid certificates had been laid upon the land in 1820. The right under these certificates was claimed by Ashley.

In 1830 Cunningham said that Brumbach had an improvement on the same quarter section, which Brumbach assigned to Ashley. The law sanctioned the division of a quarter section, under such circumstances.

In 1831 Cunningham claimed a pre-emption right under the Act of 20th May, 1830. The claims under this Act, and under the Cherokee float were not inconsistent with each other.

In 1838 two floats were entered upon the same quarter section, viz.: one by Plummer, for the east half of it, under the Act of 1830, and the supplemental Act of 1832; the other for the west half by Jenbeau, under the Act of 1834, and the circular of the General Land Office of 1837. Patents were issued, and the title became vested in Ashley.

The title of Cunningham is better than that derived from these floats. The title under the New Madrid certificates is not decided in this case, or affected in any way by the decision. Cunningham is therefore entitled to the half of the quarter section which he claimed separately from Brumbach.

The patents obtained by Ashley and Beebe, being

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founded upon entries which were void, are void also, so far as they interfere with the pre-emptive right of Cunningham.

THIS case was brought up from the Supreme Court of the State of Arkansas, by a writ of error issued under the 25th section of the Judiciary Act.

The facts in the case were numerous and complicated, and a statement of the principal ones is given in the opinion of the court. It would not throw light upon any general principle if the reporter were to give a more particular account of the long series of acts which the respective parties considered to be the foundation of their respective titles. Nor would it be possible to explain the arguments of counsel, commenting on contradictory testimony, without a previous and detailed history of the transactions of twenty years. One of the briefs filed in the cause was upwards of seventy printed pages. The opinion of the court has given a selection of the leading facts in the case, so that its merits upon both sides can be clearly understood.

It was argued by *Messrs. Lawrence and Pike* for the plaintiff in error, and by *Messrs. Bradley and Johnson* for the defendants in error.

378*] **Mr. Justice McLean* delivered the opinion of the court:

A writ of error to the Supreme Court of Arkansas, brings this case in chancery before us, under the 25th section of the Judiciary Act.

On the 25th of December, 1824, Matthew Cunningham, by his attorney, applied to the Register of the Land Office at Batesville, in Arkansas, to become the purchaser of the southeast quarter of section three, in township one, north, and in range twelve, west of the fifth principal meridian, south of the Arkansas River; by virtue of a certificate (No. 28) granted by the Register of the said land district, to William Wylee, assignee of William Morrison, under the Act of 26th May, 1824.

That Act provided that every person, entitled to the right of pre-emption by law, in the tract of country north of the Arkansas River, which was ceded to the Cherokees, should be authorized, in lieu thereof, to enter with the above Register, any tract, in the Lawrenceville district, on which he may have made improvements, previously to the passage of the Act; or on any unimproved tract, within the district, the sale of which is authorized by law.

By several mesne assignments, the right of the Cherokee certificate was vested in Cunningham, and the land he proposed to enter was, by law, authorized to be sold. The agent of the complainant informed the Register and Receiver, that he had the money, and was desirous of paying for the land; but after consultation between the officers, he was informed the entry would not be permitted. The ground of this rejection was not stated, at the time, nor entered upon the records of either office. There can be no doubt, from the facts in the case, which appear in the correspondence of the General Land Office, and otherwise, that the application to make the entry was rejected, on the ground that the land was covered by New Madrid locations. And it appears that two New Madrid certificates had been laid on the

quarter section; one on the 19th of April, 1820, and the other on the 1st of May, of the same year.

On the 27th of May, 1831, the complainant claimed the right of pre-emption to the same quarter section, under the Act of the 29th of May, 1830. Being duly sworn, he stated, "that, in the year 1829, he had in cultivation about four acres, in corn and vegetables, on the land, and had been in possession of it near ten years; was in possession of it the 29th of May, 1830, and still occupied it." Several other witnesses proved the same facts, and one of them states, that he saw the complainant put down on the counter about \$200, and informed the Receiver that it was offered in payment of the land.

In the record, there is a list of the pre-emptions allowed, at *the Land Office at [379] Batesville, by H. Boswell and J. Rodman, late Register and Receiver, from the 8th of January, 1831, to the 30th of June, in the same year, as appears from the papers of that office. In that list, the name of Matthew Cunningham stands first, as having entered the southeast quarter of section three, first township, north, twelfth range, west. It is certified by Townsend Dickinson, Register. On this paper the word "rejected" is found, but by whom written, and for what purpose, does not appear on the paper. The names of H. Boswell and J. Rodman are under the word "rejected"; and several of the witnesses state that the word "rejected," or "allowed," was indorsed on the envelop of pre-emption papers, as the decision of the land officers was made.

In the list is the name of Nathan Cloyes, claiming the pre-emption right to the north-west fractional quarter of section two, in township one, north of range twelve, the claim to which was decreed to his heirs, in *Lytle et al. v. The State of Arkansas et al.* 9 How., 328.

There is, also, in the record, a certificate of Samuel W. Rutherford, Register of the Land Office at Little Rock, where the papers of the Batesville officers are deposited, dated the 27th of December, 1837, which states, "that Matthew Cunningham was allowed, at the Land Office at Batesville (Lawrenceville land district), a pre-emption claim on the southeast quarter of section three, township one, north range twelve, west, as appears from the papers furnished this office from the Land Office at Batesville, as having been allowed said Cunningham, prior to the 30th of June of the same year." The year referred to was 1831, as stated in the above list of pre-emption claims.

Various efforts were made by the complainant, at the Land Office at Batesville, and at the General Land Office at Washington, to procure a full recognition of his pre-emption claim. Appeals on the subject were made to the Secretary of the Treasury, and to the Attorney-General, all of which resulted in the denial of his claim, on the ground that the quarter section was not subject to a pre-emptive right, by reason of the prior New Madrid locations.

It appears, from the record, that at the Land Office at Little Rock, on the 6th of June, 1838, there was entered, by "Samuel Plummer, by virtue of his pre-emption float, under the Act of 1830, and the supplemental Act of 1832, the

east half of the southeast quarter of fractional section three, south of the Arkansas River, in township one, north of range twelve, west, containing eighty acres, &c., as per certificate granted to him, No. 3549." And that, on the same day, "Mary L. Jenbeau entered, by virtue of her pre-emption float, under the Act of 380*] 1834, and *circular of the General Land Office, of the 9th of June, 1837, the west half of the southeast quarter of section three, in township one, north of range twelve, west, &c., as per certificate granted to her, No. 3554."

In their answers, the defendants say, "that they caused application to be made by legal and valid floating pre-emption rights, fully authorized by law, to locate and enter said southeast quarter of section three, the same being then vacant public land, and liable, by law, to be entered by such floating rights; and this defendant (Ashley), in conjunction with said Beebe, caused the same to be entered, on the east half in the name of Samuel Plummer, and the west half in the name of Mary L. Jenbeau," &c. "Which said floating pre-emption rights were located, entered, and transferred, according to law and all the lawful rules and regulations of the General Land Office; and were duly patented to said Beebe, by the President of the United States, on the 25th of September, 1839."

On the 26th of December, 1838, the Commissioner of the General Land Office required the land officers at Little Rock to inform him "why entries 3549 and 3554, with two others, were permitted to be made on land already occupied by prior claims long since located, and against the validity of which this office possesses no evidence." In reply, dated 30th January, 1839, the land officers stated, that the entries were permitted "upon the demand of Roswell Beebe, and the several allegations made by him, setting forth and showing, conclusively, that the Treasury Department had disallowed the pre-emption claims under the Act of 1814, upon all the lands south of the Arkansas River, ceded by the Quapaw Treaties of 1818 and 1824," &c. And they say, "The original plat of survey embracing those entries, was, at the time, complete, and represented the sub-divisional lines, and the number of acres corresponding respectively with those certificates of entry; and there was no evidence of record on file, in either of our offices, to show that these lands were ever regularly entered, or located, and due return made thereof, according to law, except such evidence as was exhibited by the pre-emption, abstract from Batesville, under the Act of 1814, and the coloring of the plat. The capitol of the State of Arkansas is built upon a portion of these lands, at a cost of some seventy thousand dollars, or more. The corporate authorities of the City of Little Rock, as well as the inhabitants, all hold under conveyances derived from, as under the pre-emption claim, and against the New Madrid claims, either by a compromise made by the respective claimants about the year 1821, or by the decision of the land officers at Batesville, of which we are not particularly informed. All parties, within the limits of the 381*] *city, we believe, are fully satisfied that these entries which embrace it will cure the defects in their titles, as no dissatisfaction

is believed to exist with anyone interested in the question. Those entries were therefore allowed by us upon due reflection, under the belief that we were acting correctly in the faithful discharge of our duties; and by which the individuals who supposed they rightfully claimed those lands, will be enabled to obtain a perfect title, and thereby save and protect the rights and titles of the numerous persons claiming under them, and to whom they are bound by obligation or deed."

In a letter from the Commissioner of the General Land Office, dated the 24th of September, 1839, to the Register and Receiver at Little Rock, he says: "Your letter in reference to certain tracts of land located by floats 3549 and 3554, under the Act of the 19th of June, 1834, has been received;" and he remarks, "after an attentive and careful examination of all the questions connected with the different claims preferred to the land above referred to, this office, on the 18th instant, transmitted to the Secretary of the Treasury, agreeably to his request, all the papers in reference to the case, with an opinion of this office in favor of a confirmation of these floats, regarding the bond filed by Roswell Beebe as a sufficient compliance with the spirit of the circular of 11th of October, 1837; and I have this day received from him a communication concurring in that opinion. Patents will, therefore, issue for certificates 3549 and 3554, and two other numbers stated."

The circular referred to by the Commissioner, in the above letter of the 11th of October, 1837, contains the following sentences: "The President of the United States has directed, that until the further action of Congress thereon, the rights of pre-emption of eighty acres of land elsewhere, usually called floating rights, granted by the second section of the Act of Congress, approved May 29th, 1830, which Act was revived and continued by the Act approved June 19th, 1834, and which, also, as you were informed by my circular of June 9th, 1837, is for certain purposes therein stated, still in force; shall be restricted in their location to unimproved and vacant public land."

"You are therefore instructed not to permit the entry, by virtue of a floating right, of any tract on which there is a cultivation, improvement, settlement or occupant, unless the owner of the float shall first produce to you the written consent thereto, of the person or persons claiming the same improvement, cultivation, settlement or occupancy, attested by two witnesses."

The second section of the Act of the 29th of May, 1830, provides, "that where two persons are settled upon the same quarter section, each may receive a pre-emption for eighty acres, and a *right to enter eighty acres [382 elsewhere, so as not to interfere with other settlers having a right of preference."

In his letter to the Secretary of the Treasury, "in favor of a confirmation of the above floats," the Commissioner says, "the claim of Matthew Cunningham, under the Act of 26th of May, 1824, has heretofore been disposed of;" and further, "that the claims of Christian Brumbach and Matthew Cunningham, under the Pre-emption Act of 29th May, 1830, have no validity. The report of the Register and Re-

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ceiver, dated 20th July, 1839, and its accompanying papers, together with the Receiver's letter of the 25th July, 1839, with the inclosure, show that no action had been had on the claim of Christian Brumbach, by the land officers; that no tender of the purchase money was made by him, and no explanation can be given why his claim has been suffered to sleep from 1831 to 1839; and then only revived upon the rejection of the claim of Mrs. Backus, for the same quarter section under the Act of 1838, who claims also to hold under Brumbach's claim of the Act of 1830. Brumbach's own testimony shows also that he was living there by the permission of one of the proprietors of the town, and made the improvements for their benefit under a contract; and his deed of December 22d, 1824, accompanies those papers whereby those improvements were conveyed to Chester Ashley, one of the proprietors.

And further in relation to Cunningham's claim under the Act of 1824, he says, it was rejected under the opinion of the Attorney-General; and remarks, "there is a strong point against the validity of that claim, which circumstances did not render it necessary heretofore to make, viz.: that as the law of 26th May, 1824, granted the privilege of entering vacant land only, except where the pre-emptor or his legal representatives was desirous of securing his own improvements made prior to the passage of the land, &c., and he argues that Cunningham should not be permitted to locate one hundred and sixty acres of land, to secure improvements on a few town lots."

On the 15th of July, 1839, it appears, by the certificate of the Receiver at Little Rock, that the complainant again tendered the sum of two hundred dollars, in payment of the quarter section in controversy.

As the legal title to the land in controversy is in the defendants, the right of the complainant can be sustained only by showing a paramount equity. This he has attempted to do. But before we enter upon this investigation, it may be proper to state, distinctly, the grounds on which the title of the respective parties will be considered. From the issue made by the pleadings, we do not consider the New Madrid locations, or any right under them, as involved in the case. They were necessarily set aside, 383*] if not abandoned, by the defendants, when they located their floating rights on the land in controversy, on which patents were obtained. The right of the complainant has, from its origin, been hostile to the New Madrid claims.

The equity of the complainant must rest upon his occupancy and improvement of the land, whether he claims under the Cherokee warrant or a pre-emption under the Act of 1830. The defendant's legal title will be considered as founded, exclusively on the locations made by the floating rights, on which the patents were obtained.

The two claims, set up by the complainant in his bill, require different facts, in the order of time, to sustain them; but they are in no respect inconsistent with each other. The Cherokee float could be located only on unoccupied land, or on land improved by the holder of the warrant.

As the land officers at Batesville would not
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permit the complainant to make an entry under either claim, it is therefore important to ascertain on what ground they decided; and also as to the sufficiency of the evidence to sustain the right as claimed. There can be no question that the decision of these officers was founded on the prior New Madrid locations. These were made before the complainant took possession of the land. This, under the circumstances, being an insuperable objection to the entry, no court can presume that their decision was made on any other ground, unless such ground was stated, or the evidence was defective.

The voluminous correspondence of the General Land Office shows that the land officers considered the above New Madrid locations as an appropriation of the land. Was the evidence adduced by complainant sufficient to establish his right?

The authority to Samuel C. Roane to make the entry, as the agent of Cunningham, under the Act of 1824, was undoubted. The application to make the entry was made in due form. The Cherokee warrant had been issued by the land officers, who were called upon to make the entry. The assignments upon the warrant were *prima facie* evidence of right in Cunningham, and there does not appear to have been any objection to them; they must be considered, therefore, as having been held sufficient. The money on the entry was offered to be paid to the Receiver, and the only defect in the evidence was as to the improvements and occupancy of the complainants. These, it is contended, the court may presume were within the knowledge of the land officers, or that the facts were proved by parol, or that they were proved by affidavits, which have become mislaid or lost. As the proof in the record, in regard to these facts, applies to the pre-emption claimed under the Act of 1830, there is no occasion to resort to presumptions on this head.

*The Pre-emption Act of the 29th of [384 May, 1830, in the first section, provided, "that every settler or occupant of the public lands, prior to the passage of this Act, who is now in possession, and cultivated any part thereof in the year 1829, shall be, and he is hereby authorized to enter, with the Register of the Land Office for the district in which the lands may lie, by legal sub-divisions, any number of acres, not more than one hundred and sixty, or a quarter section to include his improvement, upon paying to the United States the then minimum price of said lands."

Under this law the applicant was a witness, and Cunningham was interrogated by the land officers on his application. He stated that in the year 1829, he cultivated about four acres on the quarter section claimed, and that he had been in possession of said improvement for near ten years, and that he was still in possession of it. And he further stated, Christian Brumbach had an improvement on the same quarter section which he had in cultivation, in the year 1829, and has continued to hold possession of the same to this time. This statement is corroborated by the oath of C. Brumbach, and as to the occupancy and improvement of complainant by C. H. Pelham and Richard Searcy.

It is clearly shown that the improvements of
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Cunningham, up to 1831, were wholly on the quarter section claimed; and that his cultivation and occupancy continued without interruption from the time he took possession in 1821, until the fall of the year 1831. He then removed to his present residence, the principal part of which is on the northwest quarter section, but a part, if not all, of his outbuildings, are on the southeast quarter. His former residence was south of his present one. The improvement he made at first is still cultivated by him.

As lot number one, on which the complainant's first house was built, was conveyed to Bertrand, his step-son, in 1821, by O'Harra, it is contended that the complainant had no such residence on the land as to entitle him to pre-emption. Bertrand was a minor, and lived with his step-father at the time, and it is quite clear, that a minor cannot claim a pre-emptive right. But, in addition to this, as the case is now before us, it does not appear that O'Harra had any right to the lot conveyed.

It is objected that Cunningham's improvements, though on the quarter section claimed, are limited by the boundaries of a certain square, or lots, within the City of "Little Rock;" and that, consequently, he cannot claim a pre-emption for the quarter section.

On the 20th of November, 1821, certain individuals, assuming to be owners and proprietors of the northeast fractional quarter of **385*** section number three, and of fractional section number two, of township number one, north of the base line in range number twelve west, entered into a deed of assurance, in which they agreed to lay out the Town of Little Rock, specifying the streets and alleys, and making certain donations of public squares and lots for public purposes. This plat appears to have been surveyed so as to embrace the quarter section in controversy. In their answers, the defendants specify a number of lots sold in the southeast quarter, and they allege the greater part of it has been sold in lots. The proprietors in their deed say, that they extended the plat to adjoining lands not owned by them.

This survey of lots in the southeast quarter of section three, if made without authority, cannot embarrass the complainant's right. The New Madrid locations being out of the case, should the right of the complainant be sustained against the legal title of the defendants, the surveys must be considered as void. The town was incorporated in 1825, and by the Act of 1827, the incorporation was extended so as to embrace the whole of the town plat.

When the improvement of the complainant was commenced, the southeast quarter was in its natural state, unchanged by any improvements.

Every legal requisite appears to have been complied with under the Act of 1830, to entitle the complainant to a pre-emption. His improvement and occupancy under the law were clearly proved. Indeed, it would seem from the facts, that he was entitled to become the purchaser of the land under the law of 1824. But all the facts, necessary to establish his right, were before the Register and Receiver on his second application. His application to make the entry may be said to have been rejected, because it was not allowed. But no

doubt can exist as to the ground of the rejection. It was not on account of any deficiency in the proof, but on the ground of the New Madrid locations. This is placed beyond question, by the parol proof in the case, and the correspondence of the General Land Office. Other objections to the claim, after the second rejection, were stated by that officer, which alleged a want of diligence by the complainant, in failing to do what he has proved was done, in the prosecution of his right. Some of these objections showed a misapprehension of the facts, others of the law.

The offices at Batesville were loosely kept, and it appears in proof that some year or two before his death, Boswell, the Register, became intemperate, and his duties were neglected. Great labor was required from his successor to reduce to system the confused mass of papers he found in the office.

It was the practice of the office to indorse on the envelop *of the pre-emption papers, the decision, of which no other entry was made. And one of the witnesses states that "rejected" was indorsed on the envelop which inclosed the papers of Cunningham. It is difficult to reconcile this fact with two lists in the record, duly certified, of pre-emptions allowed, in both of which the name of Cunningham is found. The word "rejected" is on one of the lists. There can be no doubt the claim was rejected as often as it was brought to the notice of the Land Department, so long as the New Madrid locations were sanctioned. No other decision could be made. But on the 6th of June, 1838, floats were permitted to be located on the quarter section in controversy, covered by the New Madrid locations. This was procured through the agency of the defendants, and for their benefit.

It was the result of a controversy of nearly twenty years' continuance. Since 1821, Cunningham had occupied the land, and had carried on the controversy with a commendable energy, and at no small expense of time and money. He urged his claim at the General Land Office, personally, and by agents. The correspondence on the subject was earnest and voluminous. But the defendants, having made their entries, received the legal title. And their equity must now be compared with that of the complainants.

The New Madrid locations were controlled by the defendants. And they were not withdrawn, or the obstacle which they created removed, until the defendants' entries were made. The floats under which these entries were permitted, were issued under the Act of 1830, continued in force by the Act of 1834. The second section of the Act declared that these floats should be so located, "as not to interfere with other settlers, having a right of preference." And the circular of the Land Office directed that they "should be restricted to unimproved and vacant lands."

These stringent regulations were not sufficient to protect the rights of the complainant. His occupancy, improvements and claim, were known to the defendants, and to all the officers of the government, who acted on the subject. They excused or justified themselves on the ground, that by permitting the entry to be

made, many of the citizens of "Little Rock" would be quieted in their titles.

On the 6th of July, 1838, an instrument, under seal, was entered into between Roswell Beebe, to whom the patents were issued, of the one part, and the Mayor and Aldermen of the City of "Little Rock," in behalf of said City, as well as in behalf of the State of Arkansas, and also in behalf of any person or persons who may have in his own right a proper and **387** regular chain *of conveyance or conveyances of any town lot or lots situated in the first original Town, now City, of "Little Rock," derived from, by, or under, any one or more of the original owners or proprietors of the town, as represented upon the first original plan as then surveyed and laid off into town lots, of the other part, witnesseth: that whereas, the said Roswell Beebe has caused to be located and entered with pre-emption floating claims, at the Land Office at "Little Rock," and upon which the city, south of the Arkansas River, and west of the Quapaw line, is now built, the following described tracts or parcels of land, to wit: the northeast fractional quarter of fractional section three, and the west fractional part of the northwest and southwest fractional quarters of fractional section two; all in township one, north of the base line of range twelve west, &c. And in all cases, where purchases of lots had been made in the above tracts, Beebe bound himself to release to the purchasers.

This arrangement induced the land officers to permit the entries to be made, as well on the southeast quarter in controversy, as on the tracts above described. And it was considered at the General Land Office as a sufficient compliance with the circular of that Office, dated the 11th of October, 1837. The patents on this view were issued to Beebe; and on the 11th of January, 1843, Beebe conveyed one half of the southeast quarter in controversy, to Ashley.

However satisfactory the agreement of Beebe may have been to claimants of lots on the tracts specified in his agreement, as it did not embrace the land claimed by the complainant, it was not designed for his benefit. And it is unacceptable that the land officers at "Little Rock" and at Washington, should have considered the arrangement as a compliance with the regulation which prohibited the entry of floats upon improved or occupied land. And it is worthy of remark, that these locations were permitted to be made at "Little Rock" while the claimant was at Washington, prosecuting his claim.

Has the complainant placed himself in a position to object to the defendants' equity? He did everything he could reasonably be required to do, to locate his Cherokee warrant on the land, under the Act of 1824. Had it been objected, on that application, that he did not prove his improvement and occupancy, the witnesses would, at once, have been called. With this exception, he did everything the law required to perfect his claim.

But, under the Act of 1830, his proof was in no respect defective. It was worthy of the highest credit, and full to every point; and the money was offered to be paid. But the locations of the New Madrid warrants were an obstacle then, as they had been on the first appli-

cation. These locations were not in the way of *defendants' floats, and it is not mate. [***388** rial to inquire by what means they were set aside. This being done, the rights of the complainant were paramount to those acquired under the new location. Those rights were founded on the settlement and improvement in 1821, and on the acts done subsequently in the prosecution of his claim. Having done everything which was in his power to do, the law required nothing more. And the defendants who caused the floats to be located on the premises, had full notice of the complainant's rights. They are chargeable with this notice. Under the second section of the Act of the 29th of May, 1830, and the circular of the Commissioner of the General Land Office, of the 11th of October, 1847, so far as the new entries interfered with the rights of the complainant, they were void. They were in conflict with the law and the regulation.

The pretense that the agreement of Beebe, which bound him to execute deeds to the purchasers of lots, was a compliance with the above circular, so far as regards the land in controversy, was without foundation. It may have misled the officers at Washington, and in this it may have answered its purpose. The officers of the government are the agents of the law. They cannot act beyond its provisions, nor make compromises not sanctioned by it.

By the second section of the Act of 1830, it is provided, "That if two or more persons be settled upon the same quarter section, the same may be divided between the first two actual settlers, if by a north and south, or east and west line, the settlement or improvement of each can be included in a half quarter section."

At the time the complainant applied for a pre-emption under the Act of 1830, he stated that Christian Brumbach had an improvement on the same quarter section, which he had in cultivation in the year 1829, and has continued to hold possession of the same to this time. And it was proved that Brumbach cultivated the land in 1830. The improvement occupied by complainant was commenced about the same time as the one occupied by Brumbach; and the evidence shows that they were the first settlers on the land. This we suppose, under the law, limits the pre-emption claimed by the complainant to one half of the quarter section. The residence and improvement of Brumbach brought him *prima facie* within the law; whether he applied for and attained a pre-emption or not. It was necessary, under the regulations of the General Land Office, that the complainant should state, in his applications, the occupancy, improvement and cultivation of Brumbach, and whatever objection may be made to his pre-emption claim by the government, *cannot enlarge the right of the com. [***389** plainant. Brumbach applied for a pre-emption in the quarter section, under the Act of 1830, and established his right in everything, except the tender of the money. His claim was rejected, no doubt, on the same ground, as was that of the complainant's.

Brumbach had conveyed his right to Ashley, in whom the legal title is vested to one half of the quarter section. This removed the objection to the location of one of the floating rights for eighty acres on the quarter, as the improve-

ment, if not made by Ashley, was owned by him. In regard to the one half of the quarter, the entry was not prohibited by the second section of the Act of 1830, or the circular of 1837. To extend the pre-emptive right of the complainant over the entire quarter, would cover improvements of another individual, made about the same time as those on which his pre-emption is founded. This would disregard the express provision of the law, which gives to each settler, where there are two upon the same quarter section, eighty acres.

As the right set up by the complainant arises under an Act of Congress, and the decision of the Supreme Court of Arkansas was against that right, this court has jurisdiction of the case.

We have not considered any right equitable or legal, as arising under the new Madrid locations, laid upon the land in dispute. Such right, if any existed, is not presented in the pleading, in such a form as to require its consideration and decision. It therefore remains wholly unaffected by the decree.

The facts in the case are exceedingly voluminous and complicated; but we have considered them, and the legal and equitable bearing they have upon the title of the parties. Upon this view, we are brought to the conclusion that the entries on which the defendants' patents were issued, were void, so far as they interfere with the claim of the complainant, for the reasons stated, and that, consequently, the patents are also void. The decree of the Supreme Court of Arkansas is therefore reversed; and the cause is remanded to that court, with instructions to enter a decree in pursuance of this opinion. And in order to give more definitely our views, we state, that on a full consideration of the pleadings and proof in the case, we consider that the two entries of eighty acres each, made in the name of Samuel Plummer and Mary Louisa Jenbeau, on the southeast quarter of section number three, in township one north, and in range twelve, west of the fifth principal meridian, south of the Arkansas River, are void so far as they interfere with the pre-emptive right of Matthew Cunningham to one half of the said quarter; and that Roswell Beebe, and the heirs of Chester Ashley, deceased, defendants, shall execute a deed of quitclaim **390**]* to the said Cunningham, on his paying or tendering to them the minimum price of the public land, with interest from the sixth of June, 1838, the time the above entries were made, to one half of the above quarter section, by east and west, or north and south lines, so as to include his improvement on the quarter section; or, if such a division cannot be made, that they convey to him, as aforesaid, a joint interest of one half in the quarter section.

And the court order that the decree shall in no respect affect any right which may or does exist, under the New Madrid locations, in the defendants or other persons, if any there be.

ORDER.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Arkansas, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Supreme Court

in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Supreme Court, for further proceedings to be had therein in conformity to the opinion of this court.

Cited—20 How., 8; 22 How., 203; 1 Black., 139; 2 Black., 557; 13 Wall., 102; Remp., 705.

MARY LUCINDA BOSLEY, HENRY BOSLEY, MARY JANE DAVIS, SALLY ANN DAVIS, JAMES BOSLEY AND MELDRID BOSLEY (infants), by their guardian and next friend JOHN BOSLEY, AND JOHN BOSLEY, son of the said JOHN,

v.

MARGARET E. WYATT, Executrix of ELIZABETH N. BOSLEY, Deceased.

Devise of land—what change of interest of devisor will work revocation—question of interest and intent.

James Bosley, in his will, after sundry specific devises and bequests, devised and bequeathed all his lands and other real estate in Baltimore, Cecil, and Allegany counties, in Maryland, and also in Florida, and his house and lot in Santa Croix, and all the real estate he might have elsewhere, to his wife Elizabeth, her heirs and assigns, in trust to sell the same and divide the net proceeds thereof, with all the residue of his estate, equally between herself and the children of his brother.

After making his will, he sold all of the lands, particularly mentioned in the residuary clause of the will above stated, except some lands lying in Baltimore County. At the time of making the codicil hereafter mentioned, he held some of the proceeds of these sales in bonds and other securities, and with the residue had purchased other property.

He afterwards made a codicil, by which he devised his summer residence in Baltimore County, to his wife, and also the securities he held for the lands sold in Cecil County, and directed all the property he had acquired after the date of his will to be sold, and the proceeds to be equally divided between his wife and her sister Margaret. Then followed a residuary clause in the following words: "Lastly, my pew in St. Paul's Church and **391** all my other property, real or personal, and all money in bank belonging to me at the time of my decease, I give, devise and bequeath unto my said wife Elizabeth and her heirs forever; and I ratify and confirm my said last will in everything except where the same is hereby revoked and altered as aforesaid."

The residuary clause in this codicil is inconsistent with that in the will, and consequently revokes it. But the devise of the property, specifically mentioned in the will, is not revoked by the clause in the codicil.

After the execution of the codicil, the testator agreed to lease some land for the term of ninety-nine years, renewable forever, a ground rent being reserved upon the same. The lessee was to pay cash for a part, and the residue of the purchase money was to remain on interest, as ground rent, which the lessee could extinguish at any time by the payment of the principal sum.

This property was a part of that which was specifically mentioned in the will, and not revoked by the clause in the codicil.

But the conduct of the testator, in making this agreement, so altered the condition of the property that it amounted to a revocation of the devise, and manifests an intention on his part, when taken in connection with other circumstances of the case, to give it to his wife under the residuary clause in the codicil.

THIS was an appeal from the Circuit Court of the United States for the District of Maryland.

The bill was filed by the plaintiffs in error, who were the children of Dr. John Bosley, mentioned in the will of James Bosley.

That part of the will which gave occasion to the controversy is stated in the opinion, as are also the material facts in the case.

The Circuit Court decided that the residuary devise in the will was revoked by the residuary clause in the codicil; that the devise of the property, specifically mentioned in the will, was not revoked by the clause in the codicil, and ordered an account to be taken of such part as remained subject to the trust, one half of the proceeds whereof to be paid over to the complainants; and that the testator's agreement, made after the date of the will and the codicil, to lease a part of that real estate for a term of ninety-nine years, the principal sum payable at the option of the lessee, operated to revoke the devise as to that part.

From this decree, the complainants appealed to this court.

It was argued by *Mr. Mayer* for the appellants, and *Messrs. Campbell* and *Johnson* for the appellees.

Mr. Mayer, for the appellants, made the following points:

1. The final clause of the codicil institutes no new residuary devisee and legatee; and the words supposed to effect that, are not the appropriate, nor any constructive phrase, for a residuary disposition in a will; and those words (which are, "all other, my property, real or personal,") must be construed either, 1st, to comprise all property "other" than the pew, and so to purport to annul all devises and be-
[392*]quests of will and codicil, "except those in favor of Mrs. Bosley; which result must condemn the paragraph as incongruous and absurd; or, 2d, to point to only property *ejusdem generis* with the pew, and with the real property just in a preceding clause given to Mrs. Bosley and Miss Noel, and being the acquisitions subsequent to the date of the will; or, 3d, must be rejected altogether, as incapable of any consistent or reasonable application; or, as militating against the general intent of the testator, of dedicating his estate (with but small exceptions) to the children of John Bosley, and to Mrs. Bosley. (3 P. Wms., 112; 3 Atk., 61; 3 My. & Cr., 661; 1 Eq. Cas. Abr., 801, pl. 14; 1 Bro. C. C., 127, 39; 1 Russ., 146; 2 Atk., 113; 1 Jarman, 395-9, 417; Greenl. Cruise, Devises, 133 and note to ch. 8, sec. 39; 6 Watts, 192; 3 Pet., 117, 118; 11 Gill. & J., 306; 2 Paige, 22; 8 Mass., 3; 11 Ed., 528; 22 Maine, 257, 413; 4 B. & Cress., 620; 2 Wms., Ex'rs, 789, 790; 6 Pet., 83, 84; 5 Ves., 247; 10 Wheat., 239; 13 Pet., 173; 5 Ves., Jr., 247; 21 E. C. L., 352; 1 Jarman, 594, 595, 596.)

2. The paragraph adverted to, is no residuary disposition; because, a specific bequest follows it to Mrs. Bosley, which would be utterly needless and idle if it were preceded by the supposed all-comprehending residuary appropriation. (13 Ves., Jr., 39; 1 Rus., 149; 3 Atk., 61; 1 Jarman, 595, 598, 599, 600.)

3. There is, by those words, no revocation of the residuary devise and bequest of the will, because, the codicil, in terms following those words, confirms the will, except where the same is (by the codicil) "revoked and altered." The testator introduces several express revoca-

tions into his codicil; and to only those revocations must he be understood to refer—and to modifications, by name of "alterations," of his will—for any interferences with the will, as meant to be revoked, or affected by the codicil. If the words in question touch at all the residuary disposition of the will, they must affect it only as a revocation; and leaving out of view mere modifications or "alterations," the inquiry is: what revocation the testator meant should trench upon the broad confirmation his codicil gives to the will, thus declared as of continuing force. The will speaks anew from the date of the codicil, even without any confirmatory reference to it in the codicil, and the two acts are thus intimately allied; and any revocation of any part of the will, imputed to the codicil, must be by words as precise and unequivocal, and positive, as are the terms of the dispositions supposed to be revoked.

The testator has given his own limitation to the effect of his "alterings" of his will, or of any estate disposed of by it, by declaring, in the codicil, that where Mrs. Bosley (under the "clause next to the last), shall "alter" [***393** any estate, it shall nevertheless take the course prescribed in the will, and that "alteration" is not, in his view, and by the law of his will, the same as revocation; and he thus precludes the idea that he had in view any revocations but those he had expressly declared in the codicil. (3 Mason, 486; 10 B. & Cress., 895; 21 E. C. L., 192; 3 Pick., 216; 5 Johns. C., 534; 1 Wms., Ex'rs, 114, 116; 21 Eng. C. L., 352; 4 Kent., 531; 8 Cowen, 58; 1 Jarman, 189, 895; 2 How., 580.)

4. The will and codicil being thus blended and co-operative, the codicil avails as a republication of the will, except where such an inference at law is, by the express terms or necessary construction of the codicil, excluded. The will, in this relation to the codicil, is to be treated as if inserted in the codicil. If so, if even there be those contradictory residuary dispositions, the residuary estate must, as modern adjudications now deal with such contrariant clauses, be shared by the parties named or embraced in both clauses. This construction would virtually restore the residuary clause of the will, as the only rule; because, as under the construction just asserted, Mrs. Bosley and the children, the subjects of the two clauses, share equally, by the will, in the residuary estate. (14 Pick., 521; 6 Johns. C., 875; 3 My. & Cr., 376; 1 Jarman, 202, 397, 412; 2 Atk., 874; 2 My. & Keen, 165; Yelv., 209; Cro. Eliz., 9; Greenl. Cruise, Dev., 149, marg.; 10 B. & Cress., 895; 21 E. C. L., 192.)

5. The agreement of the testator to lease a part of his land in Baltimore County, had not the effect to revoke the devise of that part of the land in favor of the complainants, and only modified the devise so as to give the rent and reversion on the lease, in place of the land. This construction applies also to the lot and house by the will devised to "Old Sarah," and subsequently to the codicil, agreed to be leased to William Hollins, as stated in the defendant's schedule. The privilege, accorded by the agreement of lease, to extinguish the rent and so acquire the reversion, does not render the transaction a sale, and give to the contracting lessee the equitable fee of the land. If the

agreements for leasing revoked the devises of these pieces of property, then the testator died intestate as to them; the agreements dating after the codicil. (Greenl. Cruise, 105, 109, note to 106; 2 Ves., Jr., 428; 1 Jarman, 167, 171, 172; 4 Kent, 530; 7 T. R., 899; S. C., 1 Bos. & Pull., 576; Cro. Car., 23; Cro. Jac., 49; 1 Vern., 97; 3 Bro. Parl. Cas., 12; 2 Chipman, 74; 4 Greenl., 341; 3 Ves., Jr., 685; 1 Maryland Ch. Decis., 36; Cro. Eliz., 9.)

394*] *The counsel for the appellee made the following points:

1. That the residuary clause in the codicil revokes the residuary clause in the will. (4 Black., 381; 4 Kent, 535, note; 3 Greenl. Cruise, 139; *Rowley v. Eytton*, 2 Mer., 128; *Rogers v. Pettis*, 1 Addams, Prerog., 30.)

2. That the decree of the court below was right; because, if no part of the specific property devised by the last clause in the will, which contains also the residuary devise, was not revoked by the last clause in the codicil, a large part of that specific property was subsequently disposed of, by the testator, and other parts of it otherwise specifically devised by the codicil.

3. Because that portion of such property so specifically devised by said last clause in the will, his lands in Baltimore County, was revoked by the testator's agreement of lease, afterwards executed by Mrs. Bosley, by her lease to Armstrong, on the 18th of January, 1845, for the term of ninety-nine years, renewable forever. (7 Bac. Abr., tit. Wills and Testaments, G., 344; 4 Kent's Com., 6 ed., 528 to 530, and cases there cited, *Colegrace v. Manley*, 6 Madd., 84; *Ward v. Moore*, 4 Madd., 368; 5 Pick., 112; 7 Johns. Ch., 261.)

Mr. Chief Justice Taney delivered the opinion of the court:

The dispute in this case arises out of the will and codicil of James Bosley, late of the City of Baltimore. The will was executed in 1828, and the codicil in 1839. He died in December, 1843.

In his will, after sundry specific devises and bequests, he devised and bequeathed all his lands and other real estate, in Baltimore, Cecil, and Alleghany Counties, in Maryland, and also in Florida, and his house and lot in Santa Croix, and all the real estate he might have elsewhere, to his wife Elizabeth N. Bosley, her heirs and assigns, in trust to sell the same to the best advantage; and directed the net proceeds, together with all the residue of his estate, real, personal and mixed, not therein before devised, to be equally divided—one half to his wife, and the other to the children of his brother, Dr. John Bosley. After making his will and previous to the codicil, he sold all of the lands particularly mentioned in the residuary clause of the will above stated, except some lands lying in Baltimore County, and except also his Florida land and part of that in Alleghany County, of which it seems he had been unable to obtain possession. And at the time of making the codicil, he held some of the proceeds of these sales in bonds and other securities, and with the residue had purchased other property.

By the codicil he devised his summer residence, situated in Baltimore County, to his wife, and also the securities he held for

the lands sold in Cecil County—and directed all the property he had acquired after the date of his will to be sold and the proceeds to be equally divided between his wife and her sister, Margaret E. Noel. Then follows a residuary clause in the following words:

"Lastly, my pew in St. Paul's Church, and all my other property, real or personal, and all money in bank belonging to me at the time of my decease, I give, devise and bequeath unto my said wife Elizabeth N. Bosley, and her heirs forever; and I ratify and confirm my said last will in everything except where the same is hereby revoked and altered as aforesaid."

Upon this will and codicil, the appellants, who are the children of Dr. John Bosley, claim the one half of this personal property left by the testator at his death, and also one half of the lands not specifically devised, upon the ground that the residuary clause in the will is not revoked by that in the codicil.

This claim is altogether untenable. The residuary clause in the codicil is inconsistent with that in the will, and consequently revokes it.

There is another claim, however, which presents a question of more difficulty.

It appears that at the time of making his will the testator held, in fee simple, fifty acres of land in Baltimore County; and that in 1843, after the execution of the codicil, he entered into a contract with a certain Horatio G. Armstrong, whereby he covenanted that in consideration of the payment of two thousand dollars at the time specified in the agreement, and the annual ground rent of \$210, payable semi-annually, he would lease the said land to Armstrong, his executors, administrators, and assigns, for ninety-nine years, renewable forever, with the right to the said Armstrong to extinguish the ground rent upon the payment of \$3,500 at any time to the said James Bosley, his heirs and assigns. The testator died before the cash payments were made; and the money was afterwards received by his widow, and the lease executed by her according to the terms of the covenant.

As this was a part of the land in Baltimore County, and was therefore specifically devised in the residuary clause of the will, it was not revoked by the general devise of the residue of his real and personal property in the codicil. The question therefore is, whether the contract with Armstrong was an implied revocation of the devise in the will.

The adjudged cases upon implied revocations are collected together in 4 Kent's Com., 528, and the rule he deduces from *them is [***396** this, "that the same interest which the testator had when he made his will should continue to be the same interest, and remain unaltered to his death, and that the least alteration in that interest is a revocation." A valid agreement or covenant to convey, which equity will specifically enforce, will operate in equity as a revocation of a previous devise of the land. (*Walton v. Walton*, 7 Johns. Ch., 258.)

In the case before us, the interest which the testator had in this land at the time of making his will, was converted into money by his contract with Armstrong. It was a sale and an agreement to convey his whole interest in the land. It is therefore unlike the case of a lease for years, or of ninety-nine years renewable

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forever, in which the lessor retains the reversion—and does not bind himself to convey it on any terms to the lessee.

The form of the contract adopted in this instance, between the testator and Armstrong, is in familiar use in the sale of lots in the City of Baltimore and the adjacent country. It has nearly if not altogether superseded the old forms of contract where the vendor conveyed the lands and took a mortgage to secure the payment of the purchase money—or gave his bond for the conveyance and retained the legal title in himself until the purchase money was paid. And it has taken the place of these forms of contract, because it is far more convenient, both to the seller and the purchaser. For it enables the vendee to postpone the payment of a large portion of the purchase money until he finds it entirely convenient to pay it; and at the same time it is more advantageous to the vendor, as it gives him a better security for the punctual payment of the interest; and while an extended credit is given to the vendee, it is to the vendor a sale for cash. For if his ground rent is well secured, he can at any time sell it in the market, for the balance of the purchase money left in the hands of the vendee. It will be observed that the rent reserved is precisely the interest on the amount of the purchase money remaining unpaid. And when it must be admitted that a sale in which a bond of conveyance is given, and the title retained by the vendor, to secure the payment of the purchase money, is in equity a revocation, there would seem to be no good reason for holding otherwise in the case before us, where the vendor is equally bound to convey when the whole purchase money is paid. A distinction between the cases would rest on a difference in form rather than of substance and principle. It would moreover make the revocation depend upon the will of a stranger, and not upon that of the testator. For if Armstrong had paid to him in his lifetime, the whole amount of the purchase money, as he **397**] had a right to do under the *contract, it is very clear that the devise would then have been revoked. And if the purchaser's omission to pay prevents the contract from being a revocation, the validity of the devise is made to depend, not upon the will or the act of a testator, but that of a stranger, over which the testator has no control. We think a distinction leading to that result cannot be maintained, and that the devise in question was revoked by the contract with Armstrong.

The counsel for the appellants, however, contends, that if the will is revoked, and the land converted into money, yet there was a legal reversionary interest remaining in him; and that the rent reserved, being incident to the reversion and pertaining to the reality, cannot pass under a bequest of money or personal estate.

But it must be remembered that the residuary clause in the codicil gives to his wife all his real as well as personal property, not otherwise disposed of; and therefore is broad enough to embrace the interest in question, although, in contemplation of law, it belongs to the realty.

We do not mean to say that every residuary clause in a codicil will pass land specifically devised in a will, where, by some act of the

testator, the devise is impliedly revoked after the codicil was executed. There are adjudged cases upon certain wills where it has been held otherwise. But whether the property passes to the devisee or descends to the heir, as in a case of intestacy, must depend upon the intention of the testator, to be gathered from the will and codicil. It is always necessarily a question of intention. No two wills, probably, were ever written in precisely the same language throughout; nor any two testators die under the same circumstances in relation to their estate, family and friends. And it would be very unsafe as well as unjust to expound the will of one man, by the construction which a court of justice had given to that of another, merely because similar words were used in particular parts of it.

Undoubtedly there are fixed rules of law in relation to the construction of certain words and phrases in a will, which have been established by a long course of judicial decisions; and which have become landmarks of property and cannot therefore be disturbed. But in most of the cases in which they have been applied, it is to be feared that they have not accomplished, but defeated, the testator's intentions.

They owe their origin to the principles of the feudal system, which always favored the heir at law, because it was its policy to perpetuate large estates in the same family. And acting upon this principle, the English courts of justice have, in some instances, placed the narrowest possible construction on the *words [**398** of a will. And a testator sometimes being held to die intestate as to portions of his property, and left it to descend to his heir, when a fair and reasonable interpretation, according to the ordinary acceptance of the words used, plainly showed that the whole estate was intended to be devised to another.

It has not been the disposition of courts of justice, in modern times, to extend the application of these rigid technical rules; but rather to carry out the intention of the testator, when no fixed rule of legal interpretation stands in the way. And this is, and ought to be, more especially the case in this country. For wills here are most frequently drawn by persons unacquainted with legal phraseology, and ignorant of the meaning which the law attaches to the words they use. The property devised is, perhaps, in the greater number of cases, the fruits of the testator's own industry. And the policy and institutions of the country are adverse to the feudal policy of favoring the heir at the expense of the devisee; and of construing, for that purpose, the words of the will in their most restricted sense, although that construction obviously defeats the intention of the testator.

But the question, arising upon this will and codicil, does not depend upon any word or phrase to which the law has affixed a certain and definite meaning. The words used are legally sufficient to pass the property to his widow, and the only question is: was that his intention, as we gather it from the will and codicil, considered together. We think it was.

Eleven years elapsed between the date of the will and that of the codicil. The situation of the testator's property had undergone consid-

erable changes during that time; and his mind also had materially changed as to the manner of disposing of it. The lands mentioned in the residuary clause of his will, had, with a very small exception, been sold. And the property he purchased with the proceeds of these sales or otherwise acquired after the date of the will, was devised by the codicil to his wife and her sister, and not, as before, divided between his wife and his brother's children; and the whole of his personal estate is given exclusively to his wife, instead of the one half only bequeathed in the will. The land, which has given rise to this controversy, was also sold by the testator in his lifetime, and two thousand dollars of the purchase money had become personalty, and as such, unquestionably passed to the wife, by the residuary clause in the codicil. The testator's remaining interest in this property was also money, and not land; but by reason of the form in which he contracted to sell it, this portion of the money belonged to the realty. It is impossible to suppose, after looking at these bequests to his wife, that he meant to die intestate of this money, and to divide this 399,*] small portion *of his estate in two parts, giving her the two thousand dollars, but withholding from her the residue, and leaving it to be claimed by whoever might chance to be his heir at law at the time of his death. On the contrary, it is manifest, from the whole context of the will and codicil, that he did not mean to die intestate of any portion of his property; and that what did not pass to others by a specific devise or bequest, should go to his wife. The codicil is evidently drawn by unskillful hands, and therefore, according to settled principles of law, must receive a fair and liberal interpretation to accomplish the intent. And as that intent is apparent in favor of the widow, it ought not to be defeated by a narrow and technical construction of particular words.

It was suggested, in the argument, that the appellants might be entitled to a remainder in fee, in the two lots on which, it would seem from the will and the codicil, that two old servants of the testator were living. But this point, very properly, was not pressed. For the lots mentioned in that clause of the will, in which a remainder in fee is given to the appellants after the death of Mrs. Bosley, are lots on which there were improvements, and which yielded an income. The lots in question were not of that description. They yielded no income, and consequently are not embraced in that devise.

Upon the whole, therefore, we think the decree of the Circuit Court was right, and must be affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Maryland, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

Dissenting, *Mr. Justice Grier.*

Cited—14 How., 421.

*JOHN F. ENNIS, Administrator [***400**
de bonis non of JOSEPH ZOLKOWSKI ET AL.,
v.

J. H. B. SMITH, Administrator of GEORGE BOMFORD; LEWIS JOHNSON, Administrator *de bonis non* of THADDEUS KOSCIUSKO; JAMES CARRICO, SAMUEL STOTT, GEORGE C. BOMFORD, JACOB GIDEON, ULYSSES WARD, AND JONATHAN B. H. SMITH.¹

General Kosciusko's wills—Liability of sureties on administrator's bonds in Maryland—revocation of will by French law—in bequest, words "all my effects," restricted by context—Rules governing evidence of domicile—Personal property distributable according to law of intestate's domicile—Copy of French Code as evidence—Decrees of foreign government's courts, evidence of pedigree.

Origin of the fund in controversy.

Mr. Jefferson's letter concerning it.

General Kosciusko made four wills. One in the United States, in 1798; another in Paris, in 1806; the third and fourth were made at Soleure, in Switzerland, whilst he was sojourning there in 1816 and 1817.

The first and second wills were revoked by the third, and he died intestate as to his estate in the United States.

But the first will, before it was known that he had made the others, was probated by Mr. Jefferson, in Virginia, and when Mr. Jefferson learned that the General had made other wills, he transferred the fund to the Orphans' Court of the District of Columbia. The Orphans' Court managed the fund for some time, and then Benjamin L. Lear was appointed the administrator of Kosciusko, with the will annexed. He died, leaving a will, and George Bomford one of his executors. Bomford qualified as such, and afterwards became the administrator of Kosciusko *de bonis non*. He took into his possession, as executor, the estate of Lear, and also the funds of Kosciusko, which had been administered by Lear, and first made his return to the Orphans' Court of the administered funds of Kosciusko, as executor of Lear. Afterwards they were returned by him to the Orphans' Court, as administrator *de bonis non* of Kosciusko. The Orphans' Court deeming that his sureties as administrator *de bonis non* of Kosciusko, were insufficient, or that they were not liable for any waste of them, on account of the funds having been received by him as executor of Lear, and not as administrator *de bonis non*, called upon him for other sureties, under the Act of Congress of the 20th February, 1846. He complied with the call, and gave as sureties, Stott, Carrico, and George C. Bomford, and Gideon, Ward, and Smith.

The original bonds of Bomford were given to the Orphans' Court, under the law of Maryland, which prevailed without alteration in that part of the District of Columbia which had been ceded by Maryland, until Congress passed the Act of the 20th February, 1846. The defendant, Stott, Carrico, and George C. Bomford, and Smith, Ward, and Gideon, became the sureties of Bomford, as administrator *de bonis non* of Kosciusko, under the Act of 20th February, 1846.

In the State of Maryland, if an executor or administrator changes any part of an estate from what it was into something else, it is said to be ad-

1.—Mr. Justice CATRON did not sit in this cause.

NOTE.—*Lex loci in distribution of assets. Lex loci of domicile of testator governs validity of will and distribution. Situs of personal property. Foreign will necessary to be proved where assets are.* See note to Smith v. B'k of Georgetown, 5 Pet., 518.

Foreign laws, how proved.

The written laws of a foreign country must be proved by the best evidence of which the nature of

ministered. If an administrator *de bonis non* possesses himself of such changed estate, of whatever kind it may be, and charges himself with it as assets, his sureties to his original bond, as administrator *de bonis non*, are not liable for his waste of them. They are only liable for such assets of the deceased as remain in specie, unadministered by his predecessor, in the administration. Such is the law of Maryland, applicable to the sureties of Bomerford, in the bond given when he was appointed administrator *de bonis non* of Kosciusko.

But when other sureties are called for by the Orphans' Court, under the third section of the Act of February 20, 1846, and are given, they do not bear the same relation to the administrator that his original sureties did, and they will be bound for the waste of their principal to the amount of the estate, or funds which he has charged himself by his return to the Orphans' Court, as administrator *de bonis non*, when it called for additional sureties, and for such as the administrator may afterwards receive.

The bonds taken by the Orphans' Court in this case, were properly taken under the Act of the 20th February, 1846.

General Kosciusko's olographic will of 1816, contains a revoking clause of all other wills previously made by him, and not having disposed of his American funds in that will, nor in the will of 1817, he died intestate as to such funds. The second 401st article in the will of 1817, "Je lègue tous mes effets, ma voiture, et mon cheval y compris à Madame et à Monsieur Zavier Zeltner, les hommes ce dessus" (Record 105), is not a residuary bequest to them of the rest of his estate, not specifically disposed of in the wills of 1816 and 1817.

General Kosciusko was sojourning in Switzerland when he died, but was domiciled in France, and had been for fifteen years.

His declarations are to be received as proof that his domicile was in France. Such declarations have always been received, in questions of domicile, in the courts of France, in those of England, and in the courts of the United States.

The presumption of law is, that the domicile of origin is retained, until residence elsewhere has been shown by him who alleges a change of it. But residence elsewhere repels the presumption, and casts upon him who denies it to be a domicile of choice, the burden of disproving it. The place of residence must be taken to be a domicile of choice, unless it is proved that it was not meant to be a principal and permanent residence. Contingent events, political or otherwise, are not admissible proofs to show, where one removes from his domicile, of origin, for a residence elsewhere, that the latter was not meant to be a principal and permanent residence. But if one is exiled by authority from his domicile of origin, it is never presumed that he has abandoned all hope of returning back. The abandonment, however, may be shown by proof. General Kosciusko was not exiled by authority. He left Poland voluntarily, to obtain a

civil status in France, which he conscientiously thought he could not enjoy in Poland, whilst it continued under a foreign dominion.

Personal property, wherever it may be, is to be disturbed in case of intestacy, according to the law of the domicile of the intestate. This rule may be said to be a part of the *jus gentium*.

What that law is when a foreign law applies, must be shown by proof of it, and in the case of written law, it will be sufficient to offer, as evidence, the official publication of the law, certified satisfactorily to be such. Unwritten foreign laws, must be proved by experts. There is no general rule for authenticating foreign laws in the courts of other countries, except this, that no proof shall be received, "which presupposes better testimony behind, and attainable by the party." They may be verified by an oath, or by an exemplification of a copy under the great seal of the state or nation whose law it may be, or by a copy proved to be a true copy, by a witness who has examined and compared it with the original, or by the certificate of an officer authorized to give the law, which certificate must be duly proved. Such modes of proof are not exclusive of others, especially of codes and accepted histories of the law of a country. See, also, the cases of *Church v. Hubbard*, in 2 Cranch, 181, and *Talbot v. Seeman*, in 1 Cranch, 7. In this case, the Code Civil of France, with this indorsement, "Les Garde des Sceaux de France a la Cour Supremee Des Etats Unis," was offered as evidence to prove that the law of France was for the distribution of the funds in controversy. This court ruled that such indorsement was a sufficient authentication, to make the code evidence in this case, and in any other case in which it may be offered. By that code, the complainants named in this suit as the collateral relations of General Kosciusko, are entitled to receive the funds in controversy, in such proportions as are stated in the mandate of this court to the court below.

The documentary proofs in this cause, from the Orphans' Court, of the genealogy of the Kosciusko family, and of the collateral relationship of the persons entitled to a decree, and also of the wills of Kosciusko, are properly in evidence in this suit.

The record from Grodno is judicial; not a judgment *inter partes*, but a foreign judgment *in rem*, which is evidence of the facts adjudicated against all the world.

THIS was an appeal from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington, sitting as a Court of Equity.

The whole case is set forth in the opinion of the court.

*The appellants were those who filed [*402 the bill in the Circuit Court, which was dismissed by that court.

the case is susceptible; no testimony will be received which presupposes better testimony attainable by the party who offers it. The sanction of an oath is required for their establishment, unless they can be verified by some other such high authority that the law respects it not less than the oath of an individual. *Church v. Hubbard*, 2 Cranch, 236, 7; *Story's Conf. of Laws*, 529, 530; *Lincoln v. Battelle*, 6 Wend., 482; *Francis v. Ocean Ins. Co.*, 6 Cow., 429; *Dougherty v. Snyder*, 15 Serg. & R., 87; *Brackett v. Norton*, 4 Conn., 517; 1 Greenl. Ev., sec. 485; *Hemstead v. Reed*, 6 Conn., 490; *Dyer v. Smith*, 12 Conn., 384.

In general, authenticated copies of written laws are expected to be produced. *Story's Conf. of Laws*, 525; 2 Cow. & Hill's Notes to Phill. Ev., 329; *Robinson v. Clifford*, 2 Wash. C. C., 1, 2; *Packard v. Hill*, 2 Wend., 411; *Chanoine v. Fowler*, 8 Wend., 173, 177; see *Trimby v. Vignier*, 6 Carr. & P., 25; *Wilson v. Smith*, 5 Yerg., 390; *Talbot v. Seeman*, 1 Cranch, 38; *Richardson v. Anderson*, 1 Campb., 65, note (a); 1 Greenl. Ev., sec. 487.

Copy of foreign statute may be authenticated under the great seal of the country whose law is sought to be proved. *Dougherty v. Snyder*, 15 Serg. & R., 87; *Story's Conf. of Laws*, 530.

A sworn copy is also admissible, proved to be a true copy by a witness who has compared it with the original. *Lincoln v. Battelle*, 6 Wend., 482; *Church v. Hubbard*, 2 Cranch, 236, 7; *Dougherty v. Snyder*, 15 Serg. & R., 87.

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The copy may be authenticated by the certificate of an officer properly allowed by law to give the copy, which certificate must also itself be duly authenticated. 1 Greenl. Ev., sec. 483.

But the certificate of a consul is not sufficient. *Church v. Hubbard*, 2 Cranch, 236, 237.

The unwritten laws, customs and usages, of a foreign country may be proved by parol evidence, by the testimony of competent witnesses, instructed in the law, under oath. *Story's Conf. of Laws*, 530; *Kinniy v. Van Horn*, 1 Johns., 385, 394; *Woodbridge v. Austin*, 2 Tyl., 364, 367; *Robinson v. Clifford*, 2 Wash. C. C., 1, 2; *Livingston v. Maryland Ins. Co.*, 6 Cranch, 274; *Lincoln v. Battelle*, 6 Wend., 482; *Bayley v. Francis*, 14 Mass., 453; *Willings v. Consequa*, 1 Pet. C. C., 225, 229; *Brush v. Wilkins*, 4 Johns. Ch., 506, 520; *Chanoine v. Fowler*, 2 Wend., 117; *Wilson v. Smith*, 5 Yerg., 398, 9; *Taylor v. Swett*, 3 Mill. La., 33, 36; *M' Rae v. Mattoon*, 13 Pick., 53.

Also by books of reports and cases decided. *Raynham v. Canton*, 3 Pick., 293, 296; *M' Rae v. Mattoon*, 13 Pick., 53; *Latimer v. Eglin*, 4 Desaus. Eq., 26, 32; *Dougherty v. Snyder*, 15 Serg. & R., 87; *Brush v. Scribner*, 11 Conn., 407.

Sometimes, certificates of persons in high authority have been allowed as evidence. *Story's Conf. of Laws*, 530; 1 Greenl. Ev., sec. 488; *In re Dormay*, 3 Hagg. Eccl., 707; *Rex v. Picton*, 3 Howell's State Tr., 515-573; *The Diana*, 1 Dods., 95, 101, 102; See *Leland v. Wilkinson*, 6 Pet., 317.

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It was argued by *Messrs. Tochman* and *Johnson* for the appellants, and by *Messrs. Redin, Marbury, and Coxe*, for the appellees.

The points raised by the counsel for the appellants were the following:

I. Was Kosciusko's domicile, at the time of his death, in France, as the appellants charge, or was it in Poland, as the appellees maintain?

It could not be in Poland, since Kosciusko left it, because of its subjugation by the foreign powers, in 1794. (*Vattel's Law of Nations*, Book I., chap. 16, sec. 195.)

It was in France, by his own choice, since 1806 until 4th of June, 1816. (Wills of 1806 and 1816, and conclusions resulting from the admission of the appellees; *Story's Conf. of Laws*, secs. 44-46, secs. 8-47, sec. 14.)

It continued to be in France until his death, upon the principle of law laid down in *1 Starkie on Evid.*, Philad. ed. of 1842, p. 53, "Presumption as to Continuance." (*1 American Leading Cases*, by Hare & Wallace, p. 710, sec. 8, and the authorities therein referred to; *Story's Conf. of Laws*, sec. 47, sec. 16.)

II. Has the will of 1816 been proved? Have the letters of administration *de bonis non* to *Lewis Johnson* been issued with the wills of 1798, 1806, and 1816, as alleged in the bill? Does the will of 1816 revoke the wills of 1798 and 1806? Is the residue of Kosciusko's property liable for the legacies stated in the wills of 1816 and 1817.

The original will of 1816 was proved, recorded and is lodged for safe keeping in France, and its authenticated exemplification with the French probate was proved and recorded in the Orphans' Court for the District of Columbia, pursuant to the rules laid down in *Toller on Evid.*, p. 71. (*Van Rensselaer v. Morris*, 1 Paige, 13; *Story's Conf. of Laws*, notes to sec. 514 b, on p. 433 of the 2d ed.; *Statute of Maryland of 1785*, chap. 48, sec. 2; *De Sobre v. De Lustre*, 2 Harr. & Johns., 191.)

The letters of administration *de bonis non* to *Lewis Johnson* were issued with this will and other two, as charged in the bill, proved by the decretal of the Orphans' Court, and the deposition of the recorder of the wills.

The court below had, and this court has now, the power of deciding what effect each of these three wills of Kosciusko should have upon the final disposition of the property sought to be recovered. (*1 Jarman on Wills*, 4, 22, 23, &c.)

403* For this purpose the law of the domicile of Kosciusko at the time of his death must be resorted to. (*Jarman on Wills*, 3, 4; *Story's Conf. of Laws*, secs. 465, 467, 468, 479 f, 479 m.)

The will of 1798 cannot take effect, because of the uncertainty of its dispositions and objects of the bounty; the will of 1806 is null and void, not being executed according to either of the forms prescribed by the laws of France for making wills; but, good or bad, they have been both revoked by the will of 1816.

The will of 1816, containing the revoking clause of former wills, is a good and valid olographic will, proved by the depositions on p. 15 and 16 of the Record. (Arts. 970, 999, 1001, of the Civil Code of Napoleon.)

Parol evidence, referred to in the answers,

has not been produced; but, if it were produced, it could not be received, to impeach the will of 1816, nor to prove its revocation. (Civil Code of Napoleon, arts. 1035, 1036; *1 Wheaton*, 175; *Toller on Exec.*, 76; *1 Madd. Ch. Pr.*, 81, 552, 555; *2 Starkie on Evid.*, Part I., Phil. ed. of 1842, 756, and Part II., p. 1284, note a; *1 Greenleaf on Evid.*, sec. 273, 290.)

The word "effets," used in the 2d clause of the will of 1817, being restrained by the words "*ma voiture et mon cheval y comprise*," passes only property of "*ejusdem generis*," and nothing else. (*1 Jarman on Wills*, 692, f; *13 Ves.*, 36, 45.)

Independent of this, the French word "effets" signifies only such property as is about the person. (*Dictionnaire Francais et Anglais*, par les Professeurs Fleming et Tibbins; *Dictionnaire de l'Academie Francaise*.)

Admitted, that for the legacies specified in the will of 1816, the property sought to be recovered, and every other property of Kosciusko, would be liable—but all these legacies had been paid.

The legacies made by the will of 1817 being legacies of specific funds, which were invested in Switzerland and in England, and of such specific property which was left in the house where Kosciusko died, in Switzerland, none of them can charge any other property; but whatever may be the law in this respect, the proof is that these legacies have also been paid.

The accidental omission, in the proceedings, of Mr. and Mrs. *Zavie Zeltner*, legatees under the will of 1817, is immaterial: first, because they take only such property in kind as comes within the definition of the word "effets," restrained by the words "*ma voiture et mon cheval y comprise*," and should claim it from those persons in Switzerland in whose possession these "effets" were left; second, because, by the law of France, upon the death of the testator or intestate, the property vests in *the [404] lawful heirs, who stand in loco of legal representatives of the deceased at common law. (Civil Code of Napoleon, art. 724; *Story's Conf. of Laws*, sec. 507, 508, 516.)

It follows, from the above rule, that when the lawful heirs of Kosciusko recover the property which is not wanted here by local administrator, all claimants residing in Europe, whether they are legatees or creditors, will have a right to establish there their claims. It would be immaterial, then, were all the claimants residing in Europe omitted in these proceedings, as no decree *pro confesso* taken here will bar their claims there. (Civil Code of Napoleon, arts. 724, 870, 873, 1011, 1025, 1028.)

Admitting, for the sake of argument, the existence of such European claims, this is no defense; the appellees in such a case should bring money into court—show good reasons of their apprehension for safety, and pray that the appellants may interplead their right with other claimants. (*2 Story's Com. on Eq.*, sec. 805, 809, &c.; *Mitt. Eq. Plead.*, by *Jeremy*, pp. 48, 49.)

III. Have the appellants proved that Kosciusko died unmarried and without issue, and that they are his next of kin, entitled to the residue of undisposed of property? "In civil cases, slight evidences of right or title are sufficient—as against a stranger who possesses no

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color of title." (1 Starkie on Evid., Phil. ed. of 1842, p. 544.) In case of *Folger's Lessee v. Simpson*, 1 Yeates, 17, *ex-parte* affidavit, made in England, was held to be sufficient evidence of pedigree against strangers. (*Kingston v. Lesley*, 10 Sergeant & Rawle, 388.) The appellants are all strangers, having no color of title to the estate of Kosciusko. The appellants, to establish their title thereto, produced a decree of the nobility of the Government of Grodno, and a decree of the Court of Kobryn, in the Province of Lithuania, formerly Poland, now a part of the Empire of Russia, which were proved as to their authenticity, and as to the competency of the tribunals which passed them; first, in the Orphans' Court for the District of Columbia, in the course of legal proceedings against Bomford, deceased administrator, and subsequently, by depositions taken under the commission in the case.

The originals of these foreign decrees, written in the Russian language, are on file in the court below. Their translations will be found on p. 73, Exhibit A, and on p. 80, Exhibit B. These translations are judicial—they were made under oath, taken in open court. The originals, written in the Russian language, are not in the record, from reasons stated in the answer of the clerk of the court below.

The authenticity of these documents has been established by the testimony that the seal 405*] of the Assembly of the Nobility on *the decree of pedigree (marked A, on p. 78), and the seal of the Court of Kobryn in the decree (marked B, on p. 80) are genuine seals, which alone is sufficient, under the principles laid down in 6 Wendell, 484; 1 Paine, 614; Norris' Peake's Evid., 58, conjointly with 60, 108, and 109; 3 East, 222; Act of Maryland, of 1785, ch. 46, sec. 6.

Though the foregoing authorities do not require that the signatures be proved, to establish the authenticity of a decree or judgment—the appellants proved two of the signatures on the decree of pedigree, marked A, on p. 80, by the deposition—which, upon the principle laid down in *Gresley's Eq. Evid.*, p. 120, and the authorities therein referred to, would be sufficient, were it deemed necessary to prove the signatures.

The seals and signatures not proved (which are appended to the certificates, purporting to attest the signatures and seals of the Assembly of the Nobility of Grodno, and of the Court of Kobryn), are useless appendages, the law not admitting such certificates as evidence. (13 Pet., 209; 2 Cranch, 187.)

The competency of the jurisdiction of the Assembly of the Nobility of Grodno, and of the Court of Kobryn, in matters decided upon by the exhibited decrees of pedigree, &c., is proved by the depositions of witnesses skilled in law, which depositions prove also that the decree of the Assembly of the Nobility, marked A, on p. 78, falls within the scope of such as are called *in rem*, and bind everybody.

Depositions taken in the Orphans' Court are evidence in this case, upon the principle laid down in 1 Starkie on Evid., Phil. ed. of 1842, p. 815—the more so when they were brought before the court below, through the medium of a commission taken in the case.

Independent of the witness, Judge Kalus-Howard 14.

owski was re-examined under the commission, and another witness, Tysowski, was examined under it.

The decrees, marked A and B, are as conclusive evidence to prove pedigree in this country, as they are in the country from which they come, upon principles laid down in 1 Starkie on Evid., Phil. ed. of 1842, p. 253, "Judgments *in rem*." (*Id.*, p. 80, "Reputation, in what cases evidence;" 2 Starkie on Evid. *Id.* ed. part 1, p. 842; 1 *Id.*, 275; Norris' Peake's Evid., 101, 104–106; 1 Starkie on Evid., *Id.* ed., 285, 286, 295, 296; 1 Greenleaf on Evid., secs. 525, 543; Story's Conf. of Laws, sec. 593.)

The objection that the decree of pedigree, marked A, was obtained upon *ex-parte* proceedings, &c., cannot be sustained, when it is proved that it was obtained upon such proceedings as the law of the country from which it comes prescribes (depositions on pp. 85, 69, 70, of the record). (4 Pet., 472, 475; Story's *Conf. of Laws, secs. 605, 608; Peake's [*406 Evid., 101, 104–106; 1 Greenleaf on Evid., sec. 547.)

The City of Grodno is the capital, and the seat of the government of the Province of Lithuania, which is called Government of Grodno—just as is called the Government of the United States, "Government of Washington." (Encyc. Brit., Vol. X., p. 799; Cycl. of Soc. for Diff. of Useful Knowledge, Vol. XI., p. 455.) Hence comes the incongruity of the testimony, in calling the official seal of the nobility of Grodno, "the Government of Grodno's official seal," "a Government seal of Lithuania." But that both these expressions mean to speak of the seal of the nobility of Grodno, proves the fact that both witnesses had before them the document with the seal described in its body, on p. 80 of the record, as the seal of the nobility of Grodno.

Nor can the testimony of these witnesses be impeached by giving it a different construction than the nature of the case admits of, the appellees having neglected to cross-examine them (Starkie on Evid., Phil. ed. of 1842, pp. 197, 212, 214, 316, 317, 577), though their counsel were present at the taking of depositions, and cross examined one witness on other matters.

Independent of the above, witness Kalusowski explained himself as to his testimony by deposition.

The Assemblies of Nobility, when called upon to decide on pedigree, issue as many original copies of decrees as there are interested parties.

In this case, four original copies of such decree were issued and delivered to the appellants. The original copy, of which the translation is marked A, on p. 73 of the record, is one of these four copies. None of these copies is "better evidence." Each of them is evidence of the same decree for all purposes.

Reference is made that a certain Pole, Klimkiewicz, filed a bill claiming the estate, as next of kin of Kosciusko. This individual attempted to impose in the premises—when, upon the death of the former counsel for the appellants, they had no one here to take care of their claim. This suit abated by the death of Klimkiewicz and of administrator Bomford, and its papers formed no part of the record in the court below.

The residue of Kosciusko's estate goes to

the appellants, as his next of kin, upon the principle laid down in 1 Jarman on Wills, 3, 4, &c.; Civil Code of Napoleon, art. 750.

IV. Are the defendants liable to account, as is charged in the bill, on pp. 6, 8, of the record?

The decree dismissing the bill against Jonathan B. H. Smith, as administrator of the estate of Bomford, is not questioned—Bomford having died insolvent (pp. 48, 109, of the record).

As to the same Jonathan B. H. Smith, trustee **407*** of the property *which Bomford delivered to him as counter security, with the deed of trust, on p. 23 of the record, he is bound to account for it to the appellants, upon the principle laid down in 1 Story's Com. on Eq., sec. 502; Eq. Abr., 98, K. 5; Com. Dig. Chancery, 4, D. 6; *Wright v. Morley*, 11 Ves., 22. He is bound also to account, upon the same principle, for the sum of \$4,156.92, for rents, &c., which he admitted to hold in his hands—in the answer on p. 49 of the record—and for such after rents as accrued since the filing of that answer.

Lewis Johnson, administrator *de bonis non* of Kosciusko's estate, in his original answer (p. 29 of the record), admitted, that at the time of the filing of it he had under his control stock of the Bank of Washington of the nominal value of \$5,580.00—of which the market price was then 60 per 100—and \$200 in cash. In his amended answer (on p. 62 of the record), he informed the court that said bank refused to pay him further dividends, under "pretense" that this stock does not belong to Kosciusko's estate; and on p. 63 of it, he admitted that he had in hands \$268.28 in cash. In view of these admissions, the decree of the court below, dismissing the bill against him as administrator *de bonis non*, is erroneous; he ought to account for the cash and the certificate of the stock which he holds.

As to the liability of the sureties of Bomford:

This is the only point upon which the court below delivered a written opinion. It is not in the record, the judges not having filed it in the case, but it will be found in a separate pamphlet, published by the appellees.

Grounds upon which the court below dismissed the bill against the sureties, are as follows:

First, because the original assets of Kosciusko having been converted into money, by Lear, the first administrator, this money and the evidences of the new investments could not (in the opinion of the court below) pass lawfully to Bomford as the administrator *de bonis non* of the estate of Kosciusko, but he ought to have administered them as Lear's executor (pp. 9, 12, 13, of the opinion); second, because Bomford, administrator *de bonis non*, "converted and used" the funds of Kosciusko's estate before the date of the bonds (*Id.*, 14); third, because the Act of Congress of 1846 (chap. 8), and the bonds obtained under it, are prospective, and not retrospective (*Id.*, 16-21); fourth, because what is retained by the first administrator cannot go to the administrator *de bonis non* (*Id.*, 21, 24); fifth, variances of the bonds referred to in the bill, and exhibited as evidence, were alleged (*Id.*, 7), but the court expressed no opinion as to it.

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*The counsel for the appellees made ***408** the following points, many of which were divided into sub-divisions. *Mr. Coxe* argued points 1, 2, 4, 5. *Mr. Redin*, points 7 and 8, and part of 3. *Mr. Marbury* the remaining sub division of 3, and point 6.

The appellees, the sureties of Bomford, contend:

I. That the Circuit Court had no jurisdiction of the cause. (Act of 21st Feb., 1801, sec. 5; 3d March, 1801, sec. 3; Judicial Act of 1789; *Strawbridge v. Curtis*, 3 Cranch, 267.)

II. That the claim must be made through the administrator or Kosciusko's domicile.

The administration in the District of Columbia, if the domicile was, as the complainants allege, in France, was merely ancillary, and after paying debts, &c., the residue of the estate ought to be remitted to France, to the executors under the wills of 1816 and 1817; and complainants, all being or representing foreign parties, must proceed against such foreign executors, and cannot sue the ancillary administrator here; and the bill makes no case in which a foreign distributee can maintain an action here. (Story's Conf. Laws, sec. 513, and cases cited in the notes.)

III. That if the appellants have proved themselves to be the true representatives of Kosciusko, and can claim directly, the defendants, as sureties of Bomford, as administrator *de bonis non* of Kosciusko, are not liable to them.

1. Because the whole of the original assets were converted into money by Lear in his life, except Bank of Columbia stock: and because the money and new securities on hand at his death passed to Bomford, as executor of Lear, for distribution, and Bomford's sureties, in that capacity, if any, are answerable; that Bomford had no legal right or authority, as administrator *de bonis non*, to receive such money and securities; and the defendants, as sureties for him in that character, are liable only for what he could lawfully and rightfully receive in virtue of his office as such administrator; that their bond does not cover what is claimed.

2. Admitting Bomford came rightfully, as administrator *de bonis non*, into possession of the money and securities left by Lear, the sureties are not liable to the full extent of the complainant's claim; because Bomford wasted and converted to his own use, prior to the date of the bonds, as shown by complainant's proof, \$30,625.47, part of said assets, for which the sureties are not liable, their bonds being prospective and not retrospective.

3. The third ground upon which the sureties are not liable to complainants is, that there is a fatal variance between the bonds as charged in the bill, and the bonds as exhibited by complainants to prove the charge; and further, that said bonds are void.

*IV. That there is no proof in this ***409** cause that the appellants are the next of kin of Kosciusko.

V. If the complainants are the next of kin, and if there be liability on the part of the sureties, there was no intestacy by Kosciusko as to these funds; but if the will of 1795 be revoked, or its trusts cannot be carried out, then the will of 1817 disposes of the whole fund to Mr. and Mrs. Xavier Zeltner, and intercepts the claim of the next of kin.

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As to the trust of the will of 1798, *vide* 2 Story Eq., secs. 1169, 1172, 1176; *Brocket's case*, 9 How.; *Girard's*, 2 How.; *Bap. Ass'n*, 4 Wheaton, 1.

Kosciusko did not intend to die intestate as to any of his property; this is shown by his frequent wills, and by the introductory clause in the will of 1817.

The words of the will of 1817, in the introductory, clause are "*mes biens*;" in the clause of gift (the second) "*tous mes effets, ma voiture, et mon cheval y compris*."

Standing alone, the words are broad enough to pass his whole estate. "*Mes biens*," meaning "estate," "what a man is worth," and "*tous mes effets*," "all or the whole of my effects or property."

The words "*tous mes effets*" would pass the whole residue; and the introduction of the words, "my carriage and horse included," was not for the purpose of restricting or qualifying the former terms, but resulted from the testator's anxiety that those articles should pass under the general terms.

The expression is "included"; and the rule of *ejusdem generis* is inapplicable. The clause in this will of 1817 comes within the qualifying cases upon that rule, of *Fleming v. Burrows*, 1 Russ. C. C., 217; *Kendal v. Kendal*, 4 Russ. C. C., 360 (2 Wm's Ex'rs, 1019); *Arnold v. Arnold*, 2 Mynle & Keen, 365 (2 Wm's Ex'rs, 1019); *Parker v. Merchant*, 1 Younge & Collier C. C., 290; *Rop. on. Leg.*, 210, 211.

Mr. and Mrs. Xavier Zeltner are not made parties in this bill.

VI. If there was intestacy, then it is not proved where the domicile of Kosciusko was at the time of his death; nor is the law or rule of representation or succession shown; these must be stated in the bill, and proved as stated.

The bill states that Kosciusko was a native of Poland, and died at Soleure, in Switzerland, intestate, and possessed of a large personal estate in the United States.

It is alleged that France was the domicile of the intestate at the time of his death, and that by the law of France, then in force, the succession to the whole of the said estate was cast upon the decedents of his sisters, representing the parents living at the time.

410*] *The defendants contend—

1. That there is no evidence to prove the domicile, as alleged. Mere residence, is not in itself proof of a change of domicile; it must be *animo manendi*. (Story's Confli. of Laws, sec. 39; 1 Cur. E. R., 856; 2 *Id.*, 697; 7 Clark & Fin., 876.)

2. That the law of the assumed domicile is not set forth in the bill.

3. That there is no evidence in the case, to prove the law of France providing for the succession of an intestate's personal estate.

To prove this law, as alleged, the complainants offered in evidence a printed volume of the Code Napoleon. To the admissibility of which, for such purpose, the defendants objected; and they rely on 1 Greenleaf, secs. 487, 488; 3 Wend., 173; 5 *Id.*, 375, 384, and 389.

The defendants also contend, that if the printed volume of the code be received as admissible, the law as contained in the Code does not entitle the complainants to the succession of said estate, as claimed by them. They re-

fer to the Code, book 1, sec. 11; book 3, sec. 726.

VII. That proper parties are not made.

1. Lear's sureties, as administrator of Kosciusko, ought to have been made parties.

2. So ought Bomford's sureties, as executor of Lear.

3. So ought Bomford's original sureties, as administrator *de bonis non* of Kosciusko.

4. And so ought Mr. and Mrs. Xavier Zeltner, the residuary legatees in the will of 1817.

There is no averment in the bill, of the insolvency of any of the omitted sureties to excuse the omission.

The averment goes no further than that the original sureties of Bomford, as administrator *de bonis non*, are dead, and the bond is open to the plea of limitations. (Story's Eq. Pl., sec. 169, and note 5; *Madox v. Jackson*, 3 Atk., 406; *Cockburn v. Thompson*, 16 Ves., 321, overruling *Stanley v. Cook*, Moseley, 383, &c.)

VIII. That the remedy against the sureties was at law on the bond, and not in equity.

The sureties severally filed demurrers, general and special, to the complainants' bill; in support of which, they contend that the complainants have a free and unobstructed remedy at law against them on their bonds, and have, therefore, no right to bring them before the court as parties in this cause.

In the case of *Richardson v. Jones*, 8 Gill & J., 163, it was held that a court of chancery had no jurisdiction (on petition by a trustee acting under a decree of the Chancellor to sell land), *to order the purchaser and his [*411 sureties, who had given a bond for the purchase money, to bring the same into court, to be paid to the trustee. The court say, the contract on this bond is a purely legal one, and can be enforced by an action at law and trial before a jury.

In the case of *Boteler & Belt v. Brookes*, 7 Gill & J., 143, on petition to the Chancellor to compel the sureties in a trustee's bond (he being dead and insolvent) to bring the proceeds of a sale made by the trustee, into court, the court held that the obligation of the sureties on their bond was purely legal, and could be enforced in a court of law only.

In *Brooke v. Boteler et al.*, 12 Gill & J., 307, it was held that a bill in chancery might be maintained against sureties in a bond, when there could be no remedy at law. In the particular case, the trustee being dead, insolvent, and there being no administration on his estate, there could be no order by the court for the payment of the complainants' claim. At page 317, the court say, "No person could maintain a suit at law in such case, until payment was awarded by order of the court under whose decree the land was sold, and demanded of the trustee."

The cases in 4 Munford, 289; 2 Edw. Ch., 67; 9 Porters, 697; were determined on the ground that a preliminary judgment, and execution against the administrator, was necessary to establish a *devastavit*, before suit could be maintained against sureties in an administration bond; and the court say that a complainant would be without remedy, if not allowed to sue in chancery.

It was said this would not be allowed in an ordinary case, where the administrator was

alive, and within the reach of the common law courts, and a judgment could be obtained against him. (*Bolton v. Powell*, 8 Eng. L. and E., 165.)

But by the Act of Assembly of Maryland, 1798, ch. 101, sub. ch. 8, sec. 15, and sub. ch. 11, sec. 1, distribution is to be made when the debts are paid. A distributee may sue at law on the administration bond, against the sureties, after the lapse of thirteen months, without having first obtained judgment and issued execution against the administrator. (7 Gill & J., 475.)

More than thirteen months had elapsed between the filing of the new bonds and the filing of the bill. A right of action at law had accrued on the bonds before the filing of the bill.

Again: the complainants do not in their bill aver that there was a surplus in the hands of Bomford, as administrator *de bonis non*, after the payment of debts, to which they, as distributees of the estate of Kosciusko, under the French law, are entitled. Which omission, the defendants say, is bad on demurrer. (*Stevens v. Frost*, 2 Younge & Coll., 297.)

412*] *Mr. Justice Wayne* delivered the opinion of the court:

The purpose of this suit is to recover for the decedents of the sisters of General Kosciusko, the funds which he owned in the United States at the time of his death.

Several points are suggested by the pleadings.

We will consider such of them as we think necessary, after having stated the origin of the fund in controversy, and the management of it, from the time that Kosciusko placed it under the care of Mr. Jefferson until the death of Colonel Bomford, the administrator *de bonis non*, in eighteen hundred and forty-eight.

General Kosciusko came to the United States early in our Revolutionary War, to join our army. He did so at first as a volunteer. In October, 1776, he received from Congress the commission of Colonel of Engineers. He served with great distinction until the close of the war, and then retired from the army, after our independence had been acknowledged, with the rank of Brigadier-General. He stood prominently with those great men of our own country, with whom he had given seven years of his life to secure its freedom and nationality. He returned to Poland, poorer than when he came to us, and was, in fact, our creditor for a part of his military pay.

His subsequent career in Europe is a part of its history. All that we can say of it in connection of this case, is, that he returned to the United States after he was released from the prisons of Catherine, by her son and successor, the Emperor Paul. Whilst he was absent from the United States, a military certificate for \$12,280.54, had been issued, as due to him for services during the war. Not having been, for several years, in a situation to claim or to receive it, until his return to the United States, in 1798, Congress passed an Act in 1799 (6 Stat. at Large, 32), directing the Secretary of the Treasury to pay to him the amount of the certificate, with interest from the first day of January, one thousand seven hundred and ninety-three, to the thirty-first of December one

thousand seven hundred and ninety-seven. It was not a gratuity, but a simple act of justice, graduated then by the inability of our country to do more. It yet remains for us to give some national testimonial of his virtues, and of his services in the war of our independence. Seven years of peril and suffering, of wise forecast in counsels of war, and of dauntless bravery in the field, may claim from our people grateful recollections, and the expression of them in the best way that they can be commemorated by art. The cadets at West Point, unaided by the Government, have reared to his memory a monument there, and it is the only memorial of him upon the face of our land.

*That military certificate, with a part [*413 of the interest upon it, was the basis of the fund now in controversy.

It was paid to Kosciusko, was invested in American stocks in his own name, and placed under the care and direction of Mr. Jefferson.

In a letter from Mr. Jefferson, in answer to one from H. E. M. De Polignac, the Russian Minister at Washington, of the 27th of May, 1819, written by the latter, at the instance of the Viceroy of Poland, to make inquiries about the fund, Mr. Jefferson says: "A little before the departure of the General from America, in 1798, he wrote a will, all with his own hand, in which he directed that the property he should possess here, at the time of his death, should be laid out in the purchase of young negroes, who were to be educated and emancipated—of this will he named me executor, and deposited it in my hands. The interest of his money was to be regularly remitted to him in Europe. My situation in the interior of the country, rendered it impossible for me to act personally in the remittances of his funds, and Mr. John Barnes, of Georgetown, was engaged, under a power of attorney, to do that on commission; which duty he regularly and faithfully performed, until we heard of the death of the General. We had, in the mean time, by seasonably withdrawing a part of his funds from the bank in which he had deposited them, and lending them to the government during the late war (with England), augmented them to \$17,159.63, to wit.: \$12,499.63, in the funds of the United States, and \$4,600 in the Bank of Columbia, at Georgetown. I delayed for some time the regular probate of the will, expecting to hear from Europe, whether he had left any will there, which might affect his property here. I thought that prudence and safety required this, although the last letter he wrote me before his death, dated September 15th, 1817, assured me of the contrary, in these words: 'Nous avançons tous en âge, c'est pour cela, mon cher et respectable ami, que je vous prie de vouloir bien (et comme vous avez tout le pouvoir,) arranger qu' après la mort de notre digne ami, Mr. Barnes, quelqu'un d'aussi probe que lui prenne sa place, pour que je reçoive les intérêts ponctuellement de mon fonds; duquel, après ma mort, vous savez, la destination invariable, quant à présent faites pour le mieux comme vous pensez.'

"Translation.

"We all grow old, and for that reason, my dear and respectable friend, I ask you, as you have full power to do, to arrange it in such a

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manner that, after the death of our worthy friend, Mr. Barnes, some one, as honest as 414*] himself, may take his place, *so that I may receive interest of my money punctually; of which money, after my death, you know the fixed destination. As for the present, do what you think best.'

"After his death, a claim was presented to me, on behalf of Kosciusko Armstrong, son of General Armstrong, of \$3,704, given in Kosciusko's lifetime, payable out of this fund; and subsequently, came a claim to the whole, from Mr. Zeltaer, under a will made there. I proceeded, on the advice of the Attorney-General of the United States, to prove the will, in the State Court of the District in which I reside, but declined the executorship. When the General named me his executor, I was young enough to undertake the duty, although, from its nature, it was likely to be of long continuance; but, the lapse of twenty years or more, had rendered it imprudent for me to engage in what I could not live to carry into effect. Finding, now, by your letter of May 27th, that a relation of the General's also claims the property; that it is likely to become litigious, and age and incompetence to business admonishing me to withdraw myself from entanglements of that kind, I have determined to deliver the will, and the whole subject, over to such court of the United States as the Attorney-General of the United States shall advise (probably it will be that of the District of Columbia), to place the case in his hands, and to petition that court to relieve me from it, and to appoint an administrator, with the will annexed. Such an administrator will probably call upon the different claimants to interplead, and let the court decide what shall be done with the property. This I shall do, sir, with as little delay as the necessary consultations will admit; and when the administrator is appointed, I shall deliver to him the original certificates which are in my possession. The accumulating interest and dividends remain, untouched, in the Treasury of the United States, and Bank of Columbia."

The facts of this letter are referred to and admitted, in the answer of the defendants, but we preferred to give them in the language of the writer.

Mr. Jefferson carried out his intentions, and letters of administration were granted to the late Benjamin F. Lear. He received, in different kinds of stock, and in dividends, which had accrued since the death of Kosciusko, \$25,931.43½; \$4,100.62½ of which were applied by him for the payment of United States six per cents, which had been purchased on account of the estate, by the direction of the Orphans' Court, when it had control of the fund. It is not necessary, for the purposes of this suit, to inquire into the correctness of Mr. Lear's accounts of his administration. There is nothing on the record making them 415*] doubtful. He died in 1832, and it appears, from the books and papers from which the final account of his administration was made, that the funds in his hands had been increased to \$31,785.27. Colonel Bomford, his successor, charged himself with that sum.

The accounts of both, however, must be looked into, for another purpose. And that is, HOWARD 14.

to determine, from the changes made by Lear in the funds, and in his mode of managing them, in what official relation to Lear Bomford received them, and why it is, though he did so as the executor of Lear, that the defendants in this suit, by becoming his bondsmen, under the Act of the 20th February, 1846, have made themselves liable for the *devastavit* of their principal. And here we will consider that point of the case.

It appears, from the accounts of Lear, that he thought he was authorized, as administrator, to change the funds of the estate into other funds, and to lend them upon private securities, without the permission of the Orphans' Court. Most, if not all of them, in whatever way invested by him, were in his own name, at the time of his death. Bomford took them, as his executor, and settled an account with the Orphans' Court, in which he charged himself, as executor of Lear, with all the stocks, bonds, mortgages, and other securities for the payment of money, and the money of the estate, which Lear had, as administrator, at the time of his death. In fact, the funds, excepting the stock of the Bank of Columbia, were converted into money, in Lear's hands, and Bomford took them, as his executor, with the obligation, as such, to account for the same to whomsoever might be entitled to Kosciusko's estate. This being so, the question arises, whether or not his sureties, as executor of Lear, were not liable for any waste of the estate by him, instead of his sureties, as the administrator of Kosciusko, upon the ground that the latter were only liable, by their bonds, for so much as he received as administrator, and not for what he had possessed himself of, as the executor of Lear.

Bomford, it must be remembered, was the executor of Lear, and became, also, by appointment of the Orphans' Court, the administrator *de bonis non cum testamento* of Kosciusko, under the laws of Maryland, as they were of force in that part of the District of Columbia which had been a part of Maryland, when Congress took jurisdiction over the same. His bonds, in both relations to the two estates of Lear and Kosciusko, were given under that law; and the obligations of himself and his sureties are determined by what has been the judicial interpretation and administration of it in Maryland, uncontrolled by any decisions of other courts elsewhere.

*We understand, by the laws of [416 Maryland, as they stood when Congress assumed jurisdiction over the District of Columbia, that the property of a deceased person was considered to be administered, whenever it was sold, or converted into money, by the administrator or executor, or in any respect changed from the condition in which the deceased left it. It did not go to the administrator *de bonis non*, unless, on the death of the executor or administrator, it remained in specie, or was the same then that it was when it came to his hands. When the assets have been changed, it is said, in Maryland, that the property has been administered. In that sense, all the funds received by Lear, and changed by him into other securities, were administered by him. If this suit, then, had been brought against the first sureties of Bomford, in his original bond as administrator *de bonis non* of Kosciusko,

they would not have been answerable. For any waste of the estate of Kosciusko, the remedy would have been against him and his sureties, as executor of Lear, and if the assets had been wasted by Lear, Lear's securities would have been answerable. Nor would the circumstance that Bomford charged himself with these assets, as administrator *de bonis non*, make any difference. His sureties could be made liable only for the assets which legally came to his hands: that is, for what remained in specie, unadministered. Nor could he make them liable for more, by charging himself, in his account as administrator, with any property which had been changed by his predecessor, or administered, as it is said to be, in Maryland, when such a change is made, by an administrator or executor.

Such being the law as to the responsibility of Lear and his sureties, and of Bomford and his original sureties, it was urged in the court below, as we see from the decision of the learned judge who gave that court's opinion, and here also in argument by the counsel of the defendants, that it applied equally to Bomford's second and third sets of sureties, who became so under the Act of Congress of the 20th February, 1846. (9 Stat. at Large, 4.) So the court below decided, but we think it did so erroneously. The error consists in this: that the bonds of these defendants were treated as if they were the same as the original bonds given by the first sureties of Bomford under the Maryland law, and that the relations of Bomford to the estate of Kosciusko were precisely such as they were when he came into the possession of the Kosciusko funds, as the executor of Lear. The argument was this: that as Bomford had, from the character of the assets at the death of Lear, a valid right to them, as Lear's executor, and was bound by law to administer them as Lear was, that he would not have any legal right in them as administrator *de bonis non*, to bind [417*] these defendants as *his sureties for any of his defaults; particularly as it appears from his accounts, including the last of them, that he charges himself with a balance of \$43,504.40, in his ninth account; the items of which related to transactions which had taken place before the date of either of the bonds of the defendants.

Now, upon such a state of facts, it must be admitted that Bomford himself was bound for the amount stated by him to be due, in an account of assets of the estate of Kosciusko, and that his original sureties were not under the Maryland law, for those assets which had been administered by Lear.

For what purpose, then, it may be asked, did the Orphans' Court call upon Bomford, after he had rendered his eighth account, to give other sureties, under the penalty, if he did not do so, that he would be displaced as administrator, and that another administrator would be appointed in his stead, unless it was to secure that amount for which he had become personally liable, though it had been originally received by him as executor, but for which there were no sureties in fact, when the defendants became so? They became his sureties under the 3d section of the Act of 1846. (9 Stat. at Large, 4.) That section provides, that, whenever the Orphans' Court shall be satisfied

that the security which has been taken, or which may hereafter be taken from an executor or administrator, is insufficient, by reason of the removal or insolvency of any of the sureties, or because the penalty of the bond is too small, or from any cause whatever, that the court may call upon the administrator or executor to give additional security, and if there shall be a failure to comply with such order, the court is empowered to appoint another administrator in the stead of the first, and to require, from him removed, to hand over to his successor the unadministered assets, and to enforce compliance with such an order by fine and attachment or any other legal process. The Act, and the proceedings of the Orphans' Court under it, towards the administrator, Colonel Bomford, cover exactly such a case as this. The object of the law and the purpose of the court, was to get from the administrator additional and adequate security, for the funds which he had stated in his sworn account to be still unadministered in his hands, without any regard to the fact which could not then have been known to the court, whether they had been misused or not by him; but which, from his rendered account, it might properly have been inferred had not been. The Act permits the court, in the cases mentioned in the 3d section, not only to take security for assets which might in future come to the hands of the administrator, but for such as he had already received and returned to the court as in his hands, or of which he ought to have made a return, and which may not have been *properly [*418 administered. If that be not the proper interpretation of the Act, it would be nugatory and idle. Instead of the power of the court being enlarged by it, it would be just as powerless to act in the cases mentioned in the 3d section, as it had been under the law of Maryland. The bonds of the defendants were manifestly given with reference to the accounts which had been filed in the Orphans' Court by Colonel Bomford. They must have so understood it; for in one of them the action of the Orphans' Court, under the law of 1846, is recited, and the record shows that the sureties in the other took from their principal a counter security, to indemnify them on account of his failure to discharge all of his duties as administrator. The bonds of the defendants are distinguishable from the original bonds which the administrator gave, the latter having been given before any inventory was returned, or account stated in the court, and when no particular sum was due from the administrator; and the bonds of these defendants were given for a sum certain, returned to the court by the administrator, due by him in that character.

All of us concur in thinking that the bonds of the defendants were properly taken under the Act of 1846. That the Orphans' Court called for them to secure the amount with which the administrator then stood charged, and such as he might afterwards get. They were accepted and approved by the court for that purpose, and the sureties gave them with a full knowledge of the state of the account which the administrator had filed. All of us think, also, that they are answerable for his waste, unless something else in the case can relieve them.

The first objection is, that Kosciusko did not die intestate as to his personal property in the United States, and that the same passed, by the second article of the will of 1817, to M. and Madame Xavier Zeltner, of Soleure, in Switzerland.

2. That there is no proof in the case that Kosciusko was domiciled at his death in France, and if he was, that the complainants have failed to prove what the law of France was at that date, for the distribution of the personal estate of one who dies domiciled there.

3. It is also said, that it is not proved that those persons named in the bill as being entitled to the fund sued for, have such a relationship to Kosciusko as entitled them to receive it.

We will consider these objections in their order.

Kosciusko made four wills. One of them in the United States, in 1798, which, after his death, Mr. Jefferson proved in the Court of Albemarle, in Virginia. His second will was made in Paris, in 1806, in which he charged the fund mentioned in the first will with a legacy to Kosciusko Armstrong. His third and fourth wills were made at Soleure, in 419*] Switzerland; the third *on the 4th of June, 1816, and the fourth on the 10th October, 1817. It is not denied that he made the first, second and fourth wills, but the defendants attack the third on account, as they suppose, that the probate of it had been taken in the Orphans' Court in Washington, without due proof of its execution; and they rely upon the fourth will to show that it contains a residuary article in favor of Monsieur and Madame Zeltner, after the payment of specific legacies.

We think that all of the wills have been proved according to the rules of evidence, and that the authenticated exemplification of that of 1816, from the registry of it in France, recorded in the Orphans' Court for the District of Columbia, is all that can be required. With these wills in view, we have the means to decide the effect of them on the property in controversy.

The olographic will of 1816, contains a revoking clause. It is in these terms: "*Je révoque tous les testaments et codicilles que j'ai pu faire avant le présent auquel seul je m'arrête comme contenant mes dernières volontés.*" Translated in the record: "I revoke all the wills and codicils which I may have made previous to the present, to which alone I confine myself, as containing my last wishes."

The right to revoke a will exists now in every nation, though the exercise of it is differently regulated. It may be done by an express revocation, or by certain acts, which of themselves infer, or from which the law infers, a revocation. "*Ambulatoria est voluntas de functi usque ad vitæ supremum exitum.*" Nor can one bind himself in a testament not to make another. "*Nemo potest in testamento suo cavere, ne legis in suo testamento locum habeant; quis nec tempore, aut conditione fini ri obligatio hæreditis legatorum nomine potest.*" (Dig., lib. 34, tit. 4, l. 4; Dig., lib. 30, tit. 1, l. 55.) In England, the manner of revocation is prescribed by the 6th and 22d sections of the Statute of Frauds. In Spain and in Holland, a will may be revoked by an act confined to

the revocation of that testament, without making any other disposition; or by making another testament which expressly revokes the former, in either manner as it may be used, is executed with the forms and solemnities which the law required to give validity to the first will. By the customs of Paris and Normandy, revocations could be made by a simple declaration before two notaries, or before one notary and two witnesses, without its being done in any prescribed form. And by the same customs, a declaration in the handwriting of a testator, and signed by himself, revoked his testament, and the effect of it was to make him intestate. (Law. 25, tit. 1, p. 6; Voet., lib. 28; tit. 3, n. 1; *Matth. de Success.* disp. 8, n. 18.) But we learn from Touillier and from the Code Civil, that these customs *were [*420 abolished, and that in France, wills may be revoked in whole or in part, by a subsequent will, or by an act before notaries, containing a declaration of such intention. (Touillier, liv. 3, tit. 2; *Don. et Test.*, ch. 5, n. 619; *Pothier des Don. Test.*, ch. 6, sec. 2, sec. 1; Art. Code Civil, 969, 1035-1038.)

The will of 1816 was made at Soleure, while Kosciusko was sojourning there, after he had left Vienna, in 1815, whither he had gone from Paris, at the instance of the Emperor Alexander, that he might be advised with concerning the affairs of Poland. It is an olographic will, wholly written in the handwriting of the testator, according to the 970th article of the Code Civil. It gives specific legacies to persons residing in France, charged upon funds owned by the testator in France, and his executor was a notary at Morcu, in the department of Seine and Marne, which is the opening of the will, the testator says, in the department of his residence, at Berville.

Within the month of Kosciusko's death, the will was taken to Paris, and recorded there, pursuant to law. The executor having received authority from the proper tribunal to act as such, paid, according to the will, the legacies given by it. (See arts. Code Civil, 969, 1000.) The wills, then, of 1798 and of 1806, were revoked by the will of 1816, and as the testator did not make in it any disposition of his American funds, he died intestate as to them, unless the second article in the will of 1817 has the effect of a residuary bequest to the persons named in it.

It is, "I bequeath all of my effects (*effets*) my carriage and my horse included, to Madame and to Mr. Xavier Zeltner, above named." It will be seen, by the first clause in the will, that they are the father and mother of Emilie Zeltner, to whom he bequeathed about fifty thousand francs of France, charged upon funds in England, in the hands of Thompson, Bonard & Co.

We shall be aided, in the construction of the second article of the will of 1817, by keeping in mind what were the relations between himself and the Zeltner family, as they are disclosed by his wills of 1816 and 1817. He makes them, in both wills, his legatees, except a legacy to General Baszkoyaki; two small legacies to his executors; two thousand francs to the poor, and one thousand for his own burial. His chosen friends were without fortune. He says so in that memorable letter

which he wrote to the Emperor Alexander, after the allies had entered Paris, in 1814; from which it may be seen, when his country was nearest his heart, that his friend was there too. (Fletcher's Poland; Harp. Fam., lib. 301; Ozinski, 4, p. 175.) To the two daughters of that friend, Andrew Lewis Zeltner, with whom he had lived for fifteen years, he gives all of his **421*** funds in *France, amounting to ninety-five thousand francs, excepting a legacy to his executor. To the daughter of Xavier Zeltner, with whom he was staying when the wills of 1816 and 1817 were made, and where he died, he bequeathes fifty thousand francs; and it is to him and to his wife, that he says "I bequeath all my effects, my carriage and horse included." From its place in the will of 1817, and from the connection of the words "all my effects, with my carriage and horse included," it would be a very strained construction, to make the words, all of my effects, comprehend his personal estate in the United States, it being neither alluded to in any way in this will, nor in that of 1816. Except in so far as it might, under the will of 1816, have been applied to the payments of the legacies given in that will, upon the failure of the funds upon which they were first charged. Effects, in French, or the word *effets*, has the same meaning in common parlance and in law, that it has in English. Its meaning properly in either, when used indefinitely in wills, but in connection with something particular and certain, is limited by its association to other things of a like kind. It is from the subject matter of its use, that intention of something else is to be implied; and that of course may be larger or less. In some instances in wills, the word has carried the whole personal estate. When in connection with words of themselves of larger meaning, or of fixed legal import, as there were in the case of *Bosley v. Bosley*, decided at this term of the court, such a clause in a will is residuary. (5 Madd. Ch., 72; 6 Madd. Ch., 119; Cowper, 299; 15 Vesey, 507.)

Such being the rule, it is our opinion that the second article in the will of 1817 is not residuary, and that it has no relation to the funds in controversy.

It follows, then, that as the wills of 1798 and of 1806 were revoked by the will of 1816, and as no disposition was made in it, or in the will of 1817, of the funds in controversy, that General Kosciusko died intestate as to them, and that they may be distributed to his relations who may be entitled to inherit from him, according to the law of his domicile at the time of his death.

We now proceed to the question of domicile. In the will of 1806, he describes himself as "an officer of the United States of America, in their Revolutionary War against Britain, and a native of Lithuania, in Poland, at present residing in Paris." In the will of 1816, made at Soleure, his language is: "I, the undersigned Thaddeus Kosciusko, residing at Berville, in the township Genevraye, of the department of Seine and Marne (being now), or at present at Soleure, in Switzerland." In the will of 1817, nothing is said of his residence. The record shows that he went from the United States to **422*** France in 1798; that he was there in 1806, when he said he resided at Paris. There

is no proof that he was not continuously in France until 1815, when he went to Vienna. We know, too, historically, that he left it in June of that year for Soleure, when he found out that it had been determined in the Congress of Vienna to erect the Duchy of Warsaw into a kingdom, without including in it his native province of Lithuania.

We do not, however, permit the historical facts just alluded to, or any other of a like kind, to have any weight in forming our conclusion concerning his domicile at the time of his death. The facts in the record are sufficient for that purpose.

In the first place, his declarations that his residence was in France, in the way they were made in his wills, with an interval of ten years between them, would, upon the authority of adjudged cases, be sufficient to establish, *prima facie*, his domicile in France. Such declarations have always been received in evidence, when made previous to the event which gave rise to the suit. They have been received in the courts of France, in the courts of England and in those of our own country. In two questions of domicile in France, such declarations in a power of attorney, and in other instruments, were received as evidence. (Denisart, tit. Domicil, sec. 1.) In the English courts there are many cases in which like declarations have been offered and received. (5 Term R., 512, and the observations of Mr. Evans, *azon et un. 2 Poth. Obl., App., No. 16, sec. 11; Rawson v. Haigh, 2 Bing., 99; 9 Moore, 217; S. C. W. & M., 353; Lord Tenterden, 1 Bing. N. C.; 5 C. & P., 575; 1 Taylor, 376.) In the United States, the case of *Gorham v. Canton*, 5 Greenleaf, 266, is to the same effect; and in Massachusetts, in the cases of *Thorndike v. Boston*, 1 Metcalf, and *Kilburn v. Bennett*, 3 Metcalf, 199, it was ruled that in a case where the question of domicile was raised, the declarations and letters of a party whose domicile was disputed, were admissible in evidence, especially if made previous to the event which gave rise to the suit. We find, also, in 8 Pickering, 476, that the will of a grandfather in 1774, in which he was described as being of O., and another will, in which he is described as resident in O., were admissible evidence to prove that the grandfather had obtained a settlement at O.*

Kosciusko's domicile of origin was Lithuania, in Poland. The presumption of law is that it was retained, unless the change is proved, and the burden of proving it is upon him who alleges the changes. (*Somerville v. Somerville*, 5 Vesey, 787; Voet, Pand., tit. 1. 5, N. 99.)

But what amount of proof is necessary to change a domicile of origin into a *prima facie* domicile of choice? It is residence elsewhere, *or where a person lives out of the [**423** domicile of origin. That repels the presumption of its continuance, and casts upon him who denies the domicile of choice, the burden of disproving it. Where a person lives, is taken *prima facie* to be his domicile, until other facts establish the contrary. (Story's Com., 44, 6 Rule; *Bruce v. Bruce*, 2 Bos. & P., 228, note 299; 8 Ves., 198, 291; Hagg. Consist., 374, 437.) It is difficult to lay down any rule under which every instance of residence could be brought, which may make a domicile of

choice. But there must be to constitute it actual residence in the place, with the intention that it is to be a principal and permanent residence. That intention may be inferred from the circumstances or condition in which a person may be as to the domicile of his origin, or from the seat of his fortune, his family and pursuits of life. (Pothier, *Introd. Gen. aux Cout.*, p. 4; *D'Argentié, Court*, art. 449; Toullier, lib. 1, tit. 3, n. 371; 1 Burge, *Com. Confl. Laws*, 42, 43.) A removal which does not contemplate an absence from the former domicile for an indefinite and uncertain time is not a change of it. But when there is a removal, unless it can be shown or inferred from circumstances that it was for some particular purpose, expected to be only of a temporary nature, or in the exercise of some particular profession, office or calling, it does change the domicile. The result is, that the place of residence is *prima facie* the domicile, unless there be some motive for that residence not inconsistent with a clearly established intention to retain a permanent residence in another place. The facts in the case, place the residence of Kosciusko in France, under the principle just stated.

It is averred in the bill that France was his residence. The defendants deny it, admitting, however, that, from the time he left the United States, he was a sojourner in France and Switzerland until he died. But they aver that he did not remove to France at any time of his life with the intention to make it his permanent residence. And they further charge that he never did abandon the hope that circumstances would favor his return to Poland, when its political condition would permit him to resume his rights and duties as a citizen of it. Such an averment implies that he had voluntarily left Poland for France, without having been forced to do so, and that his return depended upon political contingencies, which might never happen, and which we know did not occur. It places upon the defendants the burden of proving the intention, the complainants having shown, and the defendants having admitted, that he had *prima facie* a domicile in France. They have not done so. There is nothing in the record disproving the averment of his domicile in France, and we must, from [424*] his own declarations and other *proofs in the record, receive it as a fact that he was domiciled there at the time of his death.

The error of the argument and of the averment against Kosciusko's domicile in France is this: that they considered him a forced exile from Poland, and that he had only made France his asylum during banishment.

In such a case, it is true, a person cannot be presumed to have abandoned all hope of return to his country, whatever length of time may have passed since he was driven from it. But Kosciusko is not placed in that predicament by any proof in the case. Nor could such proof have been made; for it is well known, when he was liberated by the Emperor Paul, that it was done without restraint or inhibition of any kind. He was offered high military command and presents of princely amount, which he declined to accept. He came to the United States, and afterwards went voluntarily to France, where he lived for fifteen years. He could have returned to Poland at any time, if he

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had chosen to do so. Not having done so, the conclusion ought to be that he abandoned his residence there for a residence in France, which cannot be affected, as to its permanency, by any event which might have happened to induce him to change it again to the domicile of his origin. This is coincident with the fact that he had been made a French citizen by a decree of the National Assembly of France, in August, 1792. Knowing that such a naturalization would not have the effect of investing him with the privileges of a native-born citizen, if he did not become domiciled in France, unless his residence there was expressly dispensed with in the letters of naturalization, he went to France to get a civil *status* which he could not conscientiously enjoy in Poland whilst it continued to be under a foreign dominion. (Pothier, *Tr. des Personnes*, &c., P. 1, tit. 2, sec. 3; Denesart, tit. Aubaine.)

These general principles of jurisprudence in respect to domicile, by which Kosciusko's has been determined, are such as the courts of France would have ruled in this case.

Kosciusko's intestacy as to the funds in controversy, and his domicile having been determined, we will now state the law as to the right of succession in such cases.

For several hundred years upon the continent, and in England, from reported cases, for a hundred years, the rule has been, that personal property, in cases of intestacy, is to be distributed by the law of the domicile of the intestate at the time of his death. It has been universal for so long a time that it may now be said to be a part of the *jus gentium*. Lord Thurlow speaks of it as such in the House of Lords, in the case of *Bruce v. Bruce*. Erskine, in his Institutes of the Law of Scotland, B. 3, tit. 9, sec. 4, 644, *says, this rule is [*425] founded on the laws of nations. He says, "When a Scotsman dies abroad *sine animo remanendi*, the legal succession of his movable estate in Scotland must descend to his next of kin according to the law of Scotland; and where a foreigner dies in this country *sine animo remanendi*, the movables which he brought with him hither ought to be regulated, not by the law of the country in which they locally were, but that of the proprietors *patria*, or domicile whence he came, and whither he intends again to return. This rule is founded in the law of nations, and the reason of it is the same in both cases, that since all succession *ab intestato* is grounded upon the presumed will of the deceased, his estate ought to descend to him whom the law of his own country calls to the succession, as the person whom it presumes to be most favored by the deceased."

The law of Scotland had been different in this particular, but it was brought into harmony with the law of the rest of Europe by the decision of the House of Lords, in *Bruce v. Bruce*, 6 Brown's Par. Cases, 550, 566; 2 Bos. & P., 226, 230, 231; Lord Stair's Institutes, B. 3, tit. 8, sec. 5; Hogg & Lashley, House of Lords, June 25th, 1788; Robertson on Personal Success., 131; *Omman v. Bingham*, House of Lords, March 18, 1776; *Colville & Landor v. Brown & Brown*, Dict. Success., Ap. p. 1, 4; W. & S., 28.

The earliest case reported in the English books, is that of *Pipon v. Pipon*, Am., 6, 27.

Lord Hardwicke recognized in it the rule that the personal estate, in cases of intestacy, followed the person, and becomes distributable according to the law or custom of the place where the intestate lived. Among other reasons given by him is, that a contrary rule would be extremely mischievous, and would affect our commerce. No foreigner could deal in our funds but at the peril of his effects going according to our laws, and not those of his own country. He re-affirmed the same in a few years afterwards, in *Thorne v. Watkins*, 2 Ves., 85. Lord Kenyon did the same when he was Master of the Rolls in 1787, in *Killpatrick v. Killpatrick*, which will be found cited in Robertson on Personal Succession, 116. In 1790, the House of Lords acted upon the rule, in *Bruce v. Bruce*, and two years afterwards, in *Hogg v. Lashley*. Many cases followed in the English courts, and the only question since has been, what was the domicil of the intestate at the time of his death? In the United States the rule has been fully recognized. (14 Martin, N. S., La., 99; 3 Paige, 182; 2 Gill & Johns., 193, 224, 228.)

The rule prevails, also, in the ascertainment of the person who is entitled to take as heir or distributee. It decides whether primogeniture gives a right of preference, or an exclusive right [426*] to take the succession; whether a person is legitimate or not to take the succession; whether the person shall take *per stirpes* or *per capita*, and the nature and extent of the right of representation. (Story's Conflict of Laws.)

But it is objected, before the rule can be applied in this suit against the defendants, that the complainants must prove what the law of France is for the distribution of the fund. It is said that has not been done.

For this purpose, the Code Civil of France was offered in evidence, but it was objected to.

It is true, that the existence of a foreign law, written or unwritten, cannot be judicially noticed, unless it be proved as a fact, by appropriate evidence.

The written foreign law may be proved, by a copy of the law properly authenticated. The unwritten must be by the parol testimony of experts. As to the manner of authenticating the law, there is no general rule, except this: that no proof shall be received, "which presupposes better testimony behind, and attainable by the party." They may be verified by an oath, or, by an exemplification of a copy, under the great seal of a state, or, by a copy, proved to be a true copy by a witness who has examined and compared it with the original, or by a certificate of an officer, properly authorized, by law, to give the copy; which certificate must be duly proved. But such modes of proof as have been mentioned, are not to be considered exclusive of others, especially of codes of laws and accepted histories of the law of a country. In *Picton's* case, Lord Ellenborough said: "The best writers furnish us with their statements of the law, and that would certainly be good evidence upon the same principle as that which renders histories admissible. There is a case," continued Lord Ellenborough, "in which the History of the Turkish Empire, by Cantemir, was received by the House of Lords, after some dis-

cussion. I will, therefore, receive any book that purports to be a history of the common law of Spain." (B. N. P., 248, 249; 80 How. St. Tr., 492; 2 Phil. Ev., 123; 1 Salk., 281; *Morris v. Harmer*, 7 Pet., 554; 8 Cary, 178; 11 Clark & Fin.; Russell's Peerage Cases; 3 Wend., 173.) Lord Tenterden, in *Lacon v. Heggins*, Stark., 178, admitted a copy of the Code Civil of France, produced by the French Consul, who stated that it was an authentic copy of the law of France, upon which he acted in his office, and that it was printed at the office for printing the laws of France, and would be acted upon in the French courts. In the *Russel Peerage* case, Lord Campbell said: "The most authentic form of getting at foreign law, is to have the book which lays down the law. Thus, we have had the Code Napoleon in our courts. It is better than to examine *a witness, whose memory [427] may be defective, and who may have a bias influencing his mind upon the law." The Supreme Court of New York has held, that an unofficial copy of the Commercial Code of France, could not be proved by the French Consul residing at New York, though he stated it to be conformable to the official publications; and that it was an exact copy of the laws furnished by the French government to its Consul at New York. Had it been an official copy, and sworn to be such, by the Consul, it would have been received in evidence, as the Irish Statutes were, in *Jones v. Maffet*, 5 Serg. & Rawle, 523, where they were sworn to by an Irish barrister, and that he received them from the King's printer, in Ireland. In *Church v. Hubbard*, 3 Cranch, this court said, that the edicts of Portugal, offered in evidence, would have been admissible, if the copies of them had been sworn to be true copies, by the American Consul at Lisbon, instead of his having given his consular certificate, that they were true copies, because it was not one of the functions of a consul to authenticate foreign laws in that way.

The court say: "The paper offered to the court is certified to be a copy compared with the original. It is impossible to suppose that this copy might not have been authenticated by the oath of the Consul, as well as by his certificate." It will be seen, that what the court required, was a verification of the original, upon oath, and that then the edicts would have been admissible in evidence. They were municipal edicts, too, it should be remembered, and not one of those marine ordinances of a foreign nation, on a subject of common concern to all nations, which may, according to the manner of its promulgation, be read as law, without other proof. (*Talbot v. Seeman*, 1 Cranch, 1.)

The rule of this court has always been, since those cases were decided, "that the laws of a foreign country, designed only for the direction of its own affairs, are not to be noticed by other countries, unless proved as facts; and, that the sanction of an oath is required for their establishment, unless they can be verified by some other such high authority that the law respected, not less than the oath of an individual."

The question in this case is, has the Code Civil, which was offered in evidence, a verification equivalent to the oath of an individual?

Opinions and cases may be found in conflict

with the cases cited, but, from a perusal of many of them, we find that they have been formed and decided without a careful discrimination between what should be the proof of foreign written and unwritten law; and when written laws, either singly or in statute books, 428*] or in *codes, have been offered in evidence, without a sufficient authentication that they were official publications, by the government which had legislated them; or when written laws have been offered, properly proved to be official, but which were equivocal in their terms, and in the judicial administration of which there have been, or may be, various interpretations, making it necessary to call in experts, as in cases of an unwritten law, to state how the law offered in evidence is administered in the courts of the country of which it is said to be the law. In England, until recently, it was not doubted that a foreign written law was admissible in evidence, when properly authenticated. But, in the *Sussex Peerage* case, 1844, in 11 Clark & Fennelly, 115, several of the judges gave their opinions upon the subject. Lord Brougham, in that case, differed from Lord Campbell, and said that the Code Napoleon ought not to be received in an English court, and that before it could be received from the book, that an expert, acquainted with the text and the interpretation of it, must be called. And so it was ruled, afterwards, by Erie, *Justice*, in 1846, in *Cocks v. Purdy*, 2 C. & K., 269, in which fragments of a code were offered as evidence. But his Lordship's opinion, and the case of *Clark v. Purdy*, must be taken, subject to the facts upon which the point arose. In the first, it was, whether Doctor Wiseman, who had been called as a witness, could refer, whilst giving his evidence of the law of Rome on the subject of marriage, to a book, whilst it was lying by him. In the other case, fragments of laws were offered. This point had been settled by Lord Stowell, in *Dalrymple v. Dalrymple*, 2 Hagg., 54. Lord Brougham again expressed the same opinion, in his sketch of Lord Stowell, in the second series of the *Statesmen of the Time of George III.*, 76. But Lord Langdale, who also sat with the other judges, in the *Sussex Peerage* case, gave the rule, with its qualifications, in the case of *The Earl of Nelson v. Lord Bridport*, 8 Beav., 527. After stating the rule, coincidentally with the opinion of Lord Brougham, he says: "Such I conceive to be the general rule, but the case to which it is applicable admits of great variety. Though a knowledge of foreign laws is not to be imputed to the judge, you may impute to him such a knowledge of the general art of reasoning, as will enable him, with the assistance of the bar, to discover where fallacies are probably concealed, and in what cases he ought to require testimony more or less strict. If the utmost strictness was required, in every case, justice might often stand still; and I am not disposed to say that there may not be cases, in which the judge may not, without impropriety, take upon himself to construe the words of a foreign law, and determine their application to the case in question; especially, if there should 429*] be a variance or want of clearness in the testimony."

Notwithstanding the differences in the cases cited, we think that the true rule in respect to the

admissibility of foreign law in evidence, may be gathered from them. In our view it is this, that a foreign written law may be received, when it is found in a statute book, with proof that the book has been officially published by the government which made the law. Such is the foundation of Lord Tenterden's ruling, in *Lucen v. Higgins*, 3 Starkie, 178. The case in 5 Sergeant & Rawle, 523, has the same basis. Though there are other reasons for the admission of the laws of the States into the courts of the United States as evidence, when they are officially published, yet they are only received when the genuineness of the publication is apparent. This court has so ruled in *Hind v. Vattier*, 5 Pet., 398, and in *Owings v. Hull*, 9 Pet., 607-625. It is true that we are called upon, as judges, to administer the laws of the States in the courts of the United States, and that the States of the Union are not politically foreign to each other, but there is no connection between them in legislation, and we only take notice of their laws judicially, when they are found in the official statute books of the state.

With these views, it remains for us to show that the Code Civil, offered in evidence in this case by the complainants, to prove their right to the succession of the intestate estate of General Kosciusko, is authenticated in such a way that it may be received by the court for the purpose for which it was offered. It was sent to the Supreme Court, in the course of our national exchanges of laws with France. It is one of the volumes of the *Bulletin des Lois à Paris L'imprimerie royale* with this indorsement, "Les Garde des Sceaux de France à la Court Supreme Des États Unis." Congress has acknowledged it by the act, and the appropriation which was given to the Supreme Court to reciprocate the donation. We transmitted to the Minister of Justice official copies of all the laws, resolutions and treaties of the United States, and a complete series of the decisions of this court. We do not doubt, whenever the question shall occur in the courts of France, that the volumes which were sent by us will be considered sufficiently authenticated to be used as evidence. The gift and the reciprocation of it, are the fruits of the liberal age in which we live. We hope for a continuance of such exchanges between France and the United States, and for a like intercourse with all nations. Business men, jurists and statesmen, will readily appreciate its advantages. It will save much time and expense when questions occur in the courts of different nations, involving the rights of *foreigners if the writ- [*430 ten laws of every nation were verified in all of them, by certified official publications to the governments of each. In the now rapid transit of persons and property, out of the sovereignties to which they belong, into the different parts of the world, such a verification would often speed and save the rights of emigrants, sojourners and merchants.

We think that the Code Civil, certified to the court as it is, is sufficiently authenticated to make it evidence in this suit, and that it would be so in any other case in which it may be offered.

We proceed to state the law from it, applicable to the case.

It has been determined that the domicile of General Kosciusko was in France at the time of his death, that he died intestate as to his funds in the United States, and that they were to be distributed according to the law of his domicile.

It has been proved that he survived his parents, died without issue, and that these complainants are the lineal descendants of two of his sisters, one of whom died before her brother, and the other afterwards.

The fact of their relationship, notwithstanding the objection which was made to the proof of it, is sufficient. The proofs are decrees of the Court of Nobility, of the government of Grodno, and another of the Court of Kobryn, in the Russian province of Lithuania. The originals are in the Orphans' Court, and were filed in it, in the regular course of judicial proceeding. Both of them are authenticated copies of judicial proceedings in the courts from which they are brought. The competency of the jurisdiction of those courts, in the matters decided in the decrees, is proved by witnesses skilled in the law of the governments of Lithuania. Lithuania we know to be now a Russian province, governed by its own laws, except as they may be modified by the Emperor's edicts. It is divided into three governments, Wilna, Grodno, and Minsk, with a Governor-General over them. The decree of the Assembly of the Department of Grodno, is an exemplified copy of that made on the 7th May, 1843, in the case of *The Heirs of Kosciusko*, and contains the genealogical chart of the descendants of the sisters of Kosciusko.

It is not a judgment *inter partes*, but a foreign judgment *in rem*, and is evidence of the facts adjudicated against all the world. The decree from the court of Kobryn is also proved to be a judicial record. From both we learn that the persons named in the bill of the complainants, are the collateral kinsmen of General Kosciusko. By the laws of France, they may take his estate by succession.

We shall reverse the decision of the court below, and direct the funds in controversy to be divided among them, according to the 750th article of the Code, which is, that in case of the **431** *previous decease of the father and mother of a person dead without issue, his brother and sister, or their descendants, are called to the succession, to the exclusion of ancestors and other collaterals.

All of the objections which were made against the rendition of a decree in favor of the complainants, having been considered and overruled, it only remains for us to announce the sum for which the decree shall be given, and the proportions to be paid by the defendants, as the sureties of Bomford, under the Act of 1846.

It has been heretofore stated that these bonds were given under that Act, to secure the amount then returned to the Orphans' Court by the administrator, and such assets as he might afterwards receive in that character. In his ninth account, he charges himself with a balance from the eighth account of \$41,914.47, and after giving the estate credit for the sums subsequently received, and claiming credits, he admits that there was due to the estate on the 7th of June, 1847, \$48,504.40, including the stock

of the Bank of Washington, which was after his death transferred to Lewis Johnson, who became the administrator of Kosciusko, with the will annexed.

We shall enter a decree against the defendants for the sum of \$37,924.40, with interest from the 7th June, 1847, until the same shall be paid.

The said decree is to be binding upon the sureties, Carrico, Stott, and George C. Bomford, and upon the sureties, Gideon, Ward, and Smith, jointly and severally in the proportion which their respective bonds bear to the sum decreed, and the costs which have accrued in this suit. But in the event that the sureties in either bond do not pay the sum decreed against them, or any part thereof, then the sureties in the other bond shall be answerable for and pay the same to the extent of their respective bonds.

We shall also order a decree to be entered against the defendant, Lewis Johnson, not subjecting him to any costs from his having been made a defendant in this suit, directing him to turn over to the complainants the stock of the Bank of Washington, to which he is entitled as the administrator *de bonis non* of Kosciusko, and the dividends which have accrued thereon, allowing to him out of the same, the costs incurred as administrator, commissions, and such reasonable counsel fees as may have been paid by him for services in matters pertaining to this case, in the Orphans' Court, and to this suit, after the account shall be filed, and be credited to him in the Orphans' Court.

*ORDER.

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This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Columbia, holden in and for the County of Washington, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court dismissing the complainants' bill in this cause be, and the same is hereby reversed and annulled. And this court, proceeding to render such decree as the said Circuit Court ought to have rendered, doth order, adjudge and decree, as follows:

First. That the legal domicile of Thaddeus Kosciusko, the party under whom the complainants below claim, was, at the period of his death, in 1817, in France.

Second. That as to the property and fund in controversy, he, the said Kosciusko, died intestate, his will of the 4th of June, 1816, in the proceedings mentioned, having revoked his prior will of 5th of May, 1798, and 28th of June, 1806, and without disposing of said fund, and the same not having been disposed of by the will of 10th October, 1817.

Third. That the said property and fund is to be distributed according to the law of France, the place of his domicile at the time of his death.

Fourth. That by the said law of said domicile, at said period, the said property belongs in equal moieties to the collateral kindred who were the lineal descendants of the two sisters in the case mentioned, of said Kosciusko, and complainants in the bill mentioned, that is to say, one moiety thereof to Hippolitus Estho and Roman

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Estho, grandson of his sister Ann, and to Louisa Narbut, her granddaughter, a widow, and in the proportions between them of one half of said moiety to said Hippolitus Estho, and the other half of said moiety to said Roman Estho and Louisa Narbut, in equal shares—and the other moiety thereof to Vlandislaus Wankowieg, to Hippolitus Wankowieg, Adam Bychowiec, and to Michael Szyrma, also complainants, and in the proportions between them, as follows, that is to say: to Vlandislaus Wankowieg and Hippolitus Wankowieg, each of them one half of five sevenths, and of one third to each of another seventh, and to Michael Szyrma, one third of a seventh, and to Adam Bychowiec, one seventh.

Fifth. That the defendants' sureties in the bond of the 7th May, 1846, for \$20,000, in the proceedings mentioned, taken under the authority of the Act of Congress of the 20th of February, 1846, that is to say: James Carrico, Samuel Stott, and George C. Bomford, and the 433*] other defendants' sureties in the "other bond therein mentioned, also taken under said Act of Congress, and dated 4th of January, 1847, for \$40,000, that is to say: Jacob Gideon, Ulysses Ward, and Jonathan B. H. Smith, are each, and to the extent hereinafter decreed, responsible to the complainants for the amount also hereinafter decreed.

Sixth. It is further adjudged and decreed, that there is due, and that the same be paid, by said defendants, to the complainants above named, in the proportions herein stated, the sum of \$37,924.¹⁰/₁₀₀ with interest on said sum, at the rate of six per centum, from the 7th day of June, 1847, till paid; that is to say: that the said defendants, James Carrico, Samuel Stott, and George C. Bomford, are jointly and severally bound to pay to said complainants, of said \$37,924.¹⁰/₁₀₀, the sum of \$12,641.⁴⁶/₁₀₀, with interest thereon as aforesaid, from the 7th of June, 1847, till paid, and one third of the costs of this suit, in both courts, and they are hereby ordered and decreed to pay the same. And that the said defendants, Jacob Gideon, Ulysses Ward, and Jonathan B. H. Smith, are jointly and severally bound to pay to said complainants, the balance of said sum of \$37,924.¹⁰/₁₀₀, being the sum of \$25,282.⁹⁸/₁₀₀, with interest from the 7th of June, 1847, till paid, and two thirds of the said costs; and they are hereby ordered and decreed to pay the same.

Seventh. And it is further ordered, adjudged and decreed, that in the event the said sureties in the first bond, to wit: James Carrico, Samuel Stott, and George C. Bomford, do not pay the said \$12,641.⁴⁶/₁₀₀, with interest, and one third of the costs, so decreed to be paid by them, as aforesaid, and every part thereof, that then the said Jacob Gideon, Ulysses Ward, and Jonathan B. H. Smith, the sureties in the second bond, as aforesaid, are bound to pay the same, and every part thereof, to the extent of the penalties of their said bond. And that, in the event that the said Jacob Gideon, Ulysses Ward, and Jonathan B. H. Smith, the sureties in the second bond, do not pay the said \$25,282.⁹⁸/₁₀₀, with interest and two thirds of the costs, so decreed to be paid by them, as aforesaid, and every part thereof, that then the said James Carrico, Samuel Stott, and George C. Bomford, the sureties in the first bond, as aforesaid,

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said, are bound to pay the same, to the extent of the penalty of their said bond.

And it is further ordered, adjudged and decreed, that the defendant, Lewis Johnson, administrator *de bonis non* of Thaddeus Kosciusko, transfer and deliver over to said named complainants the stock of the Bank of Washington, belonging to him, as such administrator, amounting at its par value, to the sum of \$5,580, together with all the dividends which have accrued on the same, less the costs of his administration, and reasonable counsel fees, *and such commissions, as administrator. [*434
tor, as the Orphans' Court may legally allow.

And it is further ordered, adjudged and decreed, that the said sums of money and stock, so decreed to be paid and transferred by the above-named defendants, be paid and transferred to the above-named complainants, Hippolitus Estho, Roman Estho, Louisa Narbut, Vlandislaus Wankowieg, Hippolitus Wankowieg, Adam Bychowiec, and Michael Szyrma, in the proportions stated and adjudged in the preceding fourth clause of this decree.

Eighth. It is further ordered, adjudged and decreed, that the decrees *pro confesso* against Roman Estho, Louisa Narbut, born Estho, Thadea Emilie Wilhelmine Zeltner, Maria Charlotte Julia Marguerette Zeltner, Bonnisant Pere, General Baszkoyiski, Emilie Zeltner, Mr. and Mrs. Edward Zeltner, Xavier Amieth, Dr. Sheerer, Miss Ursula Zeltner, and Kosciusko Armstrong, by the said Circuit Court be, and the same is hereby affirmed.

And lastly. It is ordered, adjudged and decreed, that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to that court to carry the aforesaid decree of this court into effect.

Cited—17 How., 463; 19 How., 597; 1 Bond, 580; 2 Woods, 286; 5 Dill., 391; 2 Low., 147, 149.

WILLIAM H. WINDER, *Plaintiff in Error*,

v.

ANDREW D. CALDWELL.

Writ of scire facias—defendant may plead to—Contract to build—set-off in action by contractor—liens given by Act of 1833 only to mechanics and material men.

Where a *scire facias* was issued to enforce a lien upon a house under the Lien Law of the District of Columbia, there was no necessity to file a declaration.

Where the contract between the owner and the builder (who was also the carpenter), stipulated for a forfeiture *per diem* in case the carpenter should delay the work, the court below ought to have allowed evidence of such delay to be given to the jury by the defendant, under a notice of set-off, and also evidence that the work and materials found and provided upon and for the building, were defective in quality and character, and far inferior in value to what the contract and specification called for.

A master builder, undertaker or contractor, who undertakes by contract with the owner to erect a building, or some part or portion thereof, on certain terms, does not come within the letter or spirit of the Act of Congress passed March 2, 1833 (4 Stat.

NOTE.—*Stated sum in contract, whether penalty for liquidated damages.* See note to *Taylor v. Sandiford*, 7 Wheat., 13.

at Large 659), entitled "An Act to secure to mechanics and others, payment for labor done and materials furnished in the erection of buildings in the District of Columbia."

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington.

It was an action of *scire facias*, brought by Caldwell against Winder, upon a claim filed under the Act of Congress passed March 2, 1833, entitled "An Act to secure to mechanics and others, payment for labor done and materials furnished in the erection of buildings in the District of Columbia." (4 Stat. at Large, 659.)

Caldwell, in March, 1849, filed his claim in the clerk's office, consisting of the gross sum of \$10,500, claimed as due under a special agreement, and the further sum of \$4,086 for extra work—the items of the extra work being particularly mentioned in the claim.

Upon this claim the writ of *scire facias* issued March 20, 1849. No declaration was filed. The defendant appeared and pleaded *non assumpti*, upon which issue was joined.

Upon the trial, the jury found a verdict for the plaintiff in the sum of \$4,746, with interest from 9th March, 1849.

Upon the trial, the plaintiff took three bills of exceptions, and the defendant, ten. The substance of them all is stated in the opinion of the court.

It was argued by *Mr. Davidge* for the plaintiff in error, and *Messrs. Bradley and Lawrence* for the defendant in error.

The counsel for the plaintiff in error made the following points:

1. That, under the Act of 1833, the mechanics and material men who do the work and provide the materials for the building, are entitled to the lien, and not he who merely contracts with them to do and provide such work and materials.

1. Because the law *totidem verbis* confines the lien to those "employed in furnishing materials for, or in the erecting or constructing" the building.

2. Because the only debts secured by the law are those contracted for work done and materials furnished for the building.

3. Because the 2d clause of the 1st section of the Act plainly shows that a mere contractor is not within its provisions.

4. Because the contractor not being within the letter, is still less within the spirit of the law, the object of which was to allow those whose property, whether work or materials, had been advanced upon the credit of the building, to follow that property after it had become part of the building. In the present case, the work and materials advanced, or a large portion of them, were not the property of the contractor.

5. Because if the contractor be held within the law, the building would be subjected to double liens and double recoveries. And, more than this, a sub-contractor, not advancing either work or materials, might, with equal justice, claim the lien, and the property would then be subjected to triple liens for the same benefit.

436*] *6. Because the mechanics and material men are, by the law, expressly authorized to in-

stitute proceedings against the contractor, the basis of which is, that they have found and provided the work and materials for the building.

7. Because the law contemplates but one lien for the same work or materials, and if there be two or more, the satisfaction which the owner is entitled to, under the last clause of the 1st section could not be entered. (Act of 1833, 4 Statutes at Large, p. 659; Penn. Lien Laws of 1803, Pamphlet L., 591; of 1806, 4 Smith's L., 300; and of 1836, Pamphlet L., 695; *Jones v. Shawhan*, 4 W. & S., 257, 264; *Hoatz v. Patterson*, 9 W. & S., 537, 539; *Huley v. Prosser*, 8 W. & S., 183, 184; *Whitman v. Walker*, 9 W. & S., 183, 187; *Bolton v. Johns*, 5 Barr's Penn., 145, 150.)

But, further, the Act of 1833 cannot be regarded as giving a lien to the contractor in this case, unless it, an affirmative statute, without a repealing clause or negative words, be held to repeal a former law passed *in pari materia*, and between which and the Act of 1833 there is no necessary repugnancy. The Act of Maryland, passed December 19, 1791, provided as follows:

"X. And for the encouragement of master builders to undertake the building and finishing houses within the said city, by securing to them a just and effectual remedy for their advances and earnings, be it enacted, that for all sums due and owing, on written contracts, for the building any house in the said city, or the brickwork, or carpenters' or joiners' work thereon, the undertaker or workmen employed by the person for whose use the house shall be built, shall have a lien on the house and the ground on which the same is erected, as well as for the materials found by him; provided the said written contract shall have been acknowledged before one of the commissioners, a justice of the peace, or an alderman of the corporation of Georgetown, and recorded in the office of the clerk for recording deeds herein created, within six calendar months from the time of acknowledgment as aforesaid; and if, within two years after the last of the work is done, he proceeds in equity, he shall have remedy as upon a mortgage; or if he proceeds at law within the same time, he may have execution against the house and land, in whose hands soever the same may be; but this remedy shall be considered as additional only, nor shall, as to the land, take place of any legal incumbrance made prior to the commencement of such claim." (2 Kilty's Laws of Md., Act 1791, ch. 45, sec. 10.)

This law gives a lien to the contractor or to the workmen employed by the owner, but it requires, 1. That there shall be a contract in writing; 2. That such contract shall be acknowledged; and 3. Recorded within six [*437 months after acknowledgment.

In the present case there was a written contract, but it was neither acknowledged nor recorded; and, besides, the remedy adopted is wholly different from that given by the Act of 1791.

Is that law repealed by the Act of 1833? It is not in any portion; or, if at all, not so far as concerns the right of the contractor.

It is not repealed, in whole or in part, expressly or by direct terms. Is it by necessary implication?

There must be, to repeal by implication, a positive repugnancy between the provisions of the new law and those of the old; and even then the old law is repealed only *pro tanto*, to the extent of the repugnancy. (*Wood v. The United States*, 16 Pet., 842, 862; *Davies et al. v. Fairbairn et al.*, 3 How., 636, 646; *Beals v. Hale*, 4 How., 37, 53; *Chesapeake & O. O. Co. v. Baltimore & O. R. R. Co.*, 4 Gill & J., 1, 153, 153; *Dwarris on St.*, 678, 674, 675.)

A later statute, which is general, does not abrogate a former, which is particular. (6 Rep., b. 19; *Dwarris on St.*, 674.)

Statutes *in pari materia*, are to be taken together and compared in the construction of them. (*The United States v. Freeman*, 3 How., 556; *Dwarris on St.*, 699.)

Statutes are to be construed with reference to the existing law. Four things are to be considered; what was the law before the act; the mischief not provided against; the remedy provided; and the reason of that remedy. (*Heddon's case*, 3 Co., 7.)

The mischief which required the passage of the Act of 1833, was twofold: 1. The law gave no lien to mechanics contracting with the undertaker or contractor. 2. It gave no lien whatever to the material man, unless he was at the same time undertaker, or a workman contracting directly with the owner.

The whole object of the law of 1833 was to supply the omissions of the Act of 1791. It was designed to be auxiliary merely, and not to repeal the provisions of the existing law.

Certainly no reason can be assigned why the salutary provision of the Act of 1791, requiring a contractor to enter into a written contract, and have the same acknowledged and recorded, was intended to be annulled.

The Act of 1701 is not obsolete, but has been recognized as in full force. (*Homans v. Coombe*, 3 Cranch, C. C., 366—decided in 1828.)

II. The court below erred in refusing to instruct the jury that the plaintiff was not entitled to recover for the work and materials done and provided under the special agreement.

1. Because the Act of 1833 is inapplicable to 438*] cases where work and materials are furnished under a special agreement. (*Jones v. Shushan*, 4 W. & S., 257, 262; *Hoate v. Patterson*, 5 Id., 537, 538; *Haley v. Prosser*, 8 Id., 133, 134; *Witman v. Walker*, 9 Id., 183, 187; *Barton v. Johns*, 5 Barr's Penn., 145, 150; Act of 1791, ch. 45, sec. 10; *United States v. Barney*, 2 Hall's Law J., 128; *Ex parte Lewis*, 2 Gallis., 483; *Hostler's case*, Yelv., 66; Bac. Abr., Trover, E.; 2 Roll. Abr., 92, Justification, pl. 2; *Chapman v. Allen*, Cro. Car., 271; Bul., N. P., 45; *Brennan v. Currant*, Sayre, 224; S. C., cited 3 Selw. N. P., 1163; *Stone v. Lingwood*, 1 Str., 651; *Collins v. Ongley*, cited Selw. N. P., *ubi sup.*; *Stevenson v. Blakelock*, 1 Maule & Selw., 585; and see, also, *Boyce v. Anderson*, 2 Pet., 155.)

2. Because the special agreement in this case was inconsistent with the retention of a lien. (*Peyroux et al. v. Howard*, 7 Pet., 324, 344; *Chase v. Westermore*, 5 Maule & Selw., 180; *Scarfe v. Morgan*, 4 Mee. & W., 270; *Stoddard Woolen Man. v. Huntley*, 8 N. H., 441; *Hutchins et al. v. Olcott*, 4 Vt., 549; *Bailey v. Adams*, 14 Wend., 201; *Welch v. Manderville*, 5 Wheat., 277.)

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III. The court erred in refusing to submit to the jury the question whether the work and materials, or what part thereof, were supplied upon the credit of the building. (*Hills v. Elliott*, 16 S. & R., 56; *Hinchman v. Graham*, 2 S. & R., 170.)

IV. A declaration should have been filed. (*Foster on Scire Facias*, 72 Law. Lib., p. 350.)

V. The judgment rendered was general and *in personam*. The proceeding was *in rem*, and the last clause of the Act of 1833, expressly prohibits the rendition of a judgment in the *scire facias*, against any other property than the building against which the lien existed.

VI. The court erred in refusing to instruct the jury that the plaintiff was not entitled to recover for the portion of work and materials performed, and furnished under the special agreement, more than three months before the claim was filed.

VII. The claim, so far as it related to the special agreement, was not filed in conformity with the requirements of the law, and the court erred in refusing to instruct the jury to that effect. (See the claim, R., 9; *McDonald v. Lindall*, 3 Rawle, 492.)

VIII. The court erred in excluding from the jury, evidence of defects in the work and materials furnished, under the special agreement. (*Withers v. Greene*, 9 How., 213; *Van Buren v. Digges*, 11 How., 461.) Notice of set-off had been given. (R., 5.)

IX. The court erred in refusing evidence of delay, the demurrage money mentioned in the agreement, being liquidated damages, and not a penalty. (*Fletcher v. Dyche*, 2 T. R., 32; *Huband v. Grattan*, 1 Alc. & Napier, 389; *Crisdee v. Bolton*, 3 C. & P., *240; *Leighton v. Wales*, 3 M. & W., 545; 2 Poth., Obl., by Evans, 81, &c.; *Noble v. Bates*, 7 Cow., 807; 2 Greenleaf on Ev., secs. 257, 258, 259, and cases cited; *Van Buren v. Digges*, 11 How., 461; *Taylor v. Sandiford*, 7 Wheat., 17.)

The points on behalf of the defendant in error were:

First. That this Act is not repugnant to the Act of 1791, but is remedial, cumulative, and auxiliary. That it was designed to give a lien to every person who, whether under a parol contract, oral or written, or a contract under seal, should thereafter furnish materials for or do work upon any dwelling or other building in the City of Washington during its erection, for the owner or for the contractor.

That if the building was constructed by contract, no person who did work or furnished materials to such contractor, could have the lien, unless within thirty days after being so employed, he should give notice in writing to the owner, that he was so employed to work or furnish materials, and that he claimed the benefit of that Act.

These points are presented in the 3d, 6th, 7th, 8th, 9th and 10th exceptions.

1. The first sentence of the Act of 1833, is in the most general and comprehensive terms. (7 B. & C., 643.)

2. The second sentence expressly contemplates the case of a contract, and provides a remedy for those employed by the contractor.

There is no such provision in any one of the laws of Pennsylvania referred to by plaintiff,

and under which the decisions of the courts of that State were made.

3. The Act of 1791 expressly recognizes and provides for two sets of liens, the one by the contractor, the other by the workmen. So does the Act of 1833.

4. The Act of 1791 contemplated a statutory mortgage; provided for contracts of a certain description, viz.: those in writing acknowledged before a justice, and recorded in the clerk's office within six months, and gave a remedy in equity.

This Act is not repugnant to that. It extends the remedy and provides a new one (not for those who have made their contracts and recorded them under the law of 1791), but to all persons who have done work or furnished materials for the building, without pursuing the remedy given by that law. It provides a different remedy. It gives an absolute lien in all cases for two years, to be enforced upon a claim filed by *scire facias* or personal action; or if no claim is filed, then by personal action.

The Act of 1791 provides a lien to commence [440*] from the date of the contract, if recorded within six months. The Act of 1833 gives a lien from the commencement of the work.

There is no repugnancy between them. The two provisions may well stand together, the latter as cumulative to the former. (3 How.. 645, 646.)

They are both affirmative Statutes, and such parts of the prior statute as may be incorporated into the subsequent one as consistent with it, must be considered in force. (*Id.*, 644, 645.)

They are *in pari materia*; they must be taken together as if they were one law. (*Id.*, 564.)

A thing which is within the intention of the makers of the statute, is as much within the statute as if it were within the letter. (*Id.*, 565.)

Here the intention cannot admit of dispute. It was to protect all who furnished skill, time, labor or materials, to the erection of the building, without regard to the manner of their employment. They might make their contract under the Act of 1791, and obtain a remedy in equity under that Act; or they might proceed under the law of 1833, and seek their remedy at law only. Both laws require a recording as notice. The law of 1833 has received this construction from its passage, and hundreds of mortgages now existing, rest upon it.

Unless it repeals the Act of 1791 by necessary implication, it may be merely affirmative, or cumulative, or auxiliary. (16 Pet., 362, 363.)

The more natural, if not necessary inference is, that the Legislature intended the new law to be auxiliary to and in aid of the purposes of the old law, even when some of the cases provided for may be equally within the reach of each. (*Id.*, 363.)

In construing an Act (and equally so in acts *in pari materia*, 3 How., 564; 2 T. R., 504), if there are expressions not so large in one part as those used in another, but upon a view of the whole Act they can collect from the more large and extensive expression of the Legislature, their intention, it is the duty of the judges to give effect to the larger expressions. (Per Lord Tenterden, 7 B. & C., 643.)

A second law on the same subject does not repeal a former one without a repealing clause, or negative words, unless so clearly repugnant as to imply a negative. But if they be not so contrary or so repugnant that the last Act expresses or implies a negative of the first, then they may continue to stand together. And if such be the case here, a mortgage of city property, recorded in conformity with either law, would be valid. Many cases of this kind, very analogous, are cited in *Foster's case*, 11 Coke, 63, 64; 4 How., 53.

We contend that both Acts are in force, and the parties may proceed under either. [*441] But if the Act of 1833 repeals the Act of 1791, we contend further that its provisions clearly embrace written contracts for construction.

Second. If the contractor or person who had done work or furnished materials for the owner, files his claim in the clerk's office, as provided by the Act of 1833, within three months after the last work is done by him under the same written contract, or under an implied contract, during the progress of the work, that claim will relate back to the commencement of the building and cover the work and materials mentioned in it and used in the erection of the building. 4th and fifth exceptions.

1. The language of the Act is explicit. "Every . . . building hereafter constructed and erected, &c., shall be subject to the payment of the debts contracted for, or by reason of any work or materials found and provided by any person or persons, &c., employed in furnishing the materials for, or in the erecting and constructing such house or other building, before any other lien which originated subsequent to the commencement of such other house or building, &c.: provided, That no such debt, &c., shall remain a lien on such house or other building, longer than two years from the commencement of the building thereof, unless, &c., a claim be filed within three months after performing the work or furnishing the materials."

It could not have been designed by the Legislature to deprive a lumber merchant of his lien, if there was an understanding between himself and the owner that he should furnish the lumber for the building from time to time, as it should be required, and it should occur, in the course of the erection of the building, that more than three months should elapse between filing one order and the giving of a new one.

2. If the work is done by contract, and there is an express or tacit understanding between the parties that alterations may be required by the owner and executed by the contractor during the progress of the work, it would be in direct violation of the spirit of the law, and the obvious intent of the Legislature to deprive the contractor of his lien, unless he from time to time, and every three months, recorded his claim.

3. The language of the Act is, within three months after performing the work or furnishing the materials. This means, by the force of the terms, after performing the last work or furnishing the last materials used in the progress of the building; not that he shall record his claims *toties quoties* three months shall elapse. This would be requiring the party to

accumulate costs, the thing the Legislature designed to avoid, and to do a vain thing, which the law never requires.

4. Much more will this construction apply to 442*] a contract, as in this case, for work and materials for a building which contemplated eighteen months in its construction.

As to the pleadings.

1. No declaration is required on the appearance of the defendant to a *scire facias* under this Act. In *Blake v. Dodemead et ux.*, 2 Str., 775, it is said there is no such thing as a declaration on a *scire facias*, the plea is to the writ, and *narratio* and *brevé* in this case are the same.

Vaughn v. Floyd, 1 Sid., 406. The *scire facias* disclosed the facts on which it was founded, and required an answer from the defendant; it was said to be in the nature of a declaration.

Bank of Scotland v. Fenuick, 1 Exch., 796, per Rolfe: The declaration, in fact, sets out the writ, and is in the same form as the writ.

Nunn v. Claxton, 8 Exch., 715: Although called a declaration, it is "merely a mode of entering the writ on the record."

See, also, *Herd v. Brustoue*, Cro. Eliz., 177; *Tidd's Pract.*, 8th ed., 1140.

2. The nature of the relief intended, the object of the Legislature to give a mortgage, and the writ being provided as notice of the action, the court may well, as the Circuit Court has heretofore, consider it as setting forth the facts on which it is founded, a narrative in the nature of a declaration, make it part of the record, and require the defendant to plead to it. The Statute itself, in the second section, would seem to contemplate the same thing.

Second, as to the form of the judgment.

The writ is not to show cause why execution should not issue against the property mentioned in it, but to show cause why the court ought not to render judgment for the sum demanded upon the record aforesaid.

This is the conclusion of the declaration.

The judgment is responsive. It must be the same after the pleading "as in personal actions for the recovery of debts."

The judgment, then, is right. But the record being in the same court, the statute regulates the form and extent of the execution which may issue on that judgment.

Mr. Justice Grier delivered the opinion of the court:

Caldwell, who was plaintiff below, entered into a contract with Winder, "to furnish all the materials and do all the carpenter work required to a certain house to be erected in the City of Washington," for the sum of ten thousand dollars. After the house was finished, the contractor filed a lien against the building, claiming this sum, together with sundry charges for extra work. A *scire facias* was issued to enforce this claim, and a trial had, in the course of which, numerous bills of exception were sealed by the court at the defendant's instance, which form the subjects for our consideration in this case.

1. The want of a declaration, though not the subject of exception below, has been urged here as an error. But we think this objection is without foundation.

A *scire facias* is a judicial writ used to enforce the execution of some matter of record

on which it is usually founded; but though a judicial writ, or writ of execution, it is so far an original that the defendant may plead to it. As it discloses the facts on which it is founded, and requires an answer from the defendant, it is in the nature of a declaration, and the plea is properly to the writ. In the present case, the bill of particulars of the plaintiff's claim is filed of record under the Statute which gives this remedy, and it is recited in the writ and thereby made part of it, so that any further pleading on his part, to set forth the nature of his demand, would be wholly superfluous.

2. In the written contract between the parties, given in evidence on the trial, it is stipulated that "the work is to be promptly executed, so that no delay shall be occasioned to the builder by having to wait for the carpenter's work;" and also, "that in any and every case in which the carpenter shall occasion delay to the building, the sum of \$25 per day shall be deducted for each and every day so delayed, from the amount to be paid by this contract."

The defendant, under a notice of set-off, offered to prove "that in consequence of the plaintiff's not being ready to put up his work according to said contract, delay was occasioned by him in the construction of the building of not less than three weeks;" and also, "that the work and materials found and provided upon and for the said building, were defective in quality and character, and far inferior in value to what said contract and specification called for."

The refusal of the court to permit such evidence to go to the jury, is the subject of the first two bills of exception.

The Statute which authorizes this proceeding, gives the defendant liberty "to plead and make such defense as in personal actions for the recovery of debts." Had the plaintiff below brought his action of *assumpsit* on the contract, the right to make this defense cannot now be doubted. For, although it is true, as a general rule, that unliquidated damages cannot be the subject of set-off, yet it is well settled that a total or partial failure of consideration, acts of nonfeasance or misfeasance, immediately connected with the cause of action, or any equitable defense arising out of the same transaction, may be given in evidence in mitigation of damages, or recouped; not strictly by way of defalcation or set-off, but [444*] for the purpose of defeating the plaintiff's action in whole or in part, and to avoid circuity of action. Without noticing the numerous cases on this subject, it is sufficient to say that the cases of *Withers v. Green*, 9 How., 214, and *Van Buren v. Digges*, 11 How., 461, decided in this court, are conclusive of the question. The court below, therefore, erred in the rejection of the testimony offered.

3. The remaining bills of exception, involve, in fact, but one prominent and important question, and the decision of it will dispose of this case.

The right to file a "mechanic's lien," as it is usually denominated, is claimed by the plaintiff, under the Act of Congress of March 2d, 1838, entitled, "An Act to secure to mechanics and others, payment for labor done and materials furnished, in the erection of buildings in the District of Columbia." The first section

of this Act, defines the persons who shall be entitled to this peculiar security and remedy, as follows:

"All and every dwelling house, or other building, hereafter constructed and erected within the City of Washington, in the town of Alexandria, or in Georgetown, in the District of Columbia, shall be subject to the payment of the debts contracted for, or by reason of any work done, or materials found and provided by any brickmaker, bricklayer, stonecutter, mason, lime merchant, carpenter, painter and glazier, ironmonger, blacksmith, plasterer and lumber merchant, or any other person or persons employed in furnishing materials for, or in erecting and constructing such house or other building, before any other lien which originated subsequent to the commencement of such house, or other building. But if such dwelling house or other building, or any portion thereof, shall have been constructed under contract, or contracts, entered into by the owner thereof, or his or her agent, with any person or persons, no person who may have done work for such contractor or contractors, or furnished materials to him, or on his order or authority, shall have or possess any lien on said house or other building, for work done, or materials so furnished, unless the person or persons employed by such contractor to do work on, or furnish materials for, such building, shall, within thirty days after being so employed, give notice in writing to the owner or owners of such building, or to his or to their agent, that he or they are so employed to work or to furnish materials, and that they claim the benefit of the lien granted by this Act."

Does a master builder, undertaker or contractor, who undertakes, by contract with the owner, to erect a building, or some part or portion thereof, on certain terms, come within the letter or spirit of this Act, or within any of the **445**] classes enumerated, as "entitled to this special remedy? Such persons have an opportunity, and are capable of obtaining their own securities. They do not labor as mechanics, but superintend work done by others. They are not tradesmen in lumber, or other materials for building, but employ others to furnish materials. If such contractor should by accident be a carpenter, or an owner or vendor of lumber, yet he deals not with the owner in this capacity, but as an undertaker, who has covenanted for his own securities.

The title to this Act shows its policy and intention. It is to secure, to "mechanics and others, payment for labor done and materials found;" and the persons enumerated in the first section are, plainly, those mechanics and tradesman whose personal labor or property have been incorporated into the building, and not the agents, supervisors, undertakers or contractors, who employed them. The Act contemplates two conditions, under which such labor and materials may have been furnished: First, on the order of the owner, who may act without the intervention of any middleman, and thus become indebted directly to his mechanics and tradesmen. Or, second, when they have been furnished on the order of a contractor or undertaker. In such cases, the mechanic, or material man, if he intends to look to the credit of the building, and not to

that of the contractor with whom he deals, must give notice to the owner of the building, within thirty days, of his intention to claim his security. The contractor, though mentioned in the Act, is not enumerated among those entitled to its benefit. The aim and policy of this Act is also obvious. Experience has shown that mechanics and tradesmen, who furnish labor and materials for the construction of buildings, are often defrauded by insolvent owners and dishonest contractors. Many build houses on speculation, and after the labor of the mechanic and the materials are incorporated into them, the owner becomes insolvent, and sells the buildings, or encumbers them with liens; and thus, one portion of his creditors are paid at the expense of the labor and property of others. Or, the solvent owner, who builds by the agency of a contractor or middleman, pays his price and receives, his building, without troubling himself to inquire what has been the fate of those whose labor or means have constructed it. These evils required a remedy, and such a one as is given by this Act. Its object is, not to secure contractors, who can take care of themselves, but those who may suffer loss by confiding in them. It is not the merit of the contractor that gave rise to the system, but the protection of those who might be wronged by him, if the owner were not compelled thus to take care of their interests before he pays away the price stipulated. *But the contractor is [**446** neither within the letter nor the spirit of the Act.

A question has been made in the argument, whether the Act of Maryland, of 19th of December, 1791, formerly in force in this district, is supplied or repealed by the Act of Congress now under consideration. But as the proceedings in this case are not within or under the Act of Maryland, the question is not before us for decision. The plaintiff claims his right to support this proceeding, under the Act of Congress alone, and if that fails him, his only resource is to his action on his contract. That he has mistaken his remedy, the court entertain no doubt.

If precedent were needed to justify this construction of the Act of Congress, it may be found in the reports of the Supreme Court of Pennsylvania, where similar legislation has always received the same construction. (See *Jones v. Shawhan*, 4 Watts & Serg., 257; *Hoats v. Patterson*, 5 W. & S., 537, &c.)

4. It is unnecessary to notice particularly the exception to the form of the judgment. It is certainly not in the form required by the Act; and although the Act may be construed to prescribe the effect rather than the form of the judgment, there is no reason why the form should differ from the effect; or that, in words, it should give the plaintiff anything more than the law gives him, viz.: execution of the property described in the *scire facias*.

The judgment of the Circuit Court is therefore reversed, and venire de novo awarded.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington,

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and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to award a *senire facias de novo*.

Cited—23 How., 68; 1 Curt., 266; 2 Curt., 417, 419; 9 Blatchf., 514.

THE SALMON FALLS MANUFACTURING COMPANY, Plaintiff in Error,

v.

WILLIAM W. GODDARD.

Statute of Frauds—Sufficiency of memorandum of contract of sale—technical and equivocal terms explained by parol.

The Statute of Frauds in Massachusetts, is substantially the same as that of 29 Car. II., and declares that no contract for the sale of goods, &c., [447] shall be valid. &c., "unless some note or memorandum in writing of the bargain, be made and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized."

The following memorandum, viz.: "Sept. 19, W. W. Goddard, 12 mos. 300 bales S. F. drills, 7½; 190 cases blue do. 8½. Credit to commence when ship sails; not after December 1st, delivered free of charge for truckage. The blues, if color satisfactory to purchasers. R. M. M. W. W. G."—is sufficient to take the case out of the Statute.

If the terms are technical or equivocal on the face of the instrument, or made so by reference to extraneous circumstances, parol evidence of the usage and practice in the trade, is admissible to explain the meaning.

It was competent also to refer to the bill of parcels delivered for the purpose of explanation. It was made out and delivered by the seller, in the course of the fulfillment of the contract, acquiesced in by the buyer, and the goods ordered to be delivered after it was received.

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of Massachusetts.

The facts are set forth in the opinion of the court, and also the rulings of the Circuit Court. The bill of exceptions extended over thirty pages of the printed record.

It was argued by Mr. Goodrich for the plaintiff in error, and by Messrs. Johnson and Davis, with whom was Mr. Choate, for the defendant in error.

The points made by the counsel for the plaintiff in error were the following:

I. The evidence before the jury was competent and sufficient to authorize them to find that the bill of parcels had been adopted, recognized, and acted upon by the defendant, as the contract between himself and the plaintiffs.

II. The bill of parcels constitutes a contract

NOTE.—What is a sufficient note or memorandum under statute of frauds. See note to Barry v. Combe, 1 Pet., 640.

Ambiguity in written instrument, when explainable by parol; its effect upon the instrument. See note to Atkinson v. Cummins, 9 How., 479.

Oral evidence as applicable to written contracts. See note to Bradley v. Wash., &c., Steam Packet Co., 13 Pet., 82.

Parol evidence as to recorded plat and to prove trusts as to deed, or to explain ambiguous words or description; to show mistake in deed. See note to M'iver v. Walker, 9 Cranch, 173.

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known as a bargain and sale, by force of which the title to the property passed, without delivery, without payment of the price. It purports on its face a sale *in present*.

III. The paper signed by the defendant, dated 19th September (Record, p. 11), is a sufficient compliance with the Statute of Frauds, and the first position taken, and the first instruction asked in the court below, should have been sustained.

Addison on Contracts, 80: "It is not necessary that all the particulars of the contract should appear upon the face of the written memorandum. Any note, acknowledging the fact of the sale, mentioning the name of the vendor and the thing sold, and signed by the purchaser or his agent, will take the case out of the Statute."

Penniman v. Hartshorn, 18 Mass., 87; Eger-ton v. Matthews, 6 East, 307, as to the description of the goods being sufficiently certain.

Even if it should be considered essential that the particular "bales and cases should [*448 be selected, this was done, and thereupon the writing attached. (See Record, p. 13, letters.) The first letter set apart No. 8180 to 8679. The 100 cases blue drills were set apart at the counting room of Mason & Lawrence, on 11th October.

The second letter called for No. 8480 to 8679—200 bales, thus leaving set apart, 300 bales from No. 8180 to 8479.

In considering this position and instruction, the plaintiffs relied upon their usage, to require notes upon all sales made upon credit, which was known to Goddard.

This usage was competent, as constituting a part of the contract, as one of the incidents of the credit which was given.

Hutton v. Warren, 1 Mees. & Wels., 466; Grant v. Maddox, 15 Id., 787; Syers v. Jonas, 2 Wels., Hurls. & Gor., 111. In an action for the price of tobacco sold, evidence is admissible to show that by the established usage of the tobacco trade, all sales are by sample, although not so expressed in the bought and sold notes. (Tibbets v. Sumner, 19 Pick., 166.)

The contract is certain as to the parties, as to the number of bales, the price per yard, so that the amount of the purchase may be computed.

It is well established that a signature, by initials, is good; but the fact, whose initials they are, must be settled by the jury, upon proof. So, also, it is submitted, that it is the province of the jury to determine the character in which the parties signed. It was for them to say whether Goddard, by signing his initials and writing underneath the provision as to credit, and that the contract as to the blues might be abandoned, if color not satisfactory to the purchaser, is or is not sufficient, and was designed by the defendant to designate himself as the purchaser. That he did so design, is apparent, also, from the fact that his name is written at the top of the paper, prior to that of any other person.

In determining this question, it is competent for the jury to look at the situation of the parties and of the property, in aid and in explanation of the paper, for the purpose of attaching or locating the paper.

Whether a party signed as a witness, or as a

party, is often determined from the location of his signature upon the paper.

Higgins v. Senior, 8 Mees. & Wels., 844: It may be shown that a party, whose name does not appear upon the paper, is bound as a contracting party, where an agent signs his own name instead of that of the principal.

Why not show, upon the same principle, or infer from the paper, the character and purpose in and for which a party signs?

The provision in this paper that the goods are **449*** to be delivered *free of truckage does not prevent the passing of the property, without and before delivery—and without payment.

Phillimore v. Barry, 1 Camp., 513: "If goods are sold to be paid for in thirty days, and if not carried away at the end of that time, warehouse rent to be paid—the property of the goods vests absolutely in the purchaser, and they remain at his risk from the moment of the sale."

King v. Meredith, 2 Camp., 639: "The fact that the carrier is to be paid by the vendor, will not defeat the vesting of the property."

Wackerbath v. Masson, 3 Camp., 270: "Where, in a contract for the sale of sugar, there is the following term, 'free on board a foreign ship,' the seller is not bound to deliver it into the hands of the purchaser, but only to put it on board a foreign ship, which it is the duty of the purchaser to name."

IV. The following instructions, asked for by the plaintiff below, and refused, ought to have been given by the court to the jury:

Instruction third, asked by the plaintiffs. That if the jury are satisfied that Mason & Lawrence were the general agents and factors of the plaintiffs; that the memorandum of September 19, 1850, was executed by the parties whose initials are affixed, and was delivered by defendant to them; and that the invoice or bill of parcels, dated 30th of September, 1850, was delivered by Mason & Lawrence to defendant, in furtherance of said contract, as containing a particular specification and enumeration of the bales and cases mentioned in the memorandum, or contract of September 19th, and was received and retained by him as a true invoice, or bill of parcels, they are to be taken as parts of one contract, and together constitute a memorandum or contract in writing, binding upon both parties, and not void within the Statute of Frauds.

Eighth instruction asked. If the jury are satisfied that the two papers exhibited by the plaintiffs, severally dated September 19, and September 30, 1850, relate to the same transactions and things, and manifestly relate to the same contract and transaction, they are to be construed together, and so taken, constitute a sufficient written note or memorandum of the contract, within the Statute of Frauds.

Whether the two papers, the one dated the 19th, the other the 30th of September, constituted the contract of the parties as finally settled, is a question of fact, exclusively for the determination of the jury—the construction of the papers is partly a matter of fact, and partly matter of law.

Addison on Contracts, 80, 81: "The contract may be authenticated and established through **450*** the medium of letters and *separate writings, provided they refer to each other, and

to the same persons and things, and manifestly relate to the same contract and transaction."

Jackson v. Lowe, 1 Bing., 9: This case recognizes the position that two papers may be regarded from the same context and subject matter of the papers, as referring to the same contract. It also recognizes the cases cited as to bills of parcels. (See, also, *Smith's Mer. Law*, 407.)

Dobell v. Hutchinson, 5 Neville & Man., 251: "And where, upon such contract (a paper signed only by the purchaser), it does not appear upon the face of it, or by reference, of whom the property is furnished, letters, written by persons in the character of vendors, may be connected with the contract, for the purpose of supplying this defect."

V. The evidence before the jury was competent and sufficient to authorize the jury to find a delivery and acceptance, to and by the defendant.

VI. The defendant is estopped to set up the Statute, or to say that no delivery and acceptance has been made.

The points made by the counsel for the defendant in error, were the following:

I. The memorandum in this case is insufficient to satisfy the requirements of the Statute of Frauds.

"No contract for the sale of any goods, wares, or merchandise, for the price of \$50 or more, shall be good and valid, unless the purchaser shall accept and receive part of the goods so sold, or shall give something in earnest to bind the bargain, or in part payment, or unless some note or memorandum in writing of the bargain be made and signed by the party to be charged thereby, or by some person thereunto by him fully authorized." (Rev. Stat. of Mass., ch. 74, sec. 3, p. 478.)

1. The memorandum of September 19, is insufficient, since it cannot be understood without reference to parol evidence.

a. It does not clearly set out or evidence that a sale has been made, or whether a contract for a future sale has been made, or only proposals offered, leading to a sale not yet agreed on.

b. It does not ascertain who is vendor and who is vendee. (Addison on Contracts, 80; *Bailey v. Ogden*, 3 Johns., 399; *Smith's Mer. Law*, 451.)

c. The price is uncertain. (Addison, 80; *Smith's Mer. Law*, 451, and the cases in his note; 5 B. & C., 583; 2 B. & C., 627; 1 N. R., 252; *Laythorp v. Bryant*, 2 Bing. N. C.; 10 Bing., 217, 227, 883, 482.)

d. The time of commencement of credit is uncertain; what ship, and what December, are uncertain.

e. The name of the plaintiff is not on the contract; nor the *name nor initials of [**451** any person then his agent. R. M. M. are not the initials of any person then an agent of the plaintiff. Mason & Lawrence were the agents, and, to avail the plaintiff, he must produce a written contract, containing his name or their names. (*Higgins v. Senior*, 8 Mees. & Wels., 844; *Shaw et al. v. Phinney*, 13 Met., 456.)

To the various insufficiencies aforesaid, and to the general principles on which the Statute of Frauds is construed: *Id v. Stanton*, 15 Vt., 685; *Adams v. McMillan*, 7 Porter, 73; *Cham-*

pion v. Plummer, 4 B. & P., 252; *Elmore v. Kingacote*, 5 B. & C., 583; *Hoadley v. McLaine*, 10 Bing., 483; *Aeolal v. Levy*, 10 Bing., 170; *Cooper v. Smith*, 11 East, 103; *Kain v. Old*, 2 B. & C., 205; *Parkhurst v. Van Courtlandt*, 1 J. C., 280; *Abel v. Ratcliffe*, 18 Johns., 297; *Goss v. Nugent*, 5 B. & Ad., 58; *Stonell v. Robinson*, 3 Bing. N. S., 928; *Harvey v. Grabham*, 5 Ad. & Ellis, 61; *Ford v. Yates*, 2 Man. & Granger, 549; 2 Kent's Com., 511, 6th ed.; *Story on Sales*, sec. 269, p. 212; 1 N. H., 157; 3 Greenleaf, 340; 4 Scott's N. R., 504; 23 Wendell, 870, 275; 5 Phil. Evidence (Cowen's last ed.), 84; 16 Wendell, 28, 32.

2. The bill made out by Rien, dated September 30, cannot be connected with the memorandum of September 19, to form a note within the Statute.

a. Neither contains any reference to the other.

b. The only one signed by defendant and on which only he can be charged (that of September 19), does not anticipate, provide for, or in any manner adopt, the paper of September 30, written long afterwards; and it cannot be deemed to be amended, completed, or altered by such subsequent unanticipated paper.

Addison on Cont., 80, 81, and cases there cited; 5 Phil. Ev. (Cowen's last ed.), 84; *Boydell v. Drummond*, 11 East, 142; 1 St. on Ev., 608; 1 Greenl. on Ev., sec. 288; *Chitty on Cont.*, 814-816; *Sandiland v. Marsh*, 2 B. & A., 680; *Coles v. Trecothick*, 9 Ves., 250; *Towney v. Crouther*, 2 Bro. Ch. Cases, 320, n. a; *Story on Sales*, sec. 278, p. 216.

3. The bill of sale of September 30th is in itself insufficient as a memorandum, as not signed by the defendant, or by anyone authorized by him to sign it for him.

A. Neither Mason nor Rien had any express authority from the defendant to sign for him, and their position gave them no implied authority to do so.

Commission merchants stand upon a different footing from brokers and auctioneers; being agents for one party only, they can only bind their principals. (13 Met., 456; *Sewall v. Fitch*, 8 Cow., 215; *Dixon v. Bromfield*, 2 Chit., 205; 452*) *Wright v. Dannel*, 2 Camp., 203; *Fairbrother v. Simmons*, 5 B. & A., 333; 1 R. & M., 325; *Raynard v. Linthorn*; *Smith's Merc. Law*, 453, and cases cited; 1 Bl., 599; 1 Esp., 105; 7 E., 569.)

B. There was no subsequent ratification by the defendant of the act of Rien.

a. The language of the defendant is perfectly consistent with the idea that he had a right to insist upon having the goods, as the bill sufficiently bound the plaintiff, and is therefore no necessary ratification.

b. The silence of defendant was no ratification. Rien was an officious intermeddler in the business (if he had assumed to act as agent for defendant), so far as defendant is concerned; and it is holden by some, though denied by others, that in such case, even after notice from such person of his act, silence is no ratification. (1 Livermore, Agency, 50; *Story on Agency*, 251, and *note*.)

But defendant had no notice from Rien that he had assumed to act for him, and so silence would not amount to ratification, even under the worst view of the law for the defendant.

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McLean v. Dunn, 1 M. & P., 761, and all cases hold that, to a ratification of an unauthorized agency, knowledge that there has been an assumption of agency for the very party ratifying is indispensable.

c. There was no express ratification of Rien's act by defendant.

The view which the court took at the *mise* hearing of the case of *Batters v. Sellers*, 5 H. & J., 117, seems impregnable. (See, too, 5 Phil. Ev., Cowen's last ed., 358; *Hawkins v. Chace*, 19 Pick., 502; *Graham v. Musson*, 5 Bing. N. C., 603.)

3. Even if the memorandum of the bargain of September 19 was sufficient within the Statute, yet unless there was a subsequent delivery to, and acceptance of, goods by the defendant, the property, under the special circumstances, did not pass, and remained the plaintiff's at the time of the fire.

a. The memorandum leaves it doubtful, whether a sale *in presenti*, or a contract, or proposals towards a contract, for a future sale, were intended. The probable, if not necessary inference, from the face of the paper, is, that no present sale is made.

1. No specific goods are designated.

2. An election to reject or deny any contract as to part, at the mere pleasure of the purchaser, is reserved.

3. Credit is not to commence until a future uncertain event.

4. Delivery is thereafter to be made.

a. The goods in fact were not at the time selected, or set apart; and of course [*453] no property therein could or did pass; this aids also the inference from the face of the paper, that no present sale was intended.

c. When plaintiff subsequently selected them, the property would not pass, certainly under such a contract, until defendant accepted them, and thus adopted the particular designation; and this he never did. In *Rhode v. Thwaites*, 6 B. & C., 388, there was such actual acceptance by the buyer.

e. The plaintiff was permitted to prove that he had a right to a note before delivery; and he would have a lien for this; which affords some ground of additional argument to show that the property did not pass.

II. There was no delivery by the plaintiff, nor acceptance by the defendant, sufficient to take the case out of the operation of the Statute requiring a demand.

Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the District of Massachusetts.

The suit was brought by the plaintiffs in the court below, to recover the price of three hundred bales of brown, and of one hundred cases of blue drills, which they had previously sold to the defendant.

The contract for the purchase was made with the house of Mason & Lawrence, agents of the plaintiffs, in Boston, on the 19th September, 1850, and a memorandum of the same signed by the parties. A bill of parcels was made out under date of 30th September, stating the purchase of the goods by the defendant, carrying out prices, and footing up the amount at \$18,-

565.03; also the terms of payment—note at twelve months, payable to the treasurer of the plaintiffs. This was forwarded to the defendant on the 11th October, and in pursuance of an order from him, the three hundred bales were sent from their establishment at Salmon Falls by the railroad, and arrived at the depot in Boston on the 30th October, of which notice was given to the defendant on the same day, and a delivery tendered. He requested that the goods should not be sent to his warehouse or place of delivery, for the reason, as subsequently stated by his clerk, there was no room for storage. The agents of the plaintiffs the next day renewed the tender of delivery by letter, adding that the goods remained at the depot at his risk, and subject to storage, to which no answer was returned. On the night of the 4th November, the railroad depot was consumed by fire, and with it the three hundred bales of the goods in question. The price was to be paid by note at twelve months, which the defendant refused to give, upon which refusal this action was brought.

454*] *The court below, at the trial, held that the written memorandum made at the time of entering into the contract between the agents of the plaintiffs and the defendant, was not sufficient to take the case out of the Statute of Frauds, and as there was no acceptance of the goods, the plaintiffs could not recover.

As we differ with the learned judge who tried the cause, as to the sufficiency of the written memorandum, the question upon the statute is the only one that it will be material to notice. The memorandum is as follows:

"Sept. 19—W. W. Goddard, 12 mos.

800 bales S. F. drills, - - - 7½

100 cases blue do. - - - 8½

Credit to commence when ship sails:
not after Dec. 1st—delivered free of
charge for truckage.

The blues, if color satisfactory to purchasers.

R. M. M.

W. W. G."

The statute of Massachusetts on this subject is substantially the same as that of 29 Car. II., ch. 8. sec. 17, and declares that no contract for the sale of goods, &c., shall be valid, &c., "unless some note or memorandum in writing of the bargain be made, and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized.

The word "bargain," in the Statute, means the terms upon which the respective parties contract; and in the sale of goods, the terms of the bargain must be specified in the note or memorandum, and stated with reasonable certainty, so that they can be understood from the writing itself, without having recourse to parol proof; for, unless the essential terms of the sale can be ascertained from the writing itself, or by a reference contained in it to something else, the memorandum is not a compliance with the Statute.

This brief note of the contract, however, like all other mercantile contracts, is subject to explanation by reference to the usage and custom of the trade, with a view to get at the true meaning of the parties, as each is presumed to have contracted in reference to them. And although specific and express provisions will con-

trol the usage, and exclude any such explanation, yet, if the terms are technical, or equivocal on the face of the instrument, or made so by reference to extraneous circumstances, parol evidence of the usage and practice in the trade, is admissible to explain the meaning. (2 Kent's C., 556, and n. 3; *Id.*, 260, and n.; Long on Sales, 197, ed. 1839; 1 Gale & Davis., 52.)

Extraneous evidence is also admissible to show that a person whose name is affixed to the contract, acted only as an agent, thereby enabling the principal either to sue or be sued in his *own name; and this, though it [*455] purported on its face to have been made by the agent himself, and the principal not named. (*Higgins v. Senior*, 8 M. & Wels., 834; *Trueman v. Loder*, 11 Ad. & Ell., 589.) Lord Denman observed, in the latter case, "that parol evidence is always necessary to show that the party sued is the party making the contract, and bound by it; whether he does so in his own name, or in that of another, or in a feigned name, and whether the contract be signed by his own hand (or that of an agent) are inquiries not different in their nature from the question. Who is the person who has just ordered goods in a shop? If he is sued for the price, and his identity made out, the contract is not varied by appearing to have been made by him in a name not his own."

So the signature of one of the parties is a sufficient signing to charge the firm. (*Soames v. Spencer*, 1 D. & R., 32; Long on Sales, 58.)

It has also been held, in the case of a sold note which expressed "eighteen pockets of hops, at 100s.," that parol evidence was admissible to show that the 100s. meant the price per cwt. (*Spicer v. Cooper*, 1 Gale & D., 52; 5 Jurist, 1036.)

The memorandum in that case was as follows: "Sold to Waite Spicer, of S. Walden, 18 pos. Kent hops, as under July 23, 1840; 10 pos. Barlow East Kent, 1839; 8 pos. Springall Goodhurst Kent, 1839, 100s. Delivered, JOHN COOPER."

Evidence was admitted on the trial to prove that the 100s. was understood in the trade to refer to the price per cwt., and the ruling approved by the King's Bench. Lord Denman put a case to the counsel in the argument to illustrate his view, that bears upon the case before us. Suppose, he said, the contract had been for ten butts of beer, at one shilling, the ordinary price of a gallon—and intimated that the meaning could hardly be mistaken.

Now, within the principles above stated, we are of opinion that the memorandum in question was a sufficient compliance with the Statute. It was competent to show, by parol proof, that Mason signed for the firm of Mason & Lawrence, and that the house was acting as agents for the plaintiffs, a company engaged in manufacturing the goods which were the subject of the sale; and also to show, that the figures 7½ and 8½, set opposite the three hundred bales and one hundred cases of goods, meant seven and a quarter cents, and eight and three quarter cents per yard.

The memorandum, therefore, contains the names of the sellers, and of the buyer—the commodity and the price—also, the time of credit, and conditions of the delivery; and, in the absence of any specified time or place of

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delivery, the law will supply the omission. 456*] *namely, a reasonable time after the goods are called for, and usual place of business of the purchaser, or his customary place for the delivery of goods of this description.

In respect to the giving of the note, which was to run during the period of the credit, it appears to be the uniform custom of the house of Mason & Lawrence, to take notes for goods sold of this description. The defendant was one of their customers, and knew this usage; and it is a presumption of law, therefore, that the purchase was made with reference to it, there being no stipulation to the contrary in the contract of the parties.

We are also of opinion, even admitting that there might be some obscurity in the terms of the memorandum, and intrinsic difficulty in a proper understanding of them, that it would be competent, under the circumstances of the case, to refer to the bill of parcels delivered, for the purpose of explanation. We do not say that it would be a note in writing, of itself sufficient to bind the defendant within the Statute; though it might be to bind the plaintiff.

It was a bill of sale made out by the seller, and contained his understanding of the terms and meaning of the contract; and having been received by the buyer, and acquiesced in (for the order to have the goods forwarded was given after it was received), the natural inference would seem to be, that the interpretation given was according to the understanding of both parties. It is not necessary to say that this would be the conclusion, if the bill differed materially from the written contract; that might present a different question; but we think it is so connected with, and naturally resulting from, the transaction, that it may be properly referred to for the purpose of explaining any ambiguity or abbreviations, so common in these brief notes of mercantile contracts.

A printed bill of parcels, delivered by the seller, may be a sufficient memorandum within the Statute to bind him, especially, if subsequently recognized by a letter to the buyer. (2 Bos. & P., 238 D.; 3 Esp., 180.) And generally the contract may be collected from several distinct papers taken together, as forming parts of an entire transaction, if they are connected by express reference from the one to the others. (3 Ad. & Ell., 355; 9 B. & Cr., 561; 2 Id., 945; 3 Taunt., 169; 6 Cow., 445; 2 M. & Wels., 660; Long on Sales, 55, and cases.)

In the case before us, the bill of parcels is not only connected with the contract of sale, which has been signed by both parties, but was made out and delivered in the course of the fulfillment of it; has been acquiesced in by the buyer, and the goods ordered to be delivered after it was received. It is not a memorandum sufficient to bind him, because his name is not 457*] affixed *to it by his authority; but if he had subsequently recognized it by letter to the sellers, it might have been sufficient. (2 B. & P., 238; 2 M. & Wels., 653; 3 Taunt., 169.)

But although we admit, if it was necessary for the plaintiffs to rely upon the bill as the note or memorandum within the Statute, they must have failed, we think it competent, within the principle of the cases on the subject, from its connection with, and relation to, the

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contract, to refer to it as explanatory of any obscurity or indefiniteness of its terms, for the purpose of removing the ambiguity.

Take, for example, as an instance, the objection that the price is uncertain, the figures 7½ and 8½, opposite the 300 bales and 100 cases of drills, given without any mark to denote what is intended by them.

The bill of parcels carries out these figures as so many cents per yard, and the aggregate amount footed up; and after it is received by the defendant, and with a knowledge of this explanation, he orders the goods to be forwarded.

We cannot doubt but that the bill, under such circumstances, affords competent evidence of the meaning to be given to this part of the written memorandum. And so, in respect to any other indefinite or abbreviated item to be found in this brief note of a mercantile contract.

For these reasons, we are of opinion that the judgment of the court below must be reversed, and the proceedings remitted, with directions to award a venire de novo.

Messrs. Justices Catron, Daniel, and Curtis, dissented.

Daniel, Justice, dissenting:

Upon the point made in this case, on the Statute of Frauds, I entirely concur in the exposition of the law just announced by the court. With respect, however, to the proceedings ordered by this court to be taken in this case in the Circuit Court, I am constrained to dissent from the decision of my brethren. My opinion is, that under the 2d section of the 8d article of the Constitution, the courts of the United States could not take cognizance of the controversy between these parties; and that therefore the proper direction to the Circuit Court would have been to dismiss this suit for want of jurisdiction. My reasons, for the conclusion here expressed, having been given in detail in the case of *Rundle et al. v. The Delaware and Raritan Canal Company*, during the present term, it is unnecessary to repeat them on this occasion.

***Mr. Justice Curtis:**

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I have the misfortune to differ from the majority of my brethren, in this case, and, as the question is one which enters into the daily business of merchants, and at the same time involves the construction of a Statute of the Commonwealth of Massachusetts, I think it proper to state, briefly, the grounds on which I rest my opinion.

The first question is, whether the writing of the 19th of September is a sufficient memorandum within the 3d section of the 74th chapter of the Revised Statutes of Massachusetts. The writing is in these words and figures:

Sept. 19. W. W. Goddard, 12 mos.

300 bales S. F. drills . . . 7½.

100 cases blue " . . . 8½.

Cr. to commence when ship sails; not after Dec'r 1st; delivered free of charge for truckage.

R. M. M.

W. W. G.

The blues, if color is satisfactory to purchaser." Does this writing show, upon its face, and without resorting to extraneous evidence, that

W. W. Goddard was the purchaser of these goods? I think not. Certainly it does not so state in terms, nor can I perceive how the fact can be collected from the paper, by any certain intendment. If it be assumed that a sale was made, and that Goddard was a party to the transaction, what is there, on the face of the paper, to show whether Goddard sold or bought? Extraneous evidence that he was the seller, would be just as consistent with this writing, as extraneous evidence that he was the purchaser. Suppose the fact had been, that Mason was the purchaser, and that the writing might be explained by evidence of that fact: it would then be read that Goddard sold to Mason, on twelve months' credit; and this evidence would be consistent with everything which the paper contains, because the paper is wholly silent as to the fact whether he was the seller or the purchaser. In *Bailey et al. v. Ogden*, 8 Johns., 398, an action for not accepting sugars, the memorandum was:

"14 December.

J. Ogden & Co.—Bailey & Bogart.

Brown, 124,

White, 164.

} 60 and 90 days.

Debenture part pay."

Mr. Justice Kent, who delivered the opinion of the court, enumerating the objections to the memorandum, says, no person can ascertain, from this memorandum, which of the parties was seller, and which buyer; and I think it 459*]would be difficult to *show that the memorandum now in question is any more intelligible, in reference to this fact.

Indeed, I do not understand it is supposed, that, in the absence of all extraneous evidence, it could be determined by the court, as matter of law, upon an inspection of the paper alone, that Goddard was the purchaser of these goods. The real inquiry is, whether extraneous evidence of this fact is admissible.

Now, it is true, the Statute requires only some note, or memorandum, in writing, of the bargain; but I consider it is settled, that this writing must show who is vendor, and who is purchaser. In *Champion v. Plumer*, 1 Bos. & P., New Rep., 252, the memorandum contained the name of the vendor, a description of the goods, and their price, and was signed by the vendee; yet, it was held that the vendee could not maintain an action thereon, because it did not appear, from the writing, that he was vendee, though it was clearly proved by parol.

In *Sherburn et al. v. Shaw*, 1 N. H., 157, the plaintiffs caused certain real estate to be sold at auction, and the defendant, being the highest bidder, signed a memorandum, agreeing to take the property; this memorandum was written on a paper, headed, "Articles of sale of the estate of Jonathan Warner, deceased." containing the terms of the sale; and this paper was also signed by the auctioneer. Yet the court, through Mr. Justice Woodbury, who delivered the opinion, held that, as the paper failed to show that the plaintiffs were the vendors, it was radically defective. Here, also, there was no doubt that the plaintiffs were the vendors, but extraneous evidence to supply this fact was considered inadmissible.

It seems to me that the fact that the defendant was the purchaser, is, to say the least, as necessary to be stated in the writing as any

other fact, and that to allow it to be proved by parol, is to violate the intent of the Statute, and encounter the very mischiefs which it was enacted to prevent. Chancellor Kent (2 Com., 511) says, "the contract must, however, be stated with reasonable certainty, so that it can be understood from the writing itself, without having recourse to parol proof." And this position rests upon a current of authorities, both in England and America, which it is presumed are not intended to be disturbed. But how can the contract be understood from the writing itself, when that fails to state which party is vendor and which purchaser?

I am aware that a latent ambiguity in a contract may be removed by extraneous evidence, according to the rules of the common law; and that such evidence is also admissible to show what, in point of fact, was the subject matter called for by the terms of a contract. (*Bradlee v. Steam P. Co.*, 16 Pet., 98.) So when *an act has been done by a person, and [*460 it is doubtful whether he acted in a private or official capacity, it is allowable to prove by parol that he was an agent and acted as such. But these cases fall far short of proving that when a statute requires a contract to be in writing, you may prove by parol the fact that the defendant was purchaser, the writing being silent as to that fact; or that a writing, which does not state who is vendor and who purchaser, does contain in itself the essentials of a contract of sale.

It is one thing to construe what is written; it is a very different thing to supply a substantive fact not stated in the writing. It is one thing to determine the meaning and effect of a complete and valid written contract, and it is another thing to take a writing, which on its face imports no contract, and make it import one by parol evidence. It is one thing to show that a party, who appears by a writing to have made a contract, made it as an agent, and quite a different thing to prove by parol that he made a purchase when the writing is silent as to that fact. The duty and power of the court is a duty and power to give a construction to what is written, and not in any case to permit it to be added to by parol. Least of all when a statute has required the essential requisites of a contract of sale to be in writing, is it admissible, in my judgment, to allow the fact, that the defendant made a purchase, to be proved by parol. If this fact, which lies at the basis of the action and to which every other is incidental, can be proved by evidence out of the writing signed by the defendant, the Statute seems to me to be disregarded.

It has been argued that the bill of parcels, sent to Goddard by Mason & Lawrence, and received by him, may be resorted to for the purpose of showing he was the purchaser. But it is certainly the law of Massachusetts, where this contract was made, and the case tried, as I believe it is of most other States, and of England, that unless the memorandum which is signed contains a reference to some other paper, no paper, not signed by the party to be charged, can be connected with the memorandum, or used to supply any defect therein. This was held in *Morton et al. v. Dean*, 13 Met., 385, a case to which I shall have occasion more fully to refer hereafter. And in conformity

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therewith, Chancellor Kent lays down the rule in 2 Com., 511, and refers to many authorities in support of it. I am not aware that any court has held otherwise.

That this bill of parcels was of itself a sufficient memorandum under the Statute, or that it was a paper signed by the defendant, or by any person by him thereunto lawfully authorized, I do not understand to be held by the majority of the court.

461*] *Now, the memorandum of the 19th September, is either sufficient or insufficient, under the Statute. If the former, there is no occasion to resort to the bill of parcels to show who was vendor, and who purchaser; because, if the latter, it cannot, consistently with the Statute, be made good by another paper not signed, and connected with it only by parol. To charge a party upon an insufficient memorandum, added to by another independent paper, not signed, would be to charge him when there was no sufficient memorandum signed by him, and therefore in direct conflict with the Statute. It does not seem to me to be an answer, to say that the bill of parcels was made out pursuant to the memorandum. If the signed memorandum itself does not contain the essentials of a contract of sale, and makes no reference to any other paper, in no legal sense is any other paper pursuant to it—nor can any other paper be connected with it, save by parol evidence, which the Statute forbids. In point of fact, it would be difficult to imagine any two independent papers more nearly connected, than a memorandum made and signed by an auctioneer, and the written conditions read by him at the sale. Yet it is settled, that the latter cannot be referred to, unless expressly called for by the very terms of the signed memorandum. Upon what principle does a bill of parcel stand upon any better ground?

The distinction, heretofore, has been between papers called for by the memorandum by express reference, and those not called for; this decision, for the first time, I believe, disregards that distinction, and allows an unsigned paper, not referred to, to be used in evidence to charge the purchaser.

In my judgment, this memorandum was defective in not showing who was vendor, and who purchaser, and oral evidence to supply this defect was not admissible.

But if this difficulty could be overcome, or if it had appeared on the face of the paper, that Goddard was the purchaser, still, in my judgment, there is no sufficient memorandum. I take it to be clearly settled, that if the court cannot ascertain from the paper itself, or from some other paper therein referred to, the essential terms of the sale, the writing does not take the case out of the Statute. This has been so often decided, that it is sufficient to refer to 2 Kent's Com., 511, where many of the cases are collected.

The rule stated by the Chancellor, as a just deduction from the authorities, is, "Unless the essential terms of the sale can be ascertained from the writing itself, or by a reference contained in it to something else, the writing is not a compliance with the statute; and if the agreement be thus defective, it cannot be supplied by parol proof, for that would at once 462*] introduce all the *mischiefs which

the Statute of Frauds and Perjuries was intended to prevent."

The Statute then, requires the essential terms of the sale to be in writing; the credit to be allowed to the purchaser is one of the terms of the sale.

And if the memorandum shows that a credit was to be given, but does not fix its termination it is fatally defective, for the court cannot ascertain, from the paper, when a right of action accrues to the vendee, and the contract shown by the paper is not capable of being described in a declaration. The rights of the parties, in an essential particular, are left undetermined by the paper. This paper shows there was to be a credit of six months, and contains this clause—"Cr. to commence when ship sails: not after Dec'r 1st." According to this paper, when is this credit to commence? The answer is, when the ship sails, if before December 1st. What ship? The paper is silent.

This is an action against Goddard for not delivering his note on twelve months' credit, and it is an indispensable inquiry, on what day, according to the contract, the note should bear date. The plaintiffs must aver, in their declaration, what note Goddard was bound to deliver, and the memorandum must enable the court to say that the description of the notes in the declaration is correct. They attempt this by averring, in the declaration, that the contract was for a note payable in twelve months from the sailing of a ship called the *Crusader*, and that this ship sailed on the sixth day of November. But the writing does not refer to the *Crusader*; and if oral evidence were admissible to prove that the parties referred to the *Crusader*, this essential term of their contract is derived from parol proof, contrary to the requirement of the Statute. It was upon this ground the case of *Morton et al. v. Dean*, and many other similar cases, have been decided. In that case, there was a memorandum signed by the auctioneer, as the agent of both parties, containing their names, as vendor and vendee, the price to be paid, and a sufficient description of the property. But it appeared that there were written or printed conditions read at the sale, but not referred to in the memorandum, containing the terms of credit, &c., and therefore that the memorandum did not fix all the essential parts of the bargain, and it was held insufficient.

But further; even if oral evidence were admissible to show that the parties had in view some particular vessel, and so to explain or render certain the memorandum, no such evidence was offered, and no request to leave that question of fact to the jury was made. Mason, who made the contract with Goddard, was a witness, but he does not pretend the parties had any particular vessel in view, still less that they agreed on the **Crusader* as [*463 the vessel, the sailing of which was to be the commencement of the credit. I cannot perceive, therefore, how either of the counts in this declaration is supported by the evidence, or how a different verdict could lawfully have been rendered.

The count for goods sold and delivered, was clearly not maintained, because, when the action was brought, the credit had not expired, even if it began on the 19th of September. One

of the special counts aver, that the notes were to be due twelve months from the 30th of September; but this is inconsistent with the written memorandum, and there is no evidence to support it. The other special counts all declare for a note due twelve months after the sailing of the Crusader; but, as already stated, there is no evidence whatever to support this allegation, and a verdict of the jury, affirming such a contract, must have been set aside.

It may be added, also, that no one of the prayers for instructions, contained in the bill of exceptions, makes the fact that the parties had reference to the Crusader, any element of the contract, but that each of them asks for an instruction upon the assumption that this necessary term of the contract had not been in any way supplied.

I consider the language of *Chief Justice Marshall*, in *Grant v. Naylor*, 4 Cranch, 234, applicable to this case. That great Judge says: "Already have so many cases been taken out of the Statute of Frauds, which seem to be with-in its letter, that it may well be doubted whether the exceptions do not let in many of the mischiefs against which the rule was intended to guard. The best judges in England have been of opinion that this relaxing construction of the Statute ought not to be extended further than it has already been carried, and this court entirely concurs in that opinion."

I am authorized to state that *Mr. Justice Catron* concurs in this opinion.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Massachusetts, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to award a *venire facias de novo*.

Cited—5 Otto, 292; 9 Otto, 111.

464*] *WILLIAM D. NUTT, Executor of
ALEXANDER HUNTER, Deceased, Plaintiff in
Error,

PHILIP H. MINOR.

*Fixed annual salary—contract for increased
pay, when not implied.*

Where the Marshal of the District of Columbia engaged the services of a clerk for a stipulated sum *per annum*, and the service continued without any new agreement, and the jury were instructed that they might imply a new agreement, to pay the clerk at a different rate, this instruction was erroneous. There was nothing in the evidence from which the jury could imply such new agreement.

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington.

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The facts are stated in the opinion of the court.

It was argued by *Messrs. Bradley and Davis* for the plaintiff in error, and by *Mr. Lawrence*, with whom was *Mr. Carlisle*, for the defendant in error.

Mr. Justice Catron delivered the opinion of the court:

Alexander Hunter was appointed Marshal of the District of Columbia in 1834, and continued to fill that office by re-appointments, until June, 1848, at which time he died. Shortly after he entered on the duties of his office, in 1834, he appointed Daniel Minor his deputy for the County of Alexandria, where a separate court was held and jurisdiction exercised; and for that county Daniel Minor was practically marshal.

Philip H. Minor, the plaintiff below, was the brother of Daniel Minor, who, being desirous to obtain the office of clerk to the Marshal for Philip H., applied to Hunter for this purpose, and advised him to employ Philip H. as his clerk, and Hunter agreed to do so; Daniel and Philip came up from Alexandria to Washington, and, in the Marshal's room, a conversation took place between Philip H. Minor, Hunter the Marshal, and Daniel Minor the deputy. Hunter proposed to give, as salary for the service, \$200 per annum, and that Daniel Minor, as deputy for Alexandria County, should give \$100, making the salary \$300. Daniel Minor insisted that the salary should be larger; Hunter replied that he was just in office and did not know what the profits would be, nor what the value of the duties to be discharged by the clerk would be; and that he did not feel justified in giving a larger salary. Daniel Minor then offered, that if Hunter would pay \$250, he would pay \$150 towards the salary which was agreed to by Hunter and Daniel Minor on the one part, and by Philip H. Minor on the other.

Daniel Minor, who was the principal witness, testified to the foregoing facts [*465 for the plaintiff below, on the trial; and further deposed, that he took his brother Philip aside and conversed with him out of the hearing of Hunter, and advised him to take the offer for a year, small as it was; and accordingly Philip H. assented; that nothing was said about a continuance of the agreement after the first year.

Daniel Minor further deposed, that he told his brother Philip in the foregoing conversation, "that the substance of the matter was an agreement confined to one year, and that the compensation would be afterwards made adequate to the services, and the value of the office; and that this was urged upon Philip as an inducement to agree to the engagement for the year; but that Hunter did not authorize the witness Daniel Minor, to promise Philip H. that he would be engaged after the first year at a higher compensation."

Daniel Minor also deposed, that he suggested to Hunter during the first year's service, that the salary of Philip H. should be increased, but Hunter declined doing so. The agreement was precise: Hunter was to pay \$250, and Daniel Minor \$150, as clerk hire, *per annum*; nor was the contract limited to one year, so far

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as Hunter entered into it; it was general, at the rate stipulated, for any length of time that Hunter might remain in office, or that Philip H. Minor might see proper to serve, and Hunter and Daniel Minor see proper to retain him as clerk. It is most obvious that the court and jury held Hunter bound by what Daniel Minor promised in the absence of Hunter, and without his knowledge, and contrary to his consent. There is an entire absence of proof, that Hunter ever assented, by word or act, to raise the salary of Philip H. Minor as clerk; nor does it appear that the latter at any time applied to Hunter in person, and insisted, or even suggested that his salary should be increased, until February, 1847, when the letter offered in evidence was written; on the contrary, he received the salary of \$400, as at first stipulated, for fourteen years, regularly crediting himself with it on the Marshal's books, each year.

If we reject Daniel Minor's evidence as incompetent to bind Hunter, so far as he used persuasions in Hunter's absence to induce Philip H. Minor to hope, and probably believe, that Hunter would raise his salary, then the case, as proved by the plaintiff below, rests alone on the special agreement made in 1834; and we think it must be stripped of all these conversations between Daniel Minor and his brother, to which Hunter never assented.

Nutt was sued as Hunter's executor, for work and labor, care and diligence, done and performed by Minor in and about the business of Hunter in his lifetime, and at his special instance and request. And also for sundry matters and things properly chargeable in an account therewith filed; and on these allegations of a *quantum meruit*, Hunter's estate was charged for \$400 per annum, in addition to the \$400 annually paid on the special agreement, running through the whole time of Minor's service; and a verdict was had, and a judgment rendered for \$5,055.78, against the estate, which was held responsible, regardless of the fact that Daniel Minor was bound to pay \$150 of the \$400, from April, 1834, to June, 1847, when Alexandria County was retroceded to Virginia by Congress.

On this state of facts, the court was asked to instruct the jury (among other things), that "if from the whole evidence aforesaid, the jury shall find that in April, 1834, the plaintiff entered into the employment of the deceased to serve him as clerk at a salary of \$400 for a single year, and thereafter continued to serve the said Hunter as clerk aforesaid, during the whole time mentioned in said account and declaration, and that no new agreement was made between the said plaintiff and said Hunter, for a compensation different from that which was as aforesaid first agreed upon between them; and if they shall further find that said Hunter in his lifetime fully paid said plaintiff for his said services, at the rate aforesaid, then the plaintiff is not entitled to recover in this action; which instruction the court refused to give as prayed, but did modify the same by inserting the words "express or implied" between the words "agreement" and "was made."

By thus modifying the instruction, the court told the jury, in substance, that they might find on the allegation of a *quantum meruit*, for

work and labor done, and for services performed, and hold that an agreement to pay on Hunter's part, might be "implied," because of the performance of the services; and, that a verdict might be found equal to the value of such services, according to the proof, deducting therefrom the amount already paid on the special agreement; and that such agreement did not preclude the plaintiff below from recovering additional compensation, to any amount that the jury should think he was entitled to. That the instruction as given did reject the special agreement, and leave the jury free to imply a new promise arising on the *quantum meruit*, for labor and services, is manifest; and therefore we are of opinion, that the instruction as propounded, ought to have been given without an addition of the words "express or implied," as inserted by the Circuit Court.

The letter, offered in evidence, was a plain attempt on the part of the plaintiff to make evidence for himself. It could only be offered for the purpose of showing that Hunter was thereby notified of Minor's unwillingness to act as clerk after the notice, "unless his compensation was increased, and that he would quit unless there was an increase; or as evidence to be taken in connection with other subsequent proof, showing that Hunter assented to the propositions contained in the letter. But as Hunter not only refused to sanction the demand set up, but indignantly resisted and resented it, the letter could be of no value to establish a new promise; nor can it be of any value as notice that additional compensation would be claimed for services rendered thereafter, because the plaintiff, with full knowledge of Hunter's determined rejection of the claim, continued to perform his duties as clerk, and to receive his salary of \$400 as usual, and thereby submitted to Hunter's assumption, that the salary was governed by the special agreement made in 1834. We are of opinion that this letter should have been objected to as evidence, and the party offering it compelled by the court to state for what purpose it was offered; so that it might have been inspected and passed on by the court, without being read to the jury. As, however, this course was not pursued at the trial by the defendant's counsel, and a general objection made to reading the letter for any purpose, we do not think the court erred in admitting the evidence in the first instance, although it ought certainly to have been rejected and taken from the jury, after the evidence was closed, had a motion been made to this effect; because it was unsustained by other evidence that Hunter assented to the claim made by the letter. But as no motion was made to withdraw this piece of evidence, the court properly left it with the jury.

We order that the judgment of the Circuit Court be reversed, and that the cause be remanded for another trial.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Cir-

cuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to award a *venire facias de novo*.

Cited—23 How., 63.

**468*] *THE PHILADELPHIA AND
READING RAILROAD COMPANY,
Plaintiff in Error,**

v.

ELIAS H. DERBY.

Railroad Company liable for injuries occasioned by gross negligence of employé to stockholder riding at President's invitation, free, and not in usual passenger car—liable for tortious acts of its servants, done in course of employment, in disobedience of orders.

Where a suit was brought against a Railroad Company, by a person who was injured by a collision, it was correct in the court to instruct the jury, that, if the plaintiff was lawfully on the road, at the time of the collision, and the collision and consequent injury to him were caused by the gross negligence of one of the servants of the defendants, then and there employed on the road, he was entitled to recover, notwithstanding the circumstances, that the plaintiff was a stockholder in the Company, riding by invitation of the President, paying no fare, and not in the usual passenger cars.

And also, that the fact that the engineer having the control of the colliding locomotive, was forbidden to run on that track at the time, and had acted in disobedience of such orders, was no defense to the action.

A master is liable for the tortious acts of his servant, when done in the course of his employment, although they may be done in disobedience of the master's orders.

THIS case was brought up by writ of error from the Circuit Court of the United States for the Eastern District of Pennsylvania. It was an action on the case brought by Derby, for an injury suffered upon the railroad of the plaintiff in error.

The declaration, in ten counts, was, in substance, that on the 15th day of June, 1848, the defendants, being the owners of the railroad, and of a certain car engine called the Ariel, received the plaintiff into the said car, to be safely carried therein, upon, and over the said railroad, whereby it became the duty of the defendants to use proper care and diligence that the plaintiff should be safely and securely carried; yet, that the defendants, not regarding their duty in that behalf, conducted themselves so negligently by their servants, that, by reason of such negligence, while the car engine Ariel was upon the road, and the plaintiff therein, he was precipitated therefrom upon the ground and greatly injured. Defendants pleaded not guilty.

On the 22d of April, 1851, the cause came on to be tried, and the evidence was, in substance, as follows:

In the month of June, 1848, the plaintiff, being a stockholder in the said Railroad Company, came to the City of Philadelphia, for the purpose of inquiring into its affairs, on his own account and as the representative of other stockholders. On the 15th of June, 1848, the

plaintiff accompanied John Tucker, Esq., the President of the said Company, over the railroad, for the purpose of viewing it and the works of the Company.

They proceeded in the ordinary passenger train of the Company, from the City of Philadelphia (the plaintiff paying no fare for his passage), as far as the City of Reading.

On arriving at Reading, the plaintiff inspected the machine shops of the defendants, there situate, and remained for that purpose about half an hour after the departure of the passenger train towards Pottsville, which [*469] latter place is about the distance of ninety-two miles from Philadelphia.

By order of Mr. Tucker, a small locomotive car engine, called the Ariel, was prepared for the purpose of carrying the plaintiff and Mr. Tucker farther up the road. This engine was not constructed or used for the business of the said defendants, but was kept for the use of the President and other officers of the Company, their friends and guests.

On this engine, the plaintiff and Mr. Tucker, accompanied by the engineer and fireman, and a paymaster of defendants, proceeded, following the passenger train, until they reached Port Clinton, a station on the line of the railroad.

After leaving Port Clinton, when about three miles distant from it, going round a curve, the passengers on the Ariel saw another engine called the Lycoming, of which S. P. Jones was the conductor, approaching on the same track. The engineer of the Ariel immediately reversed his engine, and put down the break. Mr. Tucker, the plaintiff, and the fireman, jumped from the Ariel, to avoid the impending collision. After they had jumped, the engineer also left the Ariel, having done all he could do to stop it. The plaintiff, in attempting to jump, fell, and received the injury of which he complains.

The engineer of the Lycoming, when he saw the approach of the Ariel, reversed his engine and put down the break. He did not leave the Lycoming until after the collision. At the time of the collision, the Lycoming was backing. The engines were but slightly injured by it.

On the night of the 14th or the morning of the 15th of June, a bridge, on the line of the railroad above Port Clinton, was burnt. In consequence of this, one of the tracks of the railroad was blocked up by empty cars returning to the mines, and stopped by the destruction of the bridge. For this reason a single track only could be used for the business of the road between Port Clinton and the burnt bridge.

Lewis Kirk, an officer of the said Company (master machinist and foreman), went on in the passengers cars from Reading, towards Pottsville, informing the plaintiff and Mr. Tucker, that he would give the proper orders to have the track kept clear for the Ariel. On arriving at Port Clinton he did give an order to Edward Burns, despatcher at Port Clinton (an officer of said Company, charged with the duty of controlling the starting of engines) that no car should be allowed to go over the road until he, the said Kirk, returned.

This order was communicated in express terms by Burns to Jones, the conductor of the Lycoming. Jones replied that he would go, and would take the responsibility, and, contrary to *his orders, did go up the road [*470]

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NOTE.—The freedom of the plaintiff from contributory negligence necessary to entitle him to recover. See note to *Stokes v. Saltonstall*, 13 Pet., 181.

towards the burnt bridge, and on his return met the Ariel, and the collision ensued, as above stated. Jones had the reputation of being a careful and competent person, no previous disobedience of orders by him had ever occurred, and he was discharged by the defendants immediately after the accident, and because of it.

On the trial the plaintiff below requested the court to charge the jury—

I. That if the plaintiff was lawfully upon the railroad of the defendants at the time of the collision, by the license of the defendants, and was then and there injured by the negligence or disobedience of orders of the Company's servants, then and there employed on the said railroad, the defendants are liable for the injury done to the plaintiff by such collision.

II. That if the defendants, by their servants, undertook to convey the plaintiff along the Reading Railroad, in the car Ariel, and while so conveying him, through the gross negligence of the servants of the Company then and there employed on the said railroad, the collision occurred, by which the plaintiff was injured, that the defendants are liable for the injury done to the plaintiff by such collision, although no compensation was to be paid to the Company for such conveyance of the plaintiff.

III. That if the collision, by which the plaintiff was injured, was occasioned by the locomotive Lycoming, then driven negligently or in disobedience of orders upon the said road by J. P. Jones, one of the Company's servants, then having control or command of the said locomotive, that the defendants are liable for the injury to the plaintiffs, caused by such collision.

And the counsel for the defendants below requested the court to charge the jury—

1. That the damages, if any are recoverable, are to be confined to the direct and immediate consequences of the injury sustained.

2. That if the jury believe the plaintiff had paid no fare, and was passing upon the railroad of the defendant as an invited guest, in order to entitle him to recover damages he must prove gross negligence, which is the omission of that care which even the most thoughtless take of their own concerns.

3. That the defendants would be liable in damages to a passenger who had paid passage money upon their contract to deliver him safely, for slight negligence; but to an invited guest, who paid no fare or passage money, they will not be responsible unless the jury believe that there was not even slight diligence on the part of the agents of the defendants.

4. That the employer is not responsible for the willful act of his servant.

471*] 5. That if the jury believe that the conductor of the engine Lycoming willfully, and against the express orders of the officer of the Company communicated to him, by running his engine upon the track above Port Clinton, caused the collision, the defendants are not responsible for any injury or loss resulting from such willful disobedience.

6. That if the jury believe that every reasonable and proper precaution was taken to have the track of the railroad clear for the passage of the Ariel, and collision ensued solely by reason of the willful disobedience of the con-

ductor of the Lycoming, and of the express orders duly given by an agent of the Company, the plaintiff cannot recover.

7. That if the jury believe that the conductor of the Lycoming, and all the officers of the Company in any wise connected with the collision, were carefully and prudently selected, and that the collision ensued and the injury resulted to the plaintiff, an invited guest, by the willful disobedience of one of them to an order duly communicated, then the plaintiff cannot recover.

The learned judge charged the jury as requested, on all the points offered by the plaintiff.

And the learned judge charged on the first and second points offered by the defendants, as requested, and also on the third point of the defendants, with the explanation, that though all the other agents of the defendants acted with diligence, yet if one of the agents used no diligence at all, then the defendants could not be said to have shown slight diligence.

As to the fourth point, the learned judge charged as requested by the defendants, with this explanation, that though the master is not liable for the willful act of his servant, not done in the course of his employment as servant, yet if the servant disobeys an order relating to his business, and injury results from that disobedience, the master is liable, for it is his duty to select servants who will obey. The disobedience in this case is the *ipsa negligentia*, for it is not pretended by the defendants that the Lycoming was intentionally driven against the Ariel.

On the fifth, sixth and seventh points of the defendants, the learned judge refused to charge as requested.

The learned judge further said, that it is admitted that the plaintiff was injured through the act of Jones, the conductor of the Lycoming, that the plaintiff was lawfully on the road by the license of the defendants; then, in this view of case, whether he paid fare or not, or was the guest of the defendants, made no difference as to the law of the case.

The jury found a verdict for the plaintiff, and assessed the damages at three thousand dollars.

A writ of error brought the case up to this court.

*It was argued by *Messrs. Campbell* [*472 and *Fisher* for the plaintiff in error, and *Messrs. Binney* and *Wharton* for the defendant in error.

The points made by the counsel for the plaintiff in error, were the following:

I. The plaintiff stood in such relation to the defendants at the time of the accident, that he cannot by law recover.

II. The plaintiff suffered no damage from any act with which the defendants are by law chargeable.

These propositions cover the whole case; yet it may be proper to direct the attention of the court to two others, which, although included in the latter, are made more specific by referring to the points and charge of the court.

III. That the learned judge erred while affirming the third and fourth points of the defendants, in the explanation by which that instruction was accompanied. The points and explanations referred to, were,

8. That the defendants would be liable in damages to a passenger who had paid passage money, upon their contract to deliver him safely, for slight negligence; but to an invited guest, who paid no fare, or passage money, they will not be responsible, unless the jury believe that there was not even slight diligence on the part of the agents of the defendants.

4. That the employer is not responsible for the willful act of his servant or agent.

The learned judge charged as requested on the third point, with the explanation, that though all the other agents of the defendants acted with diligence, yet, if one of the agents used no diligence at all, then the defendants could not be said to have shown slight diligence.

The learned judge also charged as requested on the fourth point, with this explanation, that though the master is not liable for the willful act of his servant, not done in the course of his employment as servant, yet, if the servant disobeys an order relating to his business, and injury results from that disobedience, the master is liable; for it is his duty to select servants who will obey. The disobedience in this case is the *ipsa negligentia*, for it is not pretended by the defendants that the Lycoming was intentionally driven against the Ariel.

IV. The learned judge erred in refusing to charge as requested by the 5th, 6th, and 7th points of the defendants.

5. That if the jury believe that the conductor of the engine Lycoming willfully, and against the express orders of the officer of the Company, communicated to him, by running his engine upon the track above Port Clinton, caused the **473** collision, the defendants *are not responsible for any injury or loss resulting from such willful disobedience.

6. That if the jury believe every reasonable and proper precaution was taken to have the track of the railroad clear for the passage of the Ariel, and the collision ensued solely by reason of the willful disobedience of the conductor of the Lycoming, and of the express orders duly given by an agent of the Company, the plaintiff cannot recover.

7. That if the jury believe that the conductor of the Lycoming, and all the officers of the Company, in any wise connected with the collision, were carefully and prudently selected, and that the collision ensued, and the injury resulted to the plaintiff, an invited guest, by the willful disobedience of one of them to an order duly communicated, then the plaintiff cannot recover.

1. The plaintiff stood in such relation to the defendants at the time of the accident, that he cannot by law recover.

The plaintiff was a stockholder of the defendants; he was on the road as an invited guest, and paid no fare; was not carried in the way of their business, nor in a car used for such purpose. He voluntarily left the passenger train at Reading, and took his seat in the Ariel, with full knowledge of the service to which it was devoted, and the character of the engine itself. He was himself the President of a Railroad Company.

Being no passenger, and not carried by the Company, even gratuitously, in the way of their business, he was in the car and was carried as a stockholder and a guest.

What were his legal rights, and what the obligations of the defendants?

It was contended:

1. That no cause of action can arise to any person by reason of the occurrence of an unintentional injury while he is receiving or partaking of any of those acts of kindness which spring from mere social relations. No contract exists, and no such duty as can give a cause of action, is by law cast upon either party in such relation. Such was the position of the plaintiff.

Upon principles somewhat analogous to the one now presented it has been ruled. "*Si un hôte invite un al supper, et le nuit estant farr spent et luy inoite a stayer la tout le nuit, fi soit apres robbe uncore le hôte ne serra charge pur ceo, car cest guest ne fuit ascur traveller.*" (1 Rolle's Abr., 8.)

"And if a man set his horse at an inn, though he lodge at another place, that makes him a guest, for the innkeeper gains by the horse, and therefore that makes the owner a guest, though he be absent. *Contra*, if goods left there by a man, because the innkeeper hath no advantage by them." (*York v. Grenough*, 2 Ld. R., 868.)

"*So where one leaves his horse at **474** an inn, to stand there by agreement at livery, although neither himself nor any of his servants lodge there, he is reputed a guest for that purpose, and the innkeeper hath a valuable consideration, and if that horse be stolen, he hath an action upon the common custom of the realm. But, as in the case at bar, where he leaves goods to keep, whereof the defendant is not to have any benefit, and goes from thence for two or three days, although he saith he will return, yet he is at liberty, and is not a guest during that time, nor is the innkeeper chargeable as a common hostler for the goods stolen during that time, unless he make a special promise for the safe keeping of them, and the action ought to be grounded upon it." (*Greeley v. Clark*, Cr. Jac., 188.)

"For if a man be lodged with another who is not an inn holder on request, if he be robbed in his house by the servants of him who lodged him, or any other, he shall not answer for it. (*Cayle's case*, 4 Rep., 32.)

"And therefore, if a neighbor who is no traveler, as a friend, at the request of the innholder, lodges there, and his goods be stolen, &c., he shall not have an action." (*Cayle's case*, *Id.*, 33.)

The principles on which rights and obligations, arising from particular relations, are founded, are stated by Shaw, Ch. J., in *Farwell v. Boston & Worcester Railroad Co.*, 4 Metcalf, 58.

And it may be proper to refer to that class of cases based upon the principle, that unless the parties met upon the terms of contract, none can be inferred; or, in the words of Mr. Justice Williams, in *Davies v. Davies*, 38 Engl. C. L., 46, that the evidence must show "that the parties came there on the terms that they were to pay and be paid, but if that was not so, there can be no *ex post facto* charge made on either side."

And to the same effect are the actions brought upon claims for services rendered, when the relations of the parties do not justify the

inference of contract. *Strins v. Parsons*, 5 Watts & S., 357. The case of a woman who lived with the decedent (whose estate was sued) as his wife. *Walker's Estate*, 3 Rawle, 343. An action by a son for services rendered after he arrived at full age. And also, *Candor's Appeal*, 5 Watts & S., 216; *Hacks v. Stewart*, 8 Barr, 213.

2. The plaintiff, being a stockholder as well as guest, and availing himself of an opportunity to inspect, for his own interest as for that of others, the line of the road, their shops, &c., he cannot, by reason also of this relation, recover.

He was in the car, as already stated, as a stockholder, and not carried by the Company in the way of their business, but for his own benefit, and for the interest of other stockholders whom he represented, and for whom he [475*] was acting as agent. No contract *was entered into with him, and he occupied, in this regard, no other relation than any other officer or agent of the Company or co-proprietor of the road.

One agent injured by another agent cannot recover from their common principal. (*Farwell v. Boston & Worcester Railroad Co.*, 4 Metcalf, 49; *Brown v. Maxwell*, 6 Hill, 592; *Murray v. South Carolina Railroad Co.*, 1 McMullen, 385; *Coon v. Railroad Co.*, 6 Barbour, 231; *Priestly v. Fowler*, 3 Mees. & Welsb., 1.)

If the defendant in error owned half the stock of the road, or being so the owner, the Company was unincorporated (its charter cannot affect this relation), or if the charter had created an individual liability in the shareholders, what duty did the law impose upon the other proprietors towards him, while he was on the road by their license, without compensation, to inspect its condition for his own benefit? It is submitted he went there like any other tenant in common, or joint proprietor, without right to claim against his co-proprietors for the negligence of any of their common servants.

II. The plaintiff suffered no damage from any act with which the defendants are by law chargeable.

The gist of the action is, the neglect by the servant of the defendants of some duty imposed upon them by law, for which negligence they are sought to be held responsible.

1. It is first to be observed, that this liability of the defendants, if any, is not affected by their corporate character, and if under like circumstances an individual would not be liable, a corporation will not.

"A corporation will be liable for an injury done by its servants, if under like circumstances an individual would be responsible."

(*The First Baptist Church v. Schenectady & Tr. R. R. Co.*, 5 Barb. Sup. Ct., N. Y., 79.) "Indeed, the same rule should be applied to a corporation as should be applied to an individual who carries on a business solely through the medium of agents and servants." (Pratt, J., *Coon v. The Utica R. R. Co.*, 6 Barb. S. C., 231; *Philadelphia R. R. Co. v. Wilt*, 4 Wharton, 146.)

"The duty and power of an engine driver must be the same, simply as such, whether he be employed by a corporation or a joint stock company, or an ordinary partnership, or an individual. The driver appointed by a corpora-

tion, or company, or partnership, carrying on the business of carriers of passengers or goods, must, as such, have the same duties and powers." (Per Parke, B., 3 Welsby, H. & G., 277, *Con. v. R. R. Co.*)

2. That an individual would not, under the facts in this case, have been liable, is, it is submitted, clear, from the following *author- [476 ities, and the principles upon which the decisions are based:

"A master is chargeable with the acts of his servant, but when he acts in the execution of the authority given him by his master, and then the act of the servant is the act of the master." (Per Holt, Ch. J., *Middleton v. Fowler*, 1 Salk., 282.)

"In civil matters, to render one man amenable for another's misconduct, it must ever be established that the latter, in committing the injury, was all the while acting under the authority and with the assent, express or implied, of the former." (Hammond's *Nisi Prius*, 80.)

"Hence it is, that the principal is never liable for the unauthorized, the willful, or the malicious act or trespass of the agent." Per Story, J., Princip. and Agt., sec. 456.)

In *McManus v. Crickett*, Lord Kenyon cites these cases, as illustrating the rule:

"If my servant, contrary to my will, chase my beasts into the soil of another, I shall not be punished."

"If I command my servant to distrain, and he ride on the distress, he shall be punished, not I." (1 East, 106.)

"In order to render a master liable for a trespass committed by the servant, it is necessary to show that the acts were done while the servant was acting under the authority of the master. . . . To render him liable, it must be shown that the commission of the trespasses was in the execution of his order, or with his assent or approbation." (Per Waite, J., *Church v. Mansfield*, 20 Conn., 287.)

In *Armstrong v. Cooley*, 5 Gill., 512, it was said, by Treat, Ch. J., "Even when the act is lawful, the principal is responsible for the manner of its performance, if done in the course of his employment, and not in willful violation of his instructions." Thus declaring that, in the latter case he would not be liable.

"It should here be observed, that the ground of the principal's liability cannot be that he has selected an agent who is more or less unworthy and placed him in a situation which enables him to become the instrument of mischief to his neighbor, because that would hold him responsible; not alone for the acts done by the other, in his capacity *quatenus* agent, but even for a willful default." (Ham. N. P., 81.)

This principle is exemplified in the case next cited, which, with the following, it is submitted, rule the cause now before the court.

Joel v. Morrison, 25 Eng. C. L., 512. In this case, the plaintiff was knocked down by the defendant's horse and cart, then driven by one of his servants accompanied by another. The *defendant proved that his horse and [477 cart were only in the habit of being driven out of the city, and did not go into the city (where the act happened) at all. Thesiger, counsel for the plaintiff, suggested that the defendant's servants might have gone out of their way, for their own purposes, or might have taken the

cart at a time when it was not wanted for the purpose of business, and have gone to pay a visit to some friend. He was observing that, under these circumstances, the defendant was liable for the acts of his servants—but, per Parke, B., “He is not liable, if, as you suggest, these young men took the cart without leave.”

Wilson v. Peterley, 2 N. H., 548, was an action on the case against the master. It appeared that, by the defendant's orders, a fire was set on his land, and the charge of it given to a hired laborer. That the defendant left home, directing the laborer, after setting the fire, to employ himself in harrowing other land in the neighborhood. That the laborer, after his master's absence, and before he commenced harrowing, carried brands from that fire into the ploughing field, to consume some piles of wood and brush there collected, and on his way dropped some coals, from which another fire arose, and did all the injury complained of. That carrying fire from one field to another was dangerous, and was not in conformity to any express authority of his master; that the laborer was accustomed to work under the particular directions of his master, and could conveniently have harrowed, without first burning the piles of wood, though to burn them first is the usual course of good husbandry. A verdict was taken for the plaintiff, subject to the opinion of the court. Judgment was afterwards given for the defendant, and the judge (Woodbury) said: “The next ground on which a master is liable for wrongs of his servant, is, that the wrongs are performed by the servant in the negligent and unskillful execution of business specially intrusted to the servant; but the principle does not reach wrongs caused by carelessness in the performance of an act, not directed by the master as a piece of business of some third person, or of the servant himself, or of the master, but which the master did not, either expressly or impliedly, direct him to perform. . . . Thus, a piece of labor might be very properly performed at one time, and not at another; as, in this case, the setting of a fire in the neighborhood of much combustible matter. And if the master, when the fire would be highly dangerous in such a place, forebore to direct it to be kindled, and employed his servant in other business, it would be unreasonable to make him liable, if the servant before attending to that business, went in his own discretion, and kindled the fire [478*] to the damage of third persons. *The master *quoad hoc*, is not acting in person, or through the servant, neither *per se*, nor *per alium*, and the doctrine of *respondet superior* does not apply to such an act, it being the sole act of the servant.”

It appears by the evidence, as applied to these rules:

1. Jones was not acting in execution of the authority given him by his master, the Company, which is deemed essential by Lord Holt.

2. In committing the injury, he was not all the while, or at any time acting under the authority, or with the assent of the Company; things, says Hammond, ever to be established to make the principal liable.

3. His act was contrary to the will and express direction of the Company, which, under

the cases approved by Lord Kenyon, in *McManus v. Crickett*, would discharge the master from liability.

4. The Company directed him to do one thing, and not to do another; yet, he did the latter, and did not do the former; therefore, according to the rule approved by Lord Kenyon, he, and not the Company, is liable to the plaintiff.

5. His whole conduct was unauthorized by the defendants, who are, therefore, not liable under the authority of Story and Waite, *JJ*.

6. His acts were “in willful violation of his instructions,” and, therefore, as stated in the opinion of Treat, *Ch. J.*, the defendants are not liable.

7. He took and ran the car “without leave,” in which case, says Parke B., the principal is “not liable.”

8. Nor are the defendants liable because Jones was in the performance of a piece of business of the defendants, because they did not, either expressly or impliedly, direct him to perform it; and if, as Judge Woodbury said, it would be unreasonable to make the principal liable for an act done by the servant, without authority, but only on his own discretion, with what reason can the principal be made responsible for the willful violation of his orders?

It is hence submitted, that the defendants are not by law chargeable with the damages resulting from the willful and disobedient act of one of their servants, and that the second point is maintained.

(The argument upon the remaining points is necessarily omitted.)

The points made by the counsel for the defendant in error were the same ruled by the court below, and were stated as follows:

*The three points made by the de- [*479] fendant in error, and affirmed by his Honor, Judge Grier, who tried the cause, are found on the record. They are as follows:

I. That if the plaintiff was lawfully upon the railroad of the defendants, at the time of the collision, by the license of the defendants, and was then and there injured by the negligence or disobedience of orders of the Company's servants, then and there employed upon the said railroad, the defendants are liable for the injury done to the plaintiff by such collision.

Two principles sustain this point.

I. That every person (or corporation) whose negligence or carelessness causes damage to another person, is *prima facie* responsible to such person therefor.

II. That a corporation is liable to third persons for the damage done by its servants through negligence or disobedience of orders, in the course of their employment.

I. To the first principle, as an axiom of the law, it is not deemed necessary to cite authorities.

II. In support of the second, the authorities which follow are cited, the principles being first given as stated by eminent text writers.

In Story on Agency, p. 465, ch. 17, sec. 452, the rule is laid down as follows:

“It is a general doctrine of law, that although the principal is not ordinarily liable (though he sometimes is), in a criminal suit, for the acts or misdeeds of his agent, unless, indeed,

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he has authorized or co-operated in those acts or misdeeds; yet, he is held liable to third persons in a civil suit for the frauds, deceptions, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances and omissions of duty of his agent in the course of his employment, although the principal did not authorize, or justify, or participate in, or, indeed, know of such misconduct, or even if he forbade them or disapproved of them. In all such cases, the rule applies, *Respondet superior*; and it is founded upon public policy and convenience; for in no other way could there be any safety to third persons in their dealings, either directly with the principals, or indirectly with him through the instrumentality of agents. In every such case, the principal holds out his agent as competent, and fit to be trusted; and thereby, in effect, he warrants his fidelity and good conduct in all matters of the agency." And in note 2, the learned author, in commenting upon a passage in 1 Blackstone's Com., 432, adds, "for the master is liable for the wrong and negligence of his servant, just as much when it has been done contrary to his orders, and against his intent, as he is, when he has co-operated in, or known the wrong."

480*] "A master is ordinarily liable to answer in a civil suit for the tortious or wrongful acts of his servant, if those acts are done in the course of his employment in his master's service; the maxims applicable to such cases, being, *Respondet superior*, and *Qui facit per alium, facit per se*. This rule, with some few exceptions, is of universal application, whether the act of the servant be one of omission or commission, whether negligent, fraudulent or deceitful, or even if it be an act of positive malfeasance or misconduct; if it be done in the course of his employment his master is responsible for it, *civilitur*, to third persons. And it makes no difference that the master did not authorize, or even know of the servant's act or neglect; for even if he disapproved of or forbade it, he is equally liable, if the act be done in the course of the servant's employment. (Smith on Master and Servant, p. 153; Law Lib., Jan., 1853, p. 130.)

"If a servant is acting in the execution of his master's orders, and by his negligence causes injury to a third party, the master will be responsible, although the servant's act was not necessary for the proper performance of his duty to his master, or was even contrary to his master's orders." (Smith on Master and Servant, p. 157; Law Lib., Jan., 1853, p. 134.)

The following authorities establish conclusively the principles above stated. (*Sleath v. Wilson*, 9 Carr. & P., 607, 88 E. C. L., 249.)

If a servant, without his master's knowledge, take his master's carriage out of the coach house, and with it commit an injury, the master is not liable; because he has not in such case intrusted the servant with the carriage. But whenever the master has intrusted the servant with the control of the carriage, it is no answer that the servant acted improperly in the management of it; but the master, in such case, will be liable, because he has put it in the servant's power to mismanage the carriage, by intrusting him with it. Therefore, where a servant, having set his master down in Stamford

Street, was directed by him to put up in Castle Street, Leicester Square; but instead of so doing, went to deliver a parcel of his own, in the Old Street Road, and in returning along it, drove against an old woman, and injured her: it was held, that the master was responsible for his servant's act.

Mr. Justice Erskine states the law in the clearest manner: "Whenever the master has intrusted the servant with the control of the carriage, it is no answer that the servant acted improperly in the management of it. If it were, it might be contended that if a master directs his servant to drive slowly, and the servant disobeys his orders and drives fast, and through his negligence occasions an injury, the master will not be liable. *But that is [*481 not the law: the master, in such a case, will be liable, and the ground is, that he has put it in the servant's power to mismanage the carriage, by intrusting him with it."

The case of *Joel v. Morrison*, 6 Carr. & P., 501, 25 E. C. L., 511, is to the same point—but the servant in that case was acting against his master's implied commands, and not his express. The master was held liable. In *Brown v. Copley*, 7 Mann. & Granger, 566, 49 E. C. L., 566, Sergeant Talfourd, *arguendo*, puts the case, previously put by way of illustration by Mr. Justice Erskine, in *Sleath v. Wilson*: "As, if a coachman were driving his master, and were ordered not to drive so fast, but he nevertheless continued to do so, the master would be responsible for the injury." To which Mr. Justice Cresswell assents, saying: "In that case, the coachman would still be driving for his master, though driving badly."

It is not pretended, in the present case, that Jones disobeyed the order given him, to attend to any private business of his own, he was still "driving" (his locomotive) "for his master," "though driving badly."

Nor did the damage ensue from the breach of the express order not to run up the railroad until the Ariel had passed. Jones ran his locomotive up the road without harming anyone. It was on his return down the road that he encountered the Ariel.

And in *Croft v. Alison*, 4 Barn. & Ald., 590, 6 E. C. L., 528, in an action for the negligent driving of the defendant's coachman, whereby the plaintiff's carriage was upset, it appeared that the accident arose from the defendant's coachman striking the plaintiff's horses with his whip, in consequence of which they moved forward, and the carriage was overturned. At the time when the horses were struck, the two carriages were entangled. The defendant was held liable for the damage caused by his servant's act, although wanton, as it was done in pursuance of his employment. And *per curiam*: "The distinction is this: if a servant driving a carriage, in order to effect some purpose of his own, wantonly strikes the horses of another person, and produce the accident, the master will not be liable. But if, in order to perform his master's orders, he strikes, but injudiciously, and in order to extricate himself from a difficulty, that will be negligent and careless conduct, for which the master will be liable, being an act done in pursuance of the servant's employment."

The third point of the defendant in error,

and sustained by His Honor who tried the cause, is as follows:

III. That if the collision by which the plaintiff ⁴⁸²* was injured was occasioned by the locomotive Lycoming, then driven negligently, or in disobedience of orders, upon the said road, by J. P. Jones, one of the Company's servants, then having control or command of the said locomotive, that the defendants are liable for the injury to the plaintiff, caused by such collision.

This point merely applies the general principles of the first point to the facts proved, and is virtually comprehended in it. It therefore needs no further notice.

The second point of the defendant in error, sustained by His Honor who tried the cause, is as follows:

II. That if the defendants, by their servants, undertook to convey the plaintiff along the Reading Railroad, in the car Ariel, and while so conveying him, through the gross negligence of the servants of the Company, then and there employed upon the said railroad, the collision occurred by which the plaintiff was injured, that the defendants are liable for the injury done to the plaintiff by such collision; although no compensation was to be paid to the Company for such conveyance of the plaintiff.

The principle of this point is identical with that of the second point presented by the plaintiffs in error themselves, and which was duly affirmed by His Honor in his charge, and the principle is in entire harmony with the third point of the plaintiffs in error, which was also duly affirmed by His Honor.

As both parties, therefore, seem to have agreed in their views on these points as presented as above to His Honor for adoption, and which were duly adopted by him, it can hardly be necessary to refer to the authorities on which the doctrine is based.

The leading case in point is that of *Coggs v. Bernard*, Lord Raymond, 909, the celebrated case under the law of bailments. The principle of that case is that, "If a man undertakes to carry goods safely and securely, he is responsible for any damage they may sustain in the carriage through his neglect, though he was not a common carrier, and was to have nothing for the carriage."

This case has been commented upon with great ability, and at much length in 1 Smith's Leading Cases, p. 82, and the American authorities upon the point are collected by Messrs. Hare and Wallace, p. 227.

Mr. Smith states the general principle in these words, viz.: "The confidence induced by undertaking any service for another, is a sufficient legal consideration to create a duty in the performance of it."

Among the numerous American cases affirming this principle, is *Thorne v. Deas*, 4 Johns. ⁴⁸³* 84, in which Chief Justice Kent says: "If a party who makes this engagement" (the gratuitous performance of business for another) "enters upon the execution of the business, and does it amiss, through the want of due care, by which damage ensues to the other party, an action will lie for this misfeasance."

A principle to which the defendant in error's second point also refers, is the liability of an unpaid agent for gross negligence only.

In the later cases, the English courts have found considerable difficulty in distinguishing with precision between negligence and gross negligence. In *Wilson v. Brett*, 11 Mees. & Wels., 118, Baron Rolfe observes, "that he could see no difference between negligence and gross negligence; that it was the same thing, with the addition of a vituperative epithet."

And see Hare and Wallace's American note, p. 242, with the American cases there cited, and which are collected and commented on at much length, and the true principle stated, that any negligent conduct, which causes injury or loss, is actionable.

The defendant in error might perhaps have been entitled to ask the benefit of a rule less rigid in its bearing upon himself; but as the conduct of the Railroad Company in discharging Jones, the conductor, showed their own estimate of the grossness of the negligence in question, the defendant in error was content to ask the ruling of the point in its milder form, and the finding of the jury established the grossness of the negligence. The question of what is gross negligence being for the jury, see *Storer v. Gowen*, 6 Shepley, 174; *Whitney v. Lee*, 8 Metcalf, 91; Angell on Carriers, p. 12.

Mr. Justice Grier delivered the opinion of the court:

This action was brought by Derby, the plaintiff below, to recover damages for an injury suffered on the railroad of the plaintiffs in error. The peculiar facts of the case, involving the questions of law presented for our consideration, are these:

The plaintiff below was himself the President of another Railroad Company, and a stockholder in this. He was on the road of defendants by invitation of the President of the Company, not in the usual passenger cars, but in a small locomotive car used for the convenience of the officers of the Company, and paid no fare for his transportation. The injury to his person was caused by coming into collision with a locomotive and tender, in the charge of an agent or servant of the Company, which was on the same track, and moving in an opposite direction. Another agent of the Company, in the exercise of proper care and caution, had given orders to keep this track clear. The driver of the colliding engine acted in ⁴⁸⁴* disobedience and disregard of these orders, and thus caused the collision.

The instructions given by the court below, at the instance of plaintiff, as well as those requested by the defendant, and refused by the court, taken together, involve but two distinct points, which have been the subject of exception here, and are in substance as follows:

1. The court instructed the jury, that if the plaintiff was lawfully on the road at the time of the collision, and the collision and consequent injury to him were caused by the gross negligence of one of the servants of the defendants, then and there employed on the road, he is entitled to recover, notwithstanding the circumstances given in evidence, and relied upon by defendant's counsel as forming a defense to the action, to wit: that the plaintiff was a stockholder in the Company, riding by invitation of the President—paying no fare, and not in the usual passenger cars, &c.

2. That the fact that the engineer having the control of the colliding locomotive, was forbidden to run on that track at the time, and had acted in disobedience to such orders, was not a defense to the action.

1st. In support of the objections to the first instruction, it is alleged, "that no cause of action can arise to any person by reason of the occurrence of an unintentional injury, while he is receiving or partaking of any of those acts of kindness which spring from mere social relations; and that as there was no contract between the parties, express or implied, the law would raise no duty as between them, for the neglect of which an action can be sustained."

In support of these positions, the cases between innkeeper and guest have been cited, such as 1 Rolle's Abr., 3, where it is said, "If a host invite one to supper, and the night being far spent, he invites him to stay all night, and the guest be robbed, yet the host shall not be chargeable, because the guest was not a traveler;" and *Cayle's case*, 4 Rep., 52, to the same effect, showing that the peculiar liability of an innkeeper arises from the consideration paid for his entertainment of travelers, and does not exist in the case of gratuitous lodging of friends or guests. The case of *Purvell v. The Boston and Worcester Railroad Company*, 4 Metcalf, 47, has also been cited, showing that the master is not liable for any injury received by one of his servants, in consequence of the carelessness of another, while both are engaged in the same service.

But we are of opinion, that these cases have no application to the present. The liability of the defendants below, for the negligent and injurious act of their servant, is [485*] not necessarily *founded on any contract or privity between the parties, nor affected by any relation, social or otherwise, which they bore to each other. It is true, a traveler, by stage coach, or other public conveyance, who is injured by the negligence of the driver, has an action against the owner, founded on his contract to carry him safely. But the maxim of "*respondeat superior*," which, by legal imputation, makes the master liable for the acts of his servant, is wholly irrespective of any contract, express or implied, or any other relation between the injured party and the master. If one be lawfully on the street or highway, and another's servant carelessly drives a stage or carriage against him, and injures his property or person, it is no answer to an action against the master for such injury, either, that the plaintiff was riding for pleasure, or that he was a stockholder in the road, or that he had not paid his toll, or that he was the guest of the defendant, or riding in a carriage borrowed from him, or that the defendant was the friend, benefactor or brother of the plaintiff. These arguments, arising from the social or domestic relations of life may, in some cases, successfully appeal to the feelings of the plaintiff, but will usually have little effect where the defendant is a corporation, which is itself incapable of such relations or the reciprocation of such feelings.

In this view of the case, if the plaintiff was lawfully on the road at the time of the collision, the court were right in instructing the jury that none of the antecedent circumstances, or

accidents of his situation, could affect his right to recover.

It is a fact peculiar to this case, that the defendants, who are liable for the act of their servant coming down the road, are also the carriers who were conveying the plaintiff up the road, and that their servants immediately engaged in transporting the plaintiff were not guilty of any negligence, or in fault for the collision. But we would not have it inferred, from what has been said, that the circumstances alleged in the first point would affect the case, if the negligence which caused the injury had been committed by the agents of the Company who were in the immediate care of the engine and car in which the plaintiff rode, and he was compelled to rely on these counts of his declaration, founded on the duty of the defendant to carry him safely. This duty does not result alone from the consideration paid for the service. It is imposed by the law, even where the service is gratuitous. "The confidence induced by undertaking any service for another, is a sufficient legal consideration to create a duty in the performance of it. (See *Coggs v. Bernard*, and cases cited in 1 Smith's Leading Cases, 95.) It is true, a distinction has been taken, in some cases, between simple negligence, and great or gross negligence; and it is said, that one who acts gratuitously [*486] is liable only for the latter. But this case does not call upon us to define the difference (if it be capable of definition), as the verdict has found this to be a case of gross negligence.

When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence, in such cases, may well deserve the epithet of "gross."

In this view of the case, also, we think there was no error in the first instruction.

2. The second instruction involves the question of the liability of the master where the servant is in the course of his employment; but, in the matter complained of, has acted contrary to the express command of his master.

The rule of "*respondeat superior*," or that the master shall be civilly liable for the tortious acts of his servant, is of universal application, whether the act be one of omission or commission, whether negligent, fraudulent, or deceitful. If it be done in the course of his employment, the master is liable; and it makes no difference that the master did not authorize, or even know of the servant's act or neglect, or even if he disapproved or forbade it, he is equally liable, if the act be done in the course of his servant's employment. (See *Story on Agency*, sec. 452; *Smith on Master and Servant*, 153.)

There may be found, in some of the numerous cases reported on this subject, *dicta* which, when severed from the context, might seem to countenance the doctrine that the master is not liable if the act of his servant was in disobedience of his orders. But a more careful examination will show that they depended on the

question, whether the servant, at the time he did the act complained of, was acting in the course of his employment, or in other words, whether he was or was not at the time in the relation of servant to the defendant.

The case of *Sleath v. Wilson*, 9 Carr. & P., 607, states the law in such cases distinctly and correctly.

In that case a servant, having his master's carriage and horses in his possession and control, was directed to take them to a certain place; but instead of doing so he went in another direction to deliver a parcel of his own, and, returning, drove against an old woman and injured her. Here the master was held liable for the act of the servant, though at the time he committed the offense, he was acting **487*** in disregard of his master's orders; because the master had intrusted the carriage to his control and care, and in driving it he was acting in the course of his employment. Mr. Justice Erskine remarks, in this case: "It is quite clear that if a servant, without his master's knowledge, takes his master's carriage out of the coach house, and with it commits an injury, the master is not answerable, and on this ground, that the master has not intrusted the servant with the carriage; but whenever the master has intrusted the servant with the control of the carriage, it is no answer, that the servant acted improperly in the management of it. If it were, it might be contended that if a master directs his servant to drive slowly, and the servant disobeys his orders, and drives fast, and through his negligence occasions an injury, the master will not be liable. But that is not the law; the master, in such a case, will be liable, and the ground is, that he has put it in the servant's power to mismanage the carriage, by intrusting him with it."

Although, among the numerous cases on this subject, some may be found (such as the case of *Lamb v. Palk*, 9 C. & P., 629) in which the court have made such distinctions which are rather subtle and astute, as to when the servant may be said to be acting in the employ of his master; yet we find no case which asserts the doctrine that a master is not liable for the acts of a servant in his employment, when the particular act causing the injury was done in disregard of the general orders or special command of the master. Such a qualification of the maxim of *respondent superior*, would, in a measure, nullify it. A large proportion of the accidents on railroads are caused by the negligence of the servants or agents of the company. Nothing but the most stringent enforcement of discipline, and the most exact and perfect obedience to every rule and order emanating from a superior, can insure safety to life and property. The intrusting such a powerful and dangerous engine as a locomotive, to one who will not submit to control, and render implicit obedience to orders, is itself an act of negligence, the "*causa causans*" of the mischief; while the proximate cause, or the *ipso negligentia* which produces it, may truly be said, in most cases, to be the disobedience of orders by the servant so intrusted. If such disobedience could be set up by a railroad company as a defense, when charged with negligence, the remedy of the injured party in most cases would be illusive, discipline would be

relaxed, and the danger to the life and limb of the traveler greatly enhanced. Any relaxation of the stringent policy and principles of the law affecting such cases, would be highly detrimental to the public safety.

The judgment of the Circuit Court is therefore affirmed.

*Mr. Justice Daniel dissents from **[*488]** the decision of this court in this cause, upon the ground that the said Railroad Company being a corporation, created by the State of Pennsylvania, is not capable of pleading or being impleaded, under the 2d section of the 3d article of the Constitution, in any of the courts of the United States; and that therefore the Circuit Court could not take cognizance of the controversy between that corporation and the plaintiff in that court.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Pennsylvania, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs and interest until the same is paid, at the same rate per annum that similar judgments bear in the courts of the State of Pennsylvania.

Cited—16 How., 474; 18 How., 486; 21 How., 211; 17 Wall., 374, 383; 3 Otto, 293, 296; 10 Otto, 308; 11 Otto, 462; 12 Otto, 455; 2 Ben., 552; 4 Ben., 355; 9 Ben., 354; Chase, Dec., 153; 3 Sawy., 438, 445; 3 Cliff., 424, 425.

HENRY WEBSTER, Plaintiff in Error,

v.

PETER COOPER.

Devise to trustees and their heirs, contingent remainders over, construed—devise for life—rule in Shelly's case—stranger cannot take advantage of condition subsequent, broken—Maine Law cannot bar a legal title valid at time of its passage.

A will, executed in 1771, which devised certain lands in Maine to trustees and their heirs to the use of Richard (the son of the testator) for life, remainder, for his life in case of forfeiture, to the trustees to preserve contingent remainders; remainder to the sons of Richard, if any, as tenants in common in tail, with cross remainders; remainder to Richard's daughter Elizabeth, for life; remainder to trustees to preserve contingent remainders during her life; remainder to the sons of Elizabeth in tail—did not vest the legal estate in

NOTE.—Conditions precedent and subsequent in wills and deeds. See note to Taylor v. Mason, 9 Wheat., 325.

Adverse possession, what is necessary to constitute; requisites of. See note to Kioard v. Williams, 7 Wheat., 59.

Jurisdiction of U. S. Supreme Court. It is for State courts to construe their own statutes. Supreme Court will not review their decisions except when specially authorized by statute. See note to Commercial Bk v. Buckingham, 5 How., 317.

State laws and decisions govern U. S. courts as to rule of property and as to title and transfer of real estate by grant or devise. See note to Clark v. Graham, 6 Wheat., 577; note to Elmdorf v. Taylor, 10 Wheat., 152, and note to Jackson v. Chew, 12 Wheat., 153.

fee simple in the trustees. The life estate of Richard, and the contingent remainders limited thereon, were legal estates.

No duties were imposed on the trustees which could prevent the legal estate in these lands from vesting in the *cestuis que use*; and although such duties might have been required of them relating to other lands in the devise, yet this circumstance would not control the construction of the devise as to these lands.

The devise to Elizabeth for life, remainder to her sons as tenants in common, share and share alike, and to the heirs of their bodies, did not give an estate tail to Elizabeth, under the rule in *Shelly's case*. But upon her death, her son (the party to the suit) took as a purchaser, an estate tail in one moiety of the land, as a tenant in common with his brother.

One of the conditions of the devise was, that this party, as soon as he should come into possession of the lands, should take the name of the testator. But as he had not yet come into possession, and it was a condition subsequent, of which only the person to whom the lands were devised over, could take advantage, a non-compliance with it was no defense, in an action brought to recover possession of the land.

The son, taking an estate tail at the death of Elizabeth, in 1845, could maintain a writ of entry, and until that time had no right of possession. Consequently, the adverse possession of the occupant only began then.

In 1848 the Legislature of Maine passed an Act declaring that no real or mixed action should be commenced or maintained against any person in 489* possession of lands, *where such person had been in actual possession for more than forty years, claiming to hold the same in his own right, and which possession should have been adverse, open, peaceable, notorious and exclusive. This Act was passed two years after the suit was commenced.

The effect of this Act was to make the estate of the occupant during the lifetime of Elizabeth, adverse against her son, when he had no right of possession.

This Act, which thus purported to take away property from one man and vest it in another, was contrary to the Constitution of the State of Maine, as expounded by the highest courts of law in that State. And as this court looks to the decisions of the courts of a state to explain its statutes, there is no reason why it should not also look to them to expound its constitution.

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of Maine.

The facts are set forth in the opinion of the court.

Upon the trial in the Circuit Court, the demandant's (Webster's) counsel, prayed the court to instruct the jury as follows:

1. That the Act of the Legislature of Maine, of the year 1848, ch. 87, is not applicable to any case in which the title of the demandant had accrued before the passage of said Act.

2. That said Act is not applicable to the present action, the same having been commenced before the passage of said Act.

3. That said Act is void, because it is in violation of the Constitution of the State of Maine (art. 1, sec. 21), and because it is retrospective in its operation upon vested rights of the demandant.

4. That said Act is void, because it is in violation of the Constitution of the United States, as being a law impairing the obligation of contracts.

5. That by the true and legal construction of the will of Florentius Vassall, said Elizabeth Vassall took only an estate for life in the demanded premises.

6. That by the true and legal construction of the will of Florentius Vassall, the demandant took a remainder in tail male, as tenant in common with said Henry Edward Fox, in the de-

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manded premises expectant on the life estate of said Elizabeth Vassall.

7. That the demandant is not barred from recovering one undivided half of the demanded premises by the Statutes of Limitation of the States of Maine or Massachusetts, or any of them.

8. That if the demandant shows a right to recover one undivided half of the demanded premises, he may recover the same under the writ in this case, although he therein demands the whole of said demanded premises.

9. That it is not necessary, for the purpose of enabling the demandant to recover in this action, that he should have taken the name of Vassall.

F. DEXTER and E. H. DAVIS,

Counsel for Henry Webster.

*But the honorable Judges, who pre- [*490 sided at the said trial, declined to give to the jury any of the said instructions so prayed for by the demandant's counsel; but, on the contrary thereof, did instruct the jury, that by the true and lawful construction of the said will of Florentius Vassall, no legal estate in the demanded premises, or any part thereof, was ever vested in the demandant, but that, if the legal estate in the demanded premises was, and by force and effect of the said will, vested in any person or persons, it was thereby vested and continued to be in the trustees named in said will, viz.: Lord Viscount Falmouth, Lord Viscount Barrington, and Charles Spooner, Esq., the survivors and survivor of them, and the heirs of such survivor; and that, therefore, the demandant could not maintain the present action to recover the same, and that it was therefore unnecessary to instruct the jury upon the other points mentioned in the demandant's prayer for instructions; whereas the said counsel for the demandant respectfully insist that the said Judges ought not so to have instructed the jury, but ought to have instructed them upon the matters and in the manner prayed for by the said counsel as aforesaid; and they did therefore except in law to the said instruction and said refusal of the said Judges; and inasmuch as the several matters aforesaid do not appear by the record of said verdict, the said counsel have made and tendered to the said Judges this, their bill of exceptions, and pray that the same may be allowed.

All which being considered, and found conformable to the truth of the case, the presiding Judge has allowed this bill of exceptions, and hath thereto put his seal, this 28th day of April, in the year one thousand eight hundred and fifty-one.

[SEAL.]

LEVI WOODBURY,

Ass. Jus. Sup. Court.

The case was argued in this court by *Mr. Davis*, with whom was *Mr. Dexter*, for the plaintiff in error, and by *Mr. Allen* for the defendant in error.

The counsel for the plaintiff in error made the following points:

1. A devise to A, and his heirs, to the use of, or in trust for B, vests the legal estate immediately in B. (2 Jarm. on Wills, 196, 198, 199; Hill on Trustees, part 2, ch. 1, p. 229; 1 Greenl. Cruise, 846, 847, note; *Webster v. Gilman*, 1 Story, 499, 515.)

2. Where duties are imposed on the trustees

which make it necessary that they should take the legal estate, the extent and duration of that estate are limited to exactly that quantity of interest which the purposes of the trust require. (2 Jarm., 218; *Hill on Trustees, part 2, ch. 2; 1 Greenl. Cruise, 848, note; Doe v. Ironmonger, 3 East, 533; Robinson v. Grey, 9 East, 1; Curtis v. Price, 12 Ves., 89; Doe v. Hicks, 7 T. R., 433; Doe v. Barthorp, 5 Taunt., 382, 385; Doe v. Simpson, 5 East, 163; 1 Hill. Real Prop., ch. 22, sec. 21, and secs. 27 to 31.)

3. There are no duties imposed on the trustees by the will in this case, in relation to the demanded premises, nor is there any other expression of the intention of the testator to give them the legal estate.

4. The only duties imposed are, by the terms of the will, expressly confined to other lands, viz.: to the Friendship and Greenwich plantations. And the purposes of those duties have been fully performed and discharged. Whether the trustees took a legal estate in those plantations at any time, may depend on the local law in Jamaica. Under our laws they would take but a chattel interest, as they were only to apply the rents and profits. (Hill on Trustees, 240, 241, and cases cited to the second point.)

5. The successive remainders limited to the use of the same trustees, to preserve contingent remainders in case of forfeiture, show that it was not the intention of the testator that the legal estate should vest in them originally. (Curtis v. Price, 12 Ves., 100; Doe v. Hicks, 7 T. R., 433, 437; Fearn, Cont. Rem., 177, 178; Hill on Trustees, 240, 241.)

6. The Act of Maine, 1848, ch. 87, is void as impairing the obligation of contracts. (Fletcher v. Peck, 6 Cranch, 87, 137; 3 Story on Const., sec. 1385.)

7. It is void, as it takes away vested rights. (Wilkinson v. Leland, 2 Pet. S. C., 657, 658, Story, J.; Society, &c., v. Wheeler, 2 Gall., 105, 141; Ham v. McClave, 1 Bay, 93; Bowman v. Middleton, 1 Bay, 252; Dash v. Van Kleeck, 7 Johns., 502, Kent, Ch. J.; Call v. Hagger, 8 Mass., 423; 1 Kent, 455.)

Taking away all remedy, is taking away the right. (Bronson v. Kinzie, 1 How., 317, 318; Bruce v. Schuyler, 4 Gilman, 221, 277; Story on Const., sec. 1379; Sturges v. Crowninshield, 4 Wheat., 207; Gilmer v. Shooter, 2 Mod., 310.)

8. It is void as against the Constitution of Maine. (Proprietors, &c., v. Laborer, 2 Greenl., 275, 294; Oriental Bank v. Freeze, 18 Me., 109, 112; Austin v. Stevens, 11 Shepley, 520; Constitution of Maine, art. 1, secs. 1, 19, 21.)

9. The will in this case gave a life estate only in the demanded premises to Elizabeth Vassall, with remainder to her sons as tenants in common. (Willis v. Hiscox, 4 Myl. & Cr., 197; Right v. Creber, 5 Barn. & Cress., 860; Doe v. Laming, 2 Burrow, 1100; Backhouse v. Wells, 1 Eq. Abr., 184; White v. Collins, 1 Com., 239; Sisson v. Seabury, 1 Sumn., 235; Dingley v. Dingley, 5 Mass., 535; Webster v. Gilman, 1 Story, 499, 514; 2 Jarm., 235, 315; Fearn, Cont. Rem., 150.)

[492] *10. "Sons" and "children" are words of purchase, and not of limitation. (2 Jarm., 343, 344, 352 to 356; 1 Rolle's Abr., 837, pl. 13; Buffar v. Bradford, 2 Atk., 220; Lowe v. Davis, 2 Ld. Raym., 1561; Goodtitle v.

Herring, 1 East, 264; Walker v. Snow, Palm., 359; Archer's case, 1 Coke, 66; Lisle v. Gray, 3 Lev., 223; Dingley v. Dingley, 5 Mass., 535; 1 Fearn, Cont. R., 150, 151, &c.; 2 Jarm., 301, 302, &c.; Doe v. Simpson, 5 Scott, 770; Doe v. Webber, 1 B. & Ald., 713; Sisson v. Seabury, 1 Sumn., 235.)

The word "sons" has been held to control the words "heirs of the body," to make them words of purchase. (Lowe v. Davis, 2 Ld. Raym., 1561; Lisle v. Gray, 3 Lev., 223; Goodtitle v. Herring, 1 East, 264; cited 2 Jarm., 301, 302; and also, "issue male;" Mandeville v. Lackey, 3 Ridgw. P. C., 352.)

The word "son" in the singular, can create an estate tail only when used as *nomen collectivum*, and where it is the manifest intention of the testator to give such an estate. (Mellish v. Mellish, 2 B. & C., 520; cited 2 Jarm., 320.)

11. The devise to the sons of Elizabeth Vassall as tenants in common, shows that it was not the testator's intention to give her an estate tail. These words control even the words "issue of the body," so that they take as purchasers. (Doe v. Burneall, 6 D. & E., 30; Burneall v. Dargy, 1 Bos. & P., 215; Doe v. Collins, 4 D. & E., 294.)

12. The plaintiff's right of entry accrued at the death of Elizabeth, in 1845, and is not barred by adverse possession. (Wells v. Prince, 9 Mass., 508; Wallingford v. Heart, 15 Mass., 471; Angell on Lim., 42; 2 Sugd. Vend., 216, 323, 324.)

13. The condition of taking the name of Vassall, is subsequent, and no one but the devisee over can take advantage of it. (Gulliver v. Ashby, 4 Burrows, 1929; Taylor v. Mason, 9 Wheat., 325, 349; Finlay v. King's Lessee, 3 Pet., 347, 374; 1 Jarm., 805.)

14. The plaintiff can recover a moiety in this action. (6 Dane's Abr., 61; Dewey v. Brown, 2 Pick., 387; Somes v. Skinner, 3 Id., 53; Holyoke v. Haskins, 9 Id., 259; Rev. Stat. Maine, p. 610, secs. 12, 13.)

Mr. Allen, for the defendant in error, made the following points:

1. That there is no error in the District Court in declining to give the instructions requested by said plaintiffs in error, as contained in the assignment of errors, from No. 1 to No. 9, both inclusive. Because, if there is no error in the tenth assignment, but the instruction therein given, was correct, plaintiff in error was not prejudiced by the withholding the instructions in the *preceding nine requests. [*493 (Greenleaf v. Birth, 5 Pet., 132; Binney v. Ches. & Ohio Canal Co., 8 Pet., 214; U. S. Bank v. Planters' Bank, Gill & Johns., 439; Watts & Serg., 391.)

2. But if the instructions in first four assignments of errors had been material and injurious to plaintiff in error, they were correct and not erroneous; that the Act of the Legislature of Maine of the year 1848, ch. 87, is valid and not liable to any legal objection, and is not in violation of the Constitution of Maine, art. 1, sec. 21, or of the Constitution of the United States. (Phalen v. Virginia, 8 How. U. S., 163.) "Such Acts (Lim.) giving peace and quiet, may be said to effect or complete divestiture or transfer of rights, yet as reasons have led to their validity, cannot be questioned." (Id., 8 P., 585, Mills v. St. Clair County.) "Such

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laws do not impair the obligation of contracts within the sense of the Const. U. S." (*Townsend v. Jemison*, 9 How. U. S., 407, 419, 420; and cases cited 10 How. U. S., 395, 401, 402, *Bal. & Susquehanna R. R. v. Nesbit*).

"No real or mixed action for the recovery of any lands in this State, shall be commenced or maintained against any person in possession of such lands, where such person or those under whom he claims, have been in actual possession for more than forty years, and claiming to hold the same in his, her, or their own right, and which possession shall have been adverse, open, peaceable, notorious, and exclusive. To take effect in one day after approval." (Act of Maine, Aug. 11, 1848.)

3. The said Act may apply to actions then pending. (*Thayer v. Seavey*, 11 Maine, 284; *Bacon v. Callender*, 6 Mass., 309; 2 Gall., 315, 319.) Stat. Lim. Rhode Island, no objection that it went into immediate operation. (Story, J.)

4. There was no error in the Circuit Court in refusing to give the instructions in the 5th and 6th assignment. They were properly declined; and cannot be assigned for error if the instruction in the 10th assignment, was properly given.

5. There is no error in withholding the instructions requested in the 7th and 8th assignment. They were rightly withheld; and plaintiff was not injured thereby. The same may be said of the 9th instruction, contained in 9th assignment of errors.

6. No error in the Circuit Court in giving the instruction in the 10th assignment of errors.

1st. The fee simple and whole legal estate in the premises was by the will of F. Vassal devised to Lord Falmouth and others and their heirs, as trustees; this action cannot be maintained, not being in their names or that of their heirs. (Sanders, Uses & Trusts, 190, 191, 197, 202, 203, 204; 3 Jar. on Wills, 198, 199, 202; *Leicester v. Biggs*, 2 Taunt., 109; *Biscoe v. Perkins*, 1 Ves. & Bea., 485; *White v. Parker*, 1 494*) Scott, 542; *Harton v. *Harton*, 7 D. & E., 652; *Gregory v. Henderson*, 4 Taunt., 772; *Curham v. Newland*, 2 Moo. & Scott, 113; *Tompkins v. Willon*, 2 Barn. & Ald., 84; *Brewster v. Striker*, 2 Comstock, 19, and note, 581, 582.)

2d. The purposes for which the legal estate was originally devised to the trustees, still continue to exist, viz.: to preserve the remainders; viz.: to "same trustees" for George Barrington in tail and his issue male and his issue female. In same manner to Richard Barrington and issue—same manner to William Barrington and issue; then to testator's granddaughter, Louisa Barrington, and her fourth son and daughters, then to Rose Hening May and her issue; the words "same trustees" prior to each devise in remainder. On failure of all these, to the use of the ministers and wardens of Westmoreland. (2 Jar. on Wills, 200, 202, 228.) It was the intention of the testator that the legal estate should remain in the trustees until all the remainders should be executed. It is so expressed in the will.

3d. It is agreed that the persons named in said will, or devise in remainder, after the failure of issue of Elizabeth Vassal, or their lineal descendants, are now living.

4th. Trustees must hold the legal estate, as HOWARD 14. U. S., Book 14.

long as any of the remainders are outstanding; repetition of devise to same trustees to preserve six now unexecuted remainders (Jar., 222.)

5th. Necessary that the trustees should hold the legal estate for other purposes, viz.: out of the rents and profits &c., they were to purchase negroes, cattle and stock, and other utensils.

They were to appoint agents, attorneys, and managers. (2 Barn. & Ald., 84; *Id.*, 554; 2 Jar., 223-225; 6 Barn. & Cress., 420; *Morton v. Barrett*, 22 Maine, 257.) Testator recommends that trustees should appoint his son Richard manager, at their discretion. They are to approve marriage jointures—assumes that money will pass through their hands—they may deduct and retain; discretion as to time of paying £10,000—gives L. Falmouth 100 guineas for a ring; the other £50 cash for same purpose. (Record, 29.)

6th. The imbecility of testator's son Richard and the infancy of his granddaughter Elizabeth is a sufficient reason why he should devise the legal estate to trustees; still less, could he anticipate, with any certainty, the existence of unborn sons of his granddaughter. All the estates were over 3,000 miles distant. Not named in the will in what State in New England his lands were situate. Trustees most competent to look them up. The *cestuis que trust* most incompetent.

7th. Another object of testator in giving the legal estate to trustees, would be to prevent *cestuis que trust* from docking the entailment and defeating subsequent remainders by common *recovery, without the legal estate, they could make no legal tenant to the precipe.

8th. It is competent for defendant to urge and maintain this objection. And to show the legal title in others, and thereby disprove plaintiff's seisin. (*Cutler v. Lincoln*, 3 Cush., 125.)

Tenant may give in evidence, title of a third person, without claiming under said third person for the purpose of disproving plaintiff's seisin in a writ of entry. (Jack. on Real Actions, 157; Stearns on Real Actions, 365, 380-389; *Hall v. Stevens*, 9 Met., 418.)

9th. In this case, defendant has no need of invoking that principle; for plaintiff himself introduces the will, by which it is seen that the legal title is in other persons than the plaintiff.

10th. The acquiescence of Lady Holland, the mother of plaintiff, in the open, exclusive, and adverse possession of defendant, and those under whom he claims from the time of her divorce from her first husband, till her decease (a period of about fifty years), tends to prove that neither she nor her second husband ever claimed the legal estate to be in her.

No error in first four assignments. (See brief, 2d point.)

1. If the court should decide that there is error in the tenth assignment, and that the legal estate is not in the trustees, it is then contended that there is no error in withholding the instructions from the 5th and 9th requests; for if the legal estate was in the *cestuis que trust*, Elizabeth, mother of plaintiff, took an estate tail, and not for life only, and she is barred by the Statute of Limitations of Massachusetts and

Maine, and so is the plaintiff. (*Shelly's case*, 1 Coke, 93; 2 Jar., 241-249; Doug., 321, 324; *Soule v. Soule*, 5 Mass., 61; 19 Ves., 175; *Malcom v. Malcom*, 3 Cush., 472.)

2. Plaintiff takes, by limitation under the will, an estate tail. (Co. R., lib. 6, fol. 17. *Wyld's case*; *Robinson v. Robinson*, 1 Burr., 38; 2 Jar., 271, 272, 287; *Chandler v. Smith*, 7 D. & E., 532; *Pearson v. Vickers*, 5 East, 548; *Jesson v. Wright*, 2 Bligh., 258; *Coulson v. Coulson*, 2 Strange, 1125; *Brook v. Astley*, 3 Burr., 1570; 4 Barn. & Cress., 610; 1 Barn. & Ald., 944; *Parkman v. Bovedoin*, 1 Sumn., 359; *Fearne on Remain.*, 118, 124; 4 Kent's Com., 214-232.)

3. Sons, at time of will unborn, words of limitation. (*Wharton v. Graham*, 2 W. Black., 1083; 1 Vent., 281, cited by Hale, Ch. J., in *King v. Snelling*; *Byfield's case*, 1 East, 229; *Doe, dem Cook v. Cooper*, 2 Barn. & Cress., 524; 2 Barn. & Adol., 87; 4 Id., 43; 5 Id., 421; 2 Jar., 394 to 470; 4 Barn. & Cress., 610; 1 Moore, 682, pl. 939; *Sondy's case*, 9 Co. R., 127; *Inman v. Barnes*, 2 Gall., 315; 15 Ves., 546.)

Rule in *Shelly's case* in force in Massachusetts [496*] sets till March 8th, *1792, 14 years after probate of this will. (*Davis v. Hayden*, 9 Mass., 514; 4 Pick., 206; 15 Pick., 104; 7 Met., 172; Id., 425; *Jones v. Morgan*, 1 Brown, C. C., 206, Lord Thurlow.) Plaintiff sues as tenant in tail. (*Shoemaker v. Sheely*, 2 Den., 485.)

Mr. Justice Curtis delivered the opinion of the court:

Henry Webster, an alien, and subject of Great Britain, brought his writ of entry in the Circuit Court of the United States for the District of Maine, to recover possession of a parcel of land described in the count. He claims title under a will of Florentius Vassall. At the trial, the parties agreed on the following facts:

"It is agreed, by the parties, that the following statement of facts is true, namely: that the demanded premises belonged to the proprietors of the Kennebec Purchase, and were by them duly granted and assigned to Florentius Vassall, one of the proprietors in fee, in the year 1756, being included in the grant recorded in the records of the proprietary:

"That Florentius Vassall made his will September 20th, 1777, and died at London, 1778. seised of the lands in question, they then being unoccupied wild lands. The will was afterwards duly proved in the Prerogative Court of Canterbury, September 14, 1778. a copy of which will, with its exemplifications, has been duly filed and recorded in the Probate Office for the County of Kennebec; which will was offered in evidence, as copied, and makes a part of this case. (C.)

"Richard Vassall, named in the will, died about 1795, leaving only one child, Elizabeth Vassall, who married Sir Godfrey Webster, deceased, about the first day of January, 1793, by whom she had issue, two sons, namely: Sir Godfrey Vassall Webster, who died in the lifetime of said Elizabeth, without issue, and Henry Webster, the demandant. Said Elizabeth, afterwards, namely: in January, 1796, was legally divorced from her husband, the said Sir God-

frey Webster, and on the first day of July, 1797, she was legally joined in marriage with Richard Henry Fox, afterwards Lord Holland, by whom she had issue, one son, Henry Edward Fox, who is now living. All charges upon the land devised have been satisfied, and they are not now subject to any life estate, estate for years, or outstanding terms, under the will. Said Lord Holland died on the ———, 1841; said Lady Holland died in the fall of the year 1845. The persons named in said will as devisees in remainder, after the failure of the issue of said Elizabeth, or their lineal descendants, are now living in England, as is the said Henry Edward Fox, son of said Elizabeth. That said Florentius Vassall was, at the time of said grant, a resident in Boston, State of Massachusetts; *that he, on or before the year [*497 1775, left his said residence, went to England, and never returned; and that neither he nor any of the devisees named in said will have ever resided within the limits of the United States since that time. The premises demanded, being the matter in dispute, are of greater value than \$2,000.

"The tenant, and those from whom he legally derives title to said demanded premises, have been in the quiet, undisturbed, open, notorious, and exclusive possession and occupation of said premises for and during the term of fifty years next preceding the commencement of this action, he and they claiming to hold the same adversely to any claim of said demandant, or any other person, as his and their own property in fee simple."

These facts, together with the will of Florentius Vassall, made the case. By this will the testator devised three plantations in Jamaica, and all his lands in New England (which included the demanded premises) to Lord Falmouth, Lord Barrington, and Mr. Charles Spooner, and their heirs, to the uses, upon the trusts, and for the intents and purposes, and with and subject to the powers and provisos therein expressed. The will then proceeds to declare, in respect to all the lands in New England, as follows: To the use of my son, Richard Vassall, for and during his life, and from and after the determination of that estate by forfeiture, or otherwise, during his life, to the use of the three trustees during the life of Richard Vassall, in trust to preserve the contingent uses and estates thereafter mentioned, and for that purpose to make entries and bring actions as occasion shall require, but nevertheless to permit Richard Vassall to take the rents of the premises to his own use during his life. The testator then declares the remainder, after the death of Richard, to be to the use of the son and sons of Richard, to be equally divided between them, share and share alike, as tenants in common, and not as joint tenants, and to the several and respective heirs male of the bodies of such sons, with cross remainders among them; and in default of such issue male of Richard, subject to a term of years, which it is agreed is not outstanding, to the use of Elizabeth Vassall, the daughter of Richard, for her life, with remainder as before stated to the trustees for the life of Elizabeth to preserve contingent remainders, in case of forfeiture of her life estate; and then follows the provision under which the demandant claims title, which

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is therefore given in the words of the will. "And from and immediately after the decease of the said Elizabeth Vassall, to the one or all and every the son and sons of the said Elizabeth Vassall, to be begotten, to be divided between or amongst such sons, if more than one, share 498*] and share alike, and they to take *as tenants in common, and not as joint tenants, and the several and respective heirs male of the body and bodies of all and every such son and sons issuing." Then follow remainders to the other daughters of Richard, as tenants in common in tail general, with cross remainders; remainder to the daughters of Elizabeth Vassall, as tenants in common in tail general, with cross remainders—with successive remainders to George and Richard, and William Barrington, testator's grandsons, for life; remainder to their sons, as tenants in common in tail male; remainder to testator's granddaughter, Louisa Barrington, for life, and her sons in common in tail male; remainder to her daughters, as tenants in common in tail general; remainder to testator's daughter, Elizabeth Barrington, for life; remainder to her other sons "in tail male successively;" remainder to her future daughters, as tenants in common in tail; remainder to testator's nephew May, for life; remainder to his sons in common in tail male; remainder to his daughters in common in tail; remainder to the minister and wardens of Westmoreland, &c.

These are the most material provisions of the will of these lands, and are sufficient to show its general structure, in reference to the questions which have been made concerning its legal effect.

The first of these questions is, whether, by force of the will, the demandant took any, and if any, what legal estate in these lands on the decease of his mother, Elizabeth Vassall.

It is insisted, by the tenant's counsel, that the trustees took the legal estate in fee simple, and that the estates limited to Richard Vassall for life, and to the others, by way of remainder, were only equitable estates, and consequently the demandant cannot maintain this action.

But whether we look to the evident intent of the testator, or to the settled technical meaning of the language he has employed, we think it clearly appears that the life estate of Richard Vassall and the contingent remainders limited thereon were legal estates, and that the trustees did not hold the fee simple under this will. The instrument was drawn in England, evidently by a skillful draughtsman, and is in strict conformity with well-known precedents. It employs technical language with accuracy, and all the various provisions of the will, though numerous and complicated, compared with the usually simple testamentary dispositions of property in this country, are capable of being clearly understood and fully executed. The substance of the devise of these lands, may be stated to be: to the trustees and their heirs to the use of Richard for life, remainder, for his life in case of forfeiture, to the trustees to preserve contingent remainders; remainder to the sons of Richard, if any, as tenants in common 499*] in tail, with cross remainders; remainder to Richard's daughter Elizabeth for life; remainder to trustees to preserve contingent remainders during her life; remainder to the

sons of Elizabeth in tail, the demandant being the elder of her two sons.

A devise to the trustees and their heirs to the uses mentioned, carries the legal estate to the *cestuis que use*, unless the will has imposed on the trustees some duty, the performance of which requires the legal estate to be vested in them. And in that case they would take an estate exactly commensurate with the exigencies of their trust. (*Morant v. Gough*, 7 B. & C., 206; *Kenrick v. Lord Beauclerk*, 3 B. & P., 178; 10 Bythewood on Con., 214; Jarm. on Wills, 198, 199; *Nielson v. Lagow*, 12 How., 110, 111; 1 Greenl. Cruise, 346, 347, note.)

The testator has not imposed on the trustees any duties, connected with these lands, which in any way interfere with the existence of legal estates in the different beneficiaries named in the will. On the contrary, the sole duties to be performed by them, in reference to these lands, are to take the life estates, in case of forfeiture, and hold them, so that the future remainder men may not be deprived of the legal estates limited to them by way of contingent remainders, which require the preservation of the particular estates to support them.

Whether the trustees took and held any legal estate in either of the plantations in Jamaica, it is not necessary to determine. It was argued that they did, because they have some duties to perform concerning two of them, and that the testator employs the same language in devising these two plantations to the trustees, as he does in devising the lands in New England. But it by no means follows that the same words devising to trustees two parcels of land, must necessarily vest the legal estates in both parcels in the trustees, because they take a legal estate in one of those parcels. They may take a legal estate in one, because subsequent parts of the will require them to do acts in reference to it, which can be done only by the holder of the legal estate, and then the law assigns to them such an estate as the due execution of their trust demands; while at the same time, by force of the statutes of uses, or of wills, the other land, as to which no duties are required of the trustees, goes to the *cestuis que use*.

So far as this will operates on the lands in New England, there is nothing to prevent the usual and settled operation of a devise to uses, which is, to vest the legal estate in the *cestuis que use*; and it is placed beyond all doubt that it was not intended the trustees should hold the fee, because there are express limitations of life estates to them to preserve contingent remainders, which would be wholly inoperative if they took the fee, and is sufficient of itself to control any doubtful intent, according to *Doe v. Hicks*, 7 T. R., 433; *Curtis v. Price*, 12 Ves., 100.

Our conclusion is that the legal estates in the New England lands, were to go to the beneficiaries named in the will.

It is further urged by the tenant's counsel, that the legal effect of the devise to Elizabeth Vassall for life, remainder to her sons, as tenants in common, share and share alike, and to the heirs of their bodies, gave an estate tail to Elizabeth Vassall, under the rule in *Shelly's* case, which was in force in Massachusetts, within whose limits these lands lay at the time this will took effect. There is no doubt this

rule made part of the law of Massachusetts until the 8th of March, 1792, when it was abolished by statute, so far as it respects wills. (*Bowers v. Porter*, 4 Pick., 198; *Steel v. Cook*, 1 Met., 282.) But in our opinion, the rule in *Shelly's* case is not applicable to this devise. That rule is, that when the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited, either immediately or mediately, to his heirs in fee or in tail, that the words heirs, &c., are words of limitation, and not of purchase.

Here the life estate is limited to Elizabeth Vassall, and the remainder to her sons as tenants in common, share and share alike, and the heirs of their bodies. The fee tail is not limited to the heirs in tail of the first taker. The heir in tail was this demandant; and the remainder is not limited to him, but to him and his brother, as tenants in common. It is not a question, therefore, whether the same persons shall take by descent or purchase, which alone is the matter determined by the rule in *Shelly's* case; for the two sons could not take an estate tail from their mother as tenants in common. They must take as purchasers, or not take at all; and there is no rule of law which forbids such a devise, nor can the rule in *Shelly's* case be applied to it. On the contrary, it is well settled that a limitation by way of remainder to the sons of the first taker, as tenants in common, manifests the intent of the testator that the ancestor should not take an estate in fee or in tail, and that the sons may and do take as purchasers. (*Doe v. Burnhall*, 6 T. R., 30; *Burnhall v. Davy*, 1 B. & P., 215; *Gilman v. Elry*, 4 East, 813; *Doe v. Collins*, 4 T. R., 294; 4 Greenl. Cruise, 389.)

Our opinion is, that upon the decease of his mother, this demandant took, as a purchaser, an estate tail in one moiety of these lands, as a tenant in common with his brother.

It was objected that the devise to him was upon the condition that as soon as he should come into the actual possession of the lands devised, he should take and use the surname 501* of Vassall; *but it is enough to say that he does not appear to have yet come into such actual possession, and that if this condition subsequent were broken, only the person to whom the lands are devised over can by an entry take advantage of it. (*Taylor v. Mason*, 9 Wheat., 325; *Finley v. King*, 3 Pet., 347.)

Under the Revised Statutes of Maine, ch., 145, sec. 13, the demandant may recover according to his title, provided he has a right of entry; and this raises the only remaining question, whether he has such a right, or whether it is barred by an Act of the Legislature of Maine, passed on the eleventh day of August, 1848, which is as follows:

An Act, in addition to the one hundred and forty-seventh chapter of the Revised Statutes.

Sec. 1. No real or mixed action for the recovery of any lands in this State shall be commenced or maintained against any person in possession of such lands, where such person, or those under whom he claims, have been in actual possession for more than forty years, and claiming to hold the same in his or their own right, and which possession shall have been adverse, open, peaceable, notorious, and exclusive.

* 16

Sec. 2. This Act shall take effect at the end of one day, from and after its approval by the governor

This action was commenced on the fourteenth of April, 1846, and, consequently, had been pending upwards of two years, when the above Act was passed. The inquiry is, what is its effect upon this action, and the title of the demandant. That it was intended to be retrospective, and to bar a recovery in actions then pending, upon proof of such seisin by the tenant as the Act describes, is plainly indicated. Under the constitution of the State of Maine, can it so operate? To determine this question, it is necessary to take into view the legal rights of the demandant and tenant, when this Act was passed, and the change in those rights attempted by the Act.

The demandant, on the decease of his mother, in 1845, became constructively seised of an estate tail, and had a right of entry into these lands. The actual seisin of the tenant and those under whom he claims, though adverse to all persons having estates in possession under the will of Florentius Vassall, for a period of time sufficient to bar their right of entry, did not become adverse as against the demandant, until he acquired an estate in possession, by the decease of his mother; and, consequently, when he brought this action, he was lawfully entitled to one moiety of the land, as tenant in tail, having an estate of inheritance which he could convey by deed, and upon which, being disseised, he could maintain a writ of entry. In other words, *the land was his prop. [*502 erty, and, as such, he had a right to recover and hold it. (Rev. Stat., ch. 147, sec. 3.)

The effect of the Act is, to make the seisin of the tenant, and of those under whom he claims, adverse as against the demandant, during the time he had no right of possession, and thus to deprive him of his right of entry, and destroy his estate in the land. The actual operation of this law upon the demandant's title, would have been expressed in words, if it had been said in the statute that, whereas, up to that time an actual wrongful seisin had been by law adverse only against those having estates in possession, and so, those coming in by way of remainder, were well entitled to the land, however long that actual wrongful seisin might have been continued; yet, thereafter, those who have come in by way of remainder, shall not be deemed entitled to the land, because such actual seisin shall be taken to be adverse as against them, and they shall not be allowed to maintain an action for the recovery of the land to which they had lawful title when the action was brought. It is only by giving this construction to the law, that it can be made to operate at all, on the demandant's title. It requires a possession for forty years, "adverse, open, peaceable, notorious, and exclusive." Adverse to whom? Exclusive of whom? If adverse to, and exclusive of, the demandant, who came into the title by way of remainder, less than three years before the Act was passed, then, according to the law of the State existing down to the passage of the Act, no actual wrongful seisin could be adverse to him until he had an estate in the land entitling him to its possession. But we cannot suppose this law meant to enact merely, that forty years' ex-

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clusive and actual seisin should bar an action by one having title to the possession during the whole of that period, because, by the Revised Statutes, ch. 147, sec. 1, twenty years was sufficient; and, therefore, we are forced to conclude, that the intention of the Legislature was, to make an actual seisin, for forty years, sufficient to destroy a title which had become vested, by way of remainder, before the Act was passed, and which was a valid title by the then existing law.

Under the Constitution of the State of Maine, as expounded by the highest court of that State, is it in the power of the Legislature to pass a retrospective law, thus operating to destroy an estate in lands?

We think this case not distinguishable from the case of *The Proprietors of the Kennebec Purchase v. Lubree et al.*, 2 Greenl., 275. That was a writ of entry to recover a tract of land. The principal question was, whether an Act of the Legislature concerning disseisin, was valid in its retrospective operation. Prior to the passage of this Act an entry under a deed, 503*] duly registered, which described a tract of land by metes and bounds, and actual possession of a part of that tract, operated, by the law of Maine, as a disseisin of the true owner of the whole tract described in the deed. But an entry, without such a deed, gave seisin, as against the owner, only of so much of the land as was actually occupied; and this occupation was required to be equivalent to what is figuratively described in the common law as *pedis possessio*; that is, open, notorious, and exclusive, such as at once to give notice to all, of the nature and extent of the possession and claim, and show the exercise of the exclusive dominion over the land, and the appropriation of it to the use and benefit of the possessor. This being the state of the law when the action was brought, a law was passed, one section of which was in these words:

"Be it further enacted; that, in any writ or action which has been, or may hereafter be brought, for the recovery of any lands, &c., it shall not be necessary for limiting the demandant and barring his right of recovery, that the premises defended shall have been surrounded by fences, or rendered inaccessible by other obstructions; but it shall be sufficient if the possession, occupancy and improvement thereof, by the defendant or those under whom he claims, shall have been open, notorious and exclusive, comporting with the ordinary managements of similar estates in the possession and occupancy of those who have title there unto, or satisfactorily indicative of such exercise of ownership as is usual in the improvement of a farm by its owner; and no part of the premises demanded and defended shall be excluded from the operation of the aforesaid limitation, because, such part may be woodland or without cultivation."

The Supreme Court of Maine held, that so far as this Act attempted to change the law of disseisin in respect to titles existing when it was passed, the Act was inoperative and void, because in conflict with the Constitution of that State. The opinion of the court, delivered by Mellen, Chief Justice, contains an elaborate and searching analysis of the subject, and it is evident that that learned court considered it

with all the care demanded by a question of so much delicacy and importance, and brought to its adjudication sound principles of constitutional jurisprudence. The principles of this decision have been recognized in subsequent cases (*Oriental Bank v. Freeze*, 18 Maine, 109; *Austin v. Stevens*, 24 Maine, 520; *Preston v. Drew*, 5 Law Reporter, 189), and we are not aware that it has ever been questioned, or denied to be a just exposition of the constitutional law of that State. The result of the decision is, that the constitution of the State has secured to every citizen the right of "acquiring, possessing, and enjoying property;" and *that, by the true intent and meaning [504 of this section, property cannot, by a mere act of the Legislature, be taken from one man and vested in another directly; nor can it, by the retrospective operation of law, be indirectly transferred from one to another, or be subjected to the government of principles in a court of justice, which must necessarily produce that effect.

According to this decision, the Act now in question is inoperative, as respects this action and the demandant's title, on which it is founded. For, unless by a retrospective operation it subjects his title to the government of a new law of disseisin, which, in effect, transfers his property to the tenant, it can have no operation; and whether such an effect can be produced by an Act of the Legislature of Maine, under the constitution of that State, was the precise question adjudicated by the Supreme Court in the case referred to, which adjudication we understand to contain an established principle in the fundamental law of that State.

The thirty-fourth section of the Judiciary Act (1 Statute at Large, 92), as well as the rule of general jurisprudence, as to the operation of the *lex loci* upon titles to land, requires us to determine this case according to the law of the State of Maine. In ascertaining what that law is, this court looks to the decisions of the highest court of that State; and where the question turns upon the construction to be given to the Constitution of the State, and we find a construction made by the highest State Court, very soon after the Constitution was formed, acquiesced in by the people of the State for nearly thirty years, and repeatedly confirmed by subsequent judicial decisions of that court, we cannot hesitate to adopt it, and apply it to this case, to which, in our judgment, it is justly applicable. Such has been the uniform course of this court. *McKeen v. Delaney's Lessee*, 5 Cr., 22; *Polk's Lessee v. Wendall*, 9 Cr., 87; *Gardner v. Collins*, 2 Pet., 58; *Shelly v. Guy*, 11 Wheat., 351; *Green v. Neal*, 6 Pet., 291, are some of the cases in which this course has been followed, and its reasons explained. The question has usually been concerning the construction of a statute of a state. But we think there is no sound distinction between the construction of a law enacted by the Legislature of a state, and the construction of the organic law ordained by the people themselves. The exposition of both belongs to the judicial department of the government of the State, and its decision is final, and binding upon all other departments of that government, and upon the people themselves, until they see fit to change their constitution; and this court re-

ceives such a settled construction as part of the fundamental law of the State.

In conformity with these principles, we are **505*** constrained to hold the law now in question to be inoperative upon the defendant's title, and consequently, that he is not barred by it from maintaining this action.

The judgment of the Circuit Court must be reversed, and a venire de novo awarded.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Maine, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to award a *venire facias de novo*.

Cited—2 Black, 603; 1 Wall., 210; 6 Wall., 471; 16 Wall., 230; 7 Otto, 690; 2 Hughes, 393, 401; 3 Wood & M., 483; 6 Sawy., 196; 1 Curt., 427, 429; 2 Curt., 189; 1 Wood., 498; 2 Woods, 472.

ABRAM SHEPPARD AND JOHN DUNCAN, *Plaintiffs in Error*,

v.

PEYTON S. GRAVES.

Plea to merits admits jurisdiction—defendant must traverse proper averments of citizenship, and the burden is upon him to disprove them.

It is a bad mode of pleading to unite pleas in abatement and pleas to the merits. And if after pleas in abatement, a defense be interposed, going to the merits of the controversy, the grounds alleged in abatement become thereby immaterial and are waived.

When a plea is filed to the jurisdiction of the court, upon the ground that the plaintiff is a resident of the same state with the defendant, it is incumbent on the defendant to prove the allegation.

It is of no consequence whether the date of a promissory note be at the beginning or end of it.

THIS case was brought up by writ of error from the District Court of the United States for the District of Texas.

The facts are all set forth in the opinion of the court.

It was argued by *Messrs. V. E. Howard and Ballinger*, in a printed argument, for the plaintiffs in error, and *Messrs. Davidge and O. F. Johnson* for the defendant in error.

NOTE.—Pleading to merits waives plea in abatement.

A plea in abatement will not be received after a plea in bar. *Palmer v. Everton*, 2 Cow., 417; unless under special circumstances of which the court must judge. *Clapp v. Balch*, 3 Greenl., 216; *Stone v. Proctor*, 2 Chipp., 114; *Engle v. Nelson*, 1 Penn., 442; *Ripley v. Warren*, 2 Pick., 593; *Riddle v. Stevens*, 2 Serg. & R., 537; *Meggs v. Choffier*, *Hardin*, 65; 1 *Burrill's Pract.*, 153; *Gilb. C. P.*, 106; see *Harkness v. Harkness*, 5 Hill, 213.

A plea in abatement with, or after and in addition to, a plea in bar is a nullity, and need not be answered. *Cleveland v. Chandler*, 1 Stew., 489; *Palmer v. Greene*, 1 Johns. Ca., 101; 1 Ashm., 4; 2

The points made by the counsel for the plaintiffs in error, were the following:

1. The court erred in admitting the notes in evidence, because there was a variance between the notes offered and those described in the petitions.

The petitions alleged, that the notes were "executed and delivered at Matagorda," but did not allege that they bore date at Matagorda, as was found to be the fact on their being produced.

*It was the plaintiff's duty to give a [*506 perfect description of his notes, so as to prevent the possibility of the defendants being ever sued upon them again, and if so, that this record should be a bar.

The place at which the notes bore date on their face, was essential to their description. When the objection was made, the plaintiff could have amended, and given an accurate description; but, refusing to do this, it was an error in the court to admit the notes.

Thus, the words "value received," are material in a description of the note; and if omitted, the variance will be fatal. (1 Chitty's Pleadings, 339, note 1, ed. 1833; *Saxon v. Johnson*, 10 Johns., 418.)

2. The court erred in refusing to instruct the jury, "that, upon the issue as to the citizenship of plaintiff, the burden of proof was on the plaintiff to show such citizenship as entitled him to sue;" and in giving the instruction, "that the plaintiff was to be considered a citizen of Louisiana, as alleged in his petition, unless it was pleaded and proved that he was a citizen of Texas."

There was a proper plea to the jurisdiction of the court, presenting the issue as to the citizenship of plaintiff.

It was not necessary that the plea should be verified by affidavit. (Hartley's Digest, art. 690, sec. 31, Practice, Act 1846.)

Besides, there was no demurrer or exception taken to the plea for want of an affidavit; and if one had been necessary, it was waived by the plaintiff taking issue on the fact.

The rule which at first prevailed in the courts of the United States, required the plaintiff, on the general issue, to prove citizenship as alleged. (*Callett & Keith v. Pacific Insurance Company*, Paine's C. C., 594.)

It was afterwards decided, however, that a plea in abatement was necessary to raise the question of citizenship. (*D'Wolf v. Rabaud et al.*, 1 Pet., 476; see 498.)

The courts of the United States are courts of limited jurisdiction; and although a plea to the merits admits the jurisdiction, yet when jurisdiction is denied by a proper plea, it must be shown by the plaintiff. (See 1 Cowen & Hill's

Munf., 207; *Robinson v. Fisher*, 3 Cal., 99; 1 Chitt. Pl., 491; *Palmer v. Dixon*, 5 Dowl. & R., 623.

If defendant, after having pleaded in abatement, voluntarily plead to the action, without a judgment of respondent, &c., it is a waiver of his first plea which is to be considered as if never filed. *Wilson v. Oliver*, 1 Stew., 40; *Burnham v. Webster*, 5 Mass., 286; *Robertson v. Lea*, 1 Stew., 141; *Egerton v. Hart*, 8 Verm., 207.

Matters in abatement are waived by answering in bar. *Brown v. Jones*, 1 Hilt. N. Y., 204; *Goesling v. Broach*, 1 Hilt., 49; *Brown v. Illiers*, 27 Conn., 84; *West Winsted Bank v. Ford*, 27 Conn., 282; *Branch Bank v. Rhew*, 37 Miss. (8 George), 110.

Notes to Phillips' Ev., p. 487, note 376, and authorities referred to; *Maples v. Wightman*, 4 Conn., 376; *Wooster v. Parsons*, Kirby, 27.)

The counsel for the defendant in error contended, that there was no variance between the note alleged in the petition of defendant in error (R. 1 and 2) and that afforded in evidence.

1. The petition alleged the place where the note bore date, in the usual form, even under the English practice, and with greater certainty 507*] "than is required by the law of Texas. But, had there been no such allegation, the omission would have been immaterial. (1 Saund. Pl. and Ev., 260.)

2. That there was no error in the refusal of the court below to grant the first prayer of the plaintiffs in error, which plainly tended to mislead the jury, is manifest, and, indeed, is conceded by the brief filed by their counsel.

3. The court was right in refusing to instruct the jury, "that upon the issue as to the citizenship of plaintiff, the burden of proof was on the plaintiff to show such citizenship as entitles him to sue;" and in giving the instruction, "that the plaintiff was to be considered a citizen of Louisiana, as alleged in his petition, unless it was pleaded and proved that he was a citizen of Texas."

Exception to the capacity of the plaintiff below to sue in the District Court, could only be taken by plea in abatement. (*Conard v. The Atlantic Ins. Co.*, 1 Pet., 386, 450; *D'Wolf v. Rabaud et al.*, Id., 476, 498; *Evans v. Gee*, 11 Pet., 80, 83; *Sims v. Hundley*, 6 How., 1, 5; *Smith v. Kernochen*, 7 How., 198, 216.)

Such being the case, and as the obligation of proving any fact lies upon the party who substantially asserts the affirmative of the issue, the burden of proof was necessarily upon the defendants below.

The plea is strictly affirmative in its character, alleging, in terms and substance, that the plaintiff was not entitled to sue in the District Court, because he "is, and was at the commencement of this suit, a citizen of the State of Texas." Being introductory of new matter, and concluding, as it very properly does, with a verification, the defendants below, who pleaded it, held the affirmative, inseparably connected with which was the *onus probandi*. (1 Saund. Pl. and Ev., 8, 13, 16, 22; *Union Bank of Maryland v. Ridgeley*, 1 Harris & Gill, 415-419; *Smith v. Dovers*, 2 Doug., 428; Jackson on Pleading in Real Actions, 62, 65; *Fowler v. Coster*, 1 Moo. & Malk., 241; S. C., 3 C. & P., 463; *Colstone v. Hiscolls*, 6 C. & P., 666.)

Indeed, the definition of a plea in abatement (in the nature of which is a plea to the jurisdiction, or to the person of the plaintiff), is, that by it the defendant "shows cause why he should not be impleaded, or if impleaded, not in the manner and form he now is." (Bac. Abr., Abatement.)

Whenever the plea is to the jurisdiction, it must state another jurisdiction. (*Id.*)

4. The plea in abatement was a nullity, not having been filed in time. (Act of May 18, 1846, secs. 23, 24, 26, 27; Laws of Texas, 1846, pp. 369, 370.)

Process was regularly served on one of the 508*] defendants below, *May 31, 1850; on the other, October 12, 1850. The court met

on the first Monday of December, 1850. The plea was not filed until January 6, 1851.

Mr. Justice Daniel delivered the opinion of the court:

The defendant in error, in conformity with a mode of practice in the State of Texas, instituted an action at law against the plaintiffs in error upon their promissory note. That note was in the words following:

"On the first day of January, 1850, we jointly and severally promise to pay to Peyton S. Graves, or order, at the counting house of R. & D. G. Mills, in Brazoria County, the sum of \$1,845.94, for value received, with eight per cent. interest thereon, from the first day of January, till paid. ABM. SHEPPARD.

JOHN DUNCAN.

"Matagorda, Sept'r 23d, 1844."

The petition sets forth, that Peyton S. Graves, a citizen and inhabitant of Louisiana, represents, that Abram Sheppard and John Duncan, both citizens and residents of the County of Matagorda, in the State of Texas, are jointly and severally indebted to the petitioner in the sum of \$1,845 94, with interest thereon, at eight per cent. per annum, from the first day of January, 1844, until paid—for that heretofore, to wit: at Matagorda, in the State of Texas, on the 23d day of September, 1844, the said Sheppard, who signs his name Abm. Sheppard, and the said Duncan, executed and delivered to the petitioner, their joint and several promissory note, dated September 23d, 1844, and signed Abm. Sheppard and John Duncan, by which, &c.

Upon the summons issued against each of the defendants, the marshal returns, that he had executed the summons on the 12th of October, 1850, serving each of them with a certified copy of the petition and summons, and with regard to Duncan, the return further states that the original summons was also exhibited to him. The plaintiffs in error appeared to the action, and attempted to interpose several defenses in the nature of pleas in abatement. They first allege jointly, that the court could not take cognizance of the cause, because the plaintiff below was not, at the commencement of the suit, a citizen of Louisiana, but of the State of Texas.

The defendant Sheppard, then pleads separately, that the marshal's return upon the summons was not legal, and should be quashed, because it does not state that the marshal had delivered to the defendant, in person, a copy of the citation, and of the petition accompanying it; and that the return was not *made [509 and signed by the deputy purporting to make and sign the same.

The defendant Duncan also pleads separately in abatement, that the citation calls upon him to answer the complaint against him and Abraham Sheppard, whereas the true name of said Sheppard is Abram, and not Abraham; and he also insists upon the insufficiency of the return to the summons, because, as he alleges, that return does not state that the marshal delivered to him, in person, a copy of the citation, or of the petition accompanying it.

In addition to these pleas in abatement, the defendants below interposed a defense upon the merits in the nature of the general issue, by

which they deny all and singular the matters stated in the petition, and say that they are not indebted to the plaintiff as he has alleged, and in this defense they conclude to the country; whilst in the introduction thereto, they declare that they do not waive their several pleas in abatement, but fully rely upon the same. After this series of heterogeneous defenses, the plaintiff moved the court to strike out the plea to the jurisdiction and all the other pleas in abatement tendered by the defendants, assigning, as the grounds of this motion, that those pleas were not filed within the time required by law.

Upon the trial of the cause, the court seems to have considered the case as standing before it upon all the defenses attempted, but ruled out the several pleas in abatement, though whether for the insufficiency of those pleas in point of law, for the want of proof to sustain them, or for their irregularity in the order of pleading, does not certainly appear from this record. The jury upon the issue joined upon the merits, rendered a verdict for the plaintiff for the sum of \$2,788.89, for which judgment was given with costs.

The incongruities in practice, which mark the progress of this case in the court below, are much to be regretted, as having a tendency to confound the proceedings in courts of justice; proceedings calculated to define and distinguish the rights of parties litigant, and to conduct the courts to a correct adjudication upon those rights; proceedings indeed founded upon, and as it were sanctified by, an experience of their usefulness, and even of their necessity. Thus it has ever been received as a canon of pleading, that matters which appertain solely to the jurisdiction of a court, or to the disabilities of the suitor, should never be blended with questions which enter essentially into the subject matter of the controversy; and that all defenses involving inquiries into that subject matter imply, nay admit, the competency of the parties to institute such inquiries, and the authority of the court to adjudicate upon them. 510*] Hence it is, that *pleas to the jurisdiction or in abatement, are deemed inconsistent with those which appertain to the merits of a cause; they are tried upon different views as to the relations of the parties, and result in different conclusions. A striking illustration of the mischiefs flowing from the departure from the rule just stated, is seen in the practice attempted in the case before us. If it could be imagined that the plea to the jurisdiction and the plea to the merits, could be regularly committed to the jury at the same time, the verdict might involve the following absurdities: should the finding be for the plaintiff, the judgment would, as to the defendant, be upon one issue, that of *respondeas ouster*, and upon the other, that he pay the debt, as to the justice of which he was commanded to answer over. Should the finding be for the defendant, the judgment upon one issue must be that the debt was not due, and upon the other, that the court called upon so to pronounce, had no authority over the case. So that in either aspect there must, under this proceeding, be made and determined one issue, which is incongruous with and immaterial to the other. A practice, thus fraught with confusion and perplexity, and one endangering the rights of suitors,

it is exceedingly desirable should be reformed, and we are aware of no standard of reformation and improvement more safe or more convenient than that which is supplied by the time-tested rules of the common law. And by one of those rules, believed to be without an exception, it is ordained, that objections to the jurisdiction of the court, or to the competency of the parties, are matters pleadable in abatement only, and that if after such matters relied on, a defense be interposed in bar and going to the merits of the controversy, the grounds alleged in abatement become thereby immaterial, and are waived.

With respect to the exception taken to the ruling of the District Court, as to the obligation of the defendant to prove his averment of the plaintiff's residence in the State of Texas, and not of Louisiana, as set forth in the petition, were the decision of this question deemed requisite here, we should say that the true doctrine applicable to the question is this: that although in the courts of the United States it is necessary to set forth the grounds of their cognizance as courts of limited jurisdiction, yet wherever jurisdiction shall be averred in the pleadings, in conformity with the laws creating those courts, it must be taken *prima facie* as existing, and that it is incumbent on him who would impeach that jurisdiction for causes *dehors* the pleading, to allege and prove such causes; that the necessity for the allegation and the burden of sustaining it by proof, both rest upon the party taking the exception. Such, we think, would be the proper rule resulting from the intrinsic character of the exception, *and such we consider the doctrine [*511 enunciated in the cases of *Conard v. The Atlantic Insurance Company*, in 1 Pet., 386, and *D'Wolf v. Rabaud et al.*, *Id.*, 476.)

This doctrine we are unwilling to disturb. The cases just referred to, as well as those of *Sims v. Hundley*, in 6 Howard, and *Smith v. Kernochen*, 7 *Id.*, 198, expressly affirm the common law principle of pleading, hereinbefore mentioned, that the question of the residence or of the right of the parties to sue, as incident to residence, cannot be inquired into under the general issue.

The plea of a misnomer of the defendant Sheppard, by the insertion of two superfluous letters in his Christian name, and the still more captious and unmeaning distinction attempted between serving the defendants with a certified copy of the petition and summons in this suit, and a delivery of that petition and summons to the defendants in person, is disposed of by the same rule which displaces, as irrelevant and immaterial, the exception taken to the jurisdiction.

The question of variance between the note and the description of it in the petition, it is not easy to comprehend, unless, indeed, it is intended by the defendants to insist, that a note should have its date inserted at its beginning only, and cannot be dated at the termination of it: for the note at the bottom bears upon it the date as well as the place of its execution, viz.: Matagorda, September 23, 1844, and the description and the petition accord with both these facts. It is true, the petition contains a recital that Matagorda is within the State of Texas, but by no extreme of cavil can this re-

cital be converted into a misdescription of the note.

Upon the whole case, we think the judgment of the District Court was correct, and we accordingly order it to be affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Texas, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and the same is hereby affirmed, with costs and interest until the same is paid, at the same rate per annum that similar judgments bear in the courts of the State of Texas.

Cited—14 How., 512; 19 How., 519, 567, 590; 20 How., 267; 8 Wall., 423; 1 McCrary, 86; 2 Flippin, 503.

512*) ***ABRAM SHEPPARD AND JOHN DUNCAN, Plaintiffs in Error,**

v.

PEYTON S. GRAVES.

Burden on defendant to disprove averments of citizenship.

In this case, as in the preceding, it is decided, that where the plaintiff averred enough to show the jurisdiction of the court and the defendant pleaded in abatement that the plaintiff was disabled from bringing the suit, on account of residence, it was incumbent upon the defendant to sustain the allegation by proof.

Until that was done, it was not necessary for the plaintiff to offer any evidence upon the subject.

THIS case was brought up by writ of error from the District Court of the United States for the District of Texas.

The parties were the same as those in the preceding case, and the point upon which the decision of the court turned was the same as one of those decided in the preceding case.

It was argued, in conjunction with the other, by the same counsel.

Mr. Justice **Daniel** delivered the opinion of the court:

This is a suit between the parties to the case No. 65, and is in all the features essentially the same with the former case with one exception, which will be pointed out.

In this suit, as in No. 65, the defendants below demurred to the petition, pleaded in abatement to the regularity of the service of process, to the disability of the plaintiff on the score of residence, and then interposed a defense in the nature of the general issue, but tendered no proofs in support of their defenses, either in abatement or in bar. The plaintiff, to sustain the jurisdiction of the court upon the question of residence, and to meet the pleas in

abatement, offered to read the deposition of two witnesses, **Rugely** and **Blair**, residents of the City of New Orleans, in the State of Louisiana, taken *de bene esse* before a commissioner in the City of New Orleans, under the Act of Congress of 1789. The reading of these depositions was objected to by the defendants, because the commissioner did not certify that the witnesses resided at a greater distance than one hundred miles from the place of trial, but stated only that they were residents of the City of New Orleans, within the Eastern District of the State of Louisiana, and beyond the jurisdiction of the District Court of Texas. The court permitted the introduction of oral evidence to prove that the City of New Orleans was at a greater distance than one hundred miles from Galveston, the place of trial; and ruling also that the court itself knew judicially the mail routes and distances thereof, and that New Orleans, the place of taking said depositions, was more than one hundred miles from Galveston, the place of trial, permitted the depositions to be read in evidence.

*Whether the District Court erred [*513 in allowing an omission in the certificate of the Commissioner to be supplied by oral evidence, or could regularly act upon knowledge assumed to be within its judicial cognizance, we do not consider it necessary to examine, in order to dispose of the case before us. It must be recollected that the defendants below attempted no proof whatsoever in support of any of their pleas. The plaintiff having averred enough to show the jurisdiction of the court, and nothing having been adduced to impeach it, that jurisdiction remained as stated, and the plaintiff could lose nothing by adducing either imperfect evidence, or no evidence at all, in support of that which clearly existed, and which he, under the circumstances, could not be called on to sustain. Even then had the case in the District Court stood upon an issue regularly formed upon the pleas in abatement, the evidence of the depositions was wholly unnecessary—the ruling of the court upon that evidence was immaterial and should not impair the strength of the plaintiff's case, which was perfect without it. But the exception to the ruling of the court on this point, must be unavailable upon another view, as given in our consideration of the preceding case. By interposing the plea of the general issue after their several pleas in abatement, the defendants have effectually waived those pleas, and surrendered the positions covered by them.

The judgment of the Circuit Court must in this case also be affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Texas, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and the same is hereby affirmed, with costs, and interest until the same is paid, at the same rate *per annum* that similar judgments bear in the courts of the State of Texas.

SAMUEL MARSH, WILLIAM E. LEE, AND
EDWARD C. DELAVAN, *Plaintiffs in Er-*
ror.

v.

EDWARD BROOKS, AND VIRGINIA C.,
HIS WIFE; CHARLES P. BILLON AND
FRANCIS E., HIS WIFE; WALTER G.
REDDICK AND DABNEY C. REDDICK.

Treaty between U. S. and Sac and Fox Indians
—title by open and notorious possession by set-
tler under Spanish permit, protected.

This court decided, in 8 Howard, 223, that the recitals in a patent for land, referring to titles of anterior date, were not of themselves sufficient to establish the titles thus recited.

514*) *The titles themselves being now produced, it is decided, that a permit, given by the Lieutenant-Governor of Upper Louisiana, in 1799, to a person to form an establishment on the Mississippi, followed by actual possession and improvement, entitle the occupant to 640 acres, including his improvements although the Indian title was not then extinguished.

It was not the practice of the Spanish government to make treaties with the Indian tribes, defining their boundaries; but to prevent settlements upon their lands without special permits. Such permits, however, were usual.

The construction of the Treaty between the United States and the Sac and Fox Indians, must be that the latter assented to an occupancy which was as notorious as their own.

The Act of Congress, approved April 29, 1816 (3 Stat. at Large, 323), confirming certain claims to land, confirmed this one, although the Recorder of Land Titles, in his report, made in 1815, had added these words, "if Indian title extinguished." These words were surplusage.

THIS case was brought up by writ of error from the District Court of the United States for the Southern District of Iowa.

It was before this court at January Term, 1850, and is reported in 8 Howard, 223.

The children and heirs of Thomas F. Reddick (the defendants in error), were the plaintiffs in the court below, having brought their action by writ of right, according to the practice of the courts in Iowa, to recover 640 acres of land upon the right bank of the Mississippi River.

The Acts of Congress and the patent to Reddick are set forth in 8 Howard, to which the reader is referred. But the plaintiffs having offered additional evidence, it may be proper to bring the whole into one view. In the former trial the plaintiffs relied on the recitals in the patent to Reddick to prove the title of Tesson; but this court having decided that those recitals were insufficient, the evidence produced upon the trial of the present suit in the District Court was the following:

Plaintiffs' Evidence.

1. The plaintiffs proved, that Louis Honoré Tesson settled on the land in controversy, in 1798, and on the 30th of March, 1799, obtained from the Spanish government a written permit to settle thereon, which is recited at length in the record.

2. That Tesson had possession, and inhabited, cultivated, and had houses and orchards and fields on said lands, in 1798, 1799, 1800, and until 1805; and that all his right, under the permit and settlement, passed, by mesne conveyances, to said Thomas F. Reddick.

3. That said Reddick duly presented and

proved before the Recorder of Land Titles at St. Louis, his claim, and claim of title from Tesson to said land; and that said Recorder, by his report, dated November 1st, 1815, reported on said claim his opinion, as follows: "Granted 640 acres, if Indian rights extinguished."

*4. The Act of Congress, approved [*515 April 29th, 1816 (3 U. S. Stat. at Large, p. 323, ch. 155), "for the confirmation of certain claims to land in the Western District of the State of Louisiana, and in the Territory of Missouri."

5. That on the 17th of May, 1838, a patent certificate (No. 1157) was delivered by the Recorder of Land Titles at St. Louis to Edward Brooks (one of the original plaintiffs) for the land referred to in the report of November 1st, 1815.

6. A patent of the United States, issued to Thomas F. Reddick, described as assignee of Joseph Robidoux, assignee of Louis Honoré Tesson, for the lands in controversy, dated the 7th February, 1839.

7. They also proved, that they, the plaintiffs, were the heirs and legal representatives of said Reddick; and that the defendants were in possession of the land in controversy, at the commencement of the suit, and rested their case.

Defendants' Evidence.

The defendants then gave in evidence:

1. The Treaty between the United States and the Sac and Fox Indians (7 U. S. Stat. at Large, 229), made at Washington on the 4th of August, 1824, by the first article whereof, these Indians ceded to the United States all their right and title to the lands claimed by them between the Mississippi and the Missouri rivers, and a northerly line, running from the Missouri, at the entrance of the Kansas River, north 100 miles, to the northwest corner of the State of Missouri, and thence east to the Mississippi; but with the understanding "that the small tract of land lying between the rivers Des Moines and Mississippi, and the section of the above line between the Mississippi and the Des Moines, is intended for the use of the half-breeds belonging to the Sac and Fox nations; they holding it, however, by the same title, and in the same manner, that other Indian titles are held."

2. The Act of Congress, approved June 30th, 1834 (4 U. S. Stat. at Large, ch. 167, p. 740), "to relinquish the reversionary interest of the United States in a certain Indian reservation lying between the rivers Mississippi and Des Moines."

3. That the land in controversy is included within the interior boundary lines of the Sac and Fox half-breed reservation, referred to in the Treaty of 1824, and Act of Congress of 1834.

4. The Act of Congress of July 1st, 1836 (5 U. S. Stat. at Large, p. 661), by which the United States relinquished to the heirs of said Thomas F. Reddick, their right in the lands embraced in said patent—but reserving any older or better claim not emanating from the United States, and providing, that in case said lands should be included in any reservation theretofore made under treaty [*516 with any Indian tribe, Reddick should be authorized to make another location on unappropriated lands.

5. That the 640 acres of land referred to in said Act of Congress, of July 1st, 1836, lie within the exterior boundary lines of said Sac and Fox half-breed reservation, made by the Treaty of August 4th, 1834.

6. That the land in controversy is worth more than \$2,000.

The defendants then rested their case.

The plaintiffs then prayed the court to instruct the jury—

1. That under the Treaty with France, of the 30th April, 1803, and the several Acts of Congress passed in pursuance thereof, for settlement of titles in the Territory of Missouri, Tesson, and Reddick as his assignee, had a valid subsisting interest in the land in controversy, at the date of the report made by the Recorder, which was not divested by the reservation in the Treaty with the Sac and Fox Indians, or the Act of Congress of the 30th June, 1834.

2. That the claim of Tesson, and of Reddick, as his assignee, as reported, was substantially confirmed by the Act of Congress, approved April 27th, 1816.

3. That the patent, taken in connection with other evidence, conveyed to the plaintiffs a fee simple title to the land in controversy, and overrides the title set up by defendants.

These instructions were given by the court.

The defendants then prayed the court to instruct the jury—

1. That under the report of the Recorder of Land Titles, given in evidence by the plaintiffs, they are not entitled to recover the land, unless their title thereto has been confirmed by an Act of Congress. This instruction was given by the court.

2. That the true construction of the Act of Congress of the 29th of April, 1816, given in evidence by the plaintiffs, does not confirm their title to the lands sued for, if the Indian title to the same was not at that time extinguished.

3. That the Treaty of August 4th, 1824, with the Sac and Fox Indians, is a recognition by the United States, at the date of said Treaty, of the Indian right to the lands in controversy; the same being within the Sac and Fox half-breed reservation.

4. That the Indian title to the land in controversy was not extinguished prior to the 4th of August, 1824.

5. That the plaintiffs have shown no right to recover the land in controversy in this suit.

The first of these instructions, prayed for by the defendants, was given by the court; but the second, third, fourth and fifth instructions, as prayed, were refused to be given.

The defendants, by their counsel, excepted [517*] to the rulings and decisions of the court in giving the instructions prayed for by the plaintiffs, and in refusing to give the second, third, fourth and fifth instructions, prayed for by the defendants.

The jury, under these instructions, found a verdict for the plaintiffs, and a bill of exceptions brought these several rulings before this court for review.

It was argued by *Mr. Butler* for the plaintiffs in error, and *Mr. Geyer* for the defendants in error.

Mr. Butler, for the plaintiffs in error made

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several points. The one upon which the decision of the court chiefly turned, was the following:

II. The District Court erred in giving to the jury the several instructions prayed for by the counsel for the plaintiffs below.

I. The instruction, "that under the Treaty with France of the 30th of April, 1803, and the Acts of Congress, Tesson, and Reddick, as his assignee, had a valid subsisting interest in the land in controversy, at the date of the report made by the Recorder, which was not divested by the reservation in the Treaty with the Sac and Fox Indians, or the Act of Congress of the 30th of June, 1834," was erroneous.

After analyzing the Treaty, and the several Acts of Congress from that time to 1815, *Mr. Butler* came to the following conclusion:

Neither under the Treaty nor under any one of the above cited Acts, or all of them combined, had Reddick as the assignee of Tesson, a valid subsisting interest in the land in controversy, at the date of the Recorder's report, November 1, 1815.

1. Under the Treaty, every species of title to lands in Louisiana, emanating from the French or Spanish governments—whether perfect and complete, or inchoate and incomplete—was recognized and protected as "property;" but mere permits to make settlements on such lands, even when lawfully granted by such authorities, conferred no right of property within the meaning of the Treaty. (*Les Bois v. Brumell*, 4 How., 463; *Soulard & Smith v. United States*, 4 Pet., 511; *Smith v. United States*, 10 Id., 326; *Wherry v. United States*, 10 Id., 328; *Chouteau v. Eckhart*, 2 How., 344; *Menard's Heirs v. Massey*, 8 Id., 293, 308, 806; *Bissell v. Penrose*, 8 Id., 317; *Landes v. Brant*, 10 Id., 348; *Glenn v. United States*, 13 Id., 250; *Heirs of Vilemont v. United States*, 13 Id., 261.)

2. The equitable claim of settlers under such permits, upon the justice or bounty of the government, to complete their titles, devolved, after the Treaty of Cession, on Congress, who, by the several statutes above cited, have acted upon and regulated the subject. (Cases above cited.)

*3. No specific quantity, and no [518 definite location, are mentioned in the written permit to Tesson; he is merely permitted to establish himself, for the purpose of trade with the Indians, at the head of the rapid of the River Des Moines. No survey could have been made, nor was any made or contemplated, under this permit; nor did any interest, in any particular tract, pass by it to Tesson. (*United States v. Forbes*, 15 Pet., 173; *Same v. Buyck*, Id., 215; *Same v. O'Hara*, Id., 275; *Same v. Delespine*, Id., 319; *Same v. Miranda*, Id., 153; *Same v. King*, 3 How., 773; *Same v. Lawton*, 5 Id., 10; *Same v. Villalobos*, 10 Id., 541; *Same v. Boisdoré*, 11 Id., 62; *Same v. Lecompte*, Id., 115; *Same v. Vilemont*, 13 Id., 261; *Bissell v. Penrose*, 8 Id., 317.)

4. Tesson, after making his establishment, was to apply to the Governor-General, to obtain a grant of a convenient space for the use of his establishment; and, until the obtaining of such grant, Tesson neither had, nor could equitably claim, any interest whatever in any specific tract or lot.

5. This permit to Tesson was, therefore, a

mere license to reside and trade in the Indian country; it was wholly insufficient to extinguish the Indian title in any particular tract, or to sever any particular tract from the public domain; and, unless confirmed by Congress, and duly located by their authority, Tesson had, and could have no standing, under said permit, in a court of justice. (Cases above cited.)

See, as to the Indiana title, and the proceedings necessary to extinguish it, the following cases: *United States v. Arredondo*, 6 Pet., 691, 741; *Mitchell v. United States*, 9 Id., 711, S. C., 15 Id., 52, 83, 88; *United States v. Fernandez*, 10 Id., 303; *Marsh v. Brooks*, 8 How., 223; *Gaines v. Nicholson*, 9 Id., 356; *United States v. D'Aurice*, 10 Id., 624.

6. Whatever power, under the Acts of Congress passed prior to the date of the Receiver's report, that affair might have to grant or confirm to Tesson's assignee, as a donation, the land claimed by him, neither of said acts had, by itself, confirmed his claim.

The first branch of the instruction now under review—that Tesson and his assignee, on the 1st of November, 1815, had a subsisting interest in the land in controversy—was therefore erroneous.

Mr. Geyer, for the defendants in error, divided his points as follows:

That a complete title to the land in controversy was vested in Thomas F. Reddick, on the 29th of April, 1816, whether the "Indian rights" had, or had not, then been extinguished; **519*** and *the title so vested has not been divested or impaired, by any subsequent Treaty or Act of Congress.

A confirmation of a title by Act of Congress, not only renders it a legal title, but furnishes higher evidence of that fact than a patent, inasmuch as it is a direct grant of the fee by the government itself, whereas a patent is only an act of its ministerial officer. (*Grignon's Lessee v. Astor*, 2 How., 319, S. P.; *Simms' Lessee v. Irvine*, 3 Dall., 405; *Strother v. Lucas*, 12 Pet., 410.)

The grant to the half-breeds by the Act of 30th of June, 1834, does not affect the grant to Reddick, by the Act of 29th of April, 1816. It is a principle applicable to every grant, that it cannot affect pre-existing titles. (*Polk's Lessee v. Wendall*, 5 Wheat., 293; 9 Cr., 87; *Patterson v. Winn*, 11 Wheat., 380; *Stoddard et al. v. Chambers*, 2 How., 284.)

II. The confirmation by the Act of 29th April, 1816, vested in Reddick the title, subject only to the Indian right of occupancy, if not then extinguished. All grants by the government are subject to such rights, whether expressly reserved or not, but as soon as they are extinguished by cession or otherwise, the grantee of the government acquires full dominion over the property. (*Fletcher v. Peck*, 6 Cranch, 87, 137, 143; *Mitchell v. United States*, 9 Pet., 711; *United States v. Hernandez*, 10 Pet., 304.)

III. The report of the Recorder of Land Titles is an approval of the claim of Reddick, and a recommendation that six hundred and forty acres of land be granted to him, "if Indian rights extinguished." Referring it to Congress to determine the whole question. Congress must therefore be understood to have decided that the Indian rights were extinguished, or to have made the grant subject to such rights,

and in either case the title of the defendants in error is complete; all such rights having been extinguished before the commencement of the suit.

IV. Although the grantee of the government takes, subject to the Indian right of occupancy, the existence of such right is not presumed, nor is the grantee bound to prove its extinguishment in an action against a mere intruder, especially where, as in this case, the grant is by an Act of Congress.

V. If the Indian right of occupancy could be set up as a bar to a recovery under a grant by Act of Congress, which is denied, it was incumbent on the defendants below to prove the existence of such right at the time of the commencement of the suit. No such proof was made; on the contrary, so far as the evidence discloses the existence of any claim by any Indian tribe, that claim appears to have been extinguished in 1824, so that at that time, if not before, Reddick acquired the absolute dominion and right of possession.

*VI. The permit granted by the **[520]** Spanish Government to Louis Honoré Tesson, to settle upon, occupy, and cultivate the land in controversy, as his property, excluded all Indian rights. The grants of the Spanish government were not subject to Indian rights, but operated as extinguishments of such rights on the lands granted. At the date of the Treaty by which Louisiana was acquired, the title of Tesson, though incomplete, was property protected by the Treaty; that title, with all its incidents, was recognized by the laws of the United States, and confirmed by the Act of 29th April, 1816; so that according to the record, no Indian right of occupancy existed since 1798.

VII. If the existence of an Indian right had been recognized by the Treaty of 4th August, 1824, as asserted in the third refused instruction, such recognition would not have affected the title of Reddick, granted in 1816. But that Treaty recognizes no such right; it is merely a relinquishment of a claim by the Sacs and Foxes, a quitclaim by the Indians, and not a recognition of their title by the United States.

The Sacs and Foxes, by a Treaty of 3d November, 1804 (Stat. at Large, Vol. VII., p. 84), ceded to the United States all their claim to the lands east of a line drawn from a point on the Missouri River, opposite the mouth of Gasconade; to a point on the River Jefferson thirty miles above its mouth; thence down that river to the Mississippi River, and up the same to the mouth of Wisconsin River, &c.

The Great and Little Osages, by a Treaty of 10th November, 1808, ceded to the United States all lands "northwardly of the Missouri River." A survey of the boundary was provided for in the seventh article, and was made in 1816; the north boundary being coincident with the north boundary of the now State of Missouri.

The Osages, as well as the Sacs and Foxes, had set up claims to lands north of the Missouri, and both relinquished to the United States. But, in 1824, the Sacs and Foxes still pretended to have a claim within the bounds of the State of Missouri, which is relinquished by the Treaty of 1824.

It cannot be assumed that the title to the

country, embracing the land in controversy, was in the Sacs and Foxes at any time; nor can the party claiming under a grant of the Spanish Government, confirmed by Act of Congress, be required to prove that it was not, or that their Treaty of 1804 included the land granted. The party who undertakes to maintain a possession against such a title, by showing an outstanding title or right of occupancy, takes upon himself the burden of proving it.

521*] *Mr Justice Catron delivered the opinion of the court:

This case was before us in 1850, and is reported in 8 Howard. We then held that as the patent to Reddick's heirs of 1839 was younger than the Treaty of 1824, and the confirming Act of 1836, by which the title of the United States was *prima facie* vested in the Sac and Fox half-breeds, the patent could not prevail. Nor could its recitals be relied on to give it legal effect from an earlier date than it had on its face.

The judgment was then reversed and the cause remanded for another trial, and an intimation given, that probably additional evidence might be adduced on a subsequent trial, which would establish an earlier and better title in the plaintiffs, than that of the half-breeds. That trial has taken place, and the case is now before us, with the evidence to which the recitals in the patent of Reddick's heirs, to some extent refer. This evidence consists of a permit given by the Lieutenant-Governor of Upper Louisiana to Louis Honoré Tesson, to establish himself at the head of the rapids of the River Des Moines (being a great rapid in the River Mississippi), and having formed his establishment, he was assured that then it would be the duty of the Governor-General of Louisiana, residing at New Orleans, to procure for said Honoré a concession of sufficient space to render the establishment available and useful to the trade of the country in peltries, and so that said Honoré might exercise an oversight of the Indians, and keep them in the fidelity which they owed to His Catholic Majesty; the object being to increase the trade with the Indians on that border; and in which said Honoré was permitted to be a participant, and to trade with the Indians in that part of His Majesty's dominions; nor were any rival traders to be allowed to deal with the Indians, except such as had a passport for that purpose, signed by the Lieutenant Governor. This stipulation was made in March, 1799. Honoré was then in possession of the land in dispute, and had improvements on it; and he improved it further under the permit of 1799, and continued there until 1803. He had houses, orchards, and fields.

Thos. F. Reddick's claim was regularly derived by assignments from Honoré. Reddick's heirs claimed a league square, on the assumption that the permit to settle and inhabit, entitled Honoré to this quantity. But the Recorder at St. Louis, acting as Commissioner, rejected the claim for a league square; and properly, as we think; there being only a promise of title in future, but no concession of land, in the Lieutenant Governor's permission to Honoré to establish himself, and occupy the premises, and trade with the Indians. As, however, Honoré held actual possession, and had improved the

land in an expensive *and substantial [*522 manner, he was beyond question entitled to six hundred and forty acres, including his improvements, under our Acts of Congress securing this quantity to actual settlers, had the land laid within that part of Louisiana to which the Indian title was extinguished, at the time when the occupancy existed. Being uncertain whether Honoré was entitled, by reason of his inhabitation and cultivation within territory to which the Indian title was not extinguished, the Recorder, in his tabular statement, granted the six hundred and forty acres, "if Indian rights extinguished." And this expression has embarrassed the title for more than thirty years. There were many claims in the Recorder's report and tabular statement, in which this one is found; and by the Act of April 29, 1816, all of them were confirmed without exception, and without any notice having been taken of the Recorder's remark, referring to an existing Indian title to the land. That the Sacs and Foxes did claim the country generally, where this land lies, is not controverted; nor was their claim ceded to the United States till 1824. And this raises the question whether, according to Spanish usage, whilst that power governed Louisiana, an existing Indian claim to territory precluded inhabitation and cultivation under a permit to inhabit and cultivate a particular place designated in the permit, and which was in the Indian country. Spain had no treaties with any of the Indian tribes in Louisiana, fixing limits to their claims, so far as we are informed. The Indians were kept quiet, and at peace with Spanish subjects, by kind treatment and due precautions, which did not allow obstruction on lands claimed by them, without written permits from the Governor; but that such permits were usual, cannot be doubted. The County of St. Charles lies in the fork of the Mississippi and Missouri rivers; it was settled, and the village of St. Charles established there, twenty years and more before we acquired Louisiana; and yet, by the Treaty of November 3d, 1804, this section of country was ceded to the United States, by the Sac and Fox tribes, extending from the Missouri River, opposite to the mouth of the Gasconade, to the Janfilione, or "North 2 rivers," as now known; which empties into the Mississippi, in the County of Marion, in the State of Missouri. This country was as solemnly ceded, as was the country north of that cession, by the Treaty of 1824; and which Treaty is here set up in opposition to Reddick's title. The Treaty of 1804 was duly ratified by the Senate of the United States, and apparently sanctioned, retrospectively, the Sac and Fox claim to the old County of St. Charles, in like manner that the Treaty of 1824 recognized an existing Indian claim to the half-breed tract, where the land in dispute lies.

*And again in 1808, the Osages ceded [*523 to the United States all the lands east of a line running from Fort Clark on the Missouri River, situate a few miles below the mouth of the Kansas; thence, due south to the River Arkansas, and down the same to the Mississippi; up the same to Sullivan's line; then west to the northwest corner, being a point one hundred miles due north of the mouth of the Kansas River; and with this line south to the north bank of the Missouri opposite the mouth of the

Kansas. Sullivan's line was run in 1816, in execution of the Osage Treaty of 1808, and is the northern boundary of the half-breed tract, and the line referred to in the Treaty of 1824 with the Sacs and Foxes, and which the Osage Treaty of 1808 included.

This Treaty had every sanction that a ratification by our Senate could give it, and is a recognition of an Indian title in the Osages to nearly all the territory now embraced in the State of Missouri, and the greater part of Arkansas; and of an Osage right to the land claimed by Reddick up to November, 1808; and yet the County and Town of St. Louis, the seat of government in Upper Louisiana, during the existence of the Spanish colonial government there, the post of New Madrid, the County, Town and post of St. Charles—were all within the cession made by the Osages; and within which cession, lay a great mass of Spanish orders of survey and grants, in regard to which this country has been legislating and adjudicating for nearly fifty years, without anyone ever supposing that such concessions were affected by these loose Indian pretensions set up to the country at a time when the concessions were made; pretensions that the Spanish government notoriously disregarded, further than a cautious policy required. If permits to inhabit and cultivate were given in so many other instances, regardless of Indian claims, no reason exists why Honoré Tesson could not lawfully improve the land in dispute under his permit; and in view of this notorious state of facts, the Treaty of 1804 with the Sacs and Foxes, by an additional article, declared that nothing in that Treaty contained should affect the claim of any individual (or individuals, if more than one) who had obtained grants of land from the Spanish government beyond the boundary lines of the country then ceded to the United States, on lands claimed by the Sacs and Foxes, but not ceded by that Treaty; provided, that such grants had at any time been made known to the said Indian tribes, and recognized by them. That the large, valuable, and notorious improvements were made by Honoré at a place where the Sacs and Foxes themselves resided at the time, is an historical fact. He resided there as notoriously as they did. His claim to this property was transferred to Reddick, and was occupied for twenty-five years under Tesson and Reddick, and his heirs before the Treaty of 1824 was made. It was held and improved by authority of the Spanish government, and claimed as individual property, to which the Indian right of possession did not extend; of this the Indians never complained, nor do they now complain; no half-breed owner and Indian descendant is defending this suit; it is defended by trespassers, showing no color of claim under the half-breeds, or anyone else; shelter is sought under the assumption that Honoré's permit and inhabitation were neither known or recognized by the Sacs and Foxes, and that therefore, the additional article of the Treaty of 1804 cannot protect the title of Reddick. We concur with the opinion of Mr. Attorney-General Grundy, in his report of 1839 on Reddick's title, to the Secretary of the Treasury (Opinions of Attorney-General, 1280), that it must be presumed that the Indians both had knowledge and assented

to Honoré's claim; and we are furthermore of opinion, that the Indian tribes, and the half-breeds, who claim under them, must be held to knowledge, and to consent, that Honoré took and held, rightful possessions, from the fact of his open and notorious actual occupancy, and holding for himself, in their midst. This is the settled rule in other cases, and no reason is seen why it should not apply in this case. The reasons are quite as strong, and the rule quite as necessary in its application here, as it was in the case of *Landes v. Brant*, 10 How., 375, where we enforced the rule. We are therefore of opinion that the supposed Indian right of occupancy did not affect the confirmation by Congress in this case, and that the remark of the recorder, "If Indian rights extinguished," was surplusage, and which remark Congress properly disregarded.

That the confirmation of 1816 carried the title with it, if the confirmation was valid, has so often been decided by this court, that it is not open to discussion; nor is it disputed here on behalf of the defendants below. The confirming Act of 1816, however, ordered that a patent should issue according to a survey afterwards to be made, in all cases confirmed by the Act. This has been done. The patent recites the necessary facts to connect the confirmation with the patent, and gives date to it by relation, as a legal title, from the 29th of April, 1816, according to the boundaries set forth in the patent; and as this ruling covers all the instructions that were given in the court below, and all such as were refused, we order that the judgment be affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Iowa, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and the same is hereby affirmed, with costs.

JOHN JACKSON, *Plaintiff in Error*,
v.
SAMUEL HALE, GEORGE C. MANY, AND
JOHN V. AYER.

Replevin cannot be maintained against third person on warehouseman's receipt for wheat, given in consideration of a sum of money, no wheat being delivered, and no property proved.

Where a warehouseman gave a receipt for wheat which he did not receive, and afterwards the quantity which he actually had was divided amongst the respective depositors, an action of replevin, brought by the assignee of the fictitious receipt, could not be maintained when, under it, one of these portions was seized.

Evidence offered to show that the wheat in question was assigned to the defendant, was objected to by the plaintiff in the replevin; but such objection was properly overruled. The plaintiff had shown no title in himself.

So, also, evidence was admissible to show that the receiver of the fictitious certificate had never deposited any wheat in the warehouse.

The defendants in this case were the assignees of the original warehouseman, and were not responsible, unless it could be shown that wheat was deposited, which had come into their possession.

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THIS case was brought up by writ of error from the District Court of the United States for the District of Wisconsin.

The facts are stated in the opinion of the court.

It was argued by *Mr. Lawrence* for the plaintiff in error, and by *Messrs. Lee and Seward* for the defendants in error.

Mr. Lawrence, for the plaintiff in error, made the following points:

First. The judge of the district court erred in ruling upon the admission of testimony, that a depository, when there is a joint interest in the deposit, may change the joint interest of depositors into an interest in severalty, by mere setting apart, without delivery made.

Second. The court erred in holding, that a depositor, having a joint interest in one description of property, his depository could confer a title upon him, to the extent of such joint interest, from deposits of a different description; or that if his deposits were in part winter wheat, &c., his depository might set apart to him the spring wheat of other depositors, and such act of the depository would give title.

Third. Testimony was improperly admitted, that "the property rose in value after it was taken in replevin," and "that the agent of the 526*] *plaintiff was told that the wheat belonged to parties," in whom defendants had pleaded property—as also the evidence to contradict the receipt.

Fourth. The judge of the district court should not have decided to refuse a new trial, if defendants would consent to remit a part of the recovery for detention, when a recovery had been secured by testimony taken under objection.

Mr. Chief Justice Taney delivered the opinion of the court:

It appears in this case, that C. H. Hutchinson was a warehouseman at the City of Ranascho (formerly Southport), in Wisconsin, and in that character had received on deposit large quantities of wheat from different persons, which, by common consent, was mingied in general mass.

On the 22d of February, 1850, Hale, Many, and Ayer, the defendants, succeeded Hutchinson in the business and possession of this warehouse; and at the time the possession was transferred, the portions of wheat to which the several depositors were respectively entitled, were separated and put into different bins; and the old receipts given by Hutchinson, surrendered.

In this division, 7,000 bushels, which had been deposited at different times by Adams & Son, were placed in a separate bin for them; and they, as well as Hutchinson and Hale, Many and Ayer, were present when the division was made.

Previous to this, however, and while Hutchinson was still carrying on business at the warehouse, he gave the following receipt to Hubbard, Faulkner & Co.:

Received into store, Southport, January 19, 1850, for account of Messrs. Hubbard, Faulkner & Co., four thousand bushels of spring wheat, deliverable on board vessel free of charge, on return of this receipt, and not insured against fire.

4,000 bushels of wheat.

C. L. HUTCHINSON.

Hubbard, Faulkner & Co. never deposited any wheat at the warehouse, but paid Hutchinson \$2,640 as the price of the quantity mentioned in the receipt; and afterwards sold it to John Jackson, the plaintiff in error, for \$1,050, and indorsed and delivered to him the receipt.

The plaintiff, claiming to be entitled to this quantity of wheat under this assignment, sued out a writ of replevin against the defendants, and the marshal, under the direction of the agents of the plaintiff, replevied and delivered to him 4,000 bushels of wheat, part of the 7,000 bushels, placed in a bin for Adams & Son, as hereinbefore mentioned.

The defendants appeared and pleaded sundry pleas, and among others, property in Adams & Son. And at the trial, the *jury found [*527 for the defendants, and that the wheat taken, was the property of Adams & Son; and its value, \$2,640; and assessed damages for the detention, at the sum of four hundred dollars.

Upon a motion made by the plaintiff, for a new trial, the court, it seems, were of opinion that a new trial should be granted, unless the defendant remitted all the damages assessed as aforesaid, beyond the interest on the value of the wheat from the day it was taken under the replevin, to the day of trial. And under this opinion of the court, the defendants remitted all of the damages, except one hundred and one dollars, and the judgment was thereupon accordingly entered.

Upon this judgment, the present writ of error is brought.

The facts above stated, are set out in an exception taken by the plaintiff. The statement shows, that Hubbard, Faulkner & Co., in whose favor the warehouse receipt was given by Hutchinson, never deposited any wheat in this warehouse, but paid for this receipt in money. And the plaintiff offers no evidence but the receipt itself to show that Hutchinson had any wheat of his own in this warehouse at the time it was given, or at any other time; and in the division which took place when the possession was transferred to the defendants, none was set apart as belonging to Hutchinson.

Upon such a state of facts, it is difficult to see how any question of law could have arisen, open to dispute. The plaintiff indeed objected to the evidence offered to prove that the wheat replevied was, in the division of the general mass, set apart in a bin as the property of Adams & Co. But if there was anything in the objection (and clearly there was not), it would not avail the plaintiff unless he could show that it belonged to him. For he could not maintain the replevin unless he proved that the wheat was his property. And if he had no wheat there, it was perfectly immaterial whether it was lawfully divided, or remained in general mass. And if the want of a legal division among the owners, prevented it from being specifically the property of Adams & Co., it would equally prevent it from being the separate property of the plaintiff, even if he was entitled to the quantity he claimed in the general mass.

So, too, he excepts to evidence offered to prove that Hubbard, Faulkner & Co. had never deposited any wheat in the warehouse. The evidence was undoubtedly admissible. For

whether they had done so or not, was the fact in dispute. Besides, the plaintiff himself had already proved the fact by his own witness, Faulkner, who stated that Hubbard, Faulkner & Co. paid money to Hutchinson for the wheat. They did not, therefore, deposit it themselves. And as regards the damages remitted, certainly [528*] the plaintiff is not injured by having the judgment rendered against him for a smaller sum instead of a larger. If either party had a right to complain of the opinion of the court under which the *remittitur* was entered, it was the defendants, and not the plaintiff. For, if a party uses the process of the law willfully and oppressively, his conduct may be considered by the jury in estimating the damages sustained by the injured party. And proof of the conduct of the agents of the plaintiff in this respect, and also of the damage sustained by the defendants by the loss of a favorable market, were properly submitted to the consideration of the jury.

The receipt of Hutchinson, upon which the plaintiff relied, did not prove, or tend to prove that the wheat taken on the replevin was the wheat therein mentioned—or that any wheat belonging to Hutchinson, or to Hubbard, Faulkner & Co., ever came to the hands of the defendants. It showed that Hutchinson held so much wheat for Hubbard, Faulkner & Co. But the defendants are not answerable for his contracts, or his warehouse receipts, unless it is shown that the property came into their possession. And there is not the slightest evidence to show that any wheat, belonging either to Hutchinson or to Hubbard, Faulkner & Co., was ever in the warehouse after it was transferred to the defendants.

* *The judgment of the District Court was affirmed with costs.*

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Wisconsin, and was argued by counsel: on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and the same is hereby affirmed, with costs, and interest until the same is paid, at the same rate per annum that similar judgments bear in the courts of the State of Wisconsin.

JAMES STEPHENS, *Appellant*,
v.
ISAAC H. CADY.

Purchaser, of copperplate of map on sheriff's sale on execution, against owner of copyright no right to print therefrom.

Where the copyright of a map was taken out under the Act of Congress, and the copperplate engraving seized and sold under an execution, the purchaser did not acquire the right to strike off and sell copies of the map.

The court below decided that an injunction to prevent such striking off and selling, could not issue, without a return of the purchase money. This decision was erroneous.

A copyright is a "property in notion, and has [529*] no corporeal tangible substance," and is not the subject of seizure and sale by execution. [528]

It can be reached by a creditor's bill in chancery, but in such case, the court would probably have to decree a transfer in the mode pointed out in the Act of Congress.

THIS was an appeal from the Circuit Court of the United States for the District of Rhode Island, sitting as a court of equity.

The facts are stated in the opinion of the court.

It was submitted on printed argument by the appellant, in proper person. No counsel appeared for the appellee.

Mr. Justice Nelson delivered the opinion of the court:

This is an appeal from the Circuit Court of the United States for the District of Rhode Island.

The bill was filed by the appellant in the court below, to restrain the defendant from printing and publishing a map of the State of Rhode Island and Providence Plantations, in violation of the complainant's copyright.

The facts are briefly these: The complainant, on the 23d of April, 1831, took out the copyright of a map, the title of which is as follows: "A Topographical Map of the State of Rhode Island and Providence Plantations, surveyed trigonometrically and in detail, by James Stephens, topographer and civil engineer, Newport, R. I., 1831, the right whereof he claims as author, in conformity with the Act of Congress, entitled 'An Act to amend the several Acts respecting copyrights,'" and since then has been engaged in printing, publishing and vending the said maps, by virtue of the copyright thus obtained. In March, 1846, a judgment was recovered against him, in the Common Pleas of Bristol County, Massachusetts, for \$194.23, upon which an execution was issued, and the copperplate engraving of the map in question seized, and sold, and bid off by the defendant for the sum of \$245, he being the highest bidder. Having thus become entitled to the property in the engraving, he claimed the right to print and publish the maps, and in pursuance of this supposed right, he has been engaged in printing, publishing and vending the same.

On the hearing upon the bill, answer and proofs, the court below differed in opinion, as to the effect of the sale of the copperplate engraving of the map; but agreed that no injunction could issue without a repayment of the purchase money, which was refused by the complainant; whereupon the court dismissed the bill with costs.

The single question in the case is, whether or not the property acquired by the defendant in the copperplate, at the sheriff's sale, carried with it, as an incident, the right to print and publish the map engraved upon its face.

* Upon this question the court below [530] divided in opinion, but finally agreed in dismissing the bill.

The appellee has not followed the case into this court, and we have not, therefore, been favored with the grounds and reasons relied on for sustaining the decree; nor have we been furnished with the reasons of the court for the same. The ground upon which the decision was ultimately placed, namely: the refusal of the complainant to refund the purchase money,

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is certainly not satisfactory; for if the copyright of the map, or any right to print or publish the same, passed with the purchase of the plate, as incidental, as there is nothing in the facts of the case to invalidate the sale, the title became complete in the purchaser, and could not be rightfully interfered with. But if otherwise, then there was no ground for imposing the repayment of the purchase money, as a condition to the relief prayed for; the injunction should have been awarded, and the defendant directed to account.

But from the consideration we have given to the case, we are satisfied that the property acquired by the sale in the engraved plate, and the copyright of the map secured to the author under the Act of Congress, are altogether different and independent of each other, and have no necessary connection. The copyright is an exclusive right to the multiplication of the copies, for the benefit of the author or his assigns, disconnected from the plate, or any other physical existence. It is an incorporeal right to print and publish the map, or, as said by Lord Mansfield in *Millar v. Taylor*, 4 Burr., 2396, "a property in notion, and has no corporeal tangible substance."

The engraved plate and the press are the mechanical instruments, or means by which the copies are multiplied, as the types and press are the instruments by which the copies of a book are produced. And to say that the right to print and publish the copies, adheres to and passes with the means by which they are produced, would be saying, in effect, that the exclusive right to make any given work of art necessarily belonged to the person who happened to become the owner of the tools with which it was made; and that if the defendant in this case had purchased the stereotyped plates of a book, instead of the engraved plate, he would have been entitled to the copyright of the work, or at least, to the right to print, publish, and vend it; and yet, we suppose that the statement of any such pretension is so extravagant as to require no argument to refute it. Even the transfer of the manuscript of a book will not, at common law, carry with it a right to print and publish the work, without the express consent of the author, as the property in the manuscript, and the right to multiply the copies, are 531*] two separate and *distinct interests. (4 Burr., 2330, 2396; 2 Eden, 329; 2 Atkyns, 342; 2 Story, 100.)

Lord Mansfield observed, in *Millar v. Taylor*, that "no disposition, no transfer of paper upon which the composition is written, marked, or impressed (though it gives the power to print and publish), can be construed a conveyance of the copy (by which he means copyright, as appears from a previous part of his opinion), without the author's express consent 'to print and publish, much less against his will.'"

Now, it seems to us, that the transfer of the manuscript of a book by the author would, of itself, furnish a much stronger argument for the inference of a conveyance of the right to multiply copies, than exists in the case of a transfer of the plate in question, or of the stereotype plates, as the ideas and sentiments, or in other words, the composition and substance of the work, is thereby transferred. But the property in the copyright is regarded

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as a different and distinct right, wholly detached from the manuscript, or any other physical existence, and will not pass with the manuscript unless included by express words in the transfer.

The copperplate engraving, like any other tangible personal property, is the subject of seizure and sale, on execution, and the title passes to the purchaser, the same as if made at a private sale. But the incorporeal right, secured by the statute to the author, to multiply copies of the map, by the use of the plate, being intangible, and resting altogether in grant, is not the subject of seizure or sale by means of this process—certainly not at common law. No doubt the property may be reached by a creditor's bill, and be applied to the payment of the debts of the author, the same as stock of the debtor is reached and applied, the court compelling a transfer and sale of the stock for the benefit of the creditors. (20 J. R., 554; 5 J. Ch., 280; S. C., 4 *Id.*, 657; 1 Paige, 637.) But in case of such remedy, we suppose, it would be necessary for the court to compel a transfer to the purchaser, in conformity with the requirements of the Copyright Act, in order to invest him with a complete title to the property. The first section of that Act provides, that the author of any map, chart, &c., his executors, administrators, or legal assigns, shall have the sole right of printing, publishing and vending the same, during the period for which the copyright has been secured. And the seventh section forbids any person from printing, publishing, or selling the map or chart, under heavy penalties, without the consent of the proprietor of the copyright, first obtained in writing, signed in the presence of two credible witnesses. (Act of Congress, Feb. 8, 1831.)

*An assignment, therefore, that would [*532 vest the assignee with the property of the copyright, according to the Act of Congress, must be in writing, and signed in the presence of two witnesses, and it may, I think, well be doubted whether a transfer even by a sale, under a decree of a court of chancery, would pass the title so as to protect the purchaser, unless by a conveyance, in conformity with this requirement. (6 B. & Cr., 169; 1 Carr. & P., 558; R. & M., 187; D. & K., 215.)

It is unnecessary, however, to express an opinion upon the point. It is sufficient, for the purposes of this case, to say, that the right in question is wholly independent of, and disconnected from, the engraved plate; and, that there is no foundation for the defense set up, that it passed an appurtenant to the sale and transfer of the property, in the engraved plate, from which the copies of the map were struck off.

For these reasons, we are of opinion that the decree below must be reversed, with costs, and the proceedings remitted, with directions that a decree be entered for the complainant, in conformity with this opinion.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Rhode Island, and was argued by counsel; on consideration whereof, it is now here ordered,

adjudged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to enter a decree therein, in conformity to the opinion of this court.

Cited—17 How., 451, 453; 19 How., 66; 7 Otto, 506; 15 Otto, 129; 16 Blatchf., 249; 3 Cliff., 550; 4 Cliff., 26, 78; 1 Holmes, 155.

L. E. STAINBACK ET AL., Claimants of the SHIP WASHINGTON, her Tackle, &c., Appellants,

v.

WILLIAM A. RAE, in his own right, and as Administrator of JOSEPH PORTER WHEELER, deceased, and EDMUND CROSBY, Master, Owners of the SHIP MARY FRANCES, AND FREDERICK TUDOR, Owners of the Cargo of said Ship, Appellees.¹

Collision—case of inevitable accident.

Where a collision takes place between two vessels at sea, which is the result of inevitable accident, without the negligence or fault of either party, each vessel must bear its own loss.

533*] **T**HIS was an appeal from the Circuit Court of the United States for the District of Massachusetts, in admiralty.

The facts are stated in the opinion of the court.

It was argued by *Messrs. Badger and Lawrence* for the appellants, and by *Mr. Goodrich* for the appellees.

The points made by the counsel for the appellants were the following:

First. That the watch on board the Washington, was usual, proper, and safe; and that consequently, no negligence is imputable to her.

Second. That in the state of the weather, and the position of the two vessels in respect to each other, it was impossible that the Washington could have discovered the Mary Frances at a greater distance than a quarter of a mile, and highly improbable that she could have discovered her at more than half that distance; and that under such circumstances, considering the admitted rate at which the vessels were approaching each other, it was impossible for the Washington, by any maneuver whatever, to avoid the collision.

Third. That if the Mary Frances, as stated by some of her witnesses, discovered the Washington ten minutes, and as stated by others, five minutes, before the collision, the two vessels must have been at a distance of two miles, or at least one, from each other, and it was in her power, by changing her course, to have avoided the collision; and if, as stated by the same witnesses, she perceived that the Washington had not discovered her, it was her duty to have done so, and consequently the collision

1.—Mr. Justice CURTIS did not sit in this cause, having been of counsel in the court below.

NOTE.—Measure of damages in case of collision. See note to *Smith v. Condry*, 1 How., 23, and note to *The Amiable Nancy*, 3 Wheat., 545.

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is attributable to the fault, not of the Washington, but of the Mary Frances.

And hence, that the collision was either a mere misfortune, without fault in either party, or without fault on the part of the Washington, and, in either view, the decree must be reversed.

Mr. Goodrich, for the appellees, contended, 1. That on the night of the collision, the weather was fair and starlight overhead, with a hazy horizon, and that the night was not unusually dark.

2. The ships being each closehauled on the wind, neither was materially to windward of the other, and each crew was equally favorably situated to see the other ship, and to hear hailing from the other ship.

And if either ship was to windward of the other, and for this reason less favorably situated in those respects, it was the Mary Frances.

3. That the crew of the Mary Frances had a good lookout *before, and at the time [*534 of the collision, and used all due care to prevent it; and that they actually saw and hailed the Washington in time to prevent the collision; and that the crew of the Washington did no act to avoid the collision, and the collision is attributable to the absence of a good lookout on board the latter ship.

4. The appellees maintain, that the rule of the sea is, that where two vessels, closehauled on the wind, approach each other, and must meet unless the course of one is changed, the vessel having her starboard tacks on board, must keep her course, and the one having her larboard tacks on board, must bear up and give way. (*The Alexander Wise*, 2 Wm. Robinson, Adm., 65, 68; *The Virgil*, Id., 201; *The Mary Stewart*, Id., 244; *The Chester*, 3 Haggard, Adm., 316; *The Ligo*, 2 Id., 356, 360; *Clapp v. Young*, 6 Law Reporter, 111-113; 1 Conkling's Admiralty Practice, 303-306; *The Europa*, 14 Jurist, 627, 2 Law and Eq., 562-564; *The Genesee v. Fitzhugh*, 12 Howard, 443; *Wales v. Rogers*, 13 Id., 283; Pritchard's Admiralty Digest, art. 12, p. 156; 1 Bell's Com., 583.)

5. That the appellees having made out a *prima facie* case of want of skill and care on the part of the crew of the Washington, the burden of proof is on the appellants to show that due care and skill was used. (Authorities previously cited; *The George*, 9 Jurist, 283, 4; Notes and Cases, 161; Pritchard's Admiralty Digest, art. 114, 116, and 117, p. 137, tit. Damage.)

6. That appellees are entitled in law to recover compensation for freight and cargo, as well as for the ship of appellants. (See 3 Kent's Com., 6 ed., 232, sec. 8; Story on Bailments, ch. 6, secs. 599, 602, 608, and case of *Dundas*, note to sec. 609; 1 Bell's Com., 580.)

12. The Washington was in fault, because her officers and crew did not maintain that constant care and vigilance which her position required.

A. The Washington, having her larboard tacks on board, was bound to give way.

B. No officer, and only two men on deck, attending to the navigation of the ship—one, McCoy, was at the wheel, the other, Simmons, a boy, was on the lookout.

C. A large ship, with noisy passengers, nearing the land, under full sail, in a hazy night,

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should have had at least two men on the lookout.

D. No sufficient lookout before the call to the pumps.

E. The Washington might have avoided the collision.

Mr. Justice Nelson delivered the opinion of the court:

This is an appeal from the Circuit Court of the United States for the District of Massachusetts, in admiralty.

535* The libel charges, that the ship *Mary Frances*, laden with ice, was on a voyage from Boston to New Orleans, and that on the 11th December, 1847, at about half past three o'clock in the morning, while on her starboard tack, in the prosecution of the voyage, she was struck by the ship *Washington*, nearly midships on her larboard side, breaking in her bulwarks and stanchions, and starting her planks and timbers, so that in a few hours she filled with water, and the master and hands were obliged to abandon her, and she went to the bottom.

The respondents, in their answer, state, that the ship *Washington*, at the time mentioned in the libel, was upon the high seas between George's Shoals and the south shore of Nantucket Island, at a distance of about sixty miles from land; that the wind was blowing a moderate breeze from the south-southwest, and the *Washington*, with all her reefs out, with courses free, and main topgallant sails, jib and flying jib, and fore and main topmast stay sails set, was sailing full and by, upon her larboard tack, and steering due west by the compass, and as near the wind as possible; that she had a competent watch on deck, keeping a good lookout, the weather being dark and hazy towards the horizon, especially to the leeward of the ship, but the stars visible above. That while she was thus pursuing her course, at about half past three o'clock in the morning, the *Mary Frances* was seen about four points on the lee bow of the *Washington*, and was then in the act of running up, and did immediately run up into the wind athwart the hawse of the *Washington*; and that instantly, on the discovery of the *Mary Frances*, and of the course she was pursuing, the helm of the *Washington* was put hard up, and every endeavor made by the hands on deck to put her before the wind, and to avoid a collision.

The facts, as proved on the part of the libelants, are substantially as follows:

That about half past three o'clock, on the morning of the 11th December, 1847, the hands on board the *Mary Frances*, while she was standing to the eastward, on her starboard tack, the wind from the south-southwest, close hauled, descried the *Washington* something less than a quarter of a mile distant, about a point and a half forward of the *Mary Frances'* larboard beam, some of the hands say, on the larboard bow two or three points. The *Washington* was standing to the westward when first seen, and orders were immediately given to put the helm hard down, and, at the same time, the hands cried out to those on board the *Washington*, to keep off. The collision took place, as estimated, from five to seven minutes after the *Washington* was first discovered. The

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Mary Frances was struck midships, on the larboard side, her bulwarks stove in, and **[536** her planks below the white streak on the opposite side were broken, and all her fore-rigging carried away. The ship was abandoned with thirteen feet of water in her hold, being a wreck, and wholly unmanageable. The *Washington* was not at first seen plainly, as the weather was hazy. The second mate of the *Mary Frances*, who had charge of the watch, and one of the first to descry the *Washington*, says the weather was hazy and thick, the sky was overcast, no moon or stars visible. The *Mary Frances* was about 320 tons burden; the *Washington* about 500 tons.

The evidence, on behalf of the respondents, is substantially as follows:

The *Washington* was bound from Liverpool to Virginia by the way of New York, and had on board a cargo of salt, and some 170 steerage passengers. She was on her larboard tack, closehauled, the wind about south-southwest. The man at the wheel states, that an order was given from the deck, "put the helm hard up, there is a ship into us;" that the order was obeyed instantly, but the collision immediately followed. Simmons, one of the hands, states, that he was on the weather side of the *Washington's* windlass on the lookout; that the weather was dark, cloudy and hazy; that he descried the *Mary Frances* about a minute and a half or two minutes before the collision; that she was on the lee bow of the *Washington*, between three and four points; that at first he could not determine her course on account of the thick weather. When he first saw her he sang out to the man at the wheel to put helm hard up. The witness heard a noise or hail about half a minute before he descried the *Mary Frances*, but could not determine whence it came; supposed it might be from some of the passengers, as they were in the habit of making a noise.

This witness is substantially corroborated by several others on board the *Washington*. Part of the watch were at the pumps at the time the collision took place.

The testimony on both sides agree, that each vessel was going at the rate of five and a half knots the hour.

The court below decreed in favor of the libelants.

Upon a careful perusal of the evidence in behalf of the libelants and the respondents, it is apparent that there is much less discrepancy and contradiction among the witnesses called by the respective parties, as to the material facts, than is usually found in these collision cases.

All agree as to the state of the weather—thick, hazy and dark; as to the direction of the wind—from the south-southwest; the course of the vessels—the *Mary Frances* on the starboard tack, standing southeast, and the *Washington* on the larboard, standing near **[537** ly due west; the rate of speed—five and a half knots the hour. And even as it respects the distance the vessels were from each other when first descried, there is very little, if any difference.

According to the witnesses on board the *Mary Frances*, the *Washington* was less than a quarter of a mile distant, when she was first

seen. The distance of the former vessel, when first seen by the hands on board the Washington, is not stated directly; but Simmons, the lookout, testifies, she was seen from one and a half to two minutes before the collision, which, regarding the combined speed of the two vessels, must have been at about the same distance. The probability is, that the two vessels were much nearer each other than a quarter of a mile, when first seen. The chief mate of the Mary Frances, who was asleep in his berth at the time, but immediately afterwards on deck, fixes the distance the vessel could be seen in that state of the weather at about two hundred yards; and this corresponds with the opinion expressed by the master of the Washington, where he says the Mary Frances might have been seen at a distance of about four times her length. The answer of the experts is that the distance a vessel could be seen in such weather would be uncertain. The course the two vessels were steering was calculated to increase the difficulty, and embarrass the lookout in descrying the vessel ahead, for, as they were approaching each other by the wind, they presented to the eye the edges of the sails, and not the breadth of them, as in other positions.

There is some apparent discrepancy between the witnesses of the two vessels in respect to their relative position at the time they were first seen. The hands on board the Mary Frances state, when they first descried the Washington, she was two or three points on their larboard bow, one of them states, she was a point and a half forward of their larboard beam.

The hands on board the Washington state that the Mary Frances was on their lee bow when first seen, which would place the Washington to the windward. This may be reconciled probably by what is stated by the experts, who agree, that two vessels, approaching each other as these were, the hands on each would necessarily see the approaching vessel over the lee bow, and which may have led those on board the Washington to suppose this vessel was on the weather side.

The maneuver of each, on discovering the other, it is agreed, was proper, and, indeed, the only one that could have afforded any chance of preventing the collision. The Mary Frances was thrown into the wind by putting her helm 538*] hard down, and *the Washington bore away before the wind by putting her helm hard up. The orders were not only proper and skillful, but were promptly given and instantly executed; and unless fault can be imputed to the latter vessel in not descrying the Mary Frances sooner, so as to have afforded time for these maneuvers to have avoided the disaster, we do not see how she can be properly chargeable with the consequences; and as to that, the difficulty, if not impossibility of discovering a vessel ahead at a greater distance than the Mary Frances was seen by the hands on the Washington, the relative position of the two vessels while approaching each other by the wind, presenting only the edges of the sails instead of their breadth, and in thick and hazy weather, such as existed in this case, in connection with the combined speed of the vessels at the time, seem to furnish evidence sufficient to repel any such imputation. The two vessels must have come together probably

in less than two minutes after they were first seen. The lookout appears to have been competent and sufficient, and such is, as we understand it, the opinion of the experts examined and who were selected by both the parties.

Indeed, the fact that the Mary Frances must have been seen about the same time by the hands of the Washington that she was seen by those on board of the Mary Frances, and which we think is fairly borne out by the evidence, of itself, should be regarded as conclusive against the charge of fault in this respect.

We are of opinion, therefore, that the collision was the result of an inevitable accident, arising out of one of the perils of navigation, and, in judgment of law, is not attributable to the fault of either party. And in such cases the settled rule in admiralty in England is, that each vessel must bear its own loss, which rule has been heretofore recognized by this court, but has not been before directly applied. (2 Dodson's Adm., 83; Woodrop Sims, 1 How., 28; *Id.*, 89; 8 Kent's Com., 281; Abbot on Shipping, pt. 8, ch. 1, and pt. 4, ch. 10, sec. 10; 2 Brown's Civ. & Adm. Law, 204-207; 5 How., 508, and cases.)

The rule is not uniform upon the continent, as several of the maritime states in such cases apportion the loss upon the two vessels. (Abbot, 224, 230; 2 Brown's Civ. & Ad. Law, 204-206; 8 Kent's Com., 230, 231, 232.)

But we think it more just and equitable, and more consistent with sound principles, that where the loss happens from a collision which is the result of inevitable accident, without the negligence or fault of either party, each should bear his own.

There seems no good reason for charging one of the vessels with a share of a loss resulting from a common calamity beyond *that [*539 happening to herself, when she is without fault, and therefore in no just sense responsible for it.

Our opinion is, that the decrees of the court below must be reversed, with costs, and the proceedings remitted, with directions to enter a decree dismissing the libel with costs.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Massachusetts, and was argued by counsel: on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to dismiss the libel with costs.

Cited—21 How., 194; 24 How., 125, 318; 2 Wall., 560; Brown, 408; 2 Bls., 144; Abb. Adm., 79; 2 Curt., 76; Newb., 37; 6 McLean, 182.

ELISHA BLOOMER, Appellant,

v.

JOHN W. MCQUEWAN, ALLEN R. MCQUEWAN, AND SAMUEL DOUGLAS, Partners, under the name of McQUEWANS & DOUGLAS.¹

1.—Mr. Justice CURTIS, having been of counsel, did not sit on, the trial of this cause, and Mr. Justice WAYNE was absent.

One lawfully using and owning patented machine at time of extension of letters patent may continue its use thereafter.

The patent for Woodworth's planing machine was extended from 1842 to 1843, by the Board of Commissioners.

Under that extension, this court decided, in *Wilson v. Rousseau*, 4 How., 688, that an assignee had a right to continue the use of the machine which he then had.

In 1845, Congress, by a special Act, extended the time still further from 1849 to 1856.

Under that extension, an assignee has still the same right.

By the cases of *Evans v. Eaton*, 3 Wheaton, 454, and *Wilson v. Rousseau*, 4 How., 646, these two propositions are settled, viz.:

1. That a special Act of Congress in favor of a patentee, extending the time beyond that originally limited, must be considered as ingrafted on the general law.

2. That, under the general law in force when this special Act of Congress was passed, a party who had purchased the right to use a planing machine during the period to which the patent was first limited, was entitled to continue to use it during the extension authorized by that law, unless there is something in the law itself to forbid it.

But there is nothing in the Act of Congress, passed in 1845, forbidding such use; and, therefore, the assignee has the right.

THIS was an appeal from the Circuit Court of the United States for the Western District of Pennsylvania, sitting as a court of equity.

It was a bill filed by Bloomer, who claimed under Wilson, the assignee of Woodworth's 540*) planing machine. The whole of *Wilson's title is set forth in the report of the case of *Wilson v. Rousseau*, 4 How., 646, as is also the Act of Congress passed on the 26th February, 1845, 4 How., 662, extending the patent for seven years from the 27th of December, 1849.

McQuowan claimed, through two mesne assignments from Woodworth and Strong, by virtue of a license granted on the 8th of November, 1833.

The bill and answer covered a great deal of ground, which need not be noticed in this report.

Amongst other averments was this, that the license conveyed no right to use the machine during the extension for seven years from 1849, under the Act of Congress passed in 1845; and the decision of the court being in favor of the defendants below upon this point, it is unnecessary to state all the points and arguments upon other matters.

The court below were divided in opinion, and the bill was of course dismissed. Bloomer appealed to this court.

It was argued by *Messrs. Keller and St. George T. Campbell*, for the appellant, and *Mr. Dunlop* for the appellees.

The fourth point made by the counsel for the appellant was as follows:

IV. Whether the licensee of a right to use the patented machine for the original term of the patent, is entitled to continue the use of the same during the extension by Congress.

The facts in this regard appearing by the record, are,

1. That Collins and Smith, who were assignees for the first term of the district in question, granted to Barnet the right for the City of Pittsburg and Alleghany County, "to construct and use during the residue of the said terms of fourteen years," the patented machine, and by the same assignment covenanted "not themselves to construct and use," nor to give license to any other person than Barnet "during the terms aforesaid," and Barnet covenanted not to construct more than fifty machines "during the terms aforesaid."

(The word "terms" is used in the plural, as it will be perceived by the assignment that the granters were the owners also of the Emmons patent, and that the limitation of his right applied to the duration of both.)

2. Barnet assigns all his "right, title, interest and claim of the within patent for Woodworth's planing machine to G. Warner and John W. McQuewan, their heirs and assigns," except seven rights previously given.

3. It seems to have been granted, below, that Warner had assigned his license to McQuewan, and McQuewan to the two *co. [*541 defendants, and that the machine was made during the first term of the patent; hence arises the question, have the appellees the right to continue its use during the congressional extension?

For the appellants it is submitted:

1. That this question, and the principles upon which it must be decided, have been already passed upon by this court.

In *Wilson v. Rousseau*, 4 How., the question was of the right of the licensee to continue the use of the machine during the extension by the Commissioner. The court were divided in opinion. In that delivered as their judgment, the right of the licensee to the continued use was put exclusively upon the terms of the 18th section, which were: "The benefit of such renewal shall extend to assignees and grantees of the right to use the thing patented, to the extent of their respective interests therein." Without that provision it is conceded by the learned judge, in delivering the opinion of the court, "that all the rights of assignees or grantees, whether in a share of the patent or to a specified portion of the territory held under it, terminate at the end of the fourteen years, and become re-invested in the patentee by the new grant."

"From that date he is again possessed of 'the full and exclusive right and liberty of making, using, and vending to others the invention,' whatever it may be, not only portions of the monopoly held by assignees and grantees, as subjects of trade and commerce, but the patented articles or machines throughout the country, purchased for practical use in the business affairs of life, are embraced within the operation of the extension. This latter class of assignees and grantees are reached by

NOTE.—It would seem that this case is not an authority for holding that the right of assignees of an original patent is limited, under a renewal thereof, to the use of the particular machines in being at the time the extended term commenced. *Day v. Union Rubber Co.*, 8 Blatchf., 468. Compare *Bloomer v. Millinger*, 1 Wall., 351.

Distinction between the right to make and vend

a patented machine and the grant of the right to use it. *Aiken v. Manchester Print Works*, 2 Cliff., 435. Compare *Wood v. Mich. South. R. & Co.*, 3 Fish. Pat. Cas., 464.

Patents; assignment before issuing and re-issuing; when assignment transfers; extended term. See note to *Gayler v. Wilder*, 10 How., 477.

the new grant of the exclusive right to use the things patented. Purchasers of the machines, and who were in the use of them at the time, are disabled from further use immediately, as that right became vested exclusively in the patentee. Making and vending the invention are prohibited by the corresponding terms of his grant."

And the learned judge, in expressing the opinion of the court, further declared that the provision in the 18th section, above referred to, was "intended to restore or save to them" (those in use of the thing patented at the time of the renewal), "that right which, without the clause, would have been vested again exclusively in the patentee."

And the learned judges who dissented from the opinion of the court did so upon the ground that even this clause of the 18th section did not confer upon the licensees the right claimed in their behalf.

Thus it is clear that the extension of a patent [542*] by lawful authority revests in the patentee every right originally possessed by him, and that unless the law, by virtue of which it is extended, contains a provision in favor of licensees or assignees, their right to use ends with the term of their license. (This, of course, does not apply to cases where the patentee has covenanted to grant any subsequently acquired extensions—none such is pretended in this case.)

Applying, then, these principles to the Act extending this patent (February 26, 1845), it will be seen that it contains no such provision as is to be found in the 18th section of the Act of 1836; and that, therefore, in accordance with the opinion of all the judges, the entire right was re-invested in the patentee.

The general power to renew and extend a patent is conferred by the 18th section of the Act of 1836, which, after providing for the proof of the prerequisites, declares that "it shall be the duty of the Commissioner to renew and extend the patent, by making a certificate thereon of such extension for the term of seven years from and after the expiration of the first term."

The Act in question provides that the patent "be, and the same is hereby extended for the term of seven years from and after the 27th of December, 1849, and the Commissioner of Patents is hereby directed to make a certificate of such extension in the name of the administrator of William Woodworth, and append an authenticated copy thereof to the original letters patent," &c.; the words being substantially the same as these, judicially construed, and the intention being still further marked, as well by the omission of any provision for the licensees, as by the express insertion of the name of the party in whose favor the extension was made, and to whose benefit it was intended to inure.

The principles upon which the judgment in *Wilson v. Rousseau* is founded, are, it is submitted, if possible, more conclusively applicable to the case of such an extension by Congress than to one made by the Commissioner.

Such, too, has been the application made of them by many of the learned judges in their circuits. By *Mr. Justice Nelson*, July 22, 1850,

in *Gibson v. Gifford*, in a written opinion delivered by him; by the late *Mr. Justice Woodbury*, July, 1850, in *Mason v. Tallman*, also in a written opinion; and by *Mr. Justice McLean*, October 22, 1850, in *Bloomer v. Stately*.

The opinion of *Mr. Justice Woodbury* refers to similar decisions made by the late *Justice McKimley*, by *Judge Ware*, and *Judge Sprague*.

It may be proper, with reference to the argument founded upon the supposed intention of Congress (not declared in the words of the Act as already shown), to permit a continued use *during the congressional extension of [543 machines licensed under the original term, to annex a list of the patents, extended by special Acts, and thus to refer to the provisions in each, expressly declaring, where such was intended, the existence of such right, and providing for its mode of exercise or enjoyment.

The absence of such provision in the Act of 1845 must, it is submitted, conclusively negative any idea of such intention, even if the judicially decided effect of such an Act did not render a reference to such a source for interpretation unnecessary.

I. January 21, 1808, to Oliver Evans, 6 Stat. at Large, 70. (With special provision for parties then using invention.) Under this Act the cases of *Evans v. Jordan*, 9 Cranch, 199, and *Evans v. Eaton*, 8 Wheat., 454, were decided.

II. March 8, 1809, to Amos and William Whittemore, 6 Stat. at Large, 80 (without provision for licensees.)

III. February 7, 1815, Oliver Evans (steam engine) 6 Stat. at Large, 147 (with proviso that no greater sum should be charged for constructing and using, than was during prior term, and subject to existing patent laws).

IV. March 3, 1821, Samuel Parker, 6 Stat. at Large, 262 (subject to provision of then existing patent laws).

V. March 2, 1831, John Adamson, 6 Stat. at Large, 458 (without proviso or reference to existing laws).

VI. March 3, 1831, Samuel Browning, 6 Stat. at Large, 467 (without proviso and reference to existing laws).

VII. May 19, 1832, Jethro Wood, 6 Stat. at Large, 486 (proviso in favor of licensees that the price shall not be advanced).

VIII. June 30, 1834, Thomas Blanchard, Stat. at Large, 589 (with special proviso in favor of licensees). [It may not be improper to refer to the opinion of B. F. Butler, Attorney-General, May 25, 1837, that under this Act the United States had no right to use, except on the conditions of the original grant.]

IX. March 3, 1835, Robert Eastman, 6 Stat. at Large, 618 (without proviso or reference to existing laws).

X. July 2, 1836, James Barron, 6 Stat. at Large, 678 (extending two patents without proviso in reference to existing laws, and the other with provisos in reference to licensees).

XI. February 6, 1839, Thomas Blanchard, 6 Stat. at Large, 748 (with proviso in favor of licensees).

XII. March 3, 1845, William Gale, 6 Stat. at Large, 895 (authorizing renewal of patent under eighteenth section of Act of 1836, although it had expired, and subject to the restrictions of that Act).

XIII. March 3, 1848, Samuel K. Jennings, 6 Stat. at Large, 899 (directing Commissioner to renew patent, subject to provisions of existing laws).

544*] XIV. February 26, 1845, William Woodworth, 6 Stat. at Large, 936 (extending patent. Commissioner to certify to the extension in the name of the administrator—no proviso in favor of licensees, or reference to existing laws.)

XV. February 15, 1847, Thomas Blanchard, 9 Stat. at Large, 683 (with proviso in favor of licensees, on terms to be agreed or adjusted by the Circuit Court, &c.)

The point that, by an accidental error in the bill, the word "fourteen" was inserted, instead of "twenty eight," is not deemed a proper subject of objection in this court. No such ground appears to have been taken below; the patent itself forms part of the record, and an amendment would have been, it is submitted, instantly allowed by the court below, had the objection been there made. That the patent on its face was for twenty-eight years, forms one of the objections of the appellees to its validity, and the error complained of is set right by answer of the defendants themselves.

It is not deemed necessary by the appellants to present any authorities to meet the point argued by the appellees, that an Act of Congress, extending a patent for seven years, is unconstitutional and void.

It is therefore submitted that the decree should be reversed, and that the appellant is entitled to a perpetual injunction and an account.

The counsel for the appellees made several points, amongst which was the following:

1. That defendants are protected as assignees.

The bill (pages 14 to 20) asserts, and the answer admits, that the respondents claim to use the machine they are alleged to have infringed, as assignees, from 1833, the year of their purchase, under assignments from the original patentee. Being then assignees under the original patent, can they claim to continue unmolested in the use of the machine they purchased and paid for, and have erected and used for seventeen years?

Was it the design of the Act of 1845 to bring disasters upon the respondents, to deprive them of the rights they had acquired in good faith, to depreciate their property, to render useless their establishments, in which they had invested large sums of money, to destroy their business, and disable them from the performance of their contracts? Such flagrant outrages are not to be imputed to a statute, unless the terms of it imperatively demand it.

The language of the Act calls for no such harsh, unreasonable and impolitic construction. It is a simple extension of the patent of 1828, and nothing more. Could any design in 545*] Congress "to spread such disasters, be predicated of the simple meaning of this statute?

Chief Justice Gibson, of Pennsylvania, has laid down a rule which must commend itself to the judgment of everyone—that in the construction of statutes, the judges, when one of those cases of hardship occurs, which continually arise, should do what their consciences irresistibly persuade them the Legislature would have done, if the occurrence had been foreseen. (*Pennock v. Hart*, 8 S. & R., 369.)

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And can anyone doubt that if the idea of the propriety of protecting the purchasers of rights, and the uses of the thing patented, had been suggested, but they would immediately have inserted such a clause?

This Act of 1845 is a private Act, made for the special benefit of a particular individual, and should not have such construction as will be detrimental to others. Chief Justice Parsons, in the case of *Coolidge v. Williams*, has laid down the rule to be that private statutes, made for the accommodation of particular citizens or corporations, ought not to be construed to affect the rights or privileges of others, unless such construction results from express words, or from necessary implication. (4 Mass., 145.)

There are no express words in this Statute, which demands the construction contended for by the plaintiff.

We may appeal, too, to the language of Mr. Justice Washington, in the case of *Krass v. Jordan* that arguments founded upon hardship, would be entitled to great weight, if the language of the Act was not so peremptory as to forbid a construction at variance with the clear meaning of the Legislature. (9 Cranch, 199.)

There are no words in this Act to justify such savage construction as urged by the plaintiff. It declares a simple extension of the patent, and manifestly intends an extension similar to that which may be conferred by the Patent Office, under which the rights of persons, using the invented machine under license, are protected in the enjoyment of it.

The same learned Chief Justice of Massachusetts, has also declared in the case of *Wales v. Stetson*, that in the consideration of the provisions of any statute, they ought to receive such a reasonable construction if the words and subject matter will admit of it, as that the existing rights of the public or individuals be not injured. (3 Mass., 146.)

If the Legislature meant a simple extension of the patent for seven years, is it not a reasonable construction to suppose that it meant an extension, as ordinarily understood; as an extension of the nature of the extensions of the Patent Office, and "with the restrictions and [*546] privileges of such extensions? Is it not reasonable to conclude that they had in their mind the general Act of 1836, and the clause which gave to purchasers and users of the thing patented, the right to continue that use? Is it not a reasonable construction that they meant that this special Act should be construed in reference to the general law of the land? The language of the Act is, that the patent of 1828 "be extended for seven years." Now, what benefit would that extension be, even to complainant, without an incorporation with the general law? How could he be assignee of the right? How could he enjoy the use of the patent? How could he pretend to recover damages, without an appeal for aid to the Act of 1836? The plaintiff is obliged to invoke the aid of the general law, to maintain this very action. The very plaintiff in this cause is an assignee, and undertakes to maintain this action in his own name, by calling into requisition the Act of 1836.

The rule of law undoubtedly is, that laws on the same subject are to be construed together; that laws on the same subject are to be construed *pari passu*, and with reference to parallel legisla-

tion. This is clearly the rule as to general laws, which in relation to the same subject, are to be construed as one Act. They are to be construed, too, in reference to parallel legislation. (*Penn v. Hamilton*, 2 Watts, 60; 17 S. & R., 81; 7 *Id.*, 404.)

The right of appeal, given by the Pennsylvania Act relating to divorces *a vinculo matrimonii*, was extended, by implication, to the Act of 1817, respecting divorces *a mensa et thoro*. (*Roberts v. Roberts*, 9 S. & R., 191.)

So the right to appeal from justices' judgments, in cases of contracts, was held to extend to trespass, to which the powers of magistrates had been extended, without expressly giving the right of appeal. (4 S. & R., 73.)

And this wise and safe rule of construction has been held to apply to statutes which have been repealed, or may not have been noticed by the statutes to be construed. (*Ree v. Loxdale*, 1 Burr., 447.)

And Lord Mansfield, in that case, said, "that where there are different statutes *in pari materia*, though made at different times, or even expired, and not referring to each other, they shall be taken and construed together as one system." In the expressive language of Tilghman, *Ch. J.*, of Pennsylvania, in one of the cases cited, they were so blended together as to form one statute.

And from the cases cited from Burrow, this blending of statutes, this analogy of legislation, is not confined to public statutes, but that public laws may receive aid in their construction from private laws, and *vice versa*; for his lord-⁵⁴⁷ship says, in the *case cited, page 448, that the Act of Parliament, of 1740, relating to St. Martins, and the overseers of that parish (which was, I apprehend, clearly a private Act), which extended the number of overseers of the poor to be appointed by two justices, under the general Act of 43 Elizabeth, to the number of nine, "shows" (says the Chief Justice) "the construction put by the Legislature themselves, upon the 43 Elizabeth, on this head, and excepts this very large parish of St. Martins out of it.

I need not burden your Honors with any name of books on this, so obvious a rule of construction. This case, in Burrow, was carefully considered; it had been argued several times before *Ch. J.* Ryder, and afterwards before Lord Mansfield, by great counsel, and if any case is entitled to respect of courts, it is a case so considered, and so decided.

But we have cases nearer home, and more german to this very matter of private acts, in relation to these very patent rights.

In the case of *Evans v. Euton*, 8 Wheat., 454, it was declared, that an Act of Congress, authorizing the Secretary of State to issue a patent to Oliver Evans, for his improvements in the manufacture of flour, "was ingrafted on the general Act for the promotion of useful arts, and that the patent was issued under both Acts," the public and the private one.

So in the case of *Evans v. Jordan*, 9 Cranch, 199, which was an action to recover damages under the same private Act, Washington *J.*, said, in declaring the opinion of the court, that "it should be recollected, that the right of the plaintiff to recover damages for using his improvement, after the issuing of his patent,

arises, not under this law, but the general law of 1793."

If the plaintiff is obliged to invoke the aid of the Act of 1836, he must take the whole of it. It is a well-established rule of law, that he who claims the benefit of his title, must admit its disadvantages. *Qui sentit commodum, sentire debet et onus*.

Mr. Chief Justice Taney delivered the opinion of the court:

The bill in this case was filed by the appellants, on the 6th of July, 1850, in the Circuit Court of the United States for the Western District of Pennsylvania, to obtain an injunction restraining the appellees from the use of two of Woodworth's planing machines in the City of Pittsburgh. The term for which Woodworth's patent was originally granted, expired in 1842, but it was extended seven years by the board established by the 18th section of the Act of 1836. And afterwards, by the Act of Congress of February 26, 1845, this patent was extended for seven years more, commencing on the 27th of December, 1849, at which time the previous extension would have terminated.

It appears, from the pleadings and evidence in the case, that, *shortly after the pas-⁵⁴⁸sage of the Act of Congress of 1845, William Woodworth, the administrator of the patentee, in whose name the certificate of extension was directed to be issued, assigned all his right to James G. Wilson, from whom the appellant purchased the exclusive right to construct and use this machine, and to vend to others the right to construct and use it, in a large district of country described in the grant. Pittsburgh, in which the machines in question are used, is included within these limits. And the right which the appellant purchased was regularly transferred to him by Wilson, by an instrument of writing duly recorded in the Patent Office.

In the year 1838, during the term for which the patent was originally granted, the defendants purchased the right to construct and use a certain number of these machines within the limits of the City of Pittsburgh and Alleghany County; and the right to do so was regularly transferred to them by different assignments, deriving their title from the original patentee. The two machines mentioned in the bill were constructed and used by the respondents soon after the purchase was made, and the appellees continued to use them up to the time when this bill was filed. And the question is, whether their right to use them terminated with the first extension, or still continues under the extension granted by the Act of 1845.

The circuit court decided that the right of the appellees still continued, and upon that ground dismissed the appellant's bill. And the case is now before us upon an appeal from that decree.

In determining this question we must take into consideration not only the special Act under which the appellant now claims a monopoly, but also the general laws of Congress in relation to patents for useful improvements, and the special Acts which have from time to time been passed in favor of the particular patentees. They are statutes *in pari materia*; and all

relate to the same subject, and must be construed together. It was so held in the case of *Evans v. Eaton*, 8 Wheat., 518, where the court said that the special Act of Congress in favor of Oliver Evans, granting him a new patent for fourteen years, for his improvements in manufacturing flour and meal, was ingrafted on the general Act for the promotion of useful arts and the patent issued in pursuance of both. The rule applies with more force in the present case; for this is not the grant of a new patent, but an enlargement of the time for which a patent previously extended under the Act of 1836, should continue in force.

Indeed, this rule of construction is necessary to give effect to the special Act under which the appellant claims the monopoly. For this law does not define the rights and privileges which the patent shall confer, nor prescribe the remedy to which he shall be entitled if his rights are infringed. It merely extends the duration of the patent, and nothing more. And we are necessarily referred, therefore, to the general law upon the subject to ascertain the rights to which the patent entitled him, and also the remedy which the law affords him if these rights are invaded.

Now, the Act of 1836, in express terms, gives the benefit of the extension authorized by that law, to the assignees and grantees of the right to use the thing patented to the extent of their respective interests therein. And under this provision it was decided, in the case of *Wilson v. Rousseau*, 4 How., 688, that the party who had purchased and was using this planing machine during the original term for which the patent was granted, had a right to continue the use during the extension. And the distinction is there taken between the grant of the right to make and vend the machine, and the grant of the right to use it.

The distinction is a plain one. The franchise which the patent grants, consists altogether in the right to exclude everyone from making, using, or vending the thing patented, without the permission of the patentee. This is all that he obtains by the patent. And when he sells the exclusive privilege of making or vending it for use in a particular place, the purchaser buys a portion of the franchise which the patent confers. He obtains a share in the monopoly, and that monopoly is derived from, and exercised under, the protection of the United States. And the interest he acquires, necessarily terminates at the time limited for its continuance by the law which created it. The patentee cannot sell it for a longer time. And the purchaser buys with reference to that period; the time for which exclusive privilege is to endure being one of the chief elements of its value. He therefore has no just claim to share in a further monopoly subsequently acquired by the patentee. He does not purchase or pay for it.

But the purchaser of the implement or machine for the purpose of using it in the ordinary pursuits of life, stands on different ground. In using it, he exercises no rights created by the Act of Congress, nor does he derive title to it by virtue of the franchise or exclusive privilege granted to the patentee. The inventor might lawfully sell it to him, whether he had a patent or not, if no other patentee stood in his way.

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And when the machine passes to the hands of the purchaser, it is no longer within the limits of the monopoly. It passes outside of it, and is no longer under the protection of the Act of Congress. And if his right to the implement or machine is infringed, he must seek redress in the courts of the state, according to the laws of the state, and not in the courts of the United States, nor under the law of [*550] Congress granting the patent. The implement or machine becomes his private, individual property, not protected by the laws of the United States, but by the laws of the state in which it is situated. Contracts in relation to it are regulated by the laws of the state, and are subject to state jurisdiction. It was so decided in this court, in the case of *Wilson v. Sandford et al.*, 10 How., 99? Like other individual property, it is then subject to state taxation; and from the great number of patented articles now in use, they no doubt, in some of the states, form no inconsiderable portion of its taxable property.

Moreover, the value of the implement or machine in the hands of the purchaser for use, does not in any degree depend on the time for which the exclusive privilege is granted to the patentee; nor upon the exclusion of others from its use. For example, in the various patented articles used in agriculture, in milling, in manufactures of different kinds, in steam engines, or for household or other purposes, the value to the purchaser is not enhanced by the continuance of the monopoly. It is of no importance to him whether it endures for a year or twenty-eight years. He does not look to the duration of the exclusive privilege, but to the usefulness of the thing he buys, and the advantages he will derive from its use. He buys the article for the purpose of using it as long as it is fit for use and found to be profitable. And in the case before us the respondents derive no advantage from the extension of the patent, because the patentee may place around them as many planing machines as he pleases; so as to reduce the profits of those which they own to their just value in an open and fair competition.

It is doubtless upon these principles that the Act of 1836 draws the distinction between the assignee of a share in the monopoly, and the purchase of one or more machines, to be used in the ordinary pursuits of business. And that distinction is clearly pointed out and maintained in the case of *Wilson v. Rousseau*, before referred to.

Upon the authority, therefore, of the cases of *Evans v. Eaton*, and *Wilson v. Rousseau*, these two propositions may be regarded as settled by judicial decision: 1. That a special Act of Congress in favor of a patentee, extending the time beyond that originally limited, must be considered as ingrafted on the general law; and 2. That under the general law, in force when this special Act of Congress was passed, a party who had purchased the right to use a planing machine during the period to which the patent was first limited, was entitled to continue to use it during the extension authorized by that law.

Applying these rules to the case before us, the respondents must be entitled to [*551] continue the use of their planing machines during the time for which the patent is extended

by the special Act of Congress, unless there is something in the language of the law requiring a different construction.

But there is nothing in the law to justify the distinction claimed in this respect on behalf of the patentee. Its language is plain and unambiguous. It does not even grant a new patent, as in the case of *Oliver Evans*. It merely extends the time of the monopoly to which the patentee was entitled under the general law of 1836. It gives no new rights or privileges, to be superadded to those he then enjoyed, except as to the time they should endure. The patent, such as it then was, is continued for seven years longer than the period before limited. And this is the whole and only provision contained in this special Act. In order, therefore, to determine the rights of the patentee during the extended term, we are necessarily referred to the general law, and compelled to inquire what they were before this special Act operated upon them, and continued them. Indeed, the court has been obliged to recur to the Act of 1836, in every stage of this suit, to guide it in deciding upon the rights of the parties, and the mode of proceeding in which they are to be tried. It is necessarily referred to in order to determine whether the patent under which the complainant claims, was issued by lawful authority, and in the form prescribed by law; it was necessary to refer to it in the Circuit Court in order to determine whether the patentee was entitled to the patent, as the original inventor, that fact being disputed in the Circuit Court; also, for the notices to which he was entitled in the trial of that question; and for the forum in which he was authorized to sue for an infringement of his rights. And the rights of the appellant to bring the case before the court for adjudication is derived altogether from the provisions of the general law. For there is no evidence in the record to show that the machines are worth two thousand dollars, and no appeal therefore would lie from the decision of the Circuit Court, but for the special provision in relation to the patent cases in the Act of 1836. And while it is admitted that this special Act is so ingrafted on the general law, as to entitle the patentee to all the rights and privileges which that law has provided, for the benefit and protection of inventors, it can hardly be maintained that the one in favor of the purchaser of a machine is by construction to be excepted from it, when there are no words in the special Act to indicate that such was the intention of Congress.

This construction is confirmed by the various special Acts which have been passed from time to time, in favor of particular inventors, granting them new patents after the first had expired *or extending the time for which they were originally granted. Many of these Acts have been referred to in the argument, some of which contain express provisions, protecting the rights of the purchaser under the first term, and others contain no provision on the subject, and merely grant a new patent, or, as in the case before the court, extend the duration of the old one. And in several instances special laws in favor of different inventors have been passed within a short time of each other, in one of which the rights of the previous purchaser are expressly reserved, and

in the other there is no provision on the subject. And the Act of March 3, 1845, authorizing the patent of William Gale, for an improvement in the manufacture of silver spoons and forks to be extended, was passed only a few days after the Act in favor of Woodworth and Gale's patent is subjected in express terms to the conditions and restrictions in the Act of 1836, and consequently protects previous purchasers from a new demand.

It has been contended, on behalf of the appellant, that the insertion of these restrictions in one special law, and the omission of them in another, shows that, in the latter, Congress did not intend to exempt the purchaser from the necessity of obtaining a new license from the patentee. And that Congress might well suppose that one inventor had stronger claims upon the public than another, and might, on that account, give him larger privileges on the renewal.

But this argument only looks to one side of the question, that is, to the interest and claims of the inventor. There is another, and numerous class of persons, who have purchased patented articles, and paid for them the full price which the patentee demanded, and we are bound to suppose that their interests and their rights would not be overlooked or disregarded by Congress. And still less, that any distinction would be drawn between those who purchased one description of patented machines and those who purchased another. For example, the Act granting a new patent to Blanchard, in 1834, for cutting or turning irregular forms, saves the rights of those who had bought under the original patent. And we ought not to presume, without plain words to require it, that while Congress acknowledged the justice of such claims in the case of *Blanchard*, they intended to disregard them in the case of *Woodworth*. Nor can it be said that the policy of Congress has changed in this respect after 1834, when Blanchard's patent was renewed. For, as we have already said, the same protection is given to purchasers in the special law, authorizing the renewal of Gale's patent, which was passed a few days after the law of which we are speaking.

The fair inference from all of these special laws is this, that *Congress has constantly recognized the rights of those who purchase for use a patented implement or machine; that in these various special laws the patentee and purchasers of different inventions were intended to be placed on the same ground; and that the relative rights of both parties under the extension, by special Act of Congress, were intended to be the same as they were when the extension was granted under the general law of 1836. It would seem that in some cases the attention of the Legislature was more particularly called to the subject, and the rights of the purchaser recognized and cautiously guarded. And when the provision is omitted, the just presumption is, that Congress legislated on the principle decided by this court in *Evans v. Eaton*, and regarded the special law as ingrafted on the general one, and subject to all of its restrictions and provisions, except only as to the time the patent should endure. Time is the only thing upon which they legislate. And any other construction would make the legislation

of Congress, on these various special laws, inconsistent with itself, and impute to it the intention of dealing out a different measure of justice to purchasers of different kinds of implements and machines; protecting some of them, and disregarding the equal and just claims of others.

And if such could be the interpretation of this law, the power of Congress to pass it would be open to serious objections. For it can hardly be maintained that Congress could lawfully deprive a citizen of the use of his property after he had purchased the absolute and unlimited right from the inventor, and when that property was no longer held under the protection and control of the general government, but under the protection of the state, and on that account subject to state taxation.

The 5th amendment to the Constitution of the United States declares, that no person shall be deprived of life, liberty or property, without due process of law.

The right to construct and use these planing machines, had been purchased and paid for without any limitation as to the time for which they were to be used. They were the property of the respondents. Their only value consists in their use. And a special Act of Congress, passed afterwards, depriving the appellees of the right to use them, certainly could not be regarded as due process of law.

Congress undoubtedly have power to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.

But it does not follow that Congress may, from time to time, as often as they think proper, authorize an inventor to recall rights **554** *which he had granted to others; or re-invest in him rights of property which he had before conveyed for a valuable and fair consideration.

But we forbear to pursue this inquiry, because we are of opinion that this special Act of Congress does not, and was not intended to interfere with rights of property before acquired; but that it leaves them as they stood during the extension under the general law. And in this view of the subject, the appellant was not entitled to the injunction he sought to obtain, and the Circuit Court were right in dismissing the bill.

As the decision on this point disposes of the case, it is unnecessary to examine the other grounds of defense taken by the appellees.

The decree of the Circuit Court must be affirmed.

Messrs. Justices McLean and Nelson dissented.

Mr. Justice McLean:

Woodworth's patent bears date the 27th of December, 1828, and runs for fourteen years. On the 29th of July, 1880, the patentees conveyed to Isaac Collins and Barzillai C. Smith the right to construct, use, and vend to others, the planing machine invented within several States, including Pennsylvania, except the City of Philadelphia. On the 19th of May, 1832, Collins and Smith transferred to James Barnet the right to construct and use, during the resi-

due of the aforesaid term of fourteen years, fifty planing machines, within Pittsburg and Alleghany County, for which he agreed to pay \$4,000. Barnet agreed not to construct or run more than fifty machines during the term aforesaid, and Collins and Smith bound themselves not to license during the term, nor to construct or use themselves during the term, or allow others to do so, in the limits of Pittsburg and Alleghany County.

On the 27th of December, 1842, the patent expired, but it was renewed and extended for seven years, under the Act of 1836. This extension expired in 1849; but Congress, on the 26th of February, 1845, passed an Act which provided that "the said letters patent be, and the same is hereby extended for the term of seven years, from and after the 27th day of December, 1849."

The patentee, by deed dated the 14th of March, 1845, and also by a further deed dated the 9th of July, 1845, conveyed to James E. Wilson all his interest as administrator in the letters patent under the extension by the Act of Congress. And Wilson, on the 4th of June, 1847, for the consideration of \$25,000, gave to Bloomer, the plaintiff, a license to construct and *use, and vend to others to construct and ***555** use, during the two extensions, "all that part of Pennsylvania lying west of the Alleghany Mountains, excepting Alleghany County, for the first extension, which expires on the 27th day of December, 1849, and the States of Virginia, Maryland, Kentucky, and Missouri, excepting certain parts of each State."

The defendants continued to run their machines during the residue of the fourteen years, for which the patent was granted, and during the first extension; and the complainant filed his bill to enjoin the defendants from running their machines under the second extension, by the Act of Congress.

The contract of the defendants was entered into the 19th of May, 1831, and under it Barnet had a right "to construct and use, during the residue of the aforesaid term of fourteen years, fifty planing machines," &c. The patent expired on the 27th of December, in 1842. The contract of defendants was made the 19th of May, 1832, leaving about nine years and six months for the patent to run, and this was the time limited by the contract, and for which the consideration of \$4,000 was paid. This was not left to construction from the life of the patent, but the contract expressly declared the right was purchased "for the residue of the aforesaid term of fourteen years."

This term was enjoyed by the defendants, and under the decision of this court, in the case of *Wilson v. Rousseau et al.*, 4 How., 646, the seven years' extension under the Act of 1836, was also enjoyed by the defendants. This construction of the Act of 1836, in my judgment, was not authorized, and was not within the intention of the law, as was expressed at the time. That extension having expired, another extension is claimed under the Act of Congress. This claim is set up to an injunction bill, filed by the complainant, who is the assignee of the patent for a part of Pennsylvania and other States. And by the decision of four of my brethren, just delivered, the defendants are to enjoy this extension, making fourteen years

beyond their control. This would seem to imply, that, under the Act of 1836, and under the Act of 1845, the assignees were the favored objects of Congress. But this is not the case. The patentee who made the invention, and through whose ingenuity, labor and expense, a great benefit has been conferred on the public, in justice, is entitled to remuneration, and that only was the ground of extension, whether under the law of 1836, or the special Act of 1845.

This, as well as the former decision, was influenced by the consideration that the owners of the machines are, in equity, entitled to run them so long as the exclusive right of the patentee [556] shall be continued. It is said that the machines are property, and that no Act of Congress should deprive the owners of the use of their property. But in this view, the property of the patentee seems not to be taken into the account. He is the meritorious claimant for protection. The assignee for a specific time, rests upon his contract. He has conferred no benefit on society. His investment was made with an exclusive reference to his own advantage. He has no more claims upon the public sympathy than he who rents a mill, a farm, or engages in a business open to all who expect a profit by it.

But the hardship is supposed to exist, in the fact that, to use the right, a planing machine must be constructed at an expense of some \$400 or \$500, and this will be lost to the occupier, if by an extension he shall not be permitted to run his machine. The answer is, when he entered into the contract he knew, or is presumed to have known, that the patent might be extended under the law of 1836 or by special Act, and if he desired an interest under the renewed patent, he should have provided for it in his contract. Having failed to do this, it would seem to be unjust that, under a contract to run the machine less than ten years, he should be entitled to run it sixteen years. The consideration paid was limited to the term specified in the contract. But, it is answered, that the assignee expected to run his machine after the termination of the contract on which the exclusive right would end and become vested in the public.

Let us examine this plea, and it will be found that a great fallacy prevails on this subject. A right that is common, is no more valuable to one person than another, as all may use it. The injury, then, consists, so far as the licensee is concerned, in the reduction of the value of his machine, by the extension of the exclusive right in the patentee, to the exclusion of the assignee. It is true this deprives him of the monopoly which his contract secured to him. But he has enjoyed this to the extent of his contract, and for which he has paid the stipulated consideration. Now, his only equitable plea to run his machine during the renewed patent, arises alone from the supposed difference in the value of his machine, under the renewal, without a license, and where the right becomes vested in the public.

If there had been no renewal, the licensee might run his machine, and any other person might run one. It is a fact known to every observing individual, when a new business is set up, as a planing machine, sup-

posed to be very profitable generally, a competition is excited, which reduces the profit below a reasonable compensation for the labor and expense of the business. If the monopoly continued, as enjoyed under the contract, the consideration paid for the monopoly would be added to the profits, which would [557] make them large. But when the monopoly ceases, the profits, if not destroyed, are reduced by competition, as least as low, if not below the ordinary profit of capital employed in other investments.

If the business of the county or city required the number of planing machines in operation, the licensee could sell his machine at a reasonable reduction for the time it had run. The machines of the defendant had run, probably, from twelve to fifteen years. A considerable reduction would be expected by the purchaser, as a machine could not be expected to last more than twenty years. But suppose it can be used thirty, then one half of the value must be deducted for the wear of the machine fifteen years, which would reduce it to some two hundred and fifty or three hundred dollars.

But suppose the exclusive right should be continued in the patentee, by an extension of it seven years. Then, if the machines were not more numerous than the public required, they would be wanted by their owners, or by others disposed to engage in the business. And I hazard nothing in saying, that, after deducting the compensation from the profits, paid for the exclusive right, they would be larger than could be hoped for, where the right was common. Under such circumstances, I can entertain no doubt, that a machine would sell for more money, under the extension of the patent, than where the right goes to the public.

The idea that to refuse the use of a machine under the extension of a patent, is an unjust interference with property, I think, is unfounded. There is no interference with the property in the machine. The owner may sell it to anyone who has a license to use it. It is not the property in the machine that is complained of, but because the right to run it longer than the contract provided for, is not given. The licensee has used the franchise, as long as he purchased and paid for it; and can he in justice claim more than his contract? The extension of the right to use, while the extended patent continues, does a wrong to the patentee, by taking his property, without compensation, and giving it to the licensee. The franchise is property, and it can no more be transferred to another, without compensation or contract, than any other property. It would seem that this description of property is not governed by contract. That a contract to use the franchise ten years, does not mean what is expressed, but may mean a right for twenty years, or any other term to which the patent may be extended.

Every man who has sense enough to make a contract, takes into his estimate the contingency of a loss, to some extent, in going out of the business. He fixes his own time for the contract, and if he wishes to provide for [558] the contingency arising from the renewal of a patent, he can embrace it in his contract for a stipulated compensation.

It may be true, that, unless the contrary ap-

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pear, when the patentee sells a planing machine, a right to use it may be applied. But the right to construct and the right to use, are distinct. Some purchase of the patentee the right to construct the machine, others to use it. This planing machine cannot be compared to a plough, or any other article which may be considered the product of a patent. The machine is the instrument through which the plank is planed. The plank is the product, and may be sold in the market as other property. But the planing machine cannot be used without a license. The law protects the franchise, by prohibiting the use of the machine without a license. When Barnet purchased the franchise for the fifty machines, he did not buy the machines for a term as long as the machines could run, but for nine years and six months. The contract, neither expressly nor impliedly, extended beyond that term.

In this view, I think that I am not mistaken, and if I am not, the license is not injured a dollar by the termination of his right to run his machine, as fixed in his contract. But, on whom is the injury inflicted by extending the contract of the licensee with the patentee, and that without compensation? In the present case, the patentee has been injured, by the use of the fifty machines, at least \$4,000, the amount agreed to be paid for the right to run them less than ten years. And must not the property of the patentee be taken into the account, as well as the imagined rights of the licensee?

The patentee is justly considered a public benefactor. He has conferred a great benefit upon the world; and he is entitled, under our laws, to at least a compensation for his expense, ingenuity and labor.

That the patentee is the only one whose interests are regarded, as the ground of extending the patent in the Act of 1836, is clear. Now, suppose the patentee has assigned the whole of the patent, without receiving such a compensation as the law authorizes; there can be no doubt he is entitled, on that ground, to a renewal of the patent; and yet, under the decision now given, his assignees would receive all the benefits of the renewal. Should not this fact cause doubts whether the rule of construction of the statute can be a sound one, which defeats its avowed object? If this be the consequence of the assignment of the entire interest by the patentee, any partial assignment must produce the same result, though to a more limited extent. A principle which will not bear this test is not sound.

559*] *The Act of 1845, extending this patent, annexed no conditions. The exclusive right was extended to the administrator of Woodworth for seven years, from the 27th of December, 1849. But the decision now given, in effect declares this exclusive right is not given. Indeed, the object of Congress must be defeated if the machines, in operation at the time of the passage of the Act, are to be continued without compensation. It is presumed there are few places where planing machines were not constructed before 1849, the time the renewal took effect, if the public required them. On this supposition, the extension of the patent can be of little or no benefit to the heirs of the patentee. Congress could have

granted the Act only upon the ground to remunerate the heirs of the inventor.

There seems to be a great mistake as to the profits of this patent. It was a valuable patent, but, as in all other cases, its value excited the rapacity of men who seek to enrich themselves by taking the property of others. The records of the courts show, that piracies were committed on this patent in every part of the country; and that to sustain it, much expenditure and labor have been required. It is stated that the sum of near \$200,000 has been thus expended to establish this patent. Congress have extended many patents; in some instances conditions have been imposed, in others, the franchise has been extended unconditionally. Now, where the patent is extended by Act of Congress, without conditions, I am unable to perceive how the court can impose conditions. Such an Act would be legislation, and not construction.

By the Act of the 15th February, 1847, the patent of Thomas Blanchard, for cutting irregular forms out of wood, brass, or iron, was extended for fourteen years, from the 20th of January, 1848: "Provided that such extension shall inure to the use and benefit of the said Thomas Blanchard, his executors and administrators and to no other persons whomsoever, except that a *bona fide* assignee of the invention, by virtue of an assignment from the patentee heretofore made, shall have the benefit of this Act, upon just, reasonable, and equitable terms, according to his interest therein. And if the said Thomas Blanchard, his executors or administrators, cannot agree with such assignee, the terms shall be ascertained and determined by the Circuit Court of the United States for the district in which such assignee resides, to be decreed upon a bill to be filed by such assignee for that purpose. And provided further, that no assignee shall have the benefit of this Act unless he shall, within ninety days from its passage, agree with the said Thomas Blanchard as to the consideration upon which he is to have it, or file his bill," &c.

*Everyone must perceive the justice [*560 and propriety of this Act; under the decision now given, the assignee of Blanchard would have had the benefit of the extension without paying for it. This Act, extending Blanchard's patent, was passed two years after the decision of this court in *Wilson v. Rousseau*, which, under the Act of 1836, gave the benefit of the extension to the assignee. This must have been known to Congress, and yet they deemed a special provision in behalf of the assignee necessary. This Act, and several others of a similar character, cannot fail to convince everyone that Congress did not suppose that the courts have power to annex a condition to a legislative grant.

In the case of *Evans v. Jordan and Morehead*, 9 Cranch, 199, this court held, that the Act of January, 1808, for the relief of Oliver Evans, does not authorize those who erected their machinery between the expiration of their old patents and the issuing of the new one, to use it after the issuing of the latter.

The above Act extended the patent fourteen years, "provided that no person who may have heretofore paid the said Oliver Evans for license to use the said improvements, shall be

obliged to renew said license or be subject to damages for not renewing the same; and provided also, that no person who shall have used the said improvements, or have erected the same for use, before the issuing of the said patent, shall be liable to damages therefor."

This was a much stronger case for equitable considerations than the one before us. Evans' patent had expired. His improvements were free to the public, and they were adopted by the defendants before he made application to Congress for a renewal of his patent. I will cite the reasoning of the Supreme Court on that case. "The language," they say, "of this last proviso is so precise, and so entirely free from all ambiguity, that it is difficult for any course of reasoning to shed light upon its meaning. It protects against any claim for damages which Evans might make, those who have used his improvements, or who may have erected them for use, prior to the issuing of his patent under this law. The protection is limited to acts done prior to another act thereafter to be performed, to wit: the issuing of the patent. To extend it, by construction, to acts which might be done subsequent to the issuing of the patent, would be to make, not to interpret, the law." "The injustice of denying to the defendants the use of machinery which they had erected after the expiration of Evans' first patent, and prior to the passage of this law, has been strongly urged as a reason why the words of this proviso should be so construed as to have a prospective operation. But it should be recol-
561*] lected that *the right of the plaintiff to recover damages for using his improvement after the issuing of his patent, under this law, although it had been erected prior thereto, arises not under this law, but under the general law of the 21st of February, 1793. The provisos in this law profess to protect, against the operation of the general law, three classes of persons—those who had paid Evans for a license prior to the passage of the law; those who may have used his improvements; and those who may have erected them for use before the issuing of the patent."

And the court say: "The Legislature might have proceeded still further, by providing a shield for persons standing in the situation of these defendants. It is believed that the reasonableness of such a provision could have been questioned by no one. But the Legislature have not thought proper to extend the protection of these provisos beyond the issuing of the patent under that law; and this court would transgress the limits of the judicial power by an attempt to supply, by construction, this supposed omission of the Legislature. The argument founded upon the hardship of this and similar cases, would be entitled to great weight if the words of this proviso were obscure and open to construction. But considerations of this nature can never sanction a construction at variance with the manifest meaning of the Legislature, expressed in plain and unambiguous language."

The above views do not conflict with the opinion of the court in *Evans v. Eaton*, 8 Wheat., 454. In that case the court say: "Some doubts have been entertained respecting the jurisdiction of the courts of the United States, as both the plaintiff and defendants are citizens

of the same state. The fifth section of the Act to promote the progress of useful arts, which gives to every patentee a right to sue in a Circuit Court of the United States, in case his rights be violated, is repealed by the third section of the Act of 1800, which gives the action in the Circuit Court of the United States where a patent is granted, 'pursuant' to that Act, or to the Act for the Promotion of Useful Arts. This patent, it has been said, is granted, not in pursuance of either of those Acts, but in pursuance of the Act 'for the relief of Oliver Evans.' But this court is of opinion, that the Act for the relief of Oliver Evans, is ingrafted on the general Act for the Promotion of Useful Arts, and that the patent is issued in pursuance of both. The jurisdiction of the court is therefore sustained."

There can be no question that the special law extending the grant, as to its validity, is subject to the general patent law. The right was intended to be exclusive, if it be established that Evans was the original inventor of the improvements claimed, and such improvements were stated with the necessary precision. *And also that it came under the class [*562 of cases on which suit could be brought in the courts of the United States, without regard to the citizenship of the parties. But it could not have been intended to apply to any contract subsequent to the patent, and it could only be held to embrace those general provisions of the patent law which relate to the validity of the patent. Under the Act of Congress, a specification was necessarily filed, and it seems to be the practice to issue a patent under the Act. This, it appears to me, is unnecessary, as the grant in the Act is sufficient. But the schedule is necessary to show the nature and extent of the claim, and these must be sustained on those principles which apply to patents generally.

To give any other construction to the above remarks of the court, would be in direct contradiction to the language used, and the principle decided, in the case above cited from Cranch. In fact, the remark that the relief of Evans was ingrafted on the general law, was made in reference to the jurisdiction of the court, and cannot be extended beyond that and other questions, in relation to the validity of the patent.

This argument of the court, in *Evans v. Jordan*, applies with all its force and authority to the case before us; and I need only say it was the language of Marshall, of Story, of Washington, and of the other judges of the court, except Judge Todd, who appears to have been absent. I can add nothing to the weight of the argument; but I will proceed to name the judges of this court who have given opinions opposed to the decision of this case by four of my brethren.

Mr. Justice Wayne being sick, did not sit in the case. In *Wilson v. Rousseau*, he held that, under the Act of 1836, the licensee had no right to run his machine under the extended patent.

Mr. Justice Curtis having, as counsel, given an opinion opposed to the right of the defendants, did not sit in the case. *Mr. Justice Thompson* and *Mr. Justice Story* had both given opinions against the right of the assignee, unless under a special assignment. This was

the opinion of *Mr. Justice Woodbury*, as expressed in the case of *Wilson v. Rousseau*. *Mr. Justice McKinley* gave an opinion against the right of the assignee under the Act of 1845, extending Woodworth's patent. The same decision has been frequently given, by the justices of this bench, in the second and seventh circuits.

Sustained by the authority of seven justices of this court, and by an argument of the Supreme Court above cited, which, I think, is unanswerable, I shall deem it to be my duty to bring the same question now decided, when it shall arise in my circuit, for the consideration and decision of a full bench.

ORDER.

563*] *This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Western District of Pennsylvania, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

Cited—20 How., 206; 22 How., 223; 1 Wall., 351; 16 Wall., 547; 17 Wall., 456, 460; 18 Wall., 416; 15 Otto, 770; 1 Cliff., 355; 2 Cliff., 437; 2 Biss., 67, 69; 1 Abb., U. S., 569; 3 Blatchf., 491; 6 Blatchf., 91; 1 Holmes, 41, 44, 220, 324.

LESSEE OF IRWIN H. DOOLITTLE ET AL., *Plaintiffs*,

v.

LEVI BRYAN ET AL., *Defendants*.

Sale on venditioni exponas by marshal after his removal from office not void.

A sale of land by a marshal on a *venditioni exponas*, after he is removed from office, and a new marshal appointed and qualified, is not void.

Such sale being returned to the court and confirmed by it, on motion, and a deed ordered to be made to the purchaser at the sale, by the new marshal, such sale being made, is valid.

THIS case came up from the Circuit Court of the United States for the District of Ohio, on a certificate of division in opinion between the judges thereof.

The following was the entire record in the case:

THE UNITED STATES OF AMERICA,
District of Ohio, ss.

At a Circuit Court of the United States, for the District of Ohio, began and held at the City of Columbus, in said district, on the third Tuesday, in the month of October, in the year of our Lord one thousand eight hundred and fifty-one, and of the independence of the United States of America the 76th, before the Honorable John McLean and the Honorable Humphrey H. Leavitt, Judges of said court; among other proceedings had, were the following, to wit:

The lessee of IRWIN H.
DOOLITTLE et al.

} In ejectment.

LEVI BRYAN et al.

In this case, the lessors of the plaintiff, being citizens of Illinois, brought their action of ejectment to recover possession of one thousand HOWARD 14.

acres of land in the State of Ohio: the declaration being duly served on the tenants in possession, they appeared and entered into the consent rule, and filed the general issue. On the trial, two points arose, on which the opinions of the judges were opposed, to wit:

*1. Whether a sale of land by a mar- [*564
shal, on a *venditioni exponas*, after he is removed from office, and a new marshal appointed and qualified, is void.

2. Whether such sale, being returned to the court, and confirmed by it on motion, and a deed ordered to be made to the purchaser, at the sale, by the new marshal, such sale being made, is valid.

And the counsel for the lessors of the plaintiff, moved the court to certify the above points, for decision, to the Supreme Court, under the statute.

The practice to confirm the marshal's sale, is under the fifteenth section of the state statute "regulating judgments and executions," and is as follows:

"That if the court to which any writ of execution shall be returned by the officer, for the satisfaction of which any lands or tenements may have been sold, shall, after having carefully examined the proceedings of such officer, be satisfied that the sale has, in all respects, been made in conformity to the provisions of this Act, they shall direct their clerk to make an entry thereof on the journal, that the court are satisfied with the legality of such sale, and an order that the said officer make to the purchaser a deed for such lands and tenements."

October 27, 1851.

From the arguments of counsel, the following appeared to be the dates of the several transactions:

On the 19th of February, 1829, a *venditioni exponas* came to the hands of William Dougherty, then the Marshal of Ohio. The writ was returnable to the July Term, 1829.

On the 20th of April, 1829, Dougherty was removed from office.

On the 11th of May, 1829, John Patterson was qualified as Marshal.

On the 10th of July, 1829, Dougherty sold the land in question.

At the July Term, 1829, the writ of *venditioni exponas* was returned, by which it appeared that the land was sold to Levi Bryan, one of the defendants. The sale was confirmed by the court, and Patterson, the then Marshal, ordered to convey the land to Bryan, the purchaser.

The counsel upon both sides agreed that the plaintiffs in ejectment could not recover unless this was a void sale.

It was argued by *Mr. Stanberry* for the plaintiffs, and *Mr. Corwin* for the defendant.

**Mr. Justice Grier* delivered the [*565
opinion of the court:

On the trial of this case in the Circuit Court, two points arose, in which the judges were divided in opinion, and which have been accordingly certified to this court.

1. Whether a sale of land by a marshal, on a *venditioni exponas*, after he is removed from office, and a new marshal is appointed, is void.

2. Whether such sale, being returned to the court and confirmed by it, on motion, and a

deed ordered to be made to the purchaser at the sale, by the new marshal, such sale being made, is valid.

If the first of these questions be answered in the negative, the second will be answered affirmatively, as an undisputed consequence.

Whether a sale, made by a marshal after he is removed from office, on a writ of *venditioni exponas*, is void, will depend on the construction of the third section of the Act of May 7, 1800, ch. 45, and whether it is a repeal of the provisions on this subject, contained in the twenty-eighth section of the Judiciary Act of 1789, chap. 20.

So much of the latter Act as is material to our inquiry, is as follows: "Every marshal or his deputy, when removed from office, or when the term for which the marshal is appointed shall expire, shall have power, notwithstanding, to execute all such precepts as may be in their hands respectively at the time of such removal or expiration of office," &c.

The third section of the Act of 1800 enacts: "That whenever a marshal shall sell any lands, tenements, or hereditaments, by virtue of process from a court of the United States, and shall die or be removed from office, or the term of his commission expire, before a deed shall be executed for the same by him to the purchaser; in every such case the purchaser or plaintiff, at whose suit the sale was made, may apply to the court from which the process issued, and set forth the case, assigning the reason why the title was not perfected by the marshal who sold the same; and thereupon the court may order the marshal, for the time being, to perfect the title, and execute a deed to the purchaser, he paying the purchase money and costs remaining unpaid. And where a marshal shall take in execution any lands, &c., and shall die or be removed from office, or the term of his commission expire before a sale or other final disposition made of the same, in every case the like process shall issue to the succeeding marshal, and the same proceedings shall be had, as if such former marshal had not died or been removed, or the term of his commission had not expired. And the provisions in this section contained, shall be, and they are hereby extended **566***) to all the cases respectively which may have happened before the passing of this Act."

There is no express repeal of the Act of 1789 to be found in this Act of 1800. Nor does it contain any negative terms which are necessarily contrary to the previous affirmative Act. A latter Act is never construed to repeal a prior Act unless there be a contrariety or repugnancy in them, or at least some notice taken of the former Act so as to indicate an intention to repeal it. The law does not favor a repeal by implication unless the repugnance be quite plain; hence it has been decided that, although two Acts of Parliament be seemingly repugnant, yet if there be no clause of *non obstantibus* in the latter they shall, if possible, have such construction that the latter may not be a repeal of the former by implication. (Dwarris on Stat., §74, and cases cited.)

The purview of the clause of the Act of 1789, now in question, is to define the powers of a marshal having process in his hands at the time he is removed or his office expires; it author-

izes him to execute process previously directed to him. The Act of 1800 is evidently intended to confer rights on the parties to have the same acts performed by the new marshal. It gives cumulative rights and powers, for the benefit of suitors.

That such is its purview and policy, is evident from its language—"the purchaser or the plaintiff," it is said, "may apply, and the court may order the new marshal for the time being;" and although "may" is changed into "shall," in the latter clause of the section, it is not necessarily inconsistent with, nor repugnant to the power conferred on the marshal to execute precepts in his hands, by the Act of 1787. The latter Act does not set aside or make void process or precepts in the hands of the out-going marshal, or require him to hand them over to the new officer. It authorizes "like process" to issue to him; and the word "shall" is used because it is the most proper in conferring a power on the officer, and is not incompatible with the choice given to the plaintiff in the first clause of the section. The laws of the several States affecting liens on land, and the process by which they may be sold for the satisfaction of judgments, differ very widely. In some, by attachment a lien is created at the institution of the suit. In others, the judgment becomes a lien at the time of its rendition; while in others, the execution and levy first give a lien. In some, lands are sold on a *fi. fa.*, while in others it can be sold only on a *venditioni exponas*. Under the Act of 1789, a doubt might have been entertained, whether land attached should be sold by the officer who had originally attached it, and whether, if process issued to a new officer, it might not be a relinquishment of the lien of the original attachment, *as by fiction [**567**] of law the land, like personal property attached, might be considered in the custody of the officer who attached it. Again, an officer, going out of office, may have an execution in his hands which has created a lien; if the Act were construed so as imperatively to require a new or "like process" to issue to the new officer, the lien, and with it the debt, might be lost. In other cases, on the contrary, a marshal may be, and often is, removed from office, because money, which once gets into his hands, cannot be got out again, and a plaintiff may much prefer to relinquish his execution and take a new one. Doubts, also, may have arisen, whether a *venditioni exponas* could legally issue to the new marshal, where the former one had levied on the land and had it condemned. All these difficulties are obviated by the Act of 1800, not by repealing the general powers given by the Act of 1789, but by conferring certain powers on the new officer, where it is found expedient or necessary that he should exercise them.

It is an argument entitled to great weight in the construction of these statutes—that different constructions have been given them in different states, and the practice under them has been more or less conformed to the state practice, without, perhaps, a proper regard to these Acts. In some, the Act of 1800 has been overlooked altogether. A sharp or stringent construction, which should now declare the latter to be a repeal of the powers conferred by the former, might have the effect of unsettling ti-

ties to land to an extent the court may not be able to anticipate. In the present case, it is said, the land was sold in 1829. The purchaser paid his money and obtained his deed upon the faith of a judgment of the court that the sale was regular, and has held the land under this title ever since. Hundreds of similar cases may probably be found, where the same objections to the sale exist. Under such circumstances a court should be even astute in avoiding a construction which may be productive of much litigation and insecurity of titles.

We therefore answer the first question proposed, in the negative; which involves, as a necessary consequence, an affirmative answer to the second, so far as it affects the case before us. But we do not mean to say that the confirmation of a void sale by the court would make it valid.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Ohio, and on the points or questions on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion, agreeably to the Act of Congress in such case made and provided, and was argued by counsel; on consideration whereof, it is the opinion of this court—

1. "That a sale of land by a marshal, on a *conditio sine qua non*, after he is removed from office, and a new marshal appointed and qualified," is not void.

2. That "such sale being returned to the court, and confirmed by it on motion, and a deed ordered to be made to the purchaser, at the sale, by the new marshal, such sale being made, is valid."

Whereupon it is now here ordered and adjudged by this court, that it be so certified to the said Circuit Court.

SAMUEL VEAZIE AND LEVI YOUNG,
Plaintiffs in Error,

v.

WYMAN B. S. MOOR.

State grant of exclusive right to navigate upper waters of Penobscot River, valid.

The River Penobscot is entirely within the State of Maine, from its source to its mouth. For the last eight miles of its course it is not navigable, but crossed by four dams erected for manufacturing purposes. Higher up the stream there was an imperfect navigation.

A law of the State, granting the exclusive navigation of the upper river to a company who were to improve it, is not in conflict with the 8th section of the 1st article of the Constitution of the United States, and a license to carry on the coasting trade did not entitle a vessel to navigate the upper waters of the river.

THIS case was brought up from the Supreme Judicial Court of the State of Maine, by a writ of error issued under the 25th section of the Judiciary Act.

The facts in the case are stated in the opinion of the court.

It was argued by *Mr. Paine* for the plaintiffs in error, and by *Messrs. Kelley and Moor* for the defendant in error.

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The following propositions were contended for, in an elaborate brief, filed by the counsel for the plaintiffs in error:

1. That the constitutional power of Congress in question embraces the right to adopt any means reasonably necessary, in their opinion, to the successful prosecution of commerce among the States and with foreign nations.

2. That Congress has adopted, as such means, the whole commercial marine of the country, every part of which, as a unit, is under their entire control and regulation, without regard to the waters on which the navigation is carried on.

3. That to constitute a part of this commercial marine, no other qualifications are necessary than those prescribed by Congress in the several Acts regulating the registry and [*569] enrollment of vessels, and such registry or enrollment is evidence of a compliance with the prescribed conditions.

4. That any vessel so enrolled, being licensed, has an unrestricted right to navigate all the navigable waters of the United States, wherever they may be found serviceable to its use.

5. That the power of Congress to regulate commerce is as extensive on land as water, and is irrespective of both; that these compose no part of commerce or navigation, but are subject to be adopted as ways or thoroughfares of it, whenever they may be required by the wants of either; and that in legislating upon the subject, Congress has not discriminated between one class or body of navigable waters and another, but has made all such waters free for the uses of navigation, wherever any portion of the commercial marine of the country may exist.

6. That under the Statute of 1831, March 2, sec. 8, the plaintiffs' boat is expressly included as provided for by said Act, and is thus embraced within the power of Congress, even if not included in the general provisions of the Acts regulating the "coasting trade."

7. That the right of Congress to regulate "commerce with the Indian tribes," extends to and embraces the Penobscot tribe of Indians, and the Legislature of Maine has no right to restrict the people to, or deprive them of, any particular mode of intercourse or trade with them.

8. That any Act of a State Legislature contravening such right of navigation, as does the Act set forth in defendants' bill of complaint, is absolutely null and void.

The points made by the counsel for the defendant in error were thus stated:

The only question here is, whether the grant to Moor is in conflict with that provision of the Constitution which gives Congress the right to regulate commerce.

A party alleging that a state law is unconstitutional, takes on himself the burden of establishing these three propositions.

First. That the matter or subject in controversy is within the legislative jurisdiction of Congress.

Second. That Congress has *de facto* legislated on the subject, and embraced it within regulations established by its legislation; and,

Third. That the party impeaching the law, has himself acquired rights in the subject matter which is in controversy, and that these

rights have been invaded by the legislation of the State.

570*] *Applying these rules to this case, plaintiffs are bound to show,

First. That the navigation of the Penobscot River, above Old Town Falls, is within the jurisdiction of Congress.

Second. That Congress has embraced this navigation in its legislation, and provided regulations for it; and.

Third. That they have acquired rights in that navigation under the legislation of Congress, which rights have been impaired by the law of the State.

Plaintiffs must establish all three of these propositions. It is not enough for them to establish any two of them. If they fail in any one of them, they have no ground to stand upon.

1st. As to the first of these propositions. The grant being confined to waters wholly internal, plaintiffs can carry on no navigation by means of those waters, with any foreign nation, nor with any other state. We think this is almost too plain for argument. (*Moor v. Veazie*, 82 Maine, 343; *Wilson v. Black Bird Creek Marsh Co.*, 2 Pet., 250; 3 Kent's Com., 458; *Livingston v. Van Ingen*, 9 Johns, 506; *Gibbons v. Ogden*, 17 Id., 488; *Id.*, 9 Wheat., 1; *New Bedford Bridge case*, 1 Wood. & M., 404; *Kellogg v. Union Company*, 12 Conn., 7; *Passenger case*, 7 How., 288; *Brown v. Maryland*, 12 Wheat., 419; *New York v. Miln*, 11 Pet., 102; 3 Cowen, 713.)

Again. This grant is not in conflict with the power of Congress to regulate commerce with the Indian tribes.

1. Because commerce, in this connection, does not include navigation. (82 Maine, 343.)

2. Because the Constitution manifestly refers only to independent tribes with which the general government may come in conflict; not to those small remnants of tribes scattered over the country, which are under state jurisdiction and guardianship. (83 Maine, 343.)

2d. We hold that plaintiffs entirely fail to establish the second proposition, to wit: That the navigation of these waters is embraced within the actual legislation of Congress. None of the Acts cited were ever intended to apply to waters wholly within the limits of a state, and which could not be reached by vessels from foreign ports, or from other states.

Again. We contend that if Congress has, or should pass any acts interfering with commerce purely internal, they would be unauthorized and void. (*Passenger Case*, 7 How., 288; *Genesee Chief*, 12 Id., 443.)

3d. As to the third proposition, the case fails to show that plaintiffs have acquired any rights in the navigation of the waters of the upper Penobscot, under any regulation of Congress, or in any other way or manner.

Assuredly there can be no pretense that **571*]** plaintiffs were engaged *in any commerce on those waters with any foreign nation, or with any other state. Nor is there any fact or evidence in the case tending to show that they were engaged in commerce with the Penobscot tribe. It does not appear that they traded or had any intercourse with that tribe, nor that they wished or intended to have any such intercourse. The Penobscots

are not represented here. They do not complain of the grant. There is no fact going to show that this grant has any bearing or effect on any commerce to which they are parties. If they have any ports of entry or clearance, for aught the case finds, such ports may be as hermetically sealed as those of Japan.

If plaintiffs fail to show that they have acquired rights which have been taken away, they cannot complain, even if the act was most palpably against the Constitution. (*Wheeling Bridge case*, 13 How., 518; *East Hartford v. Hartford Bridge Company*, 17 Conn.)

Mr. Justice Daniel delivered the opinion of the court:

The questions raised upon this record, however subdivided or varied they may have been in form or number, are essentially and properly restricted to the power and the duty of this court, to inquire into the constitutional obligation of the law of the State of Maine, upon which the decision of the Supreme Court of that State was founded; for if that law and the privileges conferred thereby, be coincident with the eighth section of article 1st of the Constitution, they can be assailable here upon no just exception.

It is insisted, however, that the Statute of the State of Maine is in derogation of the power vested in Congress by the article and section above mentioned, "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." We will examine the character of this objection with reference to the facts disclosed by the record, and with reference also to the provisions of the statute in question, as they have been designed to operate on those facts: and as these last are all agreed by the parties, there can be no need of a comparison of the testimony to ascertain their verity.

The River Penobscot is situated entirely within the State of Maine; having its rise far in the interior of the State; it is not subject to the tides above the City of Bangor, near its mouth. Between the City of Bangor and Old Town, a distance of eight miles, the Penobscot passes over a fall, is crossed by four dams erected for manufacturing purposes, and for the above space is not, at this time, and never has been, navigable; but there is a railroad from Bangor to the steamboat landing at Old Town. On the 30th day of July, 1846, the Legislature of Maine, by law enacted, [**572** that "William Moor and Daniel Moor, Jr., their associates and assigns, were authorized to improve the navigation of the Penobscot River above Old Town, and for that purpose, were authorized to deepen the channel of the river, to cut down and remove any gravel or ledge, bars, rocks or other obstructions in the bed thereof: to erect in the bed, on the shore or bank of said river, suitable dams and locks, with booms, piers, abutments, breakwaters and other erections to protect the same; to build upon the shore or bank of said river, any canal or canals to connect the navigable parts of said river; or (in case it shall be deemed the preferable mode of improvement) any railroads for the like purpose.

After providing the modes of acquiring lands or gravel on the shores or in the bed of the river, and for compensating the owners of

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property used in the prosecution of the contemplated improvement, the Act proceeds to limit the time for the completion of the undertaking, within particular *termini* therein named, to the period of seven years from its date; and farther requires that, within the period thus limited, the grantees shall build and run a steamboat between those *termini*, and shall, within the same time, make a canal and lock around the falls of the river, or a railroad to connect the route above with that below the falls.

Then follows section fourth of the statute, containing the provision objected to. It is in these words: "If said William Moor and Daniel Moor, Jr., their associates and assigns, shall perform the conditions of this grant as contained in the preceding section, the sole right of navigating said river by boats propelled by steam from said Old Town so far up as they shall render the same navigable, is hereby granted to them for the term of twenty years from and after the completion of the improvement, as provided in the third section of this Act." The defendant in error, who is assignee of the original grantees from the Legislature, having made certain improvements in the river by the removal of rocks, and by deepening the channel in other places, so as to enable boats to run therein, with two and a half feet of water less than was requisite for navigation previously to these improvements, and all within the limit prescribed to him by law, built, and on the 27th of May, 1847, placed upon the said river, the steamboat Governor Neptune, and ran her from Old Town over the Piscataquis Falls, to a place called Nickaton. In the spring of the year 1847, the defendant in error placed on the river the steamboat Mattanawcook, and ran her to Lincoln, till obstructions were removed by him at a place called the Mohawk Rips, above the Piscataquis Falls; and has also built and is now running upon the river, another steamboat called the Sam Houston, in addition to the Governor Neptune and the Mattanawcook.

The plaintiff in error, Samuel Vezie, built the steamboat Governor Dana, and, in conjunction with the other plaintiffs, Levi and Warren R. Young, ran her upon the Penobscot River between Old Town and the Piscataquis Falls, from the 10th day of May, 1849, until they were arrested by an injunction granted at the suit of the defendant in error. The steamboat Governor Dana was enrolled and licensed for the coasting trade, at the custom house at Bangor. The Penobscot tribe of Indians own all the islands in the Penobscot River above Old Town Falls, some of which they occupy; and this tribe always have been, and now are, under the jurisdiction and guardianship of the State of Maine.

Upon this state of facts agreed, the Supreme Judicial Court of Maine, after argument and advisement, at its June Term, 1850, decreed, that the plaintiffs in error be perpetually enjoined to desist and refrain from running and employing the steamboat Governor Dana, propelled by steam, for transporting passengers or merchandise on said river, or any part thereof above Old Town, and also from building, using, and employing, any other boat propelled by steam on that part of the said river for

that purpose, without the consent of the said Wyman B. S. Moor, obtained according to law, until the said Moor's exclusive right shall expire. The court further decreed to the defendant in error, the sum of \$1,052.45, for damages and expenses incurred by him, by reason of the interference with his rights on the part of the plaintiffs in error.

Upon a comparison of this decree, and of the statute upon which it is founded, with the provision of the Constitution already referred to, we are unable to perceive by what rule of interpretation either the statute or the decree can be brought within either of the categories comprised in that provision.

These categories are, 1st. Commerce with foreign nations. 2d. Commerce amongst the several States. 3d. Commerce with the Indian tribes. Taking the term "commerce" in its broadest acceptation, supposing it to embrace not merely traffic, but the means and vehicles by which it is prosecuted, can it properly be made to include objects and purposes such as those contemplated by the law under review? Commerce with foreign nations must signify commerce which in some sense is necessarily connected with these nations, transactions which either immediately, or at some stage of their progress, must be extraterritorial. The phrase can never be applied to transactions wholly internal, between citizens of the same community, or to a polity and laws whose ends and purposes and operations are restricted to "the territory and soil and jurisdiction" [*574] of such community. Nor can it be properly concluded, that, because the products of domestic enterprise in agriculture or manufactures, or in the arts, may ultimately become the subjects of foreign commerce, that the control of the means or the encouragements by which enterprise is fostered and protected, is legitimately within the import of the phrase "foreign commerce," or fairly implied in any investiture of the power to regulate such commerce. A pretension as far reaching as this, would extend to contracts between citizen and citizens of the same state, would control the pursuits of the planter, the grazier, the manufacturer, the mechanic, the immense operations of the collieries and mines and furnaces of the country; for there is not one of these avocations, the results of which may not become the subjects of foreign commerce, and be borne either by turnpikes, canals or railroads, from point to point within the several States, towards an ultimate destination, like the one above mentioned. Such a pretension would effectually prevent or paralyze every effort at internal improvement by the several States; for it cannot be supposed that the States would exhaust their capital and their credit in the construction of turnpikes, canals and railroads, the remuneration derivable from which, and all control over which, might be immediately wrested from them, because such public works would be facilities for a commerce which, whilst availing itself of those facilities, was unquestionably internal, although intermediately or ultimately it might become foreign.

The rule here given with respect to the regulation of foreign commerce, equally excludes from the regulation of commerce between the

States and the Indian tribes the control over turnpikes, canals, or railroads, or the clearing and deepening of watercourses exclusively within the States, or the management of the transportation upon and by means of such improvements. In truth, the power vested in Congress by article 1st, section 8th of the Constitution, was not designed to operate upon matters like those embraced in the Statute of the State of Maine, and which are essentially local in their nature and extent. The design and object of that power, as evinced in the history of the Constitution, was to establish a perfect equality amongst the several States as to commercial rights, and to prevent unjust and invidious distinctions, which local jealousies or local and partial interests might be disposed to introduce and maintain. These were the views pressed upon the public attention by the advocates for the adoption of the Constitution, and in accordance therewith have been the expositions of this instrument propounded by this court, in decisions quoted by counsel on either side of this cause, though § 575* differently applied by them. *(*Vide* The Federalist, Nos. 7 and 11, and the cases of *Gibbons v. Ogden*, 9 Wheat., 1; *New York v. Milne*, 11 Pet., 102; *Brown v. The State of Maryland*, 12 Wheat., 419; and the License Cases in 5 How., 504.)

The fact of procuring from the collector of the port of Bangor a license to prosecute the coasting trade for the boat placed upon the Penobscot by the plaintiff in error (the Governor Dana), does not effect, in the slightest degree, the rights or condition of the parties. These remain precisely as they would have stood had no such license been obtained. A license to prosecute the coasting trade, is a warrant to traverse the waters washing or bounding the coasts of the United States. Such a license conveys no privilege to use, free of tolls, or of any condition whatsoever, the canals constructed by a state, or the watercourses partaking of the character of canals exclusively within the interior of a state, and made practicable for navigation by the funds of the state, or by privileges she may have conferred for the accomplishment of the same end. The attempt to use a coasting license for a purpose like this, is, in the first place, a departure from the obvious meaning of the document itself, and an abuse wholly beyond the object and the power of the government in granting it.

Upon the whole, we are of the opinion that the decision of the Supreme Judicial Court of the State of Maine is in accordance with the Constitution of the United States, and ought to be, and is hereby affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Supreme Judicial Court of the State of Maine, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Judicial Court in this cause be, and the same is hereby affirmed, with costs.

Att'g—32 Me., 343.
Cited—20 How., 92, 298; 15 Wall., 520; 12 Otto, 544; 1 Brown, 197.

URIAH A. BOYDEN, *Plaintiff in Error*

v.

EDMUND BURKE.

Commissioner of Patents—Action lies for refusal to furnish copies of record on legal demand—demand accompanied by insult not legal—subsequent proper demand must be complied with.

Where an action was brought against the Commissioner of Patents for refusing to give copies of papers in his office, and no special damage was set out in the declaration, evidence of the professional pursuits of the applicant was not admissible.

Where the application was made through a third person, letters of both parties to this third person were admissible in evidence, as part of the res gestæ.

*Patents are public records, and it is the duty of the Commissioner to give authenticated copies to any person, on payment of the legal fees.

But the party entitled to such services must request their performance in a proper manner, and not accompany his demand with insult or abuse.

Hence, the Commissioner could not be held responsible for refusing to comply with a demand couched in such language.

But when a second application was made, in a proper manner, the Commissioner ought to have complied with it.

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington.

Boyden was a citizen of Massachusetts, and Burke was a Commissioner of Patents at the time when the transactions took place which were the subject of the suit.

The ground of the action was, that Burke willfully, maliciously, and corruptly, and with intent to injure Boyden, had refused to give copies of certain patents.

The bills of exceptions referred to certain letters, which will be mentioned chronologically.

On the 14th December, 1847, Boyden wrote a long letter to Burke, too long to be inserted. The following extract from it will be sufficient:

"If, in your letter of August 10, 1847, you mean by the 'office' yourself, or the author of the letters which I have received from you, you prescribe two conditions in said letter which are inconsistent, viz.: that my letters to you, or to the author of those letters subscribed by you, should be both respectful and proper. It is improper to treat a person respectfully while it is known that he is unworthy of respect: therefore, it is impossible to comply with your prescriptions. The claim of unworthy office holders to have people, as they say, respect the offices they hold, while it is known that the incumbents are unworthy of respect, is absurd. Do you mean, when you urge people to respect 'the office,' to have them respect you merely because you hold the office, while it is known that you are unworthy of respect? This is a free country!" &c., &c.

On the same day Mr. Boyden wrote to Mr. Greenough, in Washington, as follows:

BOSTON, MASS., December 14, 1847.

SIR—Your letter of the 23d ult. was duly received. I wrote to Mr. Burke to-day, criticising his conduct, and informing him that I wish him to deliver to you a certified copy of each of the following patents, including drawings, specifications, and claims, or of all of

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them which are recorded in the Patent Office: George W. Henderson and John E. Cayford's patent, dated April 14, 1830, Charles Kenzie's patent, dated July 1, 1836, and J. K. Millard's patent, dated May 9, 1846.

577*] *You will oblige by tendering the fees for those copies if he declines furnishing them; and if you obtain them, I wish you to send them by mail to me at Boston.

Respectfully,

(Signed)

URIAH A. BOYDEN.

Test:

JOHN A. SMITH, Clk.

Mr. Greenough, accordingly, called upon Mr. Burke, who declined to cause the copies to be prepared for him, as the agent of Mr. Boyden, and addressed to Mr. Greenough an explanatory letter, from which the following is an extract:

"Of these reasons, for declining to cause the copies to be made for him, which you requested, you were duly apprised. And you were also informed, as Mr. Boyden himself has been informed, that, until he comes to the conclusion to treat this office with the civility which the customs and rules of official intercourse require, this office will have no intercourse with him, directly or through the agency of others. When he concludes to conduct his intercourse with this office with decency and propriety, his business will be attended to."

On the 20th of January, 1848, Mr. Burke made the following memorandum, which he handed to Mr. Laskey, who had called for the same papers:

PATENT OFFICE, January 20, 1848.

Mr. R. H. Laskey, as the agent of Uriah A. Boyden, calls for the following copies of patents, including drawings, specifications, and claims, or of all of them, which are recorded in the Patent Office, viz.: George W. Henderson and John E. Cayford's patent, dated April 14, 1830; Charles Kenzie's patent, dated July 1, 1846; and J. K. Millard's patent, dated May 9, 1846; for which he offers to pay the usual fees required by law for copies.

I hereby refuse to give him the copies called for for Mr. Boyden, or to transact any other business for Mr. Boyden with Mr. Laskey. I do not refuse copies of any patents or other papers which Mr. Laskey requires for himself or for any other person, except Mr. Boyden. I refuse to do any business for Mr. Boyden, whether he applies for the same personally or by agent, until he comes to the conclusion to observe, in his communications with this office, or its official head, the proprieties usually observed in official intercourse. When he comes to the conclusion to address this office, or its head, in respectful language, any business which he may have with it will be done as it is done for other persons, whether he applies in person or by agent.

EDMUND BURKE.

Mr. Boyden soon afterwards brought his action against Burke, as above stated.

578*] *On the trial of the cause, the plaintiff's counsel took four bills of exceptions; the first three of which related to evidence, and the fourth an exception to a general instruction, that the plaintiff was not entitled to recover.

They were as follows:

First Exception.

On the trial of the issue in this cause, the HOWARD 14.

plaintiff, to maintain the issue on his part joined, offered to give evidence tending to show that he is a citizen of the United States, residing in Boston, in the State of Massachusetts; that he is a civil engineer and machinist, and as such was, in the month of January, 1848, engaged in making improvements in "Turbines" and "water wheels;" that this fact was known to the defendant; that the defendant was at the same time Commissioner of Patents; that the plaintiff, in order to see what machinery having in view the same purpose, had been theretofore patented, as well to guard himself against any suit by such previous patentees, for any alleged infringement of their said patents, as also to avoid any infringement thereof, and to save himself time, labor, and expense, required copies of certain patents then of record in the Patent Office, and which had been theretofore issued to the persons mentioned in the memorandum of January 20th; that, on the 20th day of January, 1848, the said plaintiff applied to the said defendant, as Commissioner of Patents, as aforesaid, for copies of the said patents, and tendered himself ready, and "offered to pay the usual fees required by law for copies," and the defendant thereupon, as Commissioner, as aforesaid, answered she said application in writing, as follows.

To all which evidence, so as aforesaid offered by the plaintiff, and to every part thereof, except the said memorandum last above mentioned, the defendant by his counsel objects, as inadmissible upon the issue joined, and the court refused to permit the said evidence, so objected to, to be given; and thereupon, the plaintiff, by his counsel, excepts thereto.

Second Exception.

The plaintiff then read in evidence, without objection, the memorandum made by the defendant, dated 20th January, 1848, and then gave evidence tending to show that, on or about the 23d day of December, 1847, J. J. Greenough, by authority of the plaintiff, called at the Patent Office to obtain for him copies of three several patents, which had theretofore been issued by said office for "Turbines" or "water wheels;" that he was referred by the clerk, to whom he applied, to the defendant, and informed defendant, that he had been requested by the *plaintiff to obtain for [579 him copies of those patents, and defendant refused, saying he would not have anything to do with Mr. Boyden, directly or indirectly, or words to that effect; and, upon his cross-examination, witness stated, that he asked Mr. Burke to give him in writing his reasons for so refusing, which he then and there promised to do; and some days after the witness received a letter from the defendant containing those reasons, which letter he had transmitted to the plaintiff; and then, upon cross-examination, the counsel for the defendant called upon the plaintiff to produce said letter, and the plaintiff, admitting he had said letter then in court, refuses to produce the same, on the ground that the said letter, if produced, would not be evidence; but the court, overruling the objection of the defendant, ordered the same to be produced, and thereupon the said letter was produced by the plaintiff; and the defendant, by his counsel, offers to read the same in evidence,

and the plaintiff, by his counsel, objects thereto, but the court permits the same to be read in evidence, and it is read accordingly, as follows; and the plaintiff, by his counsel, excepts thereto, &c., &c.

Third Exception.

And here the plaintiff rested; and thereupon the defendant offered to read, in evidence, a letter addressed to him by the plaintiff, dated 14th December, 1847, and also a letter from plaintiff to J. J. Greenough, which it is admitted is the same letter referred to in the testimony of said Greenough, as containing the authority under which he applied for the copies of patents, as testified by him in his examination by the plaintiff, which letter bears date the 14th December, 1847; to the admissibility of which said letters, or either of them, as evidence in this cause, the plaintiff, by his counsel, objects; and the court overrules the said objection, and permits both of said letters to be read in evidence; and the handwriting of the plaintiff thereto being admitted, the same are read accordingly, and the plaintiff, by his counsel, excepts thereto, &c., &c.

Fourth Exception.

And thereupon, and upon the whole evidence aforesaid, the defendant prayed the court to instruct the jury that upon the evidence aforesaid, if the same is believed by the jury, the plaintiff is not entitled to recover in this action; which instruction the court gave, and the plaintiff, by his counsel, excepts thereto, &c., &c.

Upon these exceptions, the case came up to this court, and was argued by *Mr. Bradley* for the plaintiff in error, and *Mr. Coze* for the defendant in error.

580*] *Mr. Bradley* contended that the Circuit Court erred in each one of the above rulings.

First. The defendant was, by law, bound to give the copies asked for, if they could be made consistently with the public interest.

1. The Patent Office is for certain purposes an office of public record, in like manner as the office in which the titles to real property are recorded.

From the very name; the object; the nature of the contract between the government and the patentee; the effect of the granting the patent as to the right granted; and the notice implied; the manner in which the title is secured, and by which a right under it is to be transferred; the necessity to prevent litigation; to prevent conflicts; to avoid the expenditure of time and money.

2. For like reasons, if no provision were made by law for copies, still the keepers of those records should be bound to give them.

3. The original statute, and each successive one, made provision for such copies. (Act 10th April, 1790, 1 Stat. at Large, 109, secs. 1, 2, 3; Act 21st February, 1793, *Id.*, 518, secs. 1, 4, 11; Act 4th July, 1836, 5 Stat. at Large, 118, secs. 4, 5, 11; Act 3d March, 1837, *Id.*, 191, secs. 1, 2, 12; Act 3d March, 1839, *Id.*, 353, secs. 2, 8; Act 29th August, 1842, *Id.*, 542, secs. 2, 6.)

The law, in terms, provides copies in cases in which they are to be used as evidence, and makes them evidence. It does not stop here,

but directs copies of the records, drawing, and other papers deposited in the office, to be given to any person making application for them, on their paying certain fees therefor.

It requires a record of the claim, specification, drawings, the patent therefor, and the assignment thereof. It imposes heavy penalties upon an infringement of the patent, and makes these records notice of the particulars of the right granted.

Its design, in authorizing copies to every person applying for them, is obvious; that is, protection against the danger of incurring these penalties. The reason for requiring copies in such cases, is obviously the same as that which requires them to be given in cases of contest. Prevention is often better than redress.

Second. The duty was purely ministerial, involving no discretion; and it will be further contended—

1. The general proposition, that, for a refusal by a public officer to do a mere ministerial act, to the injury of another's right, an action will lie.

2. The injury is to be compensated in damages, and if the officer has acted in good faith, the measure of damages is the 'actual' [*581 injury sustained; if he has acted willfully, maliciously, corruptly, or by color of his office, with intent to injure, the party injured will be entitled to recover such damages as the jury may see fit to give.

As to the first branch of this second point, *Tracy & Ballestier v. Swartwout*, 10 Pet., 80; 9 How., 259.

As to the second branch, *Huckle v. Money*, 2 Wils., 205; *Beardmore v. Carrington*, *Id.*, 244; *Dinaman v. Wilkes*, 12 How., 401-406; *Day v. Woodworth*, 13 How., 371.

Third. Evidence is admissible, in this last case, to show that the officer knew the nature of the injury he was inflicting, and therefore it was competent for the plaintiff to give in evidence the facts stated in plaintiff's bill of exceptions, not as indicating a measure of damages, but to give the jury some knowledge of the nature, character, and degree of the injury, as a guide in forming an estimate of the extent to which they might rightfully go in inflicting punitive as well as compensatory damages. (*Marest v. Harvey*, 5 Taunt., 442; *Woert v. Jenkins*, 14 Johns., 352; *Whipple v. Walpole*, 10 N. H., 130; *Wallace, Jr., R.*, 164; and cases under second point.)

Fourth. The letter written by the defendant to Mr. Greenough, set out in the 2d bill of exceptions, was not evidence for any purpose.

1. Mr. Greenough had no authority to require it.

2. It was but an application of his first refusal, and not explanatory of it.

3. It was the party's own letter, offered in evidence by himself, not originally called for by plaintiff, and not in any manner admitted or acquiesced in by him. (*Farlie v. Denton*, 3 C. & P., 108; 14 E. C. L., 227, 228; *Healey v. Thatcher*, 8 C. & P., 338; 84 E. C. L., 442; *Whitford v. Buckmeyer & Adams*, 1 Gill, 127, 140; *Van Buren v. Digges*, 11 How., 461, 477; *Toule v. Steenson*, 1 Johns. Cas., 112; *Champlin v. Tiley*, 3 Day, 306; *Antoine v. Coit*, 2 Hall, N. Y., 40, 46, 47.)

Fifth. The letter to the defendant, set out in

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the 3d bill of exceptions, was not evidence for the defendant for any purpose. The letter from the plaintiff to Mr. Greenough was admissible to show his authority from the plaintiff, and shows conclusively that he had no authority to ask for or to receive defendant's written statement, set out in the 2d exception.

But the letter written by plaintiff to defendant, on the 14th December, 1847, was not evidence in mitigation of his refusal on the 22d December, 1847, or on the 2d January, 1848; and it could have been admissible for no other purpose.

That letter would have reached here on the 582*] 18th December, *1847, at furthest, by due course of mail, and the defendant had abundant time to get cool before the 22d of that month.

The refusals were both given deliberately, willfully, with the intent to punish, that is, to injure the plaintiff, and the malice is so much the greater.

Mr. Coxe, for the defendant in error, made the following points:

1. That the Circuit Court ruled according to law on all the points raised in the bills of exception.
2. That the action is founded upon a misconception of the 4th section of the Act of Congress of July 4th, 1836.
3. That if the plaintiff's case is embraced by that section, the evidence in the record furnishes a complete justification of the acts of defendant.
4. That the declaration sets forth no legal cause of action.

Mr. Justice Grier delivered the opinion of the court:

The bills of exception, taken by the plaintiff to the rejection and admission of testimony on the trial have not been supported.

The declaration charges, that the defendant, Burke, was Commissioner of Patents, and as such was bound to grant to applicants therefor, copies of patents, &c., on payment of fees. That the plaintiff tendered the customary fees and demanded copies of certain patents, which defendant refused to give him, to the damage of plaintiff, \$10,000, &c.

As no special damage is alleged, the court very properly refuse to receive evidence tending to prove it.

A demand for certain copies was made through the agency of Mr. Greenough, but accompanied with a letter from plaintiff to defendant, requesting him to deliver the copies to Mr. Greenough. This letter, with the answer of defendant thereto, was properly received as part of the *res gesta*, or as a conversation between the parties, reduced to writing.

A bill of exceptions was also taken to the charge of the court, who instructed the jury, "that, upon the evidence before them, the plaintiff was not entitled to recover."

As the plaintiff had shown a demand of the copies, with tender of fees, and a refusal of defendant, he had made out his case as laid in his declaration, and was entitled to a verdict for nominal damages, unless by law he was not entitled to demand such copies, or defendant had

shown a sufficient excuse for refusing them. Patents are public records. All persons are bound to take notice of their contents, and consequently should have a right to obtain copies of them. The Patent Law of 1836, sec. 4, enacts, that "any person making application therefor may *have certified copies," &c. [*583] These records being in the care and custody of the Commissioner of Patents, it is his duty to give authenticated copies to any person who shall demand the same, as soon as he conveniently can, on payment of the legal fees. Where there is a right on the one side, and a corresponding duty imposed on the other, a refusal to perform such duty, on the reasonable request of the party entitled to demand it, will subject the officer to an action. But the party entitled to such services must request it in a proper manner. He has no right to accompany his demand with personal insult, or vulgar abuse of the officer. Those to whom the people have committed high trusts, are entitled at least to common courtesy, and are not bound to submit to the insolence or ill temper of those who disregard the decencies of social intercourse. A demand, accompanied with rudeness and insult, is not a legal demand. The letter, accompanying the plaintiff's demand in this case, was taunting, insulting and libelous, indicating a want of taste and temper. And if the case had rested here, we could have found no fault with the instruction of the court. But the plaintiff showed another demand, some two weeks after the first, by his agent, which was made in a proper manner, and unaccompanied with any insulting missive. The defendant was not justified in refusing this demand on account of the former misconduct of the plaintiff, or to enforce an apology by withholding his rights. Ill manners or bad temper do not work a forfeiture of men's civil rights. While the want of an apology for his previous rudeness and insult might well justify the defendant in refusing all social intercourse with the plaintiff, yet it could not release him from the obligations imposed upon him by his official station, or entitle him to disregard the rights guaranteed to the plaintiff by the laws of the land.

The court below erred, therefore, in not instructing the jury, that if they believed the testimony, the plaintiff was entitled to a verdict for nominal damages.

The judgment is reversed, and a venire de novo awarded.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to award a *venire facias de novo*.

584*] *WILLIAM F. WALKER AND
SAMUEL M. PUCKETT, *Appellants*,

v.

GEORGE S. ROBBINS, LLOYD W.
WELLS, ABIJAH FISHER, AND ROBERT
H. MCCURDY.

False return to service of process, waived by appearance—equity will not relieve from consequences.

A bill in chancery will not lie for the purpose of perpetually enjoining a judgment, upon the ground that there was a false return in serving process upon one of the defendants. Redress must be sought in the court which gave the judgment, or in an action against the marshal.

Moreover, the defendant in this case, by his actions, waived all benefit which he might have derived from the false return; and no defense was made on the trial at law, impeaching the correctness of the cause of action sued on, and in such a case, resort cannot be had to equity to supply the omission.

THIS was an appeal from the Circuit Court of the United States for the Southern District of Mississippi, sitting as a court of equity.

The facts in the case are set forth in the opinion of the court.

It was argued by *Mr. Freeman* for the appellants, and *Mr. Crittenden* (Attorney-General) for the appellees.

Mr. Justice Catron delivered the opinion of the court:

William F. Walker, Samuel M. Puckett, and John Lang, filed their bill against Robbins and others, praying a perpetual injunction against a judgment at law recovered in the Circuit Court of the Mississippi District, alleging, among other grounds of relief, that William F. Walker, one of the complainants, was not served with notice to appear and defend the suit at law.

The deputy-marshal returned the original writ, "Executed on William F. Walker, 6th of April, 1840, personally." More than ten years afterwards the deposition of the deputy (Cook) was taken in Texas, when he testified that his return was false; that he did not notify Walker, but indorsed the writ executed, intending to execute it after the indorsement was made, and therefore he let it stand, although he never did notify Walker.

Assuming the fact to be that Walker was not served with process, and that the marshal's return is false, can the bill, in this event, be maintained? The respondents did no act that can connect them with the false return; it was the sole act of the marshal, through his deputy, for which he was responsible to the complainant, Walker, for any damages that were sustained by him in consequence of the false return. This is free from controversy; still the marshal's responsibility does not settle the question made by the bill, which is, in general terms, whether a court of equity has jurisdiction to regulate proceedings, and to afford relief at law, where there has been abuse, in the various details arising on execution of process, 585*] original, *meane, and final. If a court of chancery can be called on to correct one abuse, so it may be to correct another; and in effect, to vacate judgments, where the tribunal

rendering the same would refuse relief, either on motion, or on a proceeding by *audita querela*, where this mode of redress is in use.

In cases of false returns affecting the defendant, where the plaintiff at law is not in fault, redress can only be had in the court of law where the record was made, and if relief cannot be had there, the party injured must seek his remedy against the marshal.

We are of the opinion, however, that the return was not false; but if it was, that Walker waived the want of notice by pleading to the action. The suit was against Walker, Puckett, and Lang. The latter employed David Shelton as his attorney to defend the suit. Lang told Shelton to put in pleas for all the defendants who had been served with process. Upon examination, Shelton found that process had been served on Walker, Lang, and Puckett, and he put in a joint plea for them. Afterwards, Shelton, the attorney, met both Walker and Lang in Jackson, where the court sat, and spoke to them in each other's presence, about the defense of the case; and a conversation was held with them, in which they promised Mr. Shelton that another attorney, William Seiger, should be associated with him in defending the suit. The questions likely to arise in the case were stated by Lang and Walker, and they were especially anxious to know from Shelton whether Mr. Shields, the principal to the note sued on, would be competent as a witness on their behalf. The cause was tried at the subsequent term, on the issue made by the plea put in by Shelton, and a verdict and judgment rendered.

No defense was made on the trial at law, impeaching the consideration of the note sued on, either on the ground that Green had not delivered the bank notes, as stipulated by him; nor on the ground that usury entered into the transaction because the notes were at a discount of from forty to fifty per cent. Neither was any proof introduced on the hearing of this chancery suit in the Circuit Court, tending to show that Green failed to deliver the bank notes, although the respondents put the fact in issue; and as the face of the note imported a consideration, no further evidence to sustain it was required from the respondents.

They admit that the bank notes were at the rate of discount stated in the bill, but insisted they were of equal value to Shields as if they had been at par; and this the bill admits would have been the case, had Shields received them according to his agreement with Green; and there being no proof to the contrary, we must assume that they were duly received. But whether they were duly delivered or not, is immaterial. The defendants in the suit at law had an opportunity to make their defense there, and having failed to make it, cannot be heard in a court of equity. By way of authority, we need only repeat, as the settled rule, what was adjudged in the case of *Creath v. Sims*, 5 How., 204, that whenever a competent defense shall have existed at law, the party who may have neglected to use it, will never be permitted to supply the omission and set it up by bill in chancery.

This court has never departed from the foregoing rule, nor allowed the Circuit Courts to depart from it in cases brought here. Nor

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can we do so without violating the sixteenth section of the Judiciary Act of 1789, in its true sense. Apparent aberrations may be found, but they are only apparent.

We order that the decree below be affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

Cited—17 How., 445; 4 Otto, 658; 5 Otto, 161.

HENRY D. HUFF, JOHN BULLEN, AND
SAMUEL HALE, *Plaintiffs in Error*,

v.

CHAMPION J. HUTCHINSON, who sues
for the use of WILLIAM W. HURLBUT,
JOSEPH A. SWEETZER, PHILIP VAN VALKENBURGH, AND GEORGE S. PHILLIPS.

Marshal out of office may sue on attachment bond for another—Judgment of U. S. Courts not impeached collaterally—Judgment on bond for amount justly due, not for penalty—ad damnum is only to cover interest.

Where the marshal of the District of Wisconsin attached property at the suit of creditors in New York, and then gave it up upon the execution of a bond to himself, for the use of those creditors, it was within the jurisdiction of the District Court of the United States for Wisconsin, to entertain a suit by the marshal, suing upon the bond for the New York creditors, against the claimants in Wisconsin, although both parties resided in the same state.

The name of the marshal was merely formal; the real plaintiffs were averred to be citizens of New York.

It was not a good exception upon the ground of variation between the evidence and declaration, that the latter stated the bond to have been given to Hutchinson as marshal of the District of Wisconsin, and the former said the state of Wisconsin. They mean the same thing.

Judgment having been rendered for the plaintiffs in the attachment, by a court having jurisdiction over the subject, it was too late to object to those proceedings in a suit upon the bond, in which they were collaterally introduced.

The bond given to the marshal was in conformity with the statute.

587.] "The objections, that the declaration on the bond did not show the jurisdiction of the court in the attachment suit; that the verdict was entered for the amount due instead of the penalty of the bond, and that the recovery was for a sum greater than was claimed by the *ad damnum* in the declaration, were not sufficient for a new trial.

THIS case was brought up by writ of error from the District Court of the United States for the District of Wisconsin.

The facts are stated in the opinion of the court.

It was argued by *Mr. Chatfield* for the plaintiffs in error, and by *Messrs. Lee and Seward* for the defendants in error.

Mr. Justice McLean delivered the opinion of the court:

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This case is brought before us by a writ of error from the District Court for the District of Wisconsin.

The action was commenced on a bond given by the plaintiffs in error to Champion J. Hutchinson, United States Marshal for the State of Wisconsin, and his successor in office, in the penal sum of \$5,600, for the payment of any judgment within sixty days after its rendition, in a suit which William Hurlbut and others had commenced in the District Court, against Huff, by attachment, and in which a judgment was rendered for the plaintiffs, for \$2,884.48, and costs.

To the declaration the defendants pleaded in abatement, that at the commencement of the suit, Huff, Bullen, and Hale, were citizens of the State of Wisconsin, and that the said Champion J. Hutchinson was also a citizen of the same State.

To this plea a demurrer was filed; and the District Court sustained the demurrer.

The declaration stated that Hutchinson, late marshal, sues for the use of William W. Hurlbut, Joseph A. Sweetzer, Philip Van Valkenburgh, and George S. Phillips, citizens of the State of New York, plaintiffs. The bond was given to the marshal in pursuance of the statute of Wisconsin, regulating proceedings against debtors by attachment, and the name of Hutchinson was merely formal, as he had no interest in the suit. The real plaintiffs were those named in the declaration, for whose use the suit was brought, and who are averred to be citizens of New York.

The District Court did not err in sustaining the demurrer. In *McNutt v. Bland & Humphreys*, 2 How., 10, this court held, in such a case, the Circuit Court had jurisdiction.

After the demurrer was sustained, the defendants filed a plea of *nil debet*.

On the trial, a bill of exceptions was taken to the rulings of the court, which will now be considered.

*The first exception was to the introduction of the bond as evidence, because it varied from the declaration. The alleged variance consisted in this: The declaration states the bond to have been given to Hutchinson, as marshal of the District of Wisconsin, and in the bond he is described as the marshal for the State of Wisconsin. As the State of Wisconsin is the same in fact and in law, as the District of Wisconsin, there was no variance.

Objection was made to the introduction of the writ of attachment in evidence, on the same ground of variance as above stated to the bond. There was no necessity of introducing this evidence, as the condition of the bond referred to the judgment to be obtained, but the court did not err in admitting it.

Other objections were made to the affidavit on which the attachment was issued, to the return of the writ, &c. These objections were unsustainable. The court had jurisdiction of the writ by attachment, and the judgment obtained in that case was collateral to a suit on the bond. Objections, therefore, could not be made to the proceedings in attachment, however erroneous they might be.

In the case of *Voorhees et al. v. The Bank of the United States*, 10 Pet., 449, this court says: "So long as this judgment remains in force, it

is in itself evidence of the right of the plaintiff to the thing adjudged, and gives him a right to process to execute the judgment. The errors of the court, however apparent, can be examined only by an appellate power." That was a procedure by attachment, and there were many errors on the face of the record, which would have required an appellate court to reverse the judgment; but they could not be considered when the record of the judgment was introduced collaterally.

It was objected that the bond did not pursue the statute. 1. That it should have been in double the amount of the goods attached. 2. That the bond described in the declaration is in the penalty of \$5,000, to pay whatever judgment should be obtained. The 13th section of the statute, which regulates the giving of the bond, provides that "it may be in a penalty of double the amount specified in the affidavit, annexed to the writ, as due to the plaintiff, conditioned for the payment of any judgment which may be recovered by the plaintiff in the suit commenced by such attachment, within sixty days after such judgment shall be rendered." The bond is within the statute.

The bond being given in the name of Hutchinson, as marshal, and his successor in office, the suit is well brought in the name of Hutchinson, though he has been succeeded in office by another. The name of the obligee being 589*] used as matter of form, the *action may be brought in the name of the late marshal or his successor.

Several grounds were taken in arrest of judgment.

1. Because the declaration on the bond does not show that the District Court had jurisdiction in the attachment suit. Such showing was unnecessary, as that court had general jurisdiction of such cases.

2. Because the verdict is informal, in being entered for the amount due, when it should have been for the penalty of the bond. This is a mere informality, and no ground for arresting the judgment.

3. Because the recovery is for a sum greater than is claimed by the *ad damnum* in the declaration. The action was debt, and the damages laid were only required to cover the interest.

There was no error in the District Court in overruling the motion in arrest of judgment.

The judgment of the District Court is affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Wisconsin, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and the same is hereby affirmed, with costs, and interest until the same is paid, at the same rate per annum that similar judgments bear in the courts of the State of Wisconsin.

Cited—17 How., 499; 5 Wall., 305; 13 Wall., 67; 1 Otto, 681; 1 Bond, 544; 2 Bond, 163; 3 Biss., 371; 13 Bank. Reg., 390; 1 Sawy., 319.

JOHN G. GOESELE ET AL., *Appellants*,

v.

JOSEPH M. BIMELER ET AL.

Title to property held in trust for support of members of association—no right of property descended to heirs of members.

A Society called Separatists emigrated from Germany to the United States. They were very poor, and one of them, in 1817, purchased land in Ohio, for which he gave his bond, and took the title to himself. Afterwards, they adopted two constitutions, one in 1819, and one in 1824, which they signed, and in 1832 obtained an Act of Incorporation. The articles of association, or constitutions of 1819 and 1824, contained a renunciation of individual property.

The heirs of one of the members who signed these conditions, and died in 1827, cannot maintain a bill of partition.

From 1817 to 1819, the contract between the members and the person who purchased the property, vested in parcel, and was destitute of a consideration. No legal rights were vested in the members.

The ancestor of these heirs renounced all right of individual property, when he signed the articles, and did so upon the consideration that the society would support him in sickness and in health; and this was deemed by him an adequate compensation for his labor and property, contributed to the common stock.

*The principles of the Association were, [*590 that land and other property were to be acquired by the members, but they were not to be vested with the fee of the land. Hence, at the death of one of them, no right of property descended to his heirs.

There is no legal objection to such a partnership; nor can it be considered a forfeiture of individual rights for the community to succeed to his share, because it was a matter of voluntary contract.

Nor do the articles of association constitute a perpetuity. The Society exists at the will of its members, a majority of whom may at any time order a sale of the property, and break up the association.

The evidence shows that they are a moral, religious, and industrious people.

THIS was an appeal from the Circuit Court of the United States for the District of Ohio, sitting as a court of equity.

The bill was filed by John G. Goesele and six other persons, as heirs at law of Johannes Goesele, deceased, against Bimeler and twenty-four other persons, members of the Society of Separatists.

The facts of the case are stated in the opinion of the court.

The Circuit Court dismissed the bill and the complainants appealed to this court.

It was argued by Mr. Quinn for the appellants, and by Messrs. Stanberry and Ewing for the appellees.

Mr. Quinn, for the appellant, stated the facts in the case, the articles of association made in 1819 and 1824, and then made the following points:

1st. That the purchase being made for the use of all the members of the Company, the purchase money paid with the issues and profits of their joint labor or joint means, and the title taken by Bimeler, either with or without a fraudulent intention, makes him a trustee of the legal estate, holding to the use of the members of the Company, each of whom own an undivided portion of the whole trust or equitable estate.

2d. That this trust, or equitable estate, is an estate of inheritance, alienable and descendible like any other fee. (8 Ohio, 398; 9 Ohio, 145.)

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And that of such an estate Johannes Goesele died seised in 1827.

Here we think the argument properly ends, and that the complainants are entitled to an account and partition. But to the case made upon the articles, we say—

1st. That if the articles of 1819 constituted a partnership (which we think they did not) it became dissolved by Johannes Goesele's death, or by the first change in its constituent parts.

2d. That the articles of 1824 are void for no less than four different reasons.

1. Because there is no grantee or assignee to take the property from the natural persons. (*Sloan v. McConahy*, 4 Ohio, 169.) The society being unincorporated. (4 Wheat., 1.)

591*] 2. Because the trusts are vague and uncertain. (3 Kent's Com., 303; Bacon's Abr., Uses and Trusts, 256; Tomlins' L. Dict., Trusts; Story's Eq., sec. 979 to sec. 1070; 12 Ohio, 287; 5 Mass., 504; Swan's Ohio Stat., 319; 2 Spencer's Eq., 106; 7 Eng. Com. Law, 267.)

3. Because they create a perpetuity. (Story's Eq., sec. 974, n.; 10 Ohio, 4; 2 Spencer's Eq., 98 et seq., 106; 4 Ohio, 515; *Lord Deerhurst v. Duke of St. Albans*, 5 Madd., 285; 4 Kent's Com., 267, 271; 1 Cox, 324; 1 Bing., 104.)

4. Because they are the work of imposition, and a scheme of Bimeler to defraud the *cestui que trust*.

In addition to these two exceptions taken to the articles of 1824, two others are made, which are alike common to both, and which, in their natural order, lie in advance of those just taken. They are—

1st. That no articles were executed, some of the members having failed to sign; among whom is the defendant Bimeler, who now claims protection under them.

2d. That the so-called Separatists' Society, at Zoar, is not an association or community, but is an institution of a master and his slaves, or what the Roman jurists characterized as *societas leonina*. (Story on Part., sec. 18.)

Bimeler, upon the face of his pleadings, presents five points of defense.

1. That by the articles, there is a surrender of property, and that in consequence no property descended to Goesele's heirs.

2. That the institution is to be taken as a general partnership, with the principles of succession ingrafted upon it, and its property is to be taken as personality.

3. That in virtue of the Act of Incorporation, passed in 1832, the entire property passed to the Corporation.

4. That Johannes Goesele's labor was not worth more than his support.

5. That the property has been improved with regard to a common ownership, and cannot now be divided.

The first of these points, we say, admits the first objection made to the articles of 1824, viz.: the want of an assignee. For, while it claims a surrender, it does not show to whom that surrender was made.

Upon the second point, we think the articles do not constitute a partnership: yet, if they do, we think it is a waiver of the whole defense; for, if the members were partners, they owned the property. But a partnership, with the principle of succession ingrafted upon it, would be a Corporation, which individuals have not the

power of making. In the consideration of these points, the following cases are cited: *Miles v. Fisher*, 10 *Ohio, 1; Story on [*592 Part., sec. 273, sec. 18; 15 Johns., 159; 11 Mass., 469; Swan's Ohio Statutes.

The third point, namely: that Goesele's property passed to a Corporation, five years after his death, is not the law. (8 Pick., 455.)

Upon the fourth point we say that whether Goesele's labor was worth more or less than his support, is a matter after which the court will not inquire; but, finding him a member of the Company, and a joint owner of the estate, will presume his share equal to that of the other members. If, however, it makes the inquiry, it will find that he contributed about twice or three times his proportionate share.

The fifth and last point presented on the face of the pleadings, namely: that the property has been improved with regard to a common ownership, and is incapable of division, we cannot but regard as trifling. And yet we find that depositions, covering no less than thirty pages of printed record, have been taken to prove this point, together with one other of similar importance, namely: that the members are well clothed, well fed, and are contented.

One other point was raised by the defendant, Bimeler, at the hearing below, and will probably be raised again. It is, that "the society is a charity," or rather that the property is a donation to charitable use. This, we say, it is not, and cite Ambler, 652; Story's Eq., sec. 1156, 4th ed., secs. 1182, 1188; *Rabb v. Read*, 5 Rawle, 154; Chase's Ohio Statutes, 1066; Swan's Ohio Statutes, 782; 4 Wheat., 1.

We are advised that it will be insisted that the society is what is called a universal partnership. If it is, it will not help the defense; for such partnerships differ from ordinary partnerships only in the extent of the investment; that is, the members invest their all, all their labor, property, and skill; but in every other particular, including the causes of dissolution, they are governed by the same rules that govern ordinary partnerships. Were they, however, such as is claimed by the defense, they would be corporations.

Again, we are advised that it will be claimed that the articles are a contract for survivorship. To this we answer; that nothing can be farther from both the letter and spirit of the instruments. Instead of its being provided that one shall survive to the estate of another, it is expressly provided, that no one shall survive to, or even have anything; and in this particular the first decedent and the last survivor are placed in precisely the same situation. Nothing could be more foreign from the intention, than that the last survivor and his heirs should take the whole property, to the exclusion of the heirs of all the other members.

*That Goesele once owned the prop. [*593 erty, is admitted; and Bimeler claims to be nothing but a trustee. In this situation, when called upon by the *cestui que trust* to convey the legal title, he endeavors to defend himself by saying, that *cestui que trust* assigned his interest to a third person. This kind of defense cannot be sustained. For as he is a mere stakeholder, by his own showing, he must file his bill of interpleader, and bring that third party before the court to litigate the right.

He claims protection, too, under instruments which he never signed, but which he got others to sign, by representing that he would also be a subscriber.

Great complaint is made from the other side, that we are endeavoring to infringe upon their liberties by prohibiting them from living in community. This is not so. Mr. Bimeler and his adherents may live in any way they please, provided they live on their own property; but we are unwilling to give them our property to enable them to live in any way whatever. They say, too, that the appointment of a receiver or a petition will break up the society. If it does, it ought to be broken up; for it is an evidence that the members do not wish to live as they do.

The articles of 1833 purport to be a revision of those of 1819 and 1824, and also to be an acceptance of an Act of Incorporation passed in 1833; but they form a society entirely different from the one created by the Act, for which reason, we think, the grant of corporate power has been rejected. A grant of corporate power must be received as it came from the hands of the Legislature, or it is not received at all. (*Kirk v. Nevill*, 1 T. R., 71.)

Their by-laws, too, which are required by the statute to be consistent with the laws of the United States and the State of Ohio, are opposed to public policy.

They require the alienating rights which are unalienable, and close the doors of the courts of justice against the citizen. (Constitution of Ohio, secs. 1, 16, Bill of Rights; 1 Blackf., 122; 19 Wend., 77.) Deprive the husband of his curtesy and the widow of her dower. (4 Kent, 181; 3 *Id.*, 30, *c.*; 2 Spencer's Eq., 104; 1 Eden, 415.) Their trusts are also vague and uncertain. They are also executory, and to divest the member of his property, are without consideration.

Under these articles, as well as under those of 1824 if they are sustained, Bimeler will eventually take the whole property in absolute ownership. He still holds the legal title. The members according to his defense under the articles of 1824, hold and use while they remain members; consequently, when they cease to be members, either by death or otherwise, the use estate ^{594*} becomes extinct, and his legal title takes the absolute property. The same is the case under the articles of 1833, supposing the company to be incorporated; for by that arrangement the Corporation holds the use estate in trust for the use of the members. When the members die, then the Corporation dies, and, as a consequence, there is nobody to look after the trust; therefore, whether the Company is or is not incorporated, Bimeler's legal title will eventually take the whole estate.

Such an advantage, to be acquired by an agent over his principals, a preacher or pastor over his people, and a trustee over his *cetus que trust*, cannot be sustained by any enlightened system of jurisprudence.

Mr. Stanberry's brief was as follows:

I propose, in the first place, to consider the character and legal condition of this association, as it stood upon the mere Agreements of 1819 and 1824, before it became clothed with a corporate capacity.

It is said it was simply a partnership, liable

to the incidents of that condition, and subject to the operation of all the ordinary causes of dissolution. That, in point of fact, it was dissolved by the first death which happened amongst its members, and was capable of dissolution and partition of its real estate, at any time, at the instance of any member.

If it were a pure partnership, these results would have followed. But I claim this Association is not of that character.

The original agreement provides for a perfect community of property, real and personal, and for a succession or survivorship among members on the Tontine principle. It guards, with great care, against the dissolution of the body. Its property consisted, at the beginning, of a common stock of money and chattels, contributed in unequal proportions by the members, with which, and the labor of the members, real estate and personality, to a very large amount, were in process of time accumulated. The legal title to the real estate has always been vested in Joseph M. Bimeler, one of the members. The business of the Society has been various. Agriculture, manufactures, and merchandise, have been carried on simultaneously. From 1817 to 1833, a period of seventeen years, during which it was unincorporated, various changes took place in the body of the Society, by deaths, withdrawals, expulsions, and admissions of members.

With this general outline, we can enter upon the inquiry which is opened by the objections on the other side.

And first, we say, this was not a mere partnership, nor the members tenants in common. The agreement for community ^{*of prop. [595]} of property, the mutual surrender of all individual property into the common stock, and the express stipulations against any reclamation in the case of withdrawal, and for the preservation of the common property, for the exclusive use and perpetual enjoyment of the members, in succession, are inconsistent with the incidents of mere partnership or tenancy in common.

There can be no question as to the intent of these stipulations. The only doubt is as to their legal practicability.

The actual practicability of such a society is demonstrated in this instance. For the sixteen years in which it existed without a charter it fulfilled all the purposes of its formation, and secured the comfort and well-being of its members, beyond the common lot.

But, it is said, there are legal difficulties which the agreement of the parties cannot surmount. Let us consider them.

1. It is said, upon the death of a member, the Society was dissolved *ex necessitate*. This consequence, though generally true as to partnerships, does not follow where the agreement provides against it. It is not an inevitable consequence. The doctrine of dissolution upon the death of a partner, only obtains where the deceased partner has a continuing interest in the property or profits of the Association. It is not just that the surviving partners should be obliged to carry on the business, without his co-operation, for the benefit of his estate. (*Story on Partnership*, 458.)

I have said this Society was not an ordinary partnership. It very closely resembles that

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sort of partnership in the civil law, which is called universal. "Universal partnerships (*des sociétés universelles*) are contracts by which the parties agree to make a common stock of all property they respectively possess—they may extend it to all property, real or personal, or restrict it to the personal only. They may, as in other partnerships, agree that the property itself shall be common stock, or that the fruits only shall be such; but property which may accrue to one of the parties, after entering into the partnership, by donation, succession, or legacy, does not become common stock, and any stipulation to that effect, previous to the obtaining of the property aforesaid, is void." "A universal partnership of profits includes all the gains that may be made, from whatever source, whether from property or industry, with the restriction contained in the last article, and subject to all legal stipulations between the parties." (Civil Code of Louisiana, art. 2800, 2801.)

These universal partnerships have been adopted into the common law. *Mr. Justice Story* thus defines them: By universal partnerships, we are to understand these, that where 596*) the "parties agree to bring into the firm all their property, real, personal, and mixed, and to employ all their skill, labor, services and diligence, in trade or business, for the common and mutual benefit, so that there is an entire communion of interests between them. Such contracts are within the scope of the common law, but they are of very rare existence." (Story on Part., 104.)

Such a form of association being within the scope of the common law, can it be doubted that, by the mutual consent and agreement of the members, the effect of a dissolution by death may be provided against?

In England, and in the United States, large associations and joint stock companies exist, under agreements which protect the members, *inter se*, from the ordinary incidents of partnership, such as dissolution by death, bankruptcies, assignments, &c. (Collyer on Part., 614; *Livingston v. Lynch*, 4 Johns. Ch., 573.)

This association is a general partnership, with the principle of survivorship ingrafted upon it. In this particular it takes the character of a Tontine, which is a society with the benefit of survivorship, the longest liver taking the common property in absolute ownership. (Encyclopædia Brit., Vol. XXXVII., art. Tontine; Encyclopædia Amer., Vol. XII., art. Tontine.)

I can see no objection to this provision as to ownership. Certainly as to personalty there can be no difficulty; but it is said, in so far as the real property of the Company is concerned, there can be no joint tenancy, no right of survivorship, in Ohio; and that upon the death of a member, his interest in the real estate passes to his heirs at law, and that at any time the right to partition might be asserted.

As to that, it is to be considered, in the first place, that this is a partnership, and that the real estate is, by the articles of association, expressly made a part of the common stock. This, in equity, stamps it with the character of personalty. (*Summer v. Hampson*, 8 Ohio, 828.)

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Fortunately for the Society, the title to its real estate has always been well vested in one individual. No question can be raised in this case as to the condition of that legal title, and as to the equitable title or use, that was in the members before the Act of Incorporation, and since then it is in the corporate body.

I do not doubt, however, that as a general principle, equitable estates follow the same rules as to descent, &c., with legal estates. What I mean to say in reference to the legal, as distinguished from the equitable, title, is, that there is a necessity it should vest somewhere, and conform to general rules as to transfer, descent, &c.

Being relieved, in this case, from any difficulty as to the condition of the fee in the real estate of this Society, all we have *to [597 look to, is merely the equitable interest or use which inured to the members, who stood in the relation of, *cestuis que trust* to Bimeler, the holder of the legal title. As I have before said this interest in partnership property is viewed in this court simply as personalty.

But if that were not so, if it were strictly an interest in real estate, and to be made conformable to the rules which govern real property, I deny that the principle of survivorship may not be grafted upon it.

Our court has said, in an early case (*Sergeant v. Steinberger*, 2 Ohio, 126), that the estate by joint tenancy does not exist in Ohio. That case only required of that court to decide that it does not exist here by mere operation of law. But that the principle of survivorship may not be provided for and exist by limitation, in Ohio, has never been decided. On the contrary, we have reported cases which recognize it. *Miles v. Fisher*, 10 Ohio, 1, is a case of that character. The court say in that case. "Laying out of view the doctrine of survivorship, resulting from joint tenancy, an incident of the estate depending on the law and not on the act of the party, we find the testator, by express words, limiting the estate to three trustees and the survivor. The estate well passes by these words to the survivor for life, the remainder in fee is not disposed of."

There is, then, no objection to survivorship by express limitation or agreement. This being so, there has been no descent to any heirs of the deceased members of the Society, and there is no present right of partition in any of the living members.

It is also said that even as to the personal property, it is difficult to fix its ownership distinct from the individual right of each member making the contribution, and that the idea of accumulation for an unincorporated body is a fallacy.

This difficulty is altogether fanciful. The members of this partnership are in no way uncertain, for no one is a member whose name is not subscribed to the articles of association. It is a large partnership. The accumulation is for the partners, not for an ideal company or mere abstraction. The property loses its individuality as to ownership the instant the owner becomes a member. It stands like the property of any other partnership. The partners are joint owners. No formal transfer or delivery is necessary: the possession by one partner is the possession of all.

Objection is also made to this Association, that the principle of community and succession of property among the members, involves a perpetuity. There is nothing like a perpetuity in it. The Society has the perfect right of disposal over all its property, real as well as personal, 598*] and this power of disposal is *wholly inconsistent with the idea of perpetuity, which only exists where property is so limited that no living agency can unfetter it.

It is further urged that this Society is contrary to the genius of our free institutions—that its constitution enforces perpetual service and adherence to a particular faith, and that it is aristocratic in its tendency.

If there were anything in such objections, the constitution answers them all. So far from being at all aristocratic, this Society is a pure democracy. All the officers are chosen by ballot, every member, male and female, having an equal voice; and the body of the Society reserves to itself the power of removing officers, and changing the form of government at pleasure. All distinctions of rank or wealth are abolished, and a perfect equality provided for. No single dogma in religion or politics is announced, no unusual restraint on marriage, nor subserviency to any doctrine out of the common way, exist; and so far from any enforcement of perpetual service being provided for, the right is reserved for every member to retire from the society at pleasure, with the single condition that no claim is to be set up for services or property contributed. The powers which the Society confides to its officers are temporary, and so distributed as to prevent any one member or officer from engrossing too much power.

Besides this liberal frame of government, the constitution, by very full enactments, provides for the education of the children, the comfort and support of all the members, and the peaceable settlement of all controversies by domestic tribunals. It is impossible to hold that such a constitution is contrary to public policy, or in any sense illegal. To say that such a Society cannot exist under our form of government is a libel on our free institutions.

Here are a number of persons, who, in the exercise of their mature judgment, and following their own peculiar views, have thought it best, more than thirty years ago, to associate as one family, in a communion of property. From that time to the present, through an entire generation, their experiment has been successful. They have lived in peace, plenty, and happiness, beyond the common lot. The Legislature has given them a charter to perpetuate their social existence; and now it is urged that, in this land of liberty, the right does not exist to live in this way; a very bright idea, truly! if a despot proclaimed such an edict, forbidding men to pursue their own mode of life, in their own inoffensive way, we could understand it; but it is quite new as a democratic idea.

599*] *(Mr. Stanberry then cited and examined the cases of Waite v. Merrill et al., 4 Greenleaf, 102; Schriber v. Rapp, 5 Watts, 351; Gass & Bonta v. Wilhite et al., 2 Dana, 170. He then contended that this society was protected by the doctrine of charities, and by its Act of Incorporation.)*

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Mr. Ewing's brief was as follows:

1st. The executor or administrator of Goesele is not a party to this suit; therefore no question as to personal property can arise.

I now state the proposition as applying to property purely personal, but will, in the course of my argument, show that it controls also the real estate owned by this Association, to which the law attributes the qualities and consequences of personality.

2d. This suit, therefore, involves nothing but title to real estate, and the question is, did Goesele die seised of an inheritable estate in the lands and tenements named in the bill.

We have the object and terms of the original purchase from no other source than the answer of Bimeler. He says he purchased it for the Separatist Society, took a deed in his own name, and gave his own bonds for the payment of the purchase money. (P. 6.)

And it was purchased with the understanding at the time that it should be paid for with the means and labor of those of the Separatists who would settle upon it, and that each should have thereof in proportion to the amount that he or she should contribute to paying therefor. (P. 14.)

It is obvious, at once, that there was yet no partnership. And there was yet no contract between Bimeler and either or all of the other parties which equity could enforce.

No one was yet bound to Bimeler, that he should go upon the land or pay for any part of it; as a correlative proposition, Bimeler was not bound to hold the land, or any part of it, in trust for any of them. Both parties must be bound or neither. Goesele, however, went on to the land, and built a small log house on a town lot in Zoar, previous to 1819. Some conflict in the evidence about the building. He went into a house.

He was still under no contract to pay for any of the land. He still had no right to any definite part or amount, on making payment, unless it may have been the town lot on which his house was built.

He had yet paid nothing; applied nothing; had no contract which equity could regard.

If, the hour before the execution of the articles of April 5th, 1819, Goesele had claimed a definite portion of the land, and offered to pay for it in proportion to the cost of the whole, a court of equity could not have denied it to him.

*If Bimeler had declared that he [*600 would thenceforth hold the land to his own use, and that his associates should have none of it, equity could not have relieved them by decreeing to them parts of the land. The law, however, would have given them a *quantum meruit* for the labor which they had performed.

Or, if I be mistaken in this, and he had any interest in the land which equity could recognize, it was held by such loose and uncertain tenure, that he could abandon it by any word or deed showing a purpose not to retain or rely upon it. Goesele, therefore, was entitled to nothing, except what the articles of brotherhood and association gave him.

The genuineness of the articles is doubted, and we are called upon for proof that Goesele signed them. We are content that the court should regard them as not in evidence, and

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especially that Goesele never signed them. If that be so, we think it very clear that he never had any right whatever, except to a compensation in money for his services, if he rendered any, of value beyond his maintenance, nursing and burial. But this is a question which none but his administrator is competent to litigate.

But he had rights under those articles of association, and as his counsel is probably not seriously disposed to repudiate them, I will inquire what the rights were which were conferred by them.

Waiving, for the present, the question whether this was or was not a charitable Association, and, as such, protected by the law of charities, I will examine it as a mere attempt to dispose of property and give it direction.

I will suppose Bimeler to have signed the articles, as he intended to be bound by them, and would have signed them had the land been paid for and his notes taken up, and he did sign soon after this was done.

Then if the articles were good to transfer real estate in equity, they were good to transfer personality, and equally good to limit and direct the real estate transferred.

What title to the real estate do these articles vest in Goesele? It is to be borne in mind, that down to this time Bimeler had the legal estate, and Goesele had no interest in it which a court of equity could regard.

The articles give to Goesele a right to live upon, and enjoy a fair proportion of the land, during his life; to raise and have his children educated and maintained upon it; to take part, with others, under rules agreed upon between themselves, in its management and control. These rights, however, were conferred subject to conditions and forfeiture.

But the conditions were complied with, namely: that he should surrender whatsoever property he had, to the Association, and live **601*** and labor with them during his life. He did not incur a forfeiture; he had then purchased this right, and he enjoyed it; he lived, died, and was buried in the lands with his brethren in the faith.

Can there be a doubt that all the parties were competent to make this contract? But if there be a doubt, can a question now arise as to their competency, since both parties kept it, and executed it faithfully to the end?

No complaint on either side, of wrong or violation, until the contract, as far as Goesele was concerned, was completely executed and ended.

But if this contract could not be legally entered into by Goesele with the other members, no valid contract whatever was entered into by him or for him.

Bimeler agreed to surrender this land to the Association, to be held in this manner, and on these conditions. He never did agree, and never would have agreed, to surrender it to these one hundred and fifty men and women as a partnership, subject to the consequences of partnerships, dissolution by the death or withdrawal of a member, and consequent partition, at least three times a year, of land and personality.

If equity cannot sustain the contract which the parties did make for themselves, it will not make a contract for them which they never

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did make, and never intended to make, and which would defeat all their objects.

But it will carry out the contract according to their intent, as far forth as the principles of law will permit. This will readily and without a single difficulty, that I can discover, dispose of Goesele's interest, and consequently of this case.

Goesele might, without the violation of any rule of law, give his labor and property, if he had any, in consideration of the provision for life herein made for him.

Bimeler might, in like manner, bind his land in equity to make good such provision.

8d. But I do not, for myself, perceive any serious difficulty in transmitting the property, with the personality and the equitable title to the realty, in the manner adopted by these articles.

Cannot a man transfer the equitable title to his real estate to ten men, designated as those who live on it and have signed the article of transfer with him, to be used and enjoyed by them as long as they shall abide by the terms of the article, and giving a right to the persons, to whom he so transfers, to vest the same right in others, in succession, who shall enter into the same article in future, and comply with its conditions, the majority having, as in this case, the power to sell and dispose ***602** of the property, but required to apply the proceeds to the same object?

This is not a perpetuity in the common law sense of the term; it does not tie up real estate, for it may be disposed of at any time. Such a limitation of the real estate, or its proceeds, would be good, by the laws of Ohio, for the lives in being; and each tenant for life, by his own signature, if the full estate at any time vested in him or them, could equally well transmit it to another life, and so in succession, a majority being at all times able to terminate the succession at pleasure.

4th. But if I be wrong in this, and difficulty arise as to the final disposition of the property, when the end cometh, which is not yet, that difficulty is removed by the law of charitable uses, considered in Mr. Strawberry's brief.

5th. And if this be not a charity, and as such protected by equity, and if the contract made by the parties for themselves be invalid for the purposes intended, it is still good as a partnership with succession, by the express agreement of the parties, an agreement, so far, unobjectionable. All the property owned in common, real as well as personal, is necessary to carry on the partnership; it is, therefore, all personality in equity. And the partners, or a majority of them, can re-adopt their rules or change them at pleasure, and transmit their property by succession as heretofore, or divide between the partners.

6th. But if it were indeed a partnership, we have not the necessary parties in court. The property is all personality, and neither executor nor administrator of Goesele is in court.

Mr. Justice McLean delivered the opinion of the court:

This case comes before the court on an appeal from the Circuit Court of the District of Ohio.

In their bill the complainants represent tha

they are the heirs at law of Johannes Goesele, who died at Zoar, in the County of Tuscarawas, Ohio, in the year 1827; that the said Johannes, in his lifetime, associated himself with the defendants, Bimeler and others, and formed a Society of Separatists, and in the year 1817 they purchased of one Godfrey Haga, of Philadelphia, a tract of land situated in said county, containing 5,500 acres; that afterwards other purchases were made, which, when added to the first purchase, amounting to 10,000 acres, with a large number of town lots, and other property procured about the same time; that these purchases were made on behalf of Goesele, deceased, and his associates, and for their use, and the purchase money was paid by their joint labor and money; that Bimeler acted fraudulently as their agent, in taking the deed and title papers to himself and his heirs forever.

603*] *They further represent that many of his associates sold their interest to their ancestor, on leaving the Society. And the defendants allege, that, as heirs of their ancestor, they are entitled to one hundredth portion of the estate now held by Bimeler; and that they have requested the defendants to make partition of the estate, which has been refused; that Bimeler, although often requested, has refused to convey to the complainants any part of the estate; and they pray that he may be compelled to give a full and true description of the property held by him as stated; and that on a final hearing he may be decreed to make partition of the said property, and to make a good deed in fee simple to the complainants, for so much of the said property as may be found to belong to them.

In the year 1817 the members of the above association emigrated from Germany to the United States. They came from the Kingdom of Wurtemberg, where they had been known for years as a religious society called Separatists. They were much persecuted on account of their religion. Goesele, the ancestor of the complainants, with another member, had been imprisoned for nine years; and the safety of Bimeler depended on his frequent changes of residence, and living in the utmost privacy. In that country they sought to establish themselves by purchasing land, but they found that the laws would not allow them this privilege. Disheartened by persecution and injustice, they came to this country in pursuit of civil and religious liberty. When they arrived at Philadelphia, they were in a destitute condition. They were supported while in that City, and enabled to travel to the place where they now live, by the charities of the Friend Quakers of Philadelphia and of the City of London. These contributions amounted to eighteen dollars to each person. A large majority of the Society consisted of women and children.

While at Philadelphia, Bimeler, the head and principle man of the association, purchased, in his own name, from Godfrey Haga, the five thousand five hundred acres of land, as stated in the bill. A credit of thirteen years was given, three years without interest. A deed to Bimeler and his heirs was executed for the land, the 7th of May, 1818; a mortgage to secure the consideration of \$15,000 was executed. On their arrival at the place of their destination,

they found it an unbroken forest; their means were exhausted, and they had no other dependence than the labor of their hands. They were no strangers to a rigid economy, and they were industrious from principle.

At the time of their settlement at Zoar, they did not contemplate a community of property. On the 15th of April, 1819, articles of association were drawn up and signed by the members *of the Society, consisting of fifty-**[*604** three males and one hundred and four females. In the preamble they say, "that the members of the society have, in a spirit of Christian love, agreed to unite in a communion of property, according to the rules and regulations specified." The members renounce all individual ownership of property, present or future, real or personal, and transfer the same to three directors, elected by themselves annually; that they shall conduct the business of the Society, take possession of all its property, and account to the Society for all their transactions. Members who leave the Society are to receive no compensation for their labor or property contributed, unless an allowance be made them by a majority of the Society.

These articles continued in force until the 18th of March, 1824, when amendatory articles were drawn up and signed by the members at that time, consisting of sixty males and one hundred females. In these articles an entire union of property is declared, and a renunciation of individual ownership. Males of the age of twenty-one, and females of the age of eighteen, become members by signing the articles. New members are received in this way. The directors elected by the Society conduct the affairs of the Association, and provide for the boarding, lodging, and clothing of the members. The directors are to apply themselves for the common benefit of the Society, provide for the children, determine disputes among the members, with a right of appeal to the board of arbitration. Other provisions were made for the expulsion of members, and the general good order and welfare of the Society.

In the year 1832, the Society was incorporated by a law of the State, which gave to them the ordinary powers of a Corporation. On the 14th of May, 1833, a constitution was adopted under the Act, which was signed by fifty-one males and one hundred and three females. The constitution embodies substantially the regulations contained in the preceding articles, and some others conformably with the corporate powers conferred.

This is the outline of the Association formed at Zoar. It appears a different plan was at first adopted. Each family was to select from the general tract as many acres as it could pay for, and improve it, living on its own industry, and from the same source paying for the land. But this plan was found impracticable, and in less than two years it was abandoned, and the first articles of association were adopted.

The ancestor of the complainant, as stated, died in 1827, a member of the Society. His name was signed to the articles of 1819 and 1824. There was no evidence in the case conducing to prove any contract, except that which arises from the articles *referred **[*605** to. On the first payment made for the land, it appeared that Goesele paid a small sum that

remained unexpended of the eighteen dollars he received at Philadelphia.

The answer denies the allegations of the bill charging fraud, and every allegation to charge the defendants, except the purchase of the land and the articles referred to.

It appears, by great industry, economy, good management, and energy, the settlement at Zoar has prospered more than any part of the surrounding country. It surpasses, probably, all other neighborhoods in the State in the neatness and productiveness of its agriculture, in the mechanic arts, and in manufacturing by machinery. The value of the property is now estimated by complainant's counsel to be more than a million dollars. This is a most extraordinary advance by the labor of that community, about two thirds of which consists of females.

In view of the facts stated, it is not perceived how the case made in the bill can be sustained. A partition is prayed for; but there is no evidence on which such a right can be founded. The plan, as stated, first agreed upon at Zoar, for individual proprietorship and labor, was abandoned in less than two years. It was a parol contract, no consideration being paid. No right was acquired by the ancestor of the complainant on this ground. He then signed the first articles, which, like the amended articles, renounced individual ownership of property, and an agreement was made to labor for the community, in common with others, for their comfortable maintenance. All individual right of property became merged in the general right of the Association. He had no individual right, and could transmit none to his heirs. It is strange that the complainants should ask a partition through their ancestor when, by the terms of his contract, he could have no divisible interest. They who now enjoy the property, enjoy it under his express contract.

But if there were a right of partition by the complainants, there is no such statement in the bill as would authorize the court to decree it. For the time that Goesele lived, what was the value of his labor in comparison with the labor of the others? Twenty-five years have elapsed since his death. The property has increased in value seven hundred per cent.; and of this property partition is prayed. But there is not a shadow of evidence to sustain the right. The proofs and the statements in the bill are as remote and inconsistent as can well be conceived.

The fraud charged on Bimeler, in the purchase of the land, if true, could not help the case made in the bill. But the charge has no foundation. Bimeler purchased the land in 606*] his own *name, and became responsible for the payment of the consideration. And he retained the title until the purchase money was paid, and an Act of Incorporation was obtained, when he signed the articles, and placed the property under the control of the society, he having no greater interest in it than any other individual. But, before this, he openly declared that he held the land in trust for the society. As an honest man, he could not change, if in his power, the relation he bore to the vendor, until the consideration was paid. In this matter, the conduct of Bimeler is not only not fraudulent, but it was above reproach.

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It was wise and most judicious to secure the best interests of the association.

The Articles of 1819 and 1824 are objected to as not constituting a contract which a court of equity would enforce. And it is said that chancery will not enforce a forfeiture. As a general rule, chancery may not enforce a forfeiture; but will it relieve an individual from his contract, entered into fairly, and for a valuable consideration? What is there in either of these articles that is contrary to good morals, or that is opposed to the policy of the laws? An Association of individuals is formed under a religious influence, who are in a destitute condition, having little to rely on for their support but their industry; and they agree to labor in common for the good of the Society, and a comfortable maintenance for each individual; and whatever shall be acquired beyond this shall go to the common stock. This contract provides for every member of the community, in sickness and in health, and under whatsoever misfortune may occur. And this is equal to the independence and comforts ordinarily enjoyed.

The ancestor of the complainants entered into the contract fairly and with a full understanding of its conditions. The consideration of his comfortable maintenance, under all circumstances, was deemed by him an adequate compensation for his labor and property contributed to the common stock. But it is not shown that Goesele or any other member contributed to the general fund, with the exception of a small sum by Goesele, which, probably, could not have exceeded \$5. The members of the Association were poor, and were unable to contribute anything but labor. In this way the land purchased by Bimeler was paid for.

The complainants speak of the interest of their ancestor in the real and personal estate, owned by the Association, and their counsel contend that the articles did not divest him of either, but both descended to his heirs at law at his death.

This argument does not seem to comprehend the principles of the Association. Land and other property were to be acquired *by [607 the members, but they were not to be vested with the fee of the land. While they remained in the Society, under its general regulations, the products of their labor on the land and otherwise were applied, so far as necessary, to their support. Beyond this, they were to have no interest in the land or in the personal property. Many of the members were aged females, others, from sickness or disease, were unable to labor, but every one, whether able to labor or not, was provided for by the labor of the community. This was a benevolent scheme, and from its character might be properly denominated a charity. But from the nature of the Association and the object to be attained, it is clear the individual members could have no rights to the property, except its use, under the restrictions imposed by the articles. The whole policy of the Association was founded on a principle which excluded individual ownership. Such an ownership would defeat the great object in view, by necessarily giving to the Association a temporary character. If the interests of its members could be transferred, or pass by descent, the maintenance of the community would be impossible. In the natural course of things the

ownership of the property in a few years, by transfer and descent, would pass out of the community into the hands of strangers, and thereby defeat the object in view.

By disclaiming all individual ownership of the property acquired by their labor, for the benefits secured by the articles, the members give durability to the fund accumulated, and to the benevolent purposes to which it is applied. No legal objection is perceived to such a partnership. If members separate themselves from the Society their interest in the property ceases, and new members that may be admitted, under the articles, enjoy the advantages common to all.

The counsel for the complainants imagine the original members possessed property, real and personal, before they entered into the Association, which is contrary to the facts of the case, and then contend that, having executed no conveyance of the property, on the death of the member it descended to his heirs at law.

It is always desirable that legal principles should be applied to the facts of the case. When the members first formed the Association they were destitute of property. The purchase of the land by Bimeler had been made, but not paid for; and the members had no means of payment but by the labor of their hands. This they agreed to give, in consideration of being supported in sickness and in health, disclaiming, at the same time, any individual claim of ownership to any property which should be acquired by the community. This statement of **608** facts obviates many of the objections urged by complainants' counsel. If the members of the Association had no interest in the land when they signed the articles, no conveyance of it by them was necessary. They stipulated a compensation for their future labor in the support to be given them, and disclaimed the ownership of all property acquired.

It is said, where a member is excommunicated or leaves the Society he forfeits his rights, and that chancery will not enforce a forfeiture. What is the extent of this forfeiture? It is the right to a support from the Society. And this is certainly reasonable. Can a member expect to be supported by the Society, when he refuses to perform his part of the contract which entitles him to a support? He claims pay for his labor. He has been paid for this, in pursuance of his own contract. In sickness and in health he has been clothed and fed, and a home provided for him. But he claims payment for property which he surrendered to the Association at the time he became a member of it, by signing the articles. The ownership of this property he relinquished to his associates as a part of the contract; and for the considerations named, all the demands for such property in the language of the articles signed, "the individual abolished and abrogated for himself and his heirs."

Can property thus conveyed be deemed forfeited, if not recoverable? A forfeiture is against the will of the owner. Where property is conveyed under a fair contract and for a valuable consideration, is not the term "forfeited" misapplied, if such conveyance be held valid? Chancery is not asked to enforce a forfeiture in this case. No property is shown to have been transferred to the Association by the ancestor of

the complainants. But if property had been given by the ancestor, would a court of chancery direct such property to be surrendered or paid for against the express contract of the owner? The surrender or giving up of the property was a part of the consideration on which the Association stipulated to support him. It cannot be separated from that agreement. And it is clear, where the fault of not carrying out the contract is not attributable to the Association, but to the member, he cannot have the aid of a court of chancery.

Do the articles constitute a perpetuity? We all think that they do not. They provide for the continuance of the Association an indefinite period of time, in the exercise of the discretion of its members. But there is no obligation to this extent. The majority of the members may require a sale of the property and break up the Association. In fact the majority governs, by the election of officers. Members may be expelled from the Society and new ones admitted, under established rules. Whilst the **[609]** Society has the means of perpetuating its existence, it may be said to depend for its continuance on the will of a majority of its members.

As the law now stands in England, a conveyance by executory devises, to be good, cannot extend beyond a life or lives in being, and twenty-one years and the fraction of another year, to reach the case of a posthumous child. (*Atkinson v. Hutchinson*, 3 P. Wms., 258; *Long v. Blackall*, 7 Term R., 100.)

There are many depositions in the case, taken in behalf of the complainants, by persons who have been expelled from the Society, or having left it, show a strong hostility to Bimeler. They represent his conduct as tyrannical and oppressive to the members of the Association, and as controlling its actions absolutely. And several instances are given to impeach his moral character and his integrity. Two of the witnesses say that he drives a splendid carriage and horses.

In regard to the carriage, it is proved to be a very ordinary one, worth about \$300, one of his horses worth about \$20 and the other \$30 or \$40. By respectable persons out of the Society, Bimeler's character is sustained for integrity and morality, and several instances are given where, even in small matters, he deferred to the decision of the trustees against his own inclination. And many facts are proved wholly inconsistent with the charge of oppression.

That Bimeler is a man of great energy and of high capacity for business, cannot be doubted. The present prosperity of Zoar is evidence of this. There are few men to be found anywhere, who, under similar circumstances, would have been equally successful. The people of his charge are proved to be moral and religious. It is said that, although the Society has lived at Zoar for more than thirty years, no criminal prosecution has been instituted against any one of its members. The most respectable men who live near the village say, that the industry and enterprise of the people of Zoar have advanced property in the vicinity ten per cent.

Bimeler has a difficult part to act. As the head and leader of the Society, his conduct is narrowly watched, and often misconstrued. Narrow minds, in such an Association, will be

influenced by petty jealousies and unjust surmises. To insure success these must be overcome or disregarded. The most exemplary conduct and conscientious discharge of duty may not protect an individual from censure. On a full view of the evidence we are convinced that, by a part of the witnesses, great injustice is done to the character of Bimeler. On a deliberate consideration of all the facts in the case, we think there is no ground to authorize the relief prayed for by the complainants. **610***] **The decree of the Circuit Court is therefore affirmed.*

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Ohio, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

Att'g—5 McLean, 223.

JOHN DEACON, *Appellant*,

v.

CHARLES OLIVER AND ROBERT M. GIBBES, Executors of ROBERT OLIVER, Deceased.

Maryland—Garnishment, construction of—answers what correct.

Under the attachment laws of Maryland, a share in the Baltimore Mexican Company, which had fitted out an expedition under General Mina, was not, in 1827, the subject of an attachment under a judgment, whether such share was held by the garnishee under a power of attorney to collect the proceeds, or under an equitable assignment to secure a debt.

The answers of the garnishee to interrogatories filed, were literally correct. He had not in his hands any "funds, evidences of debt, stocks, certificates of stock," belonging to the debtor, nor "any acknowledgment by the Mexican government," on which an attachment could be laid.

THIS was an appeal from the Circuit Court of the United States for the District of Maryland, sitting as a court of equity.

The bill was filed by John Deacon, the surviving partner of Baring, Brother & Company, of London, under the following circumstances:

In 1821, Baring, Brother & Company obtained a judgment, in the Circuit Court of the United States for the District of Maryland, against one Lyde Goodwin for \$60,000 upon a bill of exchange, to be released on payment of \$41,005.58, with interest and costs. Goodwin was at this time the owner of one ninth share in the Mexican Company, the history of which is given in the report of the case of *Gill v. Oliver's Executors*, 11 How., 529. This judgment was kept alive until the issuing of the attachment hereafter spoken of, in 1826.

On the 19th of July, 1823, the government of Mexico passed a decree, declaring that General Mina, amongst other persons, was a benefactor of his country; and on the 28th of June, 1824, another decree, acknowledging the debts contracted by the Generals declared to have been benefactors.

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On the 11th of January, 1825, Lyde Goodwin addressed a *letter to Mr. Oliver, [*611 which is too long to be inserted, but which was of the following tenor. He states the claim to have been acknowledged by Mexico: that the amount of his original proportion of the claim, exclusive of interest, was \$20,000; that his object in proposing to assign his interest therein was, 1st, to secure to Oliver the sum he already owed him; and 2d, to obtain barely the means of support for the present, and that the additional sum he would acquire, should not exceed \$2,000.

Between this date and June, 1825, Oliver paid to Goodwin \$2,000 and received an assignment of the share from Brown, the trustee in insolvency of Goodwin.

On the 22d of March, 1825, the company appointed Oliver their attorney to prosecute the claim, and informed him that Goodwin was entitled to a commission of five per cent. in addition to his one ninth share.

On the 28th of October, 1826, an attachment under the Act of Maryland, of 1715, was issued upon the judgment against Goodwin, and laid in the hands of Oliver, as garnishee. At the same time, the following interrogatories were filed, which the garnishee was required to answer:

Interrogatory 1. Had you, at the time of laying the attachment in the above cause, in your hands, or at any other time, and when, any funds, evidences of debt, stocks, certificates of stock, belonging to Lyde Goodwin, or any acknowledgment of debt due by the government of Mexico to the said Lyde Goodwin?

2. Did not the said Lyde Goodwin transfer to you some certificate of stock, or evidence of debt due by the said Mexican government to Goodwin, or some document of that character, and when did such transfer take place?

3. Had you not a claim against said Goodwin, secured by a transfer or pledge of some certificate of stock, or document of a public character, showing that Goodwin was entitled to receive some funds from the Mexican government? If so, what the amount of your claim so secured, and what was the security; was, or was not, the balance or remaining credit, under your control at the time of laying the attachment? State particularly how your claim was secured.

4. Do you know any other matter or thing that may be of advantage to the plaintiffs, in the above cause? If so, state it as fully as if you were particularly interrogated thereto.

In December, 1827, Oliver filed the following answers:

1. To the first interrogatory he answers: That he had not, at the time of laying the attachment in the above cause in his hands, nor at any other time, any funds, evidences of debt, *stocks, or certificates of stocks, belong- [*612 ing to Lyde Goodwin, or any acknowledgment of debt due by the government of Mexico, but that he had a power of attorney signed by said Lyde Goodwin, in conjunction with several other persons, claimants of a debt alleged to be owing by the Mexican government, and authorizing him to claim and receive the same for the benefit of said Goodwin's assignees and others.

2. To the second interrogatory he answers: That the said Goodwin did not transfer to him

any certificates of stock or evidences of debt due by the Mexican government, or documents of that character, unless the before-mentioned power of attorney may be called one.

3. To the third interrogatory he answers: That he had, and still has, a large claim against said Goodwin for money lent him from time to time; that he has not secured for this debt, and never has been secured, by a transfer or pledge of some certificate of stock, or document of a public character, showing that Goodwin was entitled to receive some funds from the Mexican government, unless the aforesaid power of attorney be deemed such, but which he does not admit it to be.

4. To the fourth interrogatory he answers: That he knows nothing.

On the 10th of January, 1829, the counsel for the Barings caused the following entry to be made upon the docket, relative to the attachment: "Discontinued without costs."

On the 30th of May, 1829, Oliver obtained from Goodwin the following paper:

"Being indebted to Robert Oliver, of Baltimore, upward of nine thousand dollars, I hereby assign, transfer, and make over to the said Robert Oliver, in payment of my debt to him, the following objects, which were assigned to him many years ago, to secure the payment of the said debt due by me, to wit: all my undivided ninth part, and right, title and interest of every kind whatsoever, in the claim on the government of Mexico for supplies furnished, and advances made, to the late General Mina, or the proceeds thereof, and which claims are under the control of the said Robert Oliver and his agent, John Mason, Jr., now in Mexico; also a claim on a certain Louis Merwin, who died some years ago in Havana. The object and intention of this assignment, is to make a full and complete transfer to the said Robert Oliver of all my right, title and interest, as aforesaid, for which said Robert Oliver has agreed to balance my account on his books, and consider the same as satisfactorily settled; and I hereby authorize and order all my agents, or those holding any powers of attorney or in-
613*] structions from me *relative to the aforesaid property, to account with the said Robert Oliver for the same, or the proceeds thereof.

L. GOODWIN.

Baltimore, May 30, 1829.

Witness—JOHN THOMAS.

I confirm the above agreement.

ROBERT OLIVER."

This claim was prosecuted under the Treaty between the United States and Mexico, with the following result:

On the 11th of April, 1850, there were paid to Oliver's executors (he having died in 1834) the following sums, being net proceeds:

On account of Goodwin's commis-	
sions	\$22,143.12
On account of his share	35,110.47
	<hr/> \$57,253.59

In November, 1850, Deacon filed his bill against the executors, alleging that the answers of Oliver were untrue and evasive, by means of which deception the attachment had been discontinued; that at the time when it was laid, Oliver had under his control the evidences of

debt due by the Mexican government; that so far from having a mere power of attorney from Goodwin to collect the debt, he had a transfer of the claim for the purpose of security, which, being irrevocable, was, by the laws of Maryland, the subject of an attachment, &c.

The executors of Oliver answered, and upon a hearing of the cause, the Circuit Court dismissed the bill, when the complainant appealed to this court.

It was argued by *Messrs. Davis and Howard* for the appellant, and *Messrs. Campbell and Johnson* for the appellees.

As the decision rested mainly upon one point of the case, namely: that, at the time of laying the attachment, Oliver had no interest which was attachable, many of the arguments of counsel upon other points are omitted.

The following extract from the brief of *Mr. Davis* contains his view of the leading points of the case.

1. That a debt due by a foreign or domestic government is assignable, passing, by insolvency, to executors or administrators, and liable for debts of claimant, and liable to all the incidents of other debts, excepting that it cannot be enforced by suit. (*Comegys v. Vasse*, 1 Pet., 193, 215, 217; *Sheppard v. Taylor*, 5 Pet., 675; *Plater v. Scott*, 6 Gill & Johns., 116; *Gorgier v. Meeville*, 3 Barn. & Cress., 45; 10 E. C. L., 16.)

2. That the Court of Appeals of Maryland have decided, *that, by the local law, [*614 the share of Lyde Goodwin, now in controversy, and his commissions, did not pass to his insolvent trustee in 1817, because then under the ban of the public policy of the country; but that after the decrees of 19th July, 1823, and 28th June, 1824, of Mexico, it became a fair and valid debt, due by the Mexican government, and as such was assignable, and did pass by the assignment of Goodwin of 1825, and 30th May, 1829.

3. That the Supreme Court have pronounced the above to have been the decision of the Court of Appeals; and that being on a question of local municipal law, not involving any law of the United States, such decision could not be reviewed by them. (*Gill v. Oliver's Ex'rs*, 11 How., 529; *Williams v. Oliver's Ex'rs*, 12 Id., 111, 125.)

4. That the award of the Mexican commission and the decree of the Court of Appeals, are conclusive upon Robert Oliver's representatives and in our favor, of the nature and origin of the fund of the validity and assignability of the funds, and its liability to all legal incidents of a valid legal claim, from 1824 down to this time. (*Comegys v. Vasse*, 1 Pet., 212; *Sheppard v. Taylor*, 5 Id., 708, 709, 713; *Fretall v. Bache*, 14 Id., 97; *De Vallingan v. Duffy*, Id., 290, 291; *Barry v. Patterson*, 6 Harr. & Johns., 203, 204.)

II. That the assignment of 1825 was a mortgage on the fund to secure the prior debt of Goodwin to Oliver, and the \$2,000 then advanced; subject to which Goodwin remained owner of the fund, and Oliver was accountable to him.

1. This appears from Goodwin's letter to Oliver, 11th January, 1825; his receipt, 15th February, 1825; Brown's assignment, 21st March, 1825; and Goodwin's receipt, 24th March, 1825; and the assignment of 30th May, 1829.

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The letter did not propose a sale; there was no estimate of the value of the claim; Goodwin considered it likely to be received in a year, and looked on it as worth \$20,000, or more.

His objects he said were, 1st. To secure a debt he then owed, but if it were a sale for \$2,000, it secured nothing; 2d. To obtain the bare means of support for the present. He then plainly looked to the remainder of the fund as his support for the future.

"The additional sum I shall want shall not exceed \$2,000," is the language of a borrower, and implies a previous loan now to be added to. The receipts are, on account of his share, or interest.

The assignment, signed by Brown, mentions no value given. It was a mere precaution to preclude a possible claim. The assignment of 1829, May 30, finally, is express and decisive [615*] as *to the former assignment, being for security merely, and itself purports to assign and relinquish the remaining right of Goodwin. It recites a debt of \$9,000; but the answer shows only \$8,500, including the \$2,000. So it continued to be a debt, and so was not a payment on a sale. If it were a sale, then "the words to secure you the sum I already owe you," must be construed to make that sum a part of the consideration of the sale; and it also would cease to be a debt. If it were a sale, then the assignment of 30th May, 1829, would not only recite a falsehood, but be an absurdity. It cannot be half sale and half mortgage; a sale for \$2,000 and a mortgage for \$6,000.

The assignment of 1825 was therefore a mortgage, agreed by the act of the parties to be worth \$8,000, and considered by Goodwin worth more than \$20,000, and likely to be paid in cash in a year.

2. That such an assignment is in law a mortgage or security merely, the following cases prove: 1 Story Eq. Jur., sec. 1018; 1 Cruise (by Greenleaf) tit. 15, ch. 1; *Conway v. Alexander*, 7 Cranch, 218, 241; *Hughes v. Edwards*, 9 Wheat., 489; *Morris v. Nixon*, 1 How., 118, 122-123, 124, 126, 127, 130, 131; *Dougherty v. McCalgan*, 6 Gill & Johns., 275, 280, 281.

3. That on mortgage, or pledge, or transfer, by way of security, the mortgagor is treated as the substantial owner, subject to the lien of the creditor. His right to redeem is an incident inseparable. It may be assigned or passed to his representatives, or to his insolvent trustee, or in bankruptcy, or a judgment creditor may claim to stand in his place and to redeem.

This principle applies to securities of chattels as well as of lands, and to choses in action as well as to either. (*Morris v. Nixon*, 1 How., 123, 124, 126, 129; 5 Johns., 345; 2 Story Eq. Jur., sec. 1023, 1052; *Dougherty v. McCalgan*, 6 G. & J., 281, 282; *Hudson v. Warner & Vance*, 2 Harr. & G., 415; *Hartley v. Russel*, 2 Sim. & Stu., 244; *Milne v. Walton*, 2 Younge & Col., 354, 362.)

III. That, therefore, Lyde Goodwin retained such a property and interest in the claim on Mexico, after its assignment to Oliver, as was liable in some way to be subjected to the payment of his debts by judgment. Being an equitable interest in a chose in action, it could not be subjected to the common law execution of *fi. facias*.

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It could then be reached by one of two processes only; either, 1st, by attachment in the nature of an execution; 2d, by bill in equity to subject the surplus.

The appellant insists that it could be subjected by either of those modes, and that the laying the attachment was a fit preliminary; and that the fraud is the same in either view.

*1. By execution of attachment. [*616

a. The Act of 1715, sec. 7, gives any judgment creditor of any person right, in lieu of any other execution, to sue out an attachment against the goods, chattels and credits, of the defendant, in his own hands, or in the hands of any other person.

The policy of our law is to subject every species of property to execution. (*Somerville v. Brown*, 5 Gill, 422.)

It is an execution. (*Baldwin v. Wright*, 3 Gill, 246.)

The attachment was intended to cover every species of property not liable to be taken by *fi. fa.*, and for which, before plaintiff had been driven into equity to get hold of; and that it would not lie where a *fi. fa.*, lay. For example—

fi. fa. lay only for chattels held by legal title. (10 G. & J., 226, 261; *Harding v. Stevenson*, 6 H. & J., 267.) Attachment covers that by equitable title.

Legal estates in land, by the Act of 1783, are sold on *fi. fa.* Equitable estates, as equities of redemption, by attachment, but not to *fi. fa.* (*Ford v. Philpot*, 5 Harr. & J., 812; 5 Johns., 386.)

Goods consigned to merchants who had lien on them were not liable to *fi. fa.*, but were to attachment. (6 Harr. & Johns., 267, 268; *Nathan v. Giles*, 5 Taunt., 558.)

The lien of a judgment could not be sold on *fi. fa.*, but the judgment could be attached, and court could execute it. (*Wells v. Ghieslin*, 1 Harr. & McH., 91.)

Surplus money in sheriff's hands could not be taken on *fi. fa.* but might by attachment. (1 Harr. & Johns., 546; 5 Harr. & Johns., 812.)

Attachment lies for a credit, or a chose in action, or for stocks, because they are not liable to *fi. fa.* (Evans, Pr. 364.)

But chattels in defendant's possession were not liable to attachment, because they could be taken by *fi. fa.* (3 Harr. & McH., 594, 615-617.)

Thus the policy of the attachment law was to give a residuary execution, covering every case not before covered. The words "goods and chattels, and lands, covering interests in lands, and goods and chattels, which could not be taken by *fi. fa.* and credits," being used to designate everything in the nature of a chose in action.

b. The claim on the Mexican government, assigned by Goodwin, was a credit of Goodwin in the hands of Oliver, and so liable to attachment in his hands.

The statute does not confine the attachment to credits in the hands of the debtor, but extends it to the credits of the defendant in the hands of the plaintiff, or any other person.

The most common case is the attaching the credit in the "hands of the debtor, [*617 or person owing the money to the defendant.

But the Act does not define the subject matter

on which the attachment may be laid by any reference to the person in whose hands it may happen to be. The credit is the thing attached; it may be attached in the hands of the plaintiff or any other person.

May, then, a credit be in the hands of any person but the debtor, who himself directly owes the money to the defendant?

A credit is a right to demand money from some one. It is equivalent to the legal phrase, a chose in action—a thing to be sued for.

Now, a right in A to recover money from B for the use of C, is matter of every day occurrence.

If D have judgment against C, may he not lay an attachment in the hands of A, who holds a credit or chose in action against B for the benefit of C, especially if B be out of the state?

2. The modern law recognizes the assignability of choses in action, operating an actual transfer *proprio vigore* of the title of the chose in action, or credit, from the assignor to the assignee, vesting the latter with all the rights of the former, the possession of the evidences, and the right to enforce the claim, as effectually as a bargain and a sale of lands. (2 Story, Eq. Jur., sec. 1057; *Comegys v. Vasse*, 1 Pet., 218, 215, 217; *Spring v. S. C. Ins. Co.*, 8 Wheat., 268; *Bohlen v. Cleveland*, 5 Mason, 174; *Harrison v. Sterry*, 5 Cranch, 289, 300, 302; *Evans et al. v. Merriken*, 8 G. & J., 89, 46-49; *Ex parte South*, 8 Swanst., 872, 873; *Conard v. Atlantic Ins. Co.*, 1 Peters, 886, 441; *Black v. Zacharie*, 8 How., 483, 512.)

As between successive assignments, the title vests according to the dates, a former being liable, however, to be postponed to a later one by failure to notify the person liable to the assignor in proper time. (*Anderson v. Tompkins*, 1 Brock., 456; *Hudson v. Warner and Vance*, 2 H. & G., 415, 418, 427, 432; *Houston v. Nowland*, 7 G. & J., 480, 493; *Loveridge v. Cooper*, 3 Russ., 1; *Cooper v. Tynmore*, 3 Russ., 60; 3 How., 483, 512.)

3. By the assignment of 1825, therefore, the chose in action or credit belonging to Goodwin, and due by Mexico, was vested in and held by Oliver for the benefit of Goodwin, after paying his debt. He held the evidences, the sole legal right to prosecute and control it, to collect and receipt for it.

To refuse to apply the attachment to such a case, is to withdraw from its reach half the cases it was provided to remedy, forcing the judgment creditor back into a suit in equity; *e. g.*, all cases where a credit or chose in action **618** of a judgment debtor *is in the hands of anyone, except the person ultimately liable to pay the money.

A consignee has sold goods and taken notes of the purchaser, not yet due, to the consignor. The goods could have been attached—may not their proceeds, in the shape of notes, in the hands of the consignee, on a judgment against the consignor?

Chattels and choses in action are assigned in trust, the debtors living out of reach of process, to sell and pay to A B. The chattels may be attached in the hands of the trustee—may not the bonds and notes be attached, so as to bind the proceeds when collected?

United States stock is held by a trustee for

A B. It is an obligation to pay money; may the stock—the right to receive the money, not merely the quarterly installment, be attached; and if so, in whose hands but the trustee's?

So stocks of all non-resident corporations will escape execution, unless they be attachable in any hands holding the certificates for the person entitled to receive the proceeds.

The stock, like the debt, is a credit, the money payable ultimately by one person; but the right to receive it, the title to it, being in the hands of a third party for the owner, with the evidences on which alone it is payable. It is case of a credit in the hands of such party, and may be attached there.

The very point has been decided twice in Massachusetts. (*N. E. M. Ins. Co. v. Chandler*, 16 Mass., 274, 279; 6 Mass., 339, 342.)

The Massachusetts law uses the words, "goods, effects and credits," equivalent to "goods, chattels and credits." Attachment laid on goods and notes for collection, in the garnishee's hands. (*Erskine v. Staley*, 12 Leigh, 406.)

Or put the case of a legacy specific, of a note, or chose in action, where executor is here, and person liable on the chose in action beyond process.

c. The attachment was rightly laid in Oliver's hands, for it must be laid in the hands of the possessor of the thing attached. (*Van Brunt v. Pike & Ward*, 4 Gill, 270, 276.)

And possession of the evidences, together with the assignment, vests the possession of the chose in action in transferee. (*Dearle v. Hall*, 3 Russ., 1; *Farmers' Bank of Delaware v. Beaton*, 7 G. & J., 428, 429; *Gardner v. Lochlan*, 4 Myl. & Craig, 129, 133; *Black v. Zacharie*, 8 How., 483, 512.)

That Oliver is legally chargeable with the possession of the evidences of debt, since they were under his control, and should have so stated. (*Morrice v. Lively*, 2 Bevan, 500; *Attorney-General v. Bailiff of E. R.*, 2 Myln. & K., 35; 2 Danl. Ch. Pr., 259, 260; *Woods v. Mossell*, 105, 107.)

*d. That the money had not been **619** actually received, was no obstacle to a judgment of condemnation, with a stay of execution till it should be collected; for the court has power to modify its judgments and process to suit that exigency of each case; *e. g.*, where the property is subject to a lien, to have it ascertained was to get at the surplus. (*Davidson's Lessee v. Beatty*, 3 H. & McH., 594; *Pratt v. Law*, 9 Cranch, 456, 496; *Serg. on Attach.*, 91, 94; 2 Rawl., 227.)

And where laid in the hands of a debtor, on a debt not yet due, no plea of *nulla bona* is allowed; but condemnation is given, and execution stayed till debt due. (*Somerville v. Brown*, 5 Gill, 399; *Serg. on Attach.*, 101, 102, 109.)

Or where papers detained abroad. (4 Dall., 253; 2 Binney, 453; *Serg. on Attach.*, 145.)

So the court could have condemned Goodwin's interest, and either have sold it or evited its collection.

e. That the attachment, by way of execution, applies to all judgments, without regard to the residence of the defendant. (1 D. L. M., 22, 23; *Act 1715*, ch. 40.)

1. The operative words of the section giving the remedy are of the widest possible scope.

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2. The use of the word "absent" before defendant, occurs only in the last clause of the section requiring notice of the garnishee.

3. They only create a doubtful implication, which is not sufficient to limit the universality of the enacting words.

4. This section expressly dispenses with the prerequisites prescribed in the 1st and 2d sections, providing for the protection of absent defendants.

5. The 5th section of the Act implies, that an attachment may be levied on the goods of a resident. (Printed out of place, 1 D. L. M., 763.)

6. The oldest form of attachment, by way of executions, apply to residents. (2 Harris' Entries, 611; 2 Evan's Harris, 377.)

7. The defendant must have been in the State before judgment could have been recovered; yet 2d section prescribes no way to show the removal.

8. The law of 1831, ch. 321, is declaratory, and not binding; the United States courts ought not to be allowed to raise an implication, so as to do by construction what it could not do by enactment.

9. It contravenes the whole purpose and policy of the attachment, by way of execution.

f. If, therefore, the court think the assignment of 1825, or any assignment before October, 1826, covered the commissions on the Mervin claim, they are covered by the above reasoning.

620* But if not, yet Oliver, holding possession of the evidences, the right to receive the proceeds, and being the party directed to pay Goodwin, he held Goodwin's claim to the commissions as agent, sufficiently to make him a fit garnishee, as having that credit in his hands.

Though the court doubt as to the commissions and Mervin debt, that will not affect the mortgage of the share in the company.

This fund could have been reached by bill in equity.

(a.) A bill in equity is competent to compel the application of the equitable property, the choses in action and equities of redemption of a judgment debtor which cannot be reached by *fi. fa.* to the satisfaction of the judgment. (*Scott v. Scholly*, 8 East, 467, 508, 509; *Clayton v. Anthony*, 6 Rand., 285; *Dold v. Geiger*, 2 Grat., 112; *Holley v. Williams*, 1 Leigh, 140; *Hadden v. Spader*, 20 Johns., 554, 563, 564, 568; 2 Johns. Cas.; *McDermott v. Strong*, 4 Johns. Cas., 687, 690, 692; *Bayard v. Hoffman*, 4 Johns. Cas., 450; *Spader v. Davis*, 5 Johns. Cas., 280; *Hallett v. Thompson*, 5 Page, 583; *Griffith v. Fred. County Bank*, 6 Gill & Johns., 424; *Harris & Chauncey v. Alcock*, 10 Gill & Johns., 251, 252; *McDonald v. Bank U. S.*, 2 Pet., 107.)

(b.) An execution is usually required as precedent to suit in equity.

The attachment was such an execution. Even if no condemnation could have been had under it; yet neither can an equitable interest in chattels or land be sold under *fi. fa.* at common law. But the *fi. fa.* is held to bind them, and a bill lies in equity to sell them.

So here, the attachment was the most appropriate form of execution to bind an interest, in the nature of a credit or chose in action, as preliminary to a bill in equity, to have it applied to the satisfaction of the judgment.

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(c.) To this preceding the facts of the assignment, by way of mortgage to, and the possession of the evidences by Oliver, were as essential as to the sustaining of the attachment.

The untrue denials in the answers of Oliver equally misled the plaintiff to the abandonment of his remedy.

The fraud gives the plaintiff an equal equity now to call on the court to do him justice by subjecting the fund to his judgment, after paying Oliver his debt and expenses.

The points raised by the counsel for the appellees were as follows:

The theory of the bill is, that the appellant had, by the attachment on the judgment of himself and co-plaintiffs, entitled himself to condemnation of Goodwin's funds, alleged to be in *Oliver's hands as garnishee, and [**621** that Oliver, by his false and fraudulent answers, having deprived him of his legal right to such condemnation, equity will compel Oliver's estate to pay the money which, but for his unconscientious conduct, would have been recovered at law.

A right to condemnation, then, as against Oliver, and the loss of that right through his fraud and falsehood, are essential, on the appellant's own showing, to his success.

Neither of these elements are found in the case, as it appears on pleadings or proofs.

1st. The attachment was issued against law, and would, at the trial (which never came on, because the plaintiffs in the attachment discontinued it), have been quashed, and is therefore to be regarded as void. (Act of Maryland, 1715, chap. 40, sec. 6; *Waters & Caton*, 1 Harris & McHenry, 407; *Harden & Moores*, 7 Harris & Johnson, 4.)

2d. The attachment was irregular and void for another reason; that the Act of 1715 (above referred to), and adopted by the 100th rule of the Circuit Court of Maryland, authorized no such writ in the case of a resident defendant (Act of 1831, chap. 321.)

3d. But conceding the attachment to have been regular, it could only take the "lands, tenements, goods, chattels, or credits," of Goodwin, in Oliver's hands (see Writ 19, 20), and there being none of these things in his hands, there was nothing to attach, and of course nothing to condemn. (*Houston & Nowland*, 7 Gill & Johnson, 480; *Meeker and Wilson*, 1 Gallison, 419; Act of Maryland, 1810, chap. 160; *Ford & Philpot*, 5 Harris & Johnson, 312; *Campbell & Morris*, 3 Harris & McHenry, 535; 9 Cranch, 477.)

4th. If there was anything in Oliver's hand at the time of the attachment, it was only Goodwin's claim on the government of Mexico, for assistance rendered to Mina, in his attempt to revolutionize Mexico when a province of Spain, in violation of our neutrality Acts; and such a claim has been decided by the Maryland courts, in the case of Goodwin's trustee against these appellees, to be of such a character that the law of Maryland will not recognize its existence, and of course no condemnation could be had of it.

5th. The discontinuance of the attachment was the voluntary act of the appellant; and as he was not bound by Oliver's answers to the interrogatories in attachment, but might have tested their truth by bringing the attachment

to trial, his failure to proceed at law gives him no right to come into equity.

6th. Oliver's answers were true. Goodwin's share in the Mexican Company was assigned to [622*] Oliver absolutely in 1825. *and no interest therein remained in Goodwin at the time of the attachment. Goodwin's interest in his commissions and his claim on Mervin were not assigned to Oliver till May, 1829, nearly two years after the answers, and at the time of the attachment Oliver had no interest whatever in either of these claims.

Mr. Justice Grier delivered the opinion of the court:

Without attempting to give a history of the facts of this case, as exhibited in the pleadings and proofs, or noticing all the objections of the equity of the bill, we think there are two of its charges or allegations, on which its whole equity rests, and which the complainant has failed to substantiate.

1. That there were in the hands of Robert Oliver at the time the attachment was laid, any chattels, rights, or credits of Lyde Goodwin, "which were bound by said attachment."

2. That Robert Oliver was guilty of falsehood or fraudulent concealment of facts, in his answers to the interrogatories proposed to him as garnishee in the attachment.

In 1816, and previous to his insolvency, Lyde Goodwin had become a shareholder in the Baltimore Mexican Company, to the extent of one ninth part. This Company had furnished means to General Mina to fit out a warlike expedition against Mexico, then a dependency of Spain. The expedition of Mina had failed, and he had perished with it. This transaction of the Company was illegal, and punishable as a misdemeanor, with fine and imprisonment. The contract was therefore void in law, and could not be the foundation of any debt, nor could the stock thus created be treated in law as a thing of value: and from the uncertainty of its future prospects, its value in the market was little better. It was merely possible that Mexico, if successful in her struggle for independence, might, at some future day, assume the payment of the debts contracted by Mina; and if, as it was possible, or perhaps probable, that at some day still further in the future the payment may be obtained. Goodwin's title in this possibility or expectancy, or whatever it might be called, was supposed to have passed to Brown, his assignee, under the Insolvent Act. Afterwards, in 1824, Mexico having achieved her independence, passed a decree promising to acknowledge "the debts that may be proven to have been contracted for the service of the nation by the Generals declared *bene meritos de la patria*," of whom Mina was one. This renewed the hopes of the Company, that possibly something might be recovered hereafter on this pledge of the Mexican government; and Robert Oliver was appointed the attorney on the part of the Company to prosecute their claim. Lyde Goodwin being [623*] *in actual want of the means of subsistence, persuaded Robert Oliver to advance him the sum of \$2,000, and take a transfer from Brown, his insolvent trustee of this claim, as security.

In this situation of affairs, the attachment of

Baring, Brothers & Co. was served on Robert Oliver, as garnishee of Lyde Goodwin, in 1827. Now it is admitted that Oliver was a creditor of Lyde Goodwin, and not a debtor. His power of attorney put him in possession of nothing which could be attached as the property of Goodwin. The insolvent assignment was supposed to have vested Goodwin's interest in this expectancy, in Brown. If it did not do so, as has since been decided, Oliver had no title to Goodwin's claim. And if it did, and if Oliver held it merely as a security for the sum advanced by him, the equitable assignment taken as such security, was his own; it was but an instrument to obtain satisfaction for his debt; it conferred nothing but a right in equity. Whether it was valid or invalid, absolute or defeasible, it did not constitute him a debtor of Lyde Goodwin, or put him in possession of any of his credits or effects, so as to subject him to an attachment as Goodwin's garnishee. It was not till after the death of Robert Oliver, and more than ten years after the attachment of complainant was discontinued, that the United States made the Convention of April, 1839, with Mexico, under which commissioners were appointed, before whom this claim of the Baltimore Company was proved, and acknowledged by Mexico as a just debt. Then for the first time, this uncertain claim or equity, assumed the form of a credit, and an existence as a legal chose in action. But in that character it never existed in the hands of Robert Oliver. If, at the time the attachment was served on him, the claim of Lyde Goodwin had existed as a debt due him by a citizen of Maryland, and Oliver held an equitable transfer either absolute or defeasible, it is abundantly evident that the proper person to be made garnishee in an attachment, would have been the debtor, not the equitable claimant of the debt. He has but an equity or a bare right, but whatever it is, it is his own, and his claim is in hostility both to the plaintiff and defendant in the attachment.

The whole foundation of the complainant's equity in this bill rests on the averment, that the interest of Lyde Goodwin, whatever it was, in this Mexican claim, "was bound by the attachment laid in the hands of Robert Oliver, as garnishee." The Mervin claim not having been assigned till after the attachment was withdrawn, need not be noticed. The decision of this point against the averment of the bill, would dispose of the case.

But as we think the charges made in the bill against Robert *Oliver, of false and [*624] fraudulent concealment, have not been sustained, it is due to the memory of one who always sustained a high reputation as a merchant and man of honor, to notice this point.

It must be remembered that the purpose of the interrogatories was to ascertain whether Oliver had in his hands any credits or effects of Lyde Goodwin, subject to attachment; and also that Brown, the insolvent assignee of Goodwin, was supposed to have had the title to Goodwin's interest vested in him. The legitimate inquiry was not, therefore, whether Brown had abused his trust, by selling or mortgaging the trust property for the benefit of Goodwin; or whether Oliver's claim under the assignee was valid or not. This inquiry was

wholly irrelevant in the investigation, under the attachment proceeding. Nor was Oliver bound, in that investigation, to make any disclosure of the strength or weakness of his own title, which was hostile to that of the plaintiff. The discovery sought, was not of Oliver's equities, but of Goodwin's assets. Oliver's answers to the interrogatories were drawn, no doubt, by learned counsel, fully aware of the nature of the proceedings, and the rights of the parties under them. The answers were strictly true to the letter. The garnishee had not in his hands, "any funds, evidences of debt, stocks, certificates of stock, belonging to Lyde Goodwin, nor any acknowledgment by the Mexican government to said Lyde Goodwin," on which the attachment could be laid. What claims or securities he himself had as a creditor of Goodwin, the plaintiff in that proceeding had no right to inquire, nor was Oliver

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bound to answer. If he had nothing which the plaintiff could attach, it was no fraud on plaintiff to keep his own counsel, and make no disclosure as to the nature of his own securities.

The decree of the Circuit Court is therefore affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Maryland, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed, by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

Cited—17 How., 232, 239; 20 How., 536; 24 How., 320.

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REPORTS

OF

CASES

ARGUED AND ADJUDGED IN

THE

Supreme Court of the United States,

IN DECEMBER TERM, 1853.

BY BENJAMIN C. HOWARD,

Counselor at Law, and Reporter of the Decisions of the Supreme
Court of the United States.

VOLUME XV.



PROCEEDINGS

IN RELATION TO THE

DEATH OF WILLIAM R. KING,

LATE VICE-PRESIDENT OF THE UNITED STATES.

December 9th, 1853.

At the opening of the Court this morning, Mr. Cushing, the Attorney-General of the United States, addressed the Court as follows:

May it please your Honors: I rise to submit a motion, which seems to be called for by the nature of the subject matter. God, in his inscrutable, but supreme will, has removed from the service of the country, and from that path of honor which, through a long lifetime of greatness and goodness, he had so nobly trod, the Vice-President of the United States. When the voice of some future panegyrist, on the banks of the Mississippi—the Bravo of the Columbia—shall speak of the heroes, the legislators, the statesmen and the magistrates of our country, as it recounts the names borne on that glorious roll of immortality, it cannot fail to pause with unalloyed satisfaction at the name of William R. King. Providence, from time to time, raises up men to lead armies on to victory through the clash of the battle field, or by rare gifts of written or spoken thought, to wield, at will, the fiercest impulses of nations. Such men, if they have a superlatively splendid career, yet have an agitated one. They create events, and they partake of the vicissitudes of events. They may, they often do, have shaded sides of the mental formation, without which the bright ones would be too dazzlingly brilliant. They come to be praised or dispraised alternately, according to the light in which their actions are viewed, and the flux or reflux of the tides of popular emotion. If William R. King be not of these, yet he has an appropriate, and perhaps he has a more enviable place in the temple of fame and in the hearts of Americans. For of him, it is with plainest truth to be said, that with lofty elements in his character to merit and receive the most absolute commendation, there is nothing in it open to censure. He stands to the memory in sharp outline, as it were, against the sky, like some chiseled column of antique art, or some consular statue of the imperial republic wrapped in its marble robes, grandly beautiful in its simple dignity and unity of a faultless proportion.

Placed at an early age in that august assembly, the highest, all things considered, in this or any other land, the Senate of the United States—and continuing there, save with brief interruption of the most eminent diplomatic

employment, during a whole generation of time—and repeatedly elevated to preside over its deliberations—he had grown to be, not of it merely, but its representative man, its typical person, its all conspicuous model of an upright, pure, spotless, high minded, chivalric American Senator. This it is, in my judgment, which constitutes the distinctive trait in his character and career, and which drew to him the veneration and the confidence of his countrymen.

We think of him almost as an historical monument of senatorial integrity, rather than as a mere mortal man of the age. Like that gallant soldier, who received the *baton* of marshal in the very scene of his achievements, and fell, struck by a cannonshot, in the act of grasping the insignia of his command, so the Vice-President did but reach the pinnacle of his greatness to die. Such a death, so timed, though premature for us whom he has left behind to the toils and cares of public duty, was not premature for the consummate completeness of his renown. Knowing how deeply his loss must be deplored by your Honors, it is deemed fitting for me to move that this court, in unison with what has been done in both Houses of Congress, do now adjourn, in manifestation of its respect for the memory of the deceased Vice-President of the United States.

To which *Mr. Chief Justice TANEY* replied:

The court is sensible that every mark of respect is due to the memory of the late Vice-President, William R. King.

His life was passed in the public service, and marked throughout by its purity, integrity and disinterested devotion to the public good.

It is true that no part of it connected him particularly with the judicial branch of this government, but the people of the United States had elevated him to the highest office but one in their gift; and the loss of a statesman like him, so honored and so worthy of the honor bestowed, is felt to be a public calamity by this department of government as well as by that to which he more immediately belonged. And as a token of their high respect for him while living, and their sincere sorrow for his death, the Court will adjourn to-day, without transacting its ordinary business.

Whereupon, proclamation being made, the Court is adjourned until Monday morning at 11 o'clock.

JUDGES
OF THE
SUPREME COURT OF THE UNITED STATES
DURING THE TIME OF THESE REPORTS.

The Hon. ROGER B. TANEY, *Chief Justice.*
The Hon. JOHN M'LEAN, *Associate Justice.*
The Hon. JAMES M. WAYNE, *Associate Justice.*
• The Hon. JOHN CATRON, *Associate Justice.*
The Hon. PETER V. DANIEL, *Associate Justice.*
The Hon. SAMUEL NELSON, *Associate Justice.*
The Hon. ROBERT C. GRIFF, *Associate Justice.*
The Hon. BENJAMIN R. CURTIS, *Associate Justice.*
The Hon. JOHN A. CAMPBELL, *Associate Justice.*

CALEB CUSHING, Esq., *Attorney-General.*
WILLIAM THOMAS CARROLL, Esq., *Clerk.*
BENJAMIN C. HOWARD, Esq., *Reporter.*
JONAH D. HOOVER, Esq., *Marshal.*

THE DECISIONS
OF THE
Supreme Court of the United States,
AT
DECEMBER TERM, 1853.

1*] *THE UNITED STATES, *Appellants*,
v.
SAMUEL DAVENPORT'S HEIRS.

Grant by Spanish military commander, when entitled to confirmation—cause not dismissed for petition speaking of perfect and showing imperfect title—Grantees under U. S. necessary parties.

Two grants of land in the country known as the neutral territory lying between the Sabine River and the Arroyo Hondo, confirmed, namely: one for La Nana granted in 1798, and the other for Los Ormeas, granted in 1796.

These grants were made by the commandant of the Spanish post of Nacogdoches, who at that time had power to make inchoate grants.

In both cases the grants had defined metes and bounds, and the grantees were placed in possession by a public officer, and exercised many acts of ownership.

The evidence of the grants was copies made by the commandant of the post, and also copies made by the Land Office in Texas. These copies, under the circumstances, are sufficient.

At the date of these grants, it was necessary to obtain the ratification of the civil and military governor before the title became perfected. This not having been done in the present case, the title was imperfect, although the petition alleges that it was perfect, and the District Court had jurisdiction under the Acts of 1824 and 1844.

But the District Court ought not to have decreed that floats should issue where the United States had sold portions of the land, because these vendees were not made parties to the proceedings.

THIS was an appeal from the District Court of the United States for the Eastern District of Louisiana, under the Acts of 1824 and 1844, so often referred to in cases previously reported.

The facts of the case are recited in the opinion of the Court.

It was argued by **Mr. Cushing** (Attorney-General) on the part of the United States, and by **Messrs. Baldwin** and **Johnson**, with whom was **Mr. Coxe**, on behalf of the appellees.

The points made on the part of the United States were,

I. That the court below had no jurisdiction, and that the decrees are therefore nullities.

These grants were complete titles, requiring nothing more to be done to perfect them; and 2*] the cases are full of proof, offered *by the claimants, to show that the grants were perfect grants. But the Act of 1824 applies only

to cases of incomplete titles, to cases protected by the Treaty of 1803, "and which might have been perfected into a complete title, under, and in conformity to, the laws, usages and customs of the governments under which the same originated, had not the sovereignty of the country been transferred to the United States." (1 Land Laws, 885.) The point, it is conceived, is decided in the case of *The United States v. Reynes*, 9 How., 144, bottom of page, and 145.

II. That there is no sufficient evidence of the execution of the grants by Fernandez and Gaudiana.

III. That, even if their execution is proved, then they are void; because Fernandez and Gaudiana had no authority to make such large grants. Laws for the sale and distribution of lands. (2 White's Rec., p. 48 to 55; Royal Ordinance of 18th October, 1749, *Ibid.*, 87; Royal Ordinance of 1754, *Ibid.*, 62; O'Reilly's and Gayoso's Regulations, *Ibid.*, 229, 281.)

IV. That even if their execution is proved, then the grants are void, because no lands were severed from the public domain by surveys, giving a certain location previous to the Treaty of 1800 or even 1803, and the descriptions in the grants are so vague, indefinite and uncertain, that no location of the lands embraced in them can be given. (*United States v. Miranda*, 16 Pet., 156 to 160; 15 Pet., 184, 215, 275, 819; 10 Pet., 381; 8 How., 787; 5 How., 26; *United States v. Boisdonor's Heirs*, 11 How., 68; *Le-compte v. United States*, *Ibid.*, 115.)

V. That the claimants are not within the provisions of the Act of 1824, and there are not the proper averments in their petitions to show that they are entitled to its benefits.

The counsel for the appellees made the following points:

1. The territory within which both of these grants were situate was, at their respective dates, within the boundaries of Texas (the Arroyo Hondo being the eastern boundary), and subject to the dominion and control of the commandancy at Nacogdoches, so far as related to the granting of lands.

2. The civil and military commandants at that post were, *ex officio*, lieutenant-governors, and had authority to grant lands within their province or department.

3. These grants were made in manner stated in the petitions, and were in conformity with the laws, usages and customs of

Spain, which then existed in the Province of Texas and at the post of Nacogdoches.

4. These grants gave to the grantees therein named, and to their legal representatives, a good title to the premises in them respectively described.

3*] *5. The plaintiffs, in these suits, have shown themselves, by a regular deduction of title, the owners of the William Burr and Samuel Davenport interests in both tracts; and are, therefore, entitled to recover.

Mr. Johnson, in his argument, said that the United States had not denied the existence of the original grants. As to the allegation that the lands were not severed from the royal domain, if the grant was capable of being located, it need not be actually severed. (*Glenn v. United States*, 13 How., 250.) This grant can be located. A center being given, a line must be run from it two leagues to the north and two to the south; then from each end, two east and two west; then close the survey. The record shows that the center tree existed. The other grant can be surveyed also.

But it has been said that if these titles are good for anything, they are complete titles, and therefore not within the jurisdiction of the court under the Acts of 1824 and 1844.

We are aware that in the case of *The United States v. Reynes*, 9 How., 127, this court has decided that perfect grants, arising under the Treaty of 1803, do not fall within, and are not embraced by, the provisions of this law; and to that decision we bow with respectful deference; but we ask the court whether the two grants under consideration are of that description? We submit to your Honors whether the fact that these grants were made by the civil or military commandants; whether from the fact that they lay within the neutral territory, a territory which, from its earliest history, was in dispute between the commandants at Natchitoches, in Louisiana, and Nacogdoches, in Texas, and which, by the Treaty of 1819, falls within the limits of Louisiana; seeing that the grants originated with the commandant in Texas—are not considerations which will take these cases out of the operation of that decision. Notwithstanding the proof in these cases to the contrary, we submit, whether, under the laws of Spain and of the Indies, *stricti juris*, these grants, to make them perfect and complete, did not require the sanction of the Home Department and authority. Such was the construction put upon them by Governor Salcedo himself, the Governor of the internal provinces, when "on his way to San Antonio he collected all the titles he could, in order to have them confirmed." (See Colonel Bloodworth's testimony, *Y. & M., O. R.*, p. 201; *N. R.*, 187.) And did not the submission of Davenport & Co. of one of the grants to Governor Salcedo, show that they deemed the sanction of the acts of the military commandant, who made the grant, by a higher authority necessary; and did not the acquiescence in these views, and also show that the grant was further embarrassed by the fact that it lay within the neutral territory? (*Y. & M., O. R.*, p. 140; *N. R.*, 130.) This, too, is in accordance with the testimony of Benjamin Fields, who swears that he always supposed such sanction necessary (pp. 92 and 93; *N. R.*, 89, 90);

and are not these views strengthened by reference to the note of the Commissioners (pp. 43, 44, and 51)? In which last note the Commissioners say:

"It appears to be an historical fact, that the strip of country called the neutral territory was early disputed by the ancient governments of Texas and Louisiana, both alternately assuming and repelling jurisdiction over it; and even after both provinces were united under the Dominion of Spain the dispute did not subside, but was kept alive and perpetuated by the local commandants, &c." These Commissioners, in their several reports, after classing these in the first class of claims, recommend them for confirmation; a language which would not have been used in reference to perfect titles, and which, coming from them, is to be regarded as the language of the government itself. (9 Pet., 468.)

These were the grounds on which the district attorney, in the court below, insisted that the grants were inchoate and not perfect and absolute; and we with great confidence submit to the court, therefore, whether these combined considerations do not clearly distinguish these cases from that of *The United States v. Reynes*, before referred to; and if so, whether they are not embraced by the Act under which the suits are brought; and in view of the whole case in all its aspects, we, with like confidence, submit whether we are not entitled to recover.

(1 How., 24; 7 Pet., 51; 10 Pet., 803; Civil Code, title Prescription, 3421, 3497, 3438, 3465 and 3466; 2 *White's Recop.*, 191; Duff Green's *American State Papers*, Vol. III., p. 73 to 83; *Id.*, Vol. IV., pp. 34-36, 60, 61, 75; Executive Document, 33, 2d session, 27th Congress, p. 81; *Doe v. Estara et al.*, 9 Pet., 449; *Doe v. The City of Mobile, Id.*, 468.)

"The authority given to these officers (the Register and Receiver) was to be exercised only in cases of imperfect grants, confirmed by the Act of Congress, and not cases of perfect titles: in these they had no authority to act."

Mr. Justice Campbell delivered the opinion of the court:

This cause comes before this court by an appeal from a decree of the District Court of the United States for the Eastern District of Louisiana.

The appellees filed their petition in that court to establish their claim to a share in two grants of land, situate on the western border of Louisiana, in the country known as the "neutral" territory, lying between the Sabine River and the Arroyo Hondo.

One of these grants was issued by the commandant of the Spanish post at Nacogdoches to Edward Murphy, the 1st day of July, 1798, for a tract of land called La Nana, containing 92,160 acres. The grantee, in the month of November following, conveyed it to the trading firm of William Barr & Co., of which Murphy and Samuel Davenport, the ancestor of the appellees, were respectively members.

The evidence of the grant consists in copies of the petition of Edward Murphy to the commandant, dated in February, 1798, for a donation of the tract La Nana, situate to the east of the Sabine River, on the road leading from the Town of Natchitoches. The tract asked

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for forms a square of four leagues upon that road, the center of which is the prairie adjoining the bayou La Nana. The motive of the application was, that the petitioner might have summer pasturage for his cattle and other animals. The petition was granted by the commandant, and the procurator was ordered to place the grantee in possession. The procurator fulfilled this order the first of August, 1798, by going upon the land with the grantee and in the presence of witnesses, "took him by the right hand, walked with him a number of paces from north to south, and the same from east to west, and he, letting go his hand (the grantee), walked about at pleasure on the said territory of La Nana, pulling up weeds, and made holes in the ground, planted posts, cut down bushes, took up clods of earth and threw them on the ground, and did many other things in token of the possession in which he had been placed in the name of His Majesty, of said land with the boundaries and extension as prayed for."

The act of possession was returned to the commandant, who directed "that it should be placed in the protocol of the post to serve as evidence of the same, and that a certified copy should be given to the person interested." The conveyance of Murphy to his firm bears date in the month of November after; was executed in the presence of the same commandant, and at that time the certified copies offered in evidence, purport to have been made.

The other grant is for a tract of land called Los Ormezas, containing 207,360 acres. It is founded on a petition of Jacinto Mora to the commandant of the same post, in November, 1795, who asked for the concession, that he might establish a stock farm for the raising of mules, horses, horned cattle, &c., and to cultivate the soil. The tract described in the petition contains six leagues square on the River Sabine, the center of the Western line being opposite to the Indian crossing place of that [6*] river. *The prayer of the petition was allowed the same day, and orders given to the procurator to place the petitioner in possession, "with all the usual formalities of style, and that he should report his proceedings for the more effectual confirmation of the property."

This order was executed in December, 1795, with the same ceremonial that was employed about the order upon the La Nana grant, and the act recording the transaction was placed in the protocol of the post.

The paper in evidence is a certified copy made by the commandant of the post in 1806, shortly before the conveyance of the grantee to the firm of William Barr & Co., and in the certificate the copy is declared to have been compared and corrected, and that it is true and genuine.

Besides these papers, the plaintiffs procured certified copies from the officers of the Land Office in Texas, from copies of the protocol made in 1810, which were submitted by the firm of Barr & Co. to the Governor (Salcedo) of one of the internal provinces of New Spain, of which this post was at the time a dependency, apparently for the purpose of obtaining his sanction, either to the authenticity of the document or to the grant it evinced. This copy of the La Nana papers does not correspond with that of

1798, but that of the Ormezas grant is substantially the same as that made in 1806.

The plaintiffs, further to support their claim, offered evidence satisfactorily explaining why these papers came to be deposited in the archives of Texas and for the fact of their discovery there.

These claims were presented in 1812, to the commissioners appointed to ascertain and adjust claims to lands in the Western District of Louisiana, and have been before the several boards which have been since constituted to effect the same object. The genuineness of the signatures which appear on these copies of the grant; that they have come from a proper depository; that the parties who now hold them have claimed them since the date of their titles; that the lands are fitted for the objects for which they were sought, and have been used for that purpose; that surveys and possession defined their limits, contemporaneously, or nearly so, with the grants, are facts sufficiently established by the evidence submitted to the District Court. No imputation upon the authenticity of the grants occurs in any of the reports or acts of the government, but in the various reports of the boards of inquiry they have been treated as genuine, resting upon just considerations, and entitled to confirmation from the equity of the government.

The questions now arise, have these grants been legally established? *Were they with-[*7] in the competency of the persons making them? Are they binding upon the faith of the government of the United States? Does it lie within the jurisdiction of this court to render a decree favorable to the petitioners?

The copies made by the Spanish commandant from the protocol, and certified by him to be true and genuine, though dated long after the protocol, would be received in evidence in the courts of Spain, as possessing equal claims to credit as the primordial or originals. For the reason that those like these are certified by the same officer whose attestation gives authenticity to the protocol, and who is charged to preserve it. (2 *Escrache*, Dic. de leg., 185.) And this court for the same reason has uniformly received them, as having the same authority. (*United States v. Percheman*, 7 Pet., 51; *United States v. Delespine*, 15 Pet., 319, and cases cited.)

In this case the evidence of the loss or destruction of the protocol is satisfactory, and the copies would be admitted as secondary evidence upon well-settled principles.

The power of the commandants of posts, in the Spanish colonies, to make inchoate titles to lands within their jurisdictions has been repeatedly acknowledged by this court.

Under the laws and regulations of the Spanish Crown, it is a question of some doubt whether grants for the purpose of grazing cattle were anything more than licenses to use the lands, and whether they were designed to operate upon the dominion. This question was presented in the case of *The United States v. Huertas*, 8 Pet., 475, upon a grant "with the precise condition to use the lands for the purpose of raising cattle, without having the faculty to alienate the said land by sale, transfer, control of retrocession, or by any other title in favor of a stranger without the knowledge of

this government," was confirmed by a decree of this court against that objection upon the part of the government (8 Pet., 475-709.) We consider the question closed by the decision in that case, in reference to the country formerly held by Spain, lying to the east of the Sabine.

The land comprehended in these grants at their respective dates was within the unquestioned dominions of the Crown of Spain. The evidence clearly established that the commandants of the posts at Nacogdoches, before and subsequently, were accustomed to make concessions to lands in the neutral territory. This was not at all times an unquestioned jurisdiction, but between the years 1790 and 1800, it seems to have been generally acquiesced in. Some of the grants made within that period have been confirmed by the United States. The dispute of this jurisdiction was a dispute raised by other local commandants and had no relation to the controversy which arose between the United States and Spain, upon the construction of the Treaty of St. Ildefonso and the limits of the cession it made. Had these grants been executed after the date of that Treaty, they would probably have been controlled by the doctrine of the case of *The United States v. Reynes*, 9 How., 127, and those of a kindred character. Having been executed by officers of the Crown of Spain, within its dominions, and in the exercise of an apparently legitimate authority, the presumption is in favor of the rightfulness of the act. No evidence has been given on the part of this government to impugn it, and much evidence has been adduced to uphold and sustain it.

The petition of the appellees describes the grants to be complete, wanting nothing to their validity from the authorities of Spain.

They have adduced evidence to show that such was the estimation in which they were held by the inhabitants of the District of Nacogdoches. If the court had adopted this conclusion it could have taken no jurisdiction of the case. Its jurisdiction under the Act of 1814 is merely to supply the deficiencies in the titles, which were in their incipient state at the termination of the Spanish dominion.

The facts pleaded, enable us to determine the case without a reference to these legal conclusions of the parties. In *The United States v. Clarke*, 8 Pet., 436, this court reviewed the ordinances and regulations of the Crown of Spain for the disposition of its uncultivated lands in the Indies, so as to ascertain in whom, among its officers, the power to grant resided. From the examination, it was concluded that in 1774 it was confided to the civil and military governors, from whom it had been for some years previously withdrawn, and that it remained with these officers till a period subsequent to the date of these grants in the territories bordering upon the Gulf of Mexico. The commandants of posts, and other sub-delegates of this officer, were charged only with a superintendency of the incipient and mediate states of the title, but the power of completely severing the subject of the grant from the public domain was uniformly retained by that central jurisdiction. We are, therefore, of the opinion, that these concessions must be treated as imperfect, and dependent upon the sanction of the United States. Upon a full examination of the evi-

dence, we think they are sustained upon principles of equity, and that the decree of the District Court that declares them to be valid should be affirmed.

That portion of the decree which provides that the petitioners be entitled to locate so many acres of land as have at any time been sold, or otherwise disposed of, out of said subdivisions by the United States, or any other unappropriated land belonging to the United States, [*9 within the State of Louisiana, falls within the objections, stated in the case of *The United States v. Moore*, 12 How., 209, and of *United States v. McDonogh*, at this term, and cannot be maintained. To this extent the decree of the District Court is reversed. The effect of which reversal and of the decree rendered, is to exempt the lands sold or disposed of by the United States from the operation of the plaintiff's claim, and to leave the question of indemnity between the claimant and the Political Department of this government.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel; on consideration whereof, it is the opinion of this court that the grants set forth in the record are valid grants, and that so much of the decree of the District Court as confirms them should be affirmed; but that such of the lands embraced by the said grants as have been sold or otherwise disposed of by the United States are exempt from the operation of the said grants; and that so much of the decree of the said District Court as authorizes the location of so many acres of the lands embraced in the said grants as have been sold or otherwise disposed of by the United States, on any other unappropriated lands of the United States, within the State of Louisiana, is erroneous, and should be reversed.

Whereupon, it is now here ordered, adjudged and decreed, that so much of the decree of the District Court as authorizes the location of so many acres of the land as have been disposed of by the United States on any other unappropriated lands of the United States, within the State of Louisiana, be, and the same is hereby reversed and annulled; and that the lands so sold or otherwise disposed of by the United States, be, and the same are hereby exempted from the operation of the said grants.

And it is now here further ordered, adjudged and decreed, that so much of the decree of the said District Court as declares the said grants to be valid, be, and the same is hereby affirmed.

Cited—15 How., 12, 13, 30; 21 How., 175; 1 Black., 555; 8 Otto, 429.

*THE UNITED STATES, *Appellants*, [*10 v.

THOMAS H. PATTERSON.

Spanish grant—confirmation ordered for use of others than petitioner—person not party to suit cannot intervene.

A claimant of a share of the grants spoken of in the preceding case, having failed to produce evi-

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dence of the right of his grantor to convey to him, cannot have a decree in his favor.

A person cannot intervene here who was no party to the suit in the District Court. And even if the practice of this court sanctioned such intervention, there is nothing to show his right to do so in this case.

THIS was a branch of the preceding case.

The original title and the lands were the same. Patterson claimed under a deed executed on the 21st of November, 1836, by the heirs of William Barr, deceased; but the deed purported to be executed by their attorney in fact, Robert Thompson.

The cause was argued by the same counsel who argued the preceding case, with the addition of *Mr. Lawrence*, who claimed to intervene on behalf of the heirs of Joseph Piernas.

Mr. Lawrence, in support of this claim, alleged that, The petitioners rely upon a conveyance of Jacinto Mora to Barr, Davenport, and Murphey, bearing date the 22d day of July, 1805. This is the only title they set up in their petition to the Ormezas tract.

During the progress of the cause they offered in evidence a conveyance from Jacinto Mora to Joseph Piernas, bearing date the 25th of April, 1796, a paper purporting to be a conveyance from Piernas to Vitor Portia, dated 30th August, 1804, and a conveyance from Portia to Davenport, dated in the year 1818.

All of these instruments of writing are in due form, except the most important one, viz.: that purporting to be from Piernas to Portia, which was not authenticated by a notary or other officer, is not taken from any legal depository, nor recorded in the Land Office, and in which neither the handwriting of the witnesses nor of Piernas is proved, nor the witnesses produced or their absence accounted for. In short, there is no proof at all of the genuineness of the paper, but it is left for the court to judge of the genuineness of the signature of Piernas.

Now, it will be at once perceived that if there were no defect in the chain of title from Piernas to Davenport, this would have been the elder and better title to Davenport, as to the Ormezas tract; and yet, though the conveyance to Davenport of Piernas' interest was in 1818, and this petition was filed in 1845, it is not even alluded to in the petition.

It will be seen, from the extract from Vol. III., American State Papers (Rec., 46), that as [11*] late as 1815-16, Piernas made claim *to this land before the Board of Commissioners, and no claim was made by Vitor Portia.

In 1824, 1825, the same land was recommended for confirmation, but was never actually confirmed by Congress. Piernas had in the mean time died, and his heirs were young children, living in poverty and obscurity. (See letter of Hayward, Rec., 172; also Report to Commissioner, Rec., 213.)

The heirs of Piernas deny that he ever signed the paper to Portia, and aver that it is entirely fictitious.

Full notice of the claim of Piernas was before the court below, for the petitioners introduced his title themselves. It was, therefore, fully the competency of the court below, if they perceived, from the record, title in Piernas to the Ormezas tract, and had no legal evidence before them of his having parted with that title—to have reserved the rights of Piernas' heirs in

their decree; and it is respectfully submitted, that it is within the power of this court (should the validity of the grant be affirmed) to protect those rights, so far as they appear in the present record.

In the case of *Cunningham and Ashley*, 14 How., 377, this court interposed *meso motu*, to save the New Madrid title. Here an older title is introduced, the Act of Congress says the court is to decide on evidence brought in by any person other than the parties to the suit. If so, it is proper to intervene here. The deed from Piernas to Portia had never been recorded, and the court below had no right to receive it.

Mr. Baldwin, in reply to *Mr. Lawrence*, made the following points:

1. That the great lapse of time raised a strong presumption against this claim.

From 24th day of April, 1818, when, as appears by the record, Piernas conveyed his interest in that tract to Samuel Davenport, no claim has ever been set up to this land, either by Piernas or his heirs, until now, notwithstanding they reside in New Orleans, where their suit was tried at great length in the court below.

2. That the claimants under Piernas cannot intervene in this court, it being a court of appellate jurisdiction.

3. That the deed from Piernas, being an ancient deed under the laws of Louisiana, proved itself.

4. That it was regularly proved—the testimony of Crusat, as to the signature of Piernas, having been taken without objection in the court below.

5. That this court will not undertake to settle the rights of parties in interest, but leave them to litigate their rights in the court *below, [*12 or in the state tribunals; and that whatever judgment the court might pronounce in this matter, it would not be conclusive between the parties.

Mr. Justice Campbell delivered the opinion of the court:

This appeal was taken from a decree of the District Court of the United States for the Eastern District of Louisiana.

The appellee claimed in the District Court a confirmation of the grants for the La Nana and Los Ormezas tracts of land, in which he asserted an interest as an assignee of the heirs of William Barr, one of the members of the firm of William Barr & Co., in which they had been vested.

The questions of law and fact, arising in this case, are the same as those determined in the case of *The United States v. Samuel Davenport's Heirs*, in so far as they concern the validity of the grants.

The evidence of the purchase by the plaintiff from the heirs of Barr is not sufficient. No power of attorney appears in the record to Thompson, who made the conveyance to the plaintiff in their name. It is therefore proper that the decree that shall be entered shall be without prejudice to their right, and this opinion is filed in order that this judgment of the court may be understood. The operation of the judgment will be, to perfect the title for the benefit of the legal representatives of William Barr.

In this cause, as well as in that of *The United*

States v. Samuel Davenport's Heirs, a motion was submitted on behalf of the heirs of Joseph Piernas alleging that a deed from Joseph Piernas to Victor Portia, dated the 30th August, 1804, being a link in the title to the Ormezas grant, was not sufficiently proven, and suggesting that it was not a genuine deed, and praying for leave to intervene in this suit to sustain their rights to this property.

The court is of opinion that the motion cannot be allowed. The plaintiff commenced his proceedings to assert his own claims against the United States. Those proceedings can neither benefit nor injure the persons interested in this motion, for they are not parties to the cause. The period for the assertion of a claim under the Act of Congress of 17th June, 1844, has expired. Neither in the District Court nor in this court would it be lawful for persons, who failed to avail themselves of the benefit of that Act during its operation, to intervene for the purpose of establishing a right under grants like these, after its expiration, in a suit commenced by other persons.

In looking through the record, we find no fact to authorize the belief that the heirs of Piernas have any title to the lands embraced in [3*] these grants. If, therefore, it was compatible with the constitution and practice of this court, for a person to intervene here in a litigation, to which he was no party in the court of original jurisdiction, we find nothing to authorize it in the present instance.

The decree will be entered here to conform to that pronounced in the suit of *The United States v. Davenport's Heirs*, with the direction that the confirmation shall be for the use of the legal representatives of William Barr, deceased.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel; on consideration whereof, it is the opinion of this court that the grants set forth in the record are valid grants, and so much of the decree of the District Court as confirms them, should be affirmed for the use of the legal representatives of William Barr, deceased; but that such of the lands embraced by the said grants as have been sold or otherwise disposed of by the United States, are exempt from the operation of the said grants; and that so much of the decree of the said District Court as authorizes the location of so many acres of the lands embraced in the said grants as have been sold or otherwise disposed of by the United States on any other unappropriated lands of the United States within the State of Louisiana is erroneous, and should be reversed.

Whereupon it is now here ordered, adjudged and decreed, that so much of the decree of the District Court as authorizes the location of so many acres of the land as have been disposed of by the United States on any other unappropriated lands of the United States within the State of Louisiana be, and the same is hereby reversed and annulled; and that the lands so sold or otherwise disposed of by the United States be, and the same are hereby exempted from the operation of the said grants.

And it is now here further ordered, adjudged and decreed, that so much of the decree of the said District Court as declares the said grants to be valid, be, and the same is hereby affirmed for the use of the legal representatives of William Barr, deceased.

Cited—21 How., 182; 19 Wall., 597.

*THE UNITED STATES, Appellants, [*14

v.

JEAN BAPTISTE D'AUTERIEVE, PON-PONNE LE BLANC ET AL., Heirs and legal Representatives of JEAN ANTOINE BERNARD D'AUTERIEVE, Deceased.

Western or Mississippi Company grant—no subject of petition—definite location and boundary—jurisdiction.

The heirs of D'Auterieve claimed a tract of land near the River Mississippi, upon two grounds, viz.: 1st. Under a grant to Duvernay by the Western or Mississippi Company in 1717, and a purchase from him by D'Auterieve, the ancestor, accompanied by the possession and occupation of the tract from 1717 to 1780; and 2d. Under an order of survey of Unzaga, Governor of the Province of Louisiana in 1772, an actual survey made, and a confirmation thereof by the Governor.

With respect to the first ground of title, there is no record of the grant to Duvernay, nor any evidence of its extent. It is therefore without boundaries or location; and if free from these objections, it would be a perfect title, and therefore not within the jurisdiction of the District Court, under the Acts of 1824 and 1844.

With respect to the second ground of title, if the proceedings of Unzaga be regarded as a confirmation of the old French grant, then the title would become a complete one, and beyond the jurisdiction of the District Court.

If they are regarded as an incipient step in the derivation of a title under the Spanish government, then the survey did not extend to the back lands which are the property in question, but only included the front upon the river, which was surrendered to the Governor in 1780.

Neither the upper or lower side line, nor the field notes, justify the opinion that the survey included the back lands. A letter addressed to Unzaga by the surveyor is so ambiguous that it must be controlled by the field notes and map.

The neglect of the parties to set up a claim from 1780 to 1821, and the acts of the Spanish government in granting concessions within the limits now claimed, furnish a presumption of the belief of the parties that the whole property was surrendered in 1780.

THIS was an appeal from the District Court of the United States for the Eastern District of Louisiana.

The history of the claim is fully set forth in the opinion of the court.

It was argued by *Mr. Cushing* (Attorney-General) for the United States, and submitted on a printed argument by *Messrs. Janin and Taylor* for the appellees.

The points made on the part of the United States were the following:

1. That the claim of the petitioners, founded on the alleged grant by the Western Company, is not open for discussion, the petitioners having taken no appeal from the decree of the court below, confirming their claim to the extent only of the forty-four arpents of front, and excepting even out of this confirmation the forty in depth on the front granted to the Acadians. But if it were, then everything relating

to that grant and its extent and locality, and what interest D'Auterieve had in it, are so vague and uncertain that it would be impossible to identify and locate the land, and the grant would have to be declared void.

15*] *2. That D'Auterieve, by accepting the new concessions from the Spanish authorities, thereby waived all claims under the grant of the Western Company.

3. That the edict of 1728, and the alleged order of O'Reilly reducing the extent of the lands and the granting of them to others, subsequent to the alleged concessions, are acts for which the petitioners can have no relief against the United States, being the acts of competent French and Spanish authorities during the time these powers held the sovereignty of the country.

The property, in the enjoyment of which the Treaty stipulates that the inhabitants of the ceded territory were to be maintained and protected, was such property as stood recognized by Spain at the date of the Treaty, as the private property of the inhabitants. The United States are not bound to recognize what Spain had not recognized.

4. That the evidence in the case shows that this claim was voluntarily given up and surrendered to the Spanish authorities in 1780, and the long silence from that time until 1886, shows that it had been abandoned by the claimant's ancestors, and the grants made by the Spanish authorities within the limits of the land claimed, to the Acadians and others subsequent to the surrender, show how they regarded the matter.

5. That there was no sufficient evidence of the concessions made by O'Reilly and Unzaga such as to enable the court below to take jurisdiction of the claim. None were produced, and there was no evidence of loss or contents. The Act of 1824 limits the jurisdiction to claims founded on any grant, warrant, or order of survey. The letter of Unzaga to D'Auterieve is not a concession, and the recital in the certificate of survey of Andry is not evidence of the existence of the concession or of its contents.

6. That there is nothing in the case to authorize the side lines to be run to the Atchafalaya River. It is alleged in the petition that O'Reilly, at the time of his visit to point Coupée in December, 1769, whilst he reduced the front of the grant, allowed the original depth to the river to remain. The first thing to be done is to show that this was the depth of the French grant. There is not a particle of evidence to show that this was the original depth, or to show that O'Reilly sanctioned it. A supposition, even that he could have sanctioned it, is put to flight by the first article of his regulations, made 18th February, 1770, on his return to New Orleans, from his visit, which declares that grants on the borders of the river (the Mississippi) shall be forty arpents in depth. That this was the depth allowed by O'Reilly to D'Auterieve, is corroborated by the sale made by the widow of the latter shortly after his death, which conveys only to the depth of forty arpents.

16*] *As to Andry's plan and certificate of survey, they say nothing as to the rear boundary being the Atchafalaya, neither do they profess to state that he measured and run the side lines to any distance whatever; he merely marks

their direction, without saying how far they run; disregarding the twelfth article of O'Reilly's regulations. The rear boundary cannot be ascertained from either or both of the plan and certificate of survey, and the lands cannot, therefore, be located, and the alleged concessions of O'Reilly and Unzaga must therefore be declared void, as being vague and uncertain.

If the claimants were entitled to the confirmation of any part of the concessions it would be confined to the lands delineated on Andry's plan (which, it will be seen on examination, stretches back from the river only about forty arpents), because Unzaga in his letter to D'Auterieve states, that he "approves the survey, conformably to the plan of the surveyor, Don Lewis Andry, dated 12th March last." But even this would avail the claimants nothing, for the whole lands appearing on the plan are absorbed by the Acadian grants, excepted from confirmation by the court below, and other Spanish grants in their rear.

The brief of *Messrs. Janin and Taylor* was as follows:

The petitioners in this action seek to obtain the confirmation of a tract of land as described in their petition, extending from within forty arpents of the Mississippi River to the Atchafalaya. Their title to it is asserted to result from a grant made by the "Western Company," created by the King of France, in 1717, to Paris Duvernay, having four leagues front on the western bank of the Mississippi River, opposite Bayou Manchac, and extending back to the Atchafalaya River. And from the proceedings of the Spanish government in relation to it, after the transfer of Louisiana by France to Spain, under the Treaty of 1762, by which the front on the Mississippi was reduced to forty-four arpents, between side lines, the beginning and courses of which were established in 1772, by the proper surveying officer, and approved by the then governor, with the former depth to the Atchafalaya.

We shall confine ourselves to a reference to the evidence in the record produced by the petitioners, inasmuch as there can be no question as to the authority of the Western Company to make the grant alleged to have been made to Paris Duvernay (1 White's *Recop.*, 641, 642, art. 5; 648, art. 8), or of the Spanish authorities to recognize the title of the then holder of it to the whole or to a part of the land comprised in it in 1772.

The original grant by the Western Company has not been produced, nor indeed any direct written evidence of its existence, or its precise location or extent.

*The evidence showing the existence, [*17 location and extent of the grant to Paris Duvernay is, 1st, historical; 2d, documentary; and 8d, parol, and is as follows:

1st. Historical Evidence.

1st. Mention is made of it in Martin's History of Louisiana, Vol. I., pp. 205 and 246. In that work it is spoken of as one of the large grants made by the "Western Company" to promote the settlement of the colony, and is described as situated on the right bank of the Mississippi, opposite Bayou Manchac.

The arrival of the settlers sent out by Duvernay in or about 1718, to be established on the

grant, is related in Martin's History, Vol. I., p. 206, and it is also spoken of by Bernard de la Harpe, in his "*Journal Historique de l'établissement des Français à la Louisiane*," p. 142.

2d. *Documentary Evidence.*

1. The existence of the grant is clearly shown by the descriptions of the contents of different papers found by the public officer, who made an inventory in due form of law of the effects left by Claude Trenonay de Chamfret, at Point Coupee, in Louisiana, on the 10th of July, 1793.

2. Its existence is clearly shown by the following copies obtained from France:

1st. An extract from the archives existing in the office of the Minister of Marine and the Colonies of France, containing a statement of the passengers embarked for Louisiana, on the ship *Gironde*, on the 30th of September, 1724, in which one of the passengers is described as "director or manager of the concession belonging to H. Paris Duvernay;" and others are spoken of as workmen attached to the same concession.

2d. Extract from the same archives, containing a statement as to the companies of infantry supported in the Province of Louisiana, and of the situation of the inhabitants at each point, dated May, 1724. Mention is here made of the concession of Mr. Paris, and a number of particulars are given with respect to it.

3d. Extract from a general census of the plantations and inhabitants of the colony of Louisiana, from the same office, dated 1st January, 1726. Mention is made in it of the "concession of Mr. Paris Duvernay, at bayou Goula."

4th. Extract from the same archives, dated 17th May, 1724. This is an extract from the register "*Comptes des Indes*," and is an order from the directors of the East India Company, [18*] on *the council of Louisiana, for fifty negroes, for which Paris Duvernay had paid the sum of 40,000 livres to the company in Paris.

5th. Copy of a notarial Act passed in Paris on the 16th of May, 1729, between Duvernay and others, who were interested with him as partners, in relation to this concession.

6th. Copy of a notarial Act passed in Paris, on the 2d of October, 1726, containing the deliberations of the persons then interested in relation to the management of this concession.

7th. Copy of a power of attorney, by notarial Act, from Paris Duvernay to Claude Trenonay de Chamfret, dated 18th October, 1791, giving him authority to cancel and annul a previous arrangement, and to take back the plantation and concession.

8th. Copy of contract by notarial Act between Duvernay and de Chamfret, 18th October, 1791.

9th. Mention of the copy of a decree putting Claude Trenonay de Chamfret, acting under the power of attorney of Paris Duvernay, in possession of the concession contained in the extract from the inventory of Claude Trenonay de Chamfret, before mentioned. The date of this decree was 16th August, 1793. It is erroneously printed in the transcript, 1793.

10th. Notarial Act of donation, made by Paris Duvernay to Claude Trenonay, of the es-

tablishment, &c., and to all his rights, by virtue of the concession originally made, &c. This was dated at Paris, 28th July, 1748.

11th. Copies of Acts, &c., &c., showing sale by Claude Trenonay de Chamfret to D'Auterieve, of the concession, and the ratification of that sale by Claude Trenonay, by his accepting a note or notes representing a part of the price, and enforcing the payment of them.

The Act, at page 38, of the transcript, executed by Trenonay, makes mention of his claim against his uncle, Claude Trenonay de Chamfret, for the alienation of property belonging to him; and that at page 37, recites that de Chamfret had given up an obligation of D'Auterieve for the sum of 14,466 livres, the balance of the sale of the plantation at bayou Goula, comprised in the donation to him. In the examination of papers contained in the inventory before referred to, there is one described as the decree of the council, condemning D'Auterieve to pay to Trenonay the amount of his obligation for 14,466 livres.

And this brings us to a new epoch. No trace has been discovered of the original grant. If it remained in the hands of the original grantee, it was doubtless soon lost after he or his heirs ceased to have any interest in the land comprised in it. The Western Company ceased to exist long before the transfer *of Louisiana [*19] by France to Spain, in 1769. After Spain took possession of the Province, O'Reilly, the first Governor, by an arbitrary exercise of power, declared his determination to reduce the front of D'Auterieve, the then owner of the concession, to a front of twenty arpents. There is, however, no written evidence of this fact, but what results from the statement made by Andry, in the *proces verbal* of his survey. Unzaga, the succeeding Governor, did not carry out the determination of O'Reilly. He reduced the front on the river, however, to forty-four arpents, but left to D'Auterieve the original depth to the Atchafalaya. This appears from the copy of the *proces verbal* of the survey made by Andry, under the authority of the Governor-General, on the 12th of March, 1772, to be found at page 27 of the printed transcript, and the plan or map representing the same at page 40 of the original transcript, and from the express approval of the survey, *proces verbal* and plan, which were laid before him on the 28th of March, 1772, made and given in writing on the 12th of July, of the same year, 1772. There are translations of the material parts of the *proces verbal* of the survey, made by Mr. Janin, and embodied in a brief presented by him to the Land Office in 1835 or 1836, at page 21 of the transcript, and a translation of the letter of Unzaga approving it, also embodied in the same brief, at page 23.

From these proceedings, three facts are rendered indisputable. 1st. That it was to the knowledge of the Spanish government that a valid grant existed, under the authority of France, for a very large tract of land at the point in question, the title to which at the time vested in D'Auterieve, of which the tract comprised in the lines established by the survey, made a part. 2d. That it had a very wide front on the river; and 3d. That it extended back in depth to the Atchafalaya.

The parol evidence of Degruys, as to the ex-

istence, location and extent of the grant, is very clear and distinct. The portions of his deposition relating to these points are in harmony with the proceedings and acts of the Spanish government, as shown in the record.

The lines established by the Spanish government, as the boundaries to the land left to D'Auterieve, after 1772, are shown by the following evidence:

1st. By the grant to Delpino, received in evidence, and copied into the transcript, and the survey of the land granted to him, which survey was made on the 14th of February, 1772, before the survey made of the land left to D'Auterieve, which was confirmed by the United States to Joseph Hebert, under No. 406. (See confirmation, page 46, of printed transcript.) Public lands, page —, and is represented as lot or section 48, on the *plot of T. 10, R. No. 18 east, which is contained in the original transcript, and,

2d By the grant to An. Maria Dorval, and the survey of the land granted to him, made on the 12th of March, 1772. This was confirmed to Barbre Chlatre, No. 206. (Public Lands, page —.)

These two tracts constituted the upper and lower boundaries of the tract left to D'Auterieve, and the lower and upper lines, respectively, determine the direction of the side lines of the claim.

D'Auterieve continued in possession of this property up to his death. He entered into a contract for erecting a mill there in 1772. He died there in 1776.

D'Auterieve, at his death, left several young children, who were his heirs. After the death of D'Auterieve, his widow, the same year (1776), sold six arpents of the front, with the depth of forty arpents. The remainder of the front, to the depth of forty arpents only, was afterwards comprised in an arrangement made by Degruys, with Governor Galvez, as stated in his deposition before referred to. The statement of Degruys is confirmed by the fact that the surveys of the different portions of the front were all made long after the arrangement spoken of by him (being, in point of fact, made in 1796), and that it is stated in the *proces verbals* of the surveys that these lands were those which were contained in the forty arpents from the concession of Mr. D'Auterieve, for the establishment of the Acadian families. (See *proces verbal* of survey, by Pintado, and forming part of the concession of Mr. D'Auterieve, which was destined for the establishment of the Acadian families, and "which were taken for the establishment of the French Acadian families, from the concession of Mr. D'Auterieve.")

The court is also referred to the brief of Mr. Janin, prepared and filed with the commissioners in 1835 or 1836, which we find copied in the transcript at page 18.

Mr. Justice Nelson delivered the opinion of the court:

This is an appeal from a decree of the District Court for the Eastern District of Louisiana.

The heirs of D'Auterieve filed their petition under the Act of Congress of the 17th June, 1844, which provides for the adjustment of certain land claims against the government,

HOWARD 15.

setting up a claim to a large tract in the parish of Iberville, on the west bank of the Mississippi River, at a place called Bayou Goula, some thirty leagues above the City of New Orleans. The decree below is in favor of the heirs, and the case is now before us on an appeal by the United States.

*The petition sets out a charter from the [*21 King of France, in August, 1717, by which the Province of Louisiana was granted to the Western or Mississippi Company; and also a grant from that Company in the same year, to Paris Duvernay, a wealthy capitalist of France, of a tract of land fronting on the western bank of the Mississippi opposite Bayou Manchac, having four leagues front on the river, and extending back in the rear to the River Atchafalaya. That soon after this, Duvernay fitted out a company of sixty men, under the direction of his agent Dubuisson, all of whom arrived at New Orleans in the spring of 1716, and immediately thereafter settled upon the tract; the settlement was known as the "Bayou Goula Concession," the principal establishment being in the neighborhood of the village of the Bayou Goulas Indians. That the settlement was kept up by Duvernay for many years at great expense, and under many difficulties, and contributed materially towards the establishment of the French dominion in Lower Louisiana.

The petition further states, that in 1765, Duvernay, through his agent, Trenonay De Chamfriet sold the tract in question to Bernard D'Auterieve, the ancestor of the present claimants, and delivered to him the possession. That in 1769, after O'Reilly had taken possession of the province, on behalf of the King of Spain, in pursuance of the Treaty of 1762, he gave orders that the Bayou Goula Concession should be reduced from four leagues to twenty arpents front, but that Unzaga, his successor, in 1772, enlarged it to forty-four arpents on the river, and ordered a survey of the same by Luis Andry, the government surveyor, which was made accordingly on the 12th of March, 1772, and approved by the Governor, 12th July, of the same year. D'Auterieve continued to occupy and improve the tract, making it his place of residence, from 1765, the date of his purchase, till his death, 24th of March, 1776. That the widow remained in possession with her children till 1779, when she married Jean Baptiste Degruys, who resided at Attakapas, to which place they removed.

The petition further states, that about this time, Galvez, the then Governor of Louisiana, desirous of introducing some Spanish families from the Canary Islands as colonists, and to provide a settlement for them, made contracts with various persons for the construction of small houses, and, among others, with Degruys; who undertook to build a number on the Bayou Goula Concession, and to give up the front on the river to the use of these colonists, with forty arpents in depth; that he built a number of these houses, and delivered them to the Governor, and was paid for them; but not in accordance with the agreement. That the government having become engaged in a war [*22 against the Province of West Florida, the Governor changed his purposes in behalf of the Spanish families, and assigned a different location for their accommodation, but subse-

quently set apart this tract with the cabins erected, to a number of Acadian emigrants, who had been some years previously driven from their ancient possessions in Nova Scotia by the British government. The petition states, that Degruys and his family continued to reside at Attakapas, where they had other property; that the back land in Bayou Goula Concession, being either low swamp land, or nearly inaccessible, and of little value, was neglected by the family, and especially by Degruys, the head of it, and some portions were subsequently granted to others by the Spanish government, in ignorance of the rights of the ancestors of the present claimants. The petitioners admit that no claim was set up to these back lands, from the time the front was surrendered to Governor Galvez, which must have been about the year 1780, down till 1821 or 1822, when the heirs employed the late Mr. Edward Livingston, as their attorney, to inquire into their claims. They state that the children of D'Auterive, at the time of his death were under age; that there were four of them; and at the time of the removal of the family from the concession to Attakapas, the eldest, Antoine, was only fourteen years old; the second, Louis, twelve; the third, Marigny, six; the fourth, Dubrelet, died in infancy. Antoine died in 1812, leaving four children; Marigny in 1828, leaving no issue; Louis, in 1814, leaving four children. These descendants of D'Auterive have instituted the present proceedings. The widow died in 1811. Degruys, the husband, was living at the commencement of this suit, and has been examined, as a witness, on behalf of the claimants.

These are the facts substantially, as stated in the petition; and the title of the petitioners, as will be seen from the statement, is founded, 1st, upon the grant or concession to Duvernay by the Western or Mississippi Company, in 1717, and the purchase from Tremonay de Chamfret, his agent, in 1765, by D'Auterive, the ancestor, together with the possession and occupation of the tract, from 1717 down to 1780, when the family left it, and removed to Attakapas; and 2d, upon the order of survey of Unzaga, in 1772, the survey made accordingly by Andry, and the approval of the same by the Governor in the same year.

As it respects the first ground of title, the grant to Duvernay in 1717, no record of it has been produced, and, after a thorough examination of the archives of that date, both at New Orleans and at Paris, and in the appropriate offices for the deposit of such records, none can be found. The only proof furnished is to be found in the historical sketches given to the 23^d public, of the *first settlement of Louisiana by the French government, under the direction of the Western or Mississippi Company, together with some documentary evidence relating to the settlement of the plantation by Duvernay, through his agents, such as powers of attorney, and some intermediate transfers of the titles, in the course of the agency. But unfortunately, neither the historical sketches, or documentary evidence, furnish any information as to the extent of the grant or its boundaries.

The several historians of the transactions of the Western Company in Louisiana of that date,

concur in stating that agriculture was one of the first objects of encouragement in the colony; that the company thought the most effectual mode of accomplishing it would be to make large concessions of land to the most wealthy and powerful personages in the kingdom. Accordingly, one of four leagues square, on the Arkansas River, was made to John Law, the famous projector of the company, and its director-general, together with twelve others in different places in the province, and among them, one on the right bank of the Mississippi, opposite Bayou Manchac, to Paris Duvernay, the grant in question. The extent of these grants is given only in the instance of Law. Duvernay at the time was one of the counselors of the King, and Intendant of the Royal Military Academy in France. In the course of the first year after the grant was made, he shipped with his agent, Dubuisson, some sixty emigrants, and settled them upon the tract, with the necessary provisions and implements for clearing the plantation, for the erection of cabins, and for husbandry, and in a few years after, 1724, he purchased and sent to Louisiana, some fifty slaves to supply labor upon it. Large sums of money were also expended by him in other improvements. But, notwithstanding the exertions and large expenditures of the proprietor, the establishment turned out unprofitable, became embarrassed through the neglect and dishonesty of the agents, and involved in litigation, so that in 1765 he made a sale of part of it to D'Auterive, as already stated, and in the next year, 1766, gave the residue and all his interest in the concern, to Claude Tremonay, his nephew, he agreeing to indemnify him against any claims or demands arising out of it, and for which he might be liable.

Now, as it respects this branch of the title set up, and relied on by the petitioners, there are two objections to their proceedings under the Act of 1844, either of which is fatal to a recovery. In the first place, the title, as derived from Duvernay, if still a subsisting one in them, is a complete and perfect one, and consequently not within the first section of that Act, which confers the jurisdiction upon this court. The place to litigate it is in *the local jurisdiction of the State by the common law action of ejectment, or such other action as may be provided for the trial of the legal titles to real estate. For, although we are not able to speak of the nature or the character of the title from the terms of the grant, in the absence of that instrument, all the evidence which has been furnished in relation to it leads to the conclusion that the full right of property passed to the original grantee. Even the length of possession, which is relied on, lays a foundation for the presumption of such a grant, and cannot therefore avail the petitioners here.

And in the second place, the tract claimed as derived from Duvernay is without boundaries or location. The only description that has been referred to, or which we have been able to find, after a pretty thorough search, even in historical records, is that it was a grant of a large tract upon the right bank of the Mississippi river, opposite Bayou Manchac, a point some thirty leagues above New Orleans. In the intermediate transfers and powers of attorney, found in the record, it is referred to as a plan-

tation or concession, known by the name of "Le Dubuisson," the name of the first agent, or by the name of "Bayou Goula Village," the name of an ancient Indian village at that place on the river. We have no evidence of the extent of the concession on the river, or of its depth back, or of any landmarks designating the tract, by which it can be regarded as severed from the public domain.

Without, therefore, pursuing this branch of the case further, it is sufficient to say, that no title or claim of title has been made out under the French grant, or concession, to Duvernay, that could have been recognized or dealt with by the court below, under the limited jurisdiction conferred by the Act of 1844, and of course no ground for the decree in that court, in favor of the petitioners under it. The title, if any, is a legal one, not cognizable under this Act.

The next branch of the title set up and relied on by the petitioners, is that derived from the Spanish government in 1772.

It appears that O'Reilly, who first established the Spanish authority in Lower Louisiana, in 1769, after the cession by France in 1763, assumed the right to reform and modify several of the large grants that had been made by the old government upon the Mississippi River, and required of the occupants to confine themselves within fixed and determined boundaries. His avowed object was to secure a denser population upon the margin of that river, especially above New Orleans, with a view to protect the province against the incursions of hostile Indians, and also against the border settlements of the English, in case of a war between Great Britain and Spain. Amongst others, 25*] he reduced the possession of D'Auterieve under the grant to Duvernay, to twenty arpents front on the river. Unzaga, however, who succeeded him as governor of the province in 1772, enlarged it to forty-four arpents front, and ordered a survey of the same by Andry, the public surveyor. This survey was made, returned and approved by Unzaga in the same year.

These acts of O'Reilly and Unzaga have been urged as a confirmation by the Spanish government, *pro tanto*, of the French grant to Duvernay; and it may be admitted that they are entitled to great weight in that aspect of the case. But this view cannot avail the petitioners here, as the effect would be simply the confirmation of a complete and perfect title, which we have seen cannot be dealt with under this Act of 1844. The title thus confirmed must necessarily partake of the nature of the one derived under the French concession or grant.

It has also been urged, that this order of survey by Unzaga may be properly regarded as an incipient step in the derivation of a title under the Spanish government, independently of any previous grant—hence an incomplete title, and therefore an appropriate case for examination by the District Court, under the Act of 1844. This, we think, cannot be denied, and shall therefore proceed to examine the claim to the tract in question, under this survey by Andry.

We have before us the field notes of this survey, together with the lines protracted upon the map accompanying them. They furnish

full evidence, that the tract assigned to D'Auterieve by O'Reilly and Unzaga, was severed from the royal domain, and its boundaries determined; and, were there nothing else in the case, there would be but little difficulty as it respects the title within these boundaries. But, as we have already seen, it is admitted that the front of the tract on the river within the limit of this survey, and forty arpents back, was given up to Governor Galvez, in or about the year 1780, and was subsequently assigned by him to the Acadian emigrants, under whom it is still held. No part of this is claimed by the petitioners. But it is insisted that this survey extended back from the river beyond the forty arpents, and even to the Atchafalaya River, a distance of some twelve or fifteen miles. The claim is confined to this part of the tract. It becomes material, therefore, to ascertain the extent of this survey, especially the depth back from the river. The upper side line is the boundary between this and the adjoining lot, which then belonged to Vincente Delpino. This lot was surveyed by Andry, in February, 1772, the month previous to the survey of D'Auterieve in question; and, it is stated in the field notes that the two lots are separated by a strait which appears to extend back from the river to the northwest, "and will serve as a [26] common boundary between the adjacent owners. Andry further states that no landmarks have been made upon the line, as the channel of the bayou or strait is taken as the boundary; and may serve as a common canal for both habitations to get wood from the mountains. In a note to this survey it is stated that D'Auterieve and Delpino had agreed between themselves, that in case the said bayou instead of following the direction of the course of the line which was northwest, should incline more towards the west, that is, upon the concession of D'Auterieve, then this canal should remain the property of the latter.

This survey of Delpino's lot extended back from the river the usual depth, which was forty arpents, or one mile and a half. It was made in February, 1772. The survey by Andry of D'Auterieve's lot was made in the next month. The field notes of that survey adopts this bayou or canal as the common boundary between him and Delpino in case the course of its channel should be northwest; but if it should incline more west, then it was to belong exclusively to D'Auterieve. No other boundary was designated on this line, this bayou, as said by Andry, being supposed to be the division until its course may be perceived or ascertained after the land has been cleared. The bayou is drawn upon the map giving to it the course supposed; and the note of Andry appended, explaining it as follows: "Bayou or strait which separates the lands of the party interested from the lands of Vincent Delpino, under the stipulation expressed in the certificate."

Now, this is the upper side line of D'Auterieve, which it is insisted on behalf of the petitioners, extends back from the river not only the depth of forty arpents, but back to the Atchafalaya River, a distance of some twelve or fifteen miles. This river is not mentioned in the field notes, nor is it delineated on the map, nor anywhere referred to as the terminus of the line. On the contrary, the lower side

line of Delpino, the next neighbor above, is adopted as a common boundary between them, and that line, it is admitted, extends in depth but forty arpents, leaving, therefore, a very strong, if not controlling inference, that this was also the depth of D'Auterieve's.

In making the survey, Andry run out the two lots of D'Auterieve separately, that is the twenty arpents as limited by O'Reilly, and adjoining these, the addition made by Unzaga, his successor. This mode was adopted as enabling the surveyor the better to make the requisite allowance for the sharp bend in the Mississippi River at this stretch of it. Accordingly, after ascertaining the lower point, on the river, of the twenty arpents and course of the line back, Andry states in the field notes, 27*] that "he traced the line back, marked E, B, X, as a common limit between the two aforesaid grants; but he says he placed no landmarks on it, as both the grants belonged to the same master, and the interested party so desired.

This line is also drawn upon the map, and corresponds with the upper side line in depth, and of course with the rear line of Delpino's lot, which was but forty arpents back.

The field notes then set out in detail the survey of the remaining twenty-four arpents conceded to D'Auterieve by Unzaga, and after ascertaining the lower point on the river and course of the lower side line back, describes it as a line marked Q, R, S, and as separating the lot from Antonio Dorval, the neighbor below. On referring to the map, it will be seen that this line corresponds in depth with the two preceding back lines of the survey. Dorval's lot extended in depth only forty arpents.

The field notes further state, that adopting this line as the true boundary between D'Auterieve and Dorval, his neighbor below, the former would be deprived of a road of four leagues in extent, which he had made through the mountains and swamps, to enable him to go to the Atchafalaya and attend to his cattle which he had on a *vaquero* at Attakapas; and this being so, Andry changed this lower line so as to include the road within the limits of the lot.

This completed the survey; and it will be seen, from the examination, that there is not the slightest ground for the claim set up, on the part of the petitioners, that the track as surveyed under the Spanish order extended back to the Atchafalaya, or farther than the usual depth of forty arpents. This river is not drawn upon the map as the boundary in the rear, nor is it designated or even referred to as such boundary in the field notes; on the contrary the rear line of the tract as drawn on the map corresponds with the *termini* of the lines traced back from the Mississippi, and which we have already described.

Andry, in his report of the survey to Unzaga, mentions his departure in tracing the lower line of the lot from his instructions, with a view to include the road, and observes, that he had bounded him in the said road and its adjoining lines as far as the River Atchafalaya, subject to the approbation of his Excellency. This survey was approved by Unzaga, and it is argued, that this communication of Andry

implies that this lower line of the tract was intended to reach back to the Atchafalaya. The answer to this is, that no such intention is to be found in the minutes of the survey kept at the time it was made, nor as indicated upon the map, but the contrary. And all that can be properly understood from the letter, is what Andry had previously stated in the field notes, namely: that the "lower side line had [*28 been depressed so as to give to D'Auterieve, the benefit of his road of four leagues, which extended to the Atchafalaya. Had this alteration not been made, the road leading from the Mississippi back for the forty arpents, would have fallen within the limits of Dorval's lot below, and thus D'Auterieve be deprived of the benefit of it for the mile and a half, the depth of that lot. Beyond that limit he could have used it as before, as it then ran through the royal domain.

We cannot infer, from the ambiguous expressions in the letter to Unzaga, the object of which was to explain the reasons for the depression of this side line contrary to his instructions, so as to include the road, an intention to carry the survey back to that river, when in contradiction of the description as given in the field notes, and as delineated on the map. If Andry had intended the side lines should be thus carried back, it would have been a simple matter to have said so in the field notes, and to have designated the river as the rear boundary on the map. The difference in the result is not so slight as to have been overlooked, or accidental. The survey, as actually made, contains probably some twenty-five hundred, or three thousand acres. As claimed under the construction attempted to be given to the letter, it would contain but little short of half a million; a difference depending upon the fact, whether the side lines which run northwest and southwest and widened therefore ninety degrees, should be extended back one mile and a half, or from twelve to fifteen miles.

We think the field notes and map should control, rather than this casual phrase in the letter accompanying them to Unzaga. The field notes described this lower line by letters Q, R, S, and we have the delineation of it on the map corresponding to these letters; and both fix the terminus in conformity with the upper back lines of the tract as already run and delineated, and all this without any mention or allusion to this river as the boundary in the rear. Instead of this, the rear line is protracted on the map at the *termini* of the back lines, thereby expressly excluding the idea of a river boundary.

A good deal of stress has been laid upon the idea, that as the French grant extended back to the Atchafalaya, the order of survey by the Spanish authorities was intended only to limit or diminish the front upon the river, leaving the depth as before. But the difficulty in giving any force to the suggestion is, that there is no evidence before us that the French grant extended back to this river. Even the historical records, mostly relied on in the case, furnish no such suggestion. This idea, therefore, cannot aid us in giving the construction claimed to the order of survey.

*The acts of the parties tend strongly [*29 to confirm the view we have taken of this or.

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der of survey. Two of the sons of D'Auterieve were of age at the time this concession was given up to Galvez in 1780, and the family removed to Attakapas, and the youngest became of age in a few years thereafter. The eldest died in 1812, the second in 1814, and the youngest in 1828.

All of them resided in the neighborhood of the tract, and during this whole period, a lapse of some thirty-three years, no claim was made to it; nor indeed ever by any of the members of the family who had the best opportunity of knowing the facts and circumstances under which it was surrendered, and of the extent and character of the title. The presumption is very strong, they must have been impressed with the belief that all the right that belonged to the family under the order of survey, had been given up to Galvez by the arrangement entered into with him.

The acts of the Spanish government also in making concessions subsequently within the limits of the claim, as was done, show that no such right as is now set up was recognized by it.

In any view, therefore, that we have been able to take of the case, we think that the decree of the court below is erroneous, and should be reversed.

Mr. Justice Curtis:

Justices McLean, Wayne, Campbell, and myself, do not understand the opinion which has been delivered by Mr. Justice Nelson, as intended to express the judgment of this court upon the validity of the complete French grant, alleged by the petition to have been made by The Western Company to Paris Duvernay in 1717, or upon the effect of the alleged confirmation of such alleged complete French title, or any part thereof, by the Spanish Governors, O'Reilly and Unzaga. The trial of such a title not being within the jurisdiction of this court upon this petition, according to the repeated decisions of this court, and the plain terms of the Act of May 26, 1824, under which we derive our authority, it seems equally clear, that the questions whether there is any sufficient evidence that such a grant was made, or whether it could be located, or whether it embraced the premises in question, or whether it had been in part or in whole confirmed; and how extensive such confirmation, if made, was, are questions not judicially before us. For these questions belong exclusively to the trial of that legal title.

In our judgment, this embraces the whole case. It exhausts every allegation in the petition, which makes no claim to any incipient or imperfect French or Spanish titles. It alleges 30*] only "a complete French grant, and a confirmation to D'Auterieve, who was then in possession under it, of part of the land.

Now, the first section of the Act of 1824, provides that a person, claiming lands by virtue of a French or Spanish grant, concession, warrant or order of survey, which might have been perfected into a complete title, may present a petition to the District Court, setting forth fully, plainly and substantially, the nature of his claim to the lands, particularly stating the date of the grant, &c., under which he claims; and then it continues: "and the said court is hereby authorized and required to

hold and exercise jurisdiction of every petition presented in conformity with this Act, and to hear and determine the same." Unless, therefore, the petition is presented in conformity with this Act, the special and limited jurisdiction which the Act confers does not exist. The title shown by this petition being a complete title, derived from the Western Company, and confirmed by the Spanish authorities, and the petitioner not having shown, fully, plainly, and substantially, or even by the most obscure suggestion, any other title, we cannot perceive how this court has any jurisdiction under the Act of 1824. We add, however, that if, as in the case of *Davenport's Heirs*, at the present term, the petition did duly aver facts, constituting in point of law an imperfect title, we should not consider the petition defective, though it might state an erroneous legal conclusion from those facts, and call the title a perfect one. That is not this case, as may be seen by recurring to the petition.

Our opinion is, that this petition should be dismissed for want of jurisdiction, without prejudice to any legal title of the petitioners, and that no opinion should be expressed by this court upon any question of fact or law arising upon the evidence.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said District Court in this cause be, and the same is hereby reversed; and that this cause be, and the same is hereby remanded to the said District Court, with directions to that court to dismiss the petition of the claimants.

Cited—11 Otto, 701, 703.

*THE UNITED STATES, Appellants, [*31 v.

CHRISTIAN ROSELIUS, ABIAL D. CROSSMAN, WILLIAM E. LIVERIDGE, FRANCOIS B. D'AUTUIN, BENJAMIN C. HOWARD, JOHN SPEAR SMITH, BRANTZ MAYER, JOHN GIBSON, AND R. R. GURLEY, Executors of JOHN MC-DONOGH, Deceased.

French titles in Louisiana, part confirmed, considered accepted by claimant as compromise—District Court no jurisdiction where petition sets up perfect title.

Under the laws of 1824 and 1844, relating to the confirmation of land titles, where a claimant filed his petition, alleging a patent under the French government of Louisiana, confirmed by Congress, and claiming floats for land which had been sold, within his grant, by the United States to other persons, the mere circumstance, that the court had jurisdiction to decree floats in cases of incomplete titles, did not give it jurisdiction to decree floats in cases of complete titles.

This title having been confirmed by Congress, without any allowance for the sale of lands included within it, the confirmation must be consid-

ered as a compromise accepted by the other party who thereby relinquished his claim to floats.

If the title be considered as a perfect title, this court has already adjudged (9 How., 143) that the District Court had no jurisdiction over such titles.

The claimant in this case prayed that the side lines of his tract might be widened by diverging instead of parallel lines; but this court, in this same case, formerly (3 How., 693) recognized the validity of a decree of the Supreme Court of Louisiana, which decided that the lines should be parallel and not divergent. The District Court of the United States ought to have conformed its judgment to this opinion.

Moreover, the claimant in this case did not state in his petition what lands had been granted by the United States, nor to whom, nor did he make the grantees parties; all of which ought to have been done before he could have been entitled to floats.

THIS was an appeal from the District Court of the United States for the Eastern District of Louisiana.

The facts are stated in the opinion of the court.

It was argued by *Mr. Cushing* (Attorney-General) for the United States, who made the following points:

I. That the grant under which the claim is made being a complete and perfect grant, the court below had no jurisdiction.

II. That if the court had jurisdiction the grant is void, having been made by the French authorities subsequent to the Treaty of Fontainebleau of 3d November, 1762, by which France ceded Louisiana to Spain, and the order of delivery, dated 21st April, 1764. (1 Clark's Land Laws, Appendix, 976; *Mondault v. United States*, 12 How., 47; *United States v. Pellerin*, 13 How., 9.)

III. That the Spanish authorities after the cession did not confirm or recognize the said grant as valid.

The proceedings before Livaudais did not operate as a confirmation. Under the Spanish rule, the authority over the lands was vested first in the governors of the province. (See the Marquis of Grimaldi's Letter to Unzaga, of 24th August, 1770; 2 White's *Recop.*, 460.) The authority was subsequently vested *in the intendant. (See the royal order of 23d October, 1798; *Ibid.*, 477, 478.) The certificates of Trudeau were not sufficient evidence to show that Governor Miro had confirmed or recognized the grant as valid.

Under the Acts of 1824 and 1844, the District Court had no power to act, except in cases of claims under grants, concessions, warrants, or orders of survey.

V. With respect to the allegation in the petition, that the grant has been confirmed by an Act of Congress of 11th January, 1820. Whether this be so or not cannot arise in this case, the jurisdiction of the court under the Act of 1824, as revived by that of 1844, being limited to incomplete claims originating with the Spanish, French or British authorities, which might have been perfected into a complete title under and in conformity to the laws, usages, and customs of the government under which the same originated, had not the sovereignty of the country been transferred to the United States. (Act of 1824; 4 Stat. at Large, 52; Act of 1844; *Ibid.*, 676.)

VI. But as the petition claims opening and diverging side lines from the front to the rear, and avers that a large portion of the

land had been sold by the United States, and claimed floats therefor, and the court below has decreed in favor of the claimant on both points, it may be that the object of the petition was to have these points determined under the grant. With respect to the first, there is nothing in the grant which calls for diverging side lines, and when this is the case, the side lines run parallel to each other. That the side lines in this grant run parallel was decided in the Supreme Court of Louisiana, in *McDonogh v. Millaudon*, which will be found reported in 3 How., 693.

As the claim for floats, no individuals claiming lands under title from the United States having been made parties in the case, no decree for floats could be made. (*United States v. Moore*, 12 How., 209.)

Mr. Justice Catron delivered the opinion of the court:

John McDonogh claimed to be confirmed in a tract of land bounded in part by the River Mississippi; the front being 40 arpents, more or less; bounded on the upper side by a line running back from said river a distance of seventeen miles, and two hundred and twenty-seven perches, more or less, until it strikes the River Amitie, on a course by compass of north 35° west; on the lower side, by a line running back from said River Mississippi a distance of eighteen miles and twenty-two perches, more or less, until it strikes Lake Maurepas, on a course by the compass of north nine degrees fifty minutes east; and bounded on the rear line by the River Amitie and Lake Maurepas.

*The petitioner represents that in the [*33 year 1789 Duport purchased the land from the Collopiassa nation of Indians; and that said purchase was confirmed in the year 1769 by the French government by a regular and formal patent; and second, that the claim was duly presented to and approved by the Board of Land Commissioners of the United States, who confirmed it for the whole quantity claimed, according to a plan of survey. And that said titles were also recognized and confirmed by an Act of Congress of the 11th May, 1820. But the petitioner avers, that a large portion of said tract of land has been sold by the United States, or confirmed to actual settlers.

The District Court found that McDonogh held under Duport by regular meane conveyances, and showed a title to the land by patent, which was granted by the highest authorities in the province; that it was a complete and full title; and furthermore, "that the land claimed as per plan of survey on file herein was confirmed by the report of the Land Commissioners of the United States on the 20th of November, 1816."

The court below then proceeded to pronounce the grant of 1769 to be valid; and that the survey thereof, filed as an exhibit in the cause, indicates the metes and bounds, and the land is ordered to be located according to said survey, and to that extent the claim is confirmed. And then the decree proceeds to adjudge that for all lands within these bounds which have been sold or otherwise disposed of by the United States, the petitioner shall be authorized to enter other lands by floating warrants.

Assuming the foregoing facts to be true, the

question presented is, whether jurisdiction existed to make the decree.

The mere fact, standing alone, that the United States had sold or otherwise disposed of any part of the land here claimed, and that compensation could be made as provided by the 11th section of the Act of 1824, does not give jurisdiction, as the power to award floating warrants is an incident to a case where jurisdiction exists to decree the lands claimed and to order that a patent therefor shall issue; and if the power to divest title out of the United States is wanting, none exists to decree the floating warrants, because it must be first found and adjudged, that the petitioner has the better equity to the land of which the United States have deprived him by their grant to another. But there is another consideration why this petitioner could not claim floating warrants. He sought a confirmation of his title from the United States, for the obvious reason that his grant from the French government, made in 1769, was invalid, as that government had no interest in the country in 1769, it having been ceded to Spain in 1763. 34*] And if McDonogh was *forced to go behind his French grant, and rely on his Indian pretension to claim, the probability was that he could establish nothing to support his assumption of title, and must fail altogether. Under these circumstances, the United States confirmed McDonogh's claim, without allowing him any compensation for such land as had been previously sold or disposed to others within the boundaries confirmed. He accepted the confirmation on these terms; and as we are substituted by the Acts of 1824 and 1844, for the political power, and required to adjudge these claims, as Congress adjudged them before the Act of 1844 was passed, we are bound to hold that, when our predecessors decided McDonogh's claim favorably, they awarded him all that he had a right to demand, and which he sanctioned by accepting the confirmation on the terms it was offered.

Nothing could be fraught with worse consequences as regards confirmations by Congress, or by commissioners acting by its authority, than to hold, that when a doubtful claim was confirmed on certain terms, and the claimant accepted these terms, and took the full benefit of the confirmation, that still he could come into the courts of justice and enforce his entire claim for the deductions made by Congress, as if no adjustment had been made. Such cases must stand on the footing of compromise, and all equities existing when the compromise was made, and not provided for by it, must be deemed to have been abandoned. If it were otherwise, then there would be no end of these pretensions to compensation, before Congress and the courts. But to hold that the confirmation was final, and conclusive of the whole claim (as we think it clearly was), then the country will, at last, find repose, and the cultivator of the soil will know from whom to buy, and take title. McDonogh's claim being compromised, the government had no duty imposed on it to compensate him in case of loss.

Jurisdiction is also wanting on other grounds. If the grant of the French government to Dupont was a complete title, then no act on the

part of the American government was required to give it additional validity, as the Treaty of 1803, by which Louisiana was acquired, sanctioned perfect titles; nor was jurisdiction vested in the District Courts to adjudge the validity of perfect titles. This is the settled construction of the Act of 1824, as was held by this court in the case of *The United States v. Reynes*, 9 How., 143, 144.

In the next place, McDonogh alleges that his title was confirmed by the United States in 1816, and again in 1820. The Act of 1824 conferred jurisdiction on the District Courts to adjudge and settle the validity of imperfect claims against the United States as already stated. But where the claim had been granted *by an Act of Congress, or by officers act- [*35 ing under the authority of Congress, and a perfect legal title vested in the grantee, no power was conferred on the courts to deal with such title, because it needed no aid. And because such an assumption would of necessity claim power in the courts to modify the grant made by Congress, in every respect, or to set it aside altogether.

On this assumption, the District Courts might have been called on to re-adjudge every claim that Congress had confirmed. The Legislature contemplated none of these things, when passing the Acts of 1824 and 1844.

McDonogh informs us, in his petition, that he did not claim a decree for any land covered by his grant, but that he sought a decree for land warrants to be located on other lands for such parts as had been sold or disposed of by the United States within the bounds of his claim. And as incident to this claim for compensation, he prayed that his side lines might be widened, so that the upper line would run north 35° west; and the lower line, north 9° 50' east. These side lines are about eighteen miles long, and commence on the Mississippi forty arpents apart, but by widening the tract claimed, as decreed by the District Court, is something like fifteen miles wide where the lines terminate on the River Amite, and Lake Maurepas. The boundaries were thus settled by the court below, according to the power conferred by the second section of the Act of 1824, sweeping over a large tract of country, and covering many lands granted to others by the United States.

The petition in this case was filed in June, 1846; at the previous term of the Supreme Court of the United States, the cause of *John McDonogh* against *Millaudon* was decided, on which this court was asked to revise a decision of the Supreme Court of Louisiana, which settled the boundaries of McDonogh's grant; holding that the side lines could not diverge, but that the land must be of equal width in front and rear, and the side lines parallel to each other throughout. The question in the State Court being one of boundary, and not involving any consideration that could give this court cognizance, under the 25th section of the Judiciary Act, the writ of error was dismissed for want of jurisdiction.

As the decision of the Supreme Court of Louisiana had settled the question of boundary, we think the District Court should not have disregarded that decision, and involved the government in such serious consequences as

that of making compensation for lands not covered by McDonogh's grant.

If none of these objections existed, however, there is another, that would preclude the petitioner from having compensation *in land warrants. He does not state what lands the United States have granted to others, within his claim; nor who the owners are; neither does he make them parties. These steps were required by the Act of 1824, and not having been taken in this instance no general decree could be made for floating warrants, as was done by the District Court. We so held in the case of *The United States v. Moore*, 12 How., 223.

For the reasons stated, it is ordered that the decree be reversed, and the petition dismissed, without prejudice to McDonogh's claim.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said District Court in this cause be, and the same is hereby reversed; and that this cause be, and the same is hereby remanded to the said District Court with directions to that court to dismiss the petition in this case, without prejudice to the rights of the petitioner.

Cited—18 How., 546.

THE UNITED STATES, *Appellants*, v.

CHRISTIAN ROSELIUS, ABIAL D. CROSSMAN, WILLIAM E. LIVERIDGE, FRANCOIS B. D'AUTUIN, BENJAMIN C. HOWARD, JOHN SPEAR SMITH, BRANTZ MAYER, JOHN GIBSON, AND R. R. GURLEY, Executors of JOHN McDONOGH, Deceased.

District Court no jurisdiction where petition sets up complete Spanish title.

Where a party claimed title to a tract of land in Louisiana, under a judicial sale in 1760, and alleged that he and those under whom he claimed had been in peaceable possession ever since the sale, a case of perfect title is presented which is not within the jurisdiction of the District Court, under the Acts of 1824 and 1844.

Upon the sufficiency of the evidence to sustain the title, no opinion is expressed.

THIS was an appeal from the District Court of the United States for the Eastern District of Louisiana.

The case was fully stated in the opinion of the court.

It was argued by *Mr. Cushing* (Attorney-General) for the United States.

Mr. Chief Justice Taney delivered the opinion of the court.

This is an appeal from the decree of the District Court for *the Eastern District of Louisiana, in a proceeding instituted in that court by John McDonogh, in his lifetime, to

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try the validity of his claim to certain land mentioned in his petition. The proceeding was under the Acts of 1824 and 1844.

The petition was presented on the 15th of June, 1846; and sets forth that he has a good and valid title to a tract of land in the parish of Jefferson, near the City of New Orleans, and on the same side of the River Mississippi, commencing at a distance of eighty arpents from the river, and running back or in the rear from thence, with the continuous lines of the front tract of twenty-one arpents on the river, a distance of about forty-nine and one third arpents in depth, until one of the side lines intersects with the other in a point, including about one hundred and seventy-seven and one third superficial arpents. That said tract of land is a portion of a larger tract which was adjudicated and sold on or about the 17th of April, 1760, to De Pontalba, by order of the highest tribunal of the government of France, in Louisiana, called the Supreme Council of the Province of Louisiana, by Charles Marie Delalande Dapremont, Counselor and Assessor of the Supreme Council of the Province, and Attorney-General of the King of France for said Province of Louisiana; that said sale and adjudication by the order and authority aforesaid, is fully equivalent to a patent to said land; the Supreme Council of the Province being at the head of the Land Office, granted the lands and issued the patents; that after passing through various meane conveyances, the petitioner finally acquired said tract of land; that his title and claim had been presented and proved before the Board of Land Commissioners, who reported that it ought to be confirmed, but the said report was never acted on by Congress; and that said tract of land has always been in the peaceable and undisturbed possession and enjoyment of the petitioner, and those under whom he derives his title, ever since the date of the original grant thereof. The petitioner therefore prays confirmation.

These are the facts stated in this petition; and if they are true, the District Court had no jurisdiction of the case, and no right to pronounce judgment upon the validity of the title. The Acts of 1824 and 1844, authorize a proceeding of this kind in those cases, only where the title set up is imperfect, but equitable. It has been repeatedly so held by this court, and was so decided in the case of *The United States v. Moore*, 12 How., 209; and again in the case of *The United States v. Pillerin et al.*, 13 How., 9, as well as in other cases, to which it is unnecessary to refer. Indeed, the words of the Act of 1824, conferring this special jurisdiction on the District Courts, appear to be too plain for controversy.

*Now, the title set up by the petitioner is a complete legal title; and if he can establish the facts stated in his petition his title is protected by the Treaty itself, and does not need the aid of an Act of Congress to perfect or complete it. For undoubtedly, if the possession of the land has been held continually by the petitioner and those under whom he claims, under the judicial sale made by the French authorities in 1760, the legal presumption would be that a valid and perfect grant had been made by the proper authority, although no record of it can now be found.

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We of course express no opinion as to the sufficiency of the evidence to maintain the complete and perfect title claimed in the petition. That question is not before us on this appeal; for as the District Court had no authority to decide upon it, the decree must be reversed for want of jurisdiction, and the petition dismissed. But we shall dismiss it without prejudice to the legal rights of either party; leaving the petitioner at liberty to assert his rights in any court having competent jurisdiction to decide upon the validity or invalidity of the complete and perfect title set up in his petition.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged and decreed by this court, that the decree of the said District Court in this cause be, and the same is hereby reversed, for the want of jurisdiction in that court; and that this cause be, and the same is hereby remanded to that said District Court, with directions to that court to dismiss the petition without prejudice to the legal rights of either party.

Cited—14 Wall., 312.

THE UNITED STATES, Appellants,

v.

JOSEPH MARCEL DUCROS, ALFRED DUCROS, AND LOUIS TOUTANT BEAUREGARD.

Acts of Spanish Governor acting quasi judicially not confirmation of French grant in Louisiana—complete title will not support petition.

A grant of land in Louisiana by the French authorities in 1764, is void. The province was ceded to Spain in 1762. (See 10th How., 610.)

In 1793, certain legal proceedings were had before Baron de Carondelet in his judicial capacity, wherein the property now claimed is described as part of the estate of the grantor of the present claimant. But this did not amount to a confirmation of the title in his political character; and if it did, the title would be a perfect one, and beyond the jurisdiction of the District Court, under the Acts of 1824 and 1844.

THIS was an appeal from the District Court of the United States for the Eastern District of Louisiana.

39*] *The facts are set forth in the opinion of the court.

It was argued by *Mr. Cushing* (Attorney-General) for the United States.

The following were the points made on behalf of the appellants:

1. That the court below had no jurisdiction, and its decree is, therefore, void. The grant is a complete French grant, and not an incomplete title. See first section of the Act of 1824, *United States v. Reynes*, 9 How., 144, 145; *United States v. Power's Heirs*, 11 How., 580.

2. That there was no sufficient evidence of the making of the grant produced in the case. The copy certified by the register is not evi-

dence. See 8d section of the Act of 1824, and the brief in the case of *McCarthy's Heirs*, No. 21, of the present term.

3. That even if the court had jurisdiction, and the evidence were sufficient, the grant is void, having been made by the French authorities after Louisiana had been ceded by France to Spain, in 1762. (*United States v. D'Auterive*, 10 How., 610.)

4. That the proceedings had before Carondelet, in 1793, operated no confirmation of the grant. They were merely proceedings in the settlement of the estate of Louis Toutant Beauregard, in which in no way was the extent of the plantation in issue. The front of the land was held at this time, under the grant to Le Sassier. Besides, it is to be remembered, that by the 13th article of O'Reilly's regulations, approved at Madrid, it was provided, that "all grants shall be made in the name of the King, by the Governor-General of the province," &c. No land could, therefore, be divested out of the King, except by a grant.

5. That from the great lapse of time before the grant was brought forward and insisted on, it must be held that the petitioners and their ancestors had abandoned all claim to the lands embraced within its limits.

6. That the grant is void under the fourteenth section of the Act of 26th March, 1804. (1 Land Laws, 114; *United States v. D'Auterive*, 10 How., 624.)

Mr. Justice Grier delivered the opinion of the court:

The appellees filed their petition in the District Court for Louisiana, against the United States, under the Act of Congress of May 26, 1824, as revived by the Act of June 17th, 1844. It sets forth that they are the owners of a tract of land of twenty arpents front on the Mississippi River, lying about twelve miles below the City of New Orleans, and extending in depth to Lake Borgne.

*That the said tract of twenty arpents [*40 front is derived from one title, and until after the year 1800 had but one proprietor. That, in that year it was the property of the widow Toutant Beauregard, who thereafter sold an undivided half to Rodolph Joseph Ducros, who subsequently made partition thereof, by which the upper half was assigned to the widow, and the lower to Ducros. That the rights of the former have since been acquired by the petitioner, Louis Toutant Beauregard, and the rights of the latter, by Joseph Marcel and Louis Alfred Ducros.

That the widow Beauregard and Rodolph Joseph Ducros, heretofore filed their claims to said lands for confirmation with the board of commissioners, but that being then ignorant of the full extent of their rights, they claimed and obtained the confirmation of their titles only to the depth of a league and a half from the Mississippi River. The petitioners claim that the confirmation should have been to the depth of Lake Borgne, because that on the 2d of March, 1764, Madame Marie Gaston, the widow of Rochemore, who then was owner of the front tract, obtained from the French government of the Province of Louisiana a grant, of the rear of her said front tract, with the entire depth to Lake Borgne, and that the

said entire tract was, on the 16th of November, 1793, in a judicial proceeding before Baron Carondelet, adjudicated to said widow Toutant Beauregard, under whom petitioners claimed.

In support of their claim, the petitioners gave in evidence a grant from D'Abbadie, Director-General, &c., of Louisiana, under the King of France, dated 2d of March, 1764, for all the land lying in rear of her estate, running towards the lake (the said estate having a front of sixteen arpents on the River Mississippi, about four leagues below New Orleans), to Madame Marie Gaston.

The next muniment of title consists of copies from the Spanish records of the province, showing an inventory and appraisal of the estate of Don Louis Toutant Beauregard, in which this tract of land is described as part of his estate, and as running back to the lake; and a legal proceeding before Baron de Carondelet, by which it is vested in Donna Magdalena Cartier, in 1793. And again in 1799, an inventory and appraisal of the estate of Donna Magdalena Cartier and sale of the same (describing said tract of land as before) to Donna Victoria Ducros, widow of Don Louis Toutant Beauregard.

On the 1st of February, 1802, deed from the widow to Rodolph Joseph Ducros for one half, describing the tract as of the ordinary depth of forty arpents. And in all the numerous partitions and mesne conveyances, bringing down the title to the petitioners, the tract is described as forty arpents deep, till, in 1836, 41*] "in a conveyance in petition, it is again described as running back to Lake Borgne.

Without laying any stress on the want of any mesne conveyance or connection between widow Gaston and Don Louis Toutant Beauregard, and on the descriptions of the deeds from the widow Beauregard and those claiming under her, there are two objections, which are fatal to the recovering of the petitioners in this case.

1st. It has been decided by this court in *The United States v. D'Autorie*, 10 How., 610, that a grant by the French authorities after the cession of Louisiana by France to Spain in 1762, is void.

And 2d. The proceedings before Carondelet in 1793, in the settlement of the estate of Louis Toutant Beauregard, could not be construed as a confirmation of the French grant, from the mere circumstance that in the inventory, decedent's estate is described as running back to the lake. Carondelet could not be said to confirm, in his political capacity, a title which is not even stated in the mere formal proceedings before him in his judicial capacity. And if it had the effect of a confirmation of the original French grant, as that purports to be a perfect title in fee, it is not the subject of jurisdiction of the United States courts under the Acts of Congress under which this suit is brought. This has been so frequently decided by this court, that a reference to cases or the reasons for the decision, may now be considered superfluous.

The decree of the District Court of Louisiana is therefore reversed.

ORDER.

This cause came on to be heard on the tran-

script of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said District Court in this cause be, and the same is hereby reversed; and that this cause be, and the same is hereby remanded to the said District Court, with directions to dismiss the petition of the claimants.

*JOSEPH K. EYRE AND ALGERNON [*42
E. ASHBURNER, Executors of ELIZABETH
E. POTTER, Deceased,

v.

SAMUEL R. POTTER AND MAUGER LONDON.

Relief prayed, on charge of actual fraud, cannot be given upon case of constructive fraud which equity might otherwise relieve from—inadequacy of consideration not proof of fraud or mistake.

Where a widow filed a bill in chancery, complaining that immediately upon the death of her husband, the son of that husband, together with another person, had imposed upon her by false representations, and induced her to part with all her right in her husband's estate for an inadequate price, the evidence in the case did not sustain the allegation.

It is not alleged to be a case of constructive fraud, arising out of the relative position of the parties towards each other, but of actual fraud.

The answers deny the fraud and are made more emphatic by the complainants having put interrogatories to be answered by the defendants, and the evidence sustains the answers.

It will not do to set up mere inadequacy of price as a cause for annulling a contract made by persons competent and willing to contract, and besides, there were other considerations acting upon the widow to induce her to make the contract.

The testimony offered to prove the mental imbecility of the widow, should be received with great caution, and is not sufficient.

THIS was an appeal from the Circuit Court of the United States for the District of North Carolina, sitting as a court of equity.

The bill was filed by Elizabeth E. Potter, during her lifetime, to which her executors afterwards became parties.

The opinion of the court contains an explanation of the case as it is set forth in the bill, and it is not necessary to repeat it.

The cause was argued by Mr. Badger for the appellants, and by Messrs. Bryan and Graham for the appellees.

The points of law which were raised by the counsel upon each side respectively, were so intermingled with their views of the facts and evidence, that it is impossible to separate them.

The view of the case presented on behalf of the appellants was as follows:

The consideration of the deed, dated May 31, 1847, was evidently and grossly inadequate.

The defendant, Samuel R. Potter, in his an-

NOTE.—Deed, when void for fraud, insanity, drunkenness, duress, undue influence, imbecility, infancy, or fraud on marriage, from ward to guardian, from cestui que trust to trustee, from heir to executor. See note to *Harding v. Handy*, 11 Wheat., 193.

Inadequacy of price to impeach or set aside sale. See note to *Erwin v. Farham*, 12 How., 197.

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answer admits that he had formed the opinion that the estate of his late father was worth \$120,000.

The statements and estimates in the answer of the said defendant, and the schedules therein referred to, show that the real and personal estate of the said Samuel Potter, at the time of his death, must have been nearly that sum. They certainly show that the estate was so large and valuable that the price agreed to be paid to the plaintiff for her interest therein, was shockingly inadequate.

In relation to the debts of the intestate, no [43*] account has been *filed by the administrator, Samuel R. Potter, and no vouchers exhibited or proved. If the witness Burr were competent to speak in a general way, when the vouchers and exhibits, if any, are withheld, then he proves that the whole amount of disbursements by the administrators was about \$15,938: he is defendant's witness.

It is insisted, in behalf of the appellants, that her interest in the estate of her said husband was worth from \$1,800 to \$1,900 per annum, and from \$13,000 to \$14,000 absolutely. The result is arrived at from the answer of the defendant, Samuel R. Potter, and from the evidence in the cause. This valuable interest she transfers in the said deed for the sum of \$1,000, in cash, and the personal covenant of the defendant, Samuel R. Potter, to pay her \$600 per annum during her life, she being at the time nearly seventy years of age, and in infirm health. It is true, as stated in the answer of the defendant, Mauger London, that the defendant Samuel R. Potter, as administrator of the said Samuel Potter, afterwards allowed the plaintiff to obtain a decree or order in the proper court for her year's provision out of the said estate, and that said provision was of the value of \$1,000, but this has nothing to do with the merits of said deed. It is also true that the said Samuel R. Potter, in the instrument executed by him, also covenants with the plaintiff to furnish her with a competent livelihood and maintenance at his own house, but nothing of this kind is mentioned in the said deed, dated May 31, 1847.

Notwithstanding the facts immediately above mentioned, it is still insisted, in behalf of the said plaintiff, that the consideration received by her, or secured to her for her interest in said estate, was grossly inadequate. The price of board and lodging in Wilmington, N. C., is from \$20 to \$25 per month in hotels and boarding houses.

Mere inadequacy of consideration is not of itself a sufficient ground to set aside a contract, unless the inadequacy be such as amounts to apparent fraud or unless the situation of the parties be so unequal as to give one the opportunity of making his own terms. A court of equity looks upon inadequacy of consideration as a mark of fraud or imposition; and where the inadequacy is so gross as to excite an exclamation, &c., it is of itself proof of imposition. If, for instance, there be such inadequacy of price as that it must be impossible to state it to a man of common sense without an exclamation at its inequality, a court of equity considers that a sufficient proof of fraud to set aside the conveyance. (1 Bro. C. C., 9, &c.)

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If the inadequacy be such as to show that the person did not understand the bargain, or was so oppressed that he was *glad to [*44 make it, knowing its inadequacy, that shows a command over him amounting to fraud. (*Heathcote v. Paignon*, 2 Bro. C. C., 175; *Chesterfield v. Janssen*, 2 Ves., 125.)

The deed cannot be supported by evidence of the natural love and affection cherished by the plaintiff for her granddaughter Marion, who is the wife of the defendant, Samuel R. Potter.

The rules for determining upon a deed of sale, and a deed of gift, are not the same in equity. Upon principle, therefore, where a deed purports to be a sale, the party interested therein cannot escape from the appearance of fraud by setting it up as a gift, and *vice versa*. Were this allowed, the court would be cheated, and its rules would be prevented or rendered unavailing by the arts of those very persons whom its rules were intended to reach. Though a deed may, in equity, be impeached by averments negating the consideration therein expressed, yet the converse of the proposition does not hold good, and a deed cannot be supported by evidence of a consideration different from that expressed in the deed. (2 Hovenden on Frauds, 103, 43, 14, and cases there cited; *vide* 6 J. C. R., 232; 2 P. Wms., 204; *Clarkson v. Hanway*, 8 P. Wms., 129, n; *Watt v. Green*, 2 Sch. & Lef., 501; 2 Ves., 402; *Chesterfield v. Janssen*, 2 Ves., 125.)

Indeed, it may be said that where a deed purports to be a valuable consideration, and the contrary is averred and proved, it is thereby falsified and discredited; and it would be dangerous, if not absurd, to admit proof of averments in its support as a gift. These consequences would follow, that after the plaintiff has falsified the deed, and established by evidence that he was imposed upon when he put his seal to a false pretense of a sale, the defendant might escape and retain the spoils by admitting the falsehood of the deed, and thereby withdrawing himself out of the rules of the court, and insisting upon his own falsehood as the basis of a right to support the deed as a gift. A deed which expresses a valuable consideration, and no other, when impeached for inadequacy of price, cannot be supported by any evidence of natural love and affection. (*Vide* 2 Hov. on Frauds, 14, 43, 102, and the cases there cited; Newland on Contracts, 359, 360, *vide* 2 Dev. Eq., 376; *Jones v. Sasser*, 1 D. & B., 452; 1 D. & B. Eq., 496; *Chesson v. Pettijohn*, 6 Ired., 121.)

It ought to be remembered that the consideration of natural love and affection is not only not expressed in the deed, but it has not been proved, nor is anything secured in the deed to the separate use of the granddaughter of the plaintiff.

There are many circumstances in this case, either admitted in the answers or [*45 proved, which tend strongly to show fraud, imposition, and undue influence, practiced upon the plaintiff at the time of the execution of the deed. She was at the time an old woman. The deposition of her son, Joseph K. Eyre, taken on the 15th day of November, 1848, shows that she was then sixty-nine or seventy years of age, and that she was always of a very

weak mind and incompetent to transact business; and that her mind had been for many years, especially the last four or five years, materially affected by age, disease, and infirmity. And if anything in addition were needed to show the incompetency and the imbecility of the complainant, it will be found in the allegation in Samuel R. Potter's answer, that she said she knew all about her husband's estate, and its value, and the value of her own interest in it, at the very time when she was parting with that interest for a consideration so utterly inadequate.

The same facts are in substance proved by the depositions of Emma L. Allibone, Maria Ashburner, Anna Worrell, J. L. Kay, E. C. Crowley, Josephine K. McCammon, Hannah B. Drummond. The same witnesses prove that the plaintiff had, at the date of the said conveyance, five children, one of them insane, and two of them in indigent circumstances.

They also prove that she was a tender and affectionate mother, and by no means so destitute of sensibility, as the defendants and some of their witnesses have insinuated.

The said deed bears date two days after the death of the husband of the plaintiff, before she could have an opportunity to reflect deliberately upon the very important step which she was about to take, before she could consult with her friends, and when her feelings must have been too much disturbed and agitated to enable her to act with care and caution in the disposition of her property.

Her mind could hardly have been calm and composed immediately after the burial of her husband, whether she lived happily with him or not. She resided in the house of the defendant, Samuel R. Potter, and was without money enough in her pocket to pay for a piece of mourning. At such a time, and under such circumstances, the plaintiff might easily have been imposed upon by her step-son and the other defendant, and it seems she had no aid from any other person prior to the date of the conveyance. On Sunday morning no one was present but the defendant Potter and his wife, and when the agreement was entered into, nobody was present but the plaintiff and the defendant Potter.

At the time when the deed was signed, no one was present but the plaintiff, the two defendants, and Mrs. Potter.

46*] *The depositions of Everett, Baker, London, and others, show that the plaintiff was not the object of affection to the family of her deceased husband.

There was unusual haste in making the contract and in the execution of the deed. The husband of the plaintiff died on Saturday, was buried on Sunday, and the contract was completed and the instrument signed on Monday morning.

The said deed makes a disposition of all the property of the plaintiff.

The conveyance was in a very high degree unwise and imprudent, as regards the plaintiff, and unjust and unnatural towards her children, two of whom were poor, and one of them insane.

A disposition of property so revolting to common sense and natural affection ought to be looked upon with suspicion. If the plaintiff

married her late husband under the influence of the mercenary motives which have been attributed to her, the execution of the said deed would be no less extraordinary and unaccountable. If property was so dear to her, why should she dispose of it upon such ruinous terms, if she in fact understood what she was about? The parties did not deal with each other upon equal terms. The defendant Potter was much more competent than the plaintiff to transact business, and was much better acquainted with the estate. He admits in his answer that he had the management of a portion of his father's property, to wit: the rice plantation, known as Point Peter, and Love Grove, and the hands belonging to the same.

The defendant, Potter, misrepresented the value of the estate to the plaintiff, before she signed the deed. The defendant, Potter, says in his answer that, on Monday morning, 31st of May, 1847, the plaintiff said that she had concluded to sell her interest in her husband's estate to him for the benefit of her granddaughter. How then does it happen that the property was not conveyed for the benefit of the granddaughter of the plaintiff? By what influence did she sign a deed contrary to her own conclusion and in violation of the agreement? Where, and when, and with whom, and for what price, did she consent to change her purpose?

This pretended consideration of love and affection for her granddaughter, at the expense of her more needy and equally beloved children, was probably introduced to save the agreement from the imputation of shocking inadequacy, but like all similar pretexts, it puts upon the deed a brand of fraud and a mark of surprise or imposition. Neither by general nor special words does this leading motive find a place in her deed, and yet she signed it, according to the statement of the defendant Potter, *gladly and eagerly. The name of [*47 Mrs. Marion Potter is not even mentioned in the deed.

Again. The defendant, Potter, says the bargain was that he would pay her \$1,000 in in cash. How happens it that the writing only gave her his note without interest, and left her obliged to borrow money from her granddaughter to buy clothes?

Again. Said defendant says that the bargain was that he would "give her board," as a part of the price. How does it happen that the covenants for her board and the other writings, do not recite this as a part of the price, but, on the contrary, recite that she is to be boarded at the house of said defendant, simply because she "deserved it," thereby making it a voluntary covenant? And wherefore did plaintiff consent to turn her privilege of boarding with Marion into a condition that she was to board with Mr. Potter, no matter whither he might go?

Again. Said defendant says that the agreement was, that he was to "find her a servant." Why is this omitted in the writings?

Again. The said defendant says that it was a part of his original agreement with the plaintiff, that she was to have her year's allowance. And yet she conveys away her entire interest in the estate.

The statements of the two defendants concerning the circumstances attending the transaction, do not in all respects agree with each other, and their statements are in many respects extraordinary and suspicious.

The deed, dated June 21, 1847, is no confirmation of the deed previously executed by the plaintiff. It is not relied upon as a confirmation. But if it were relied upon as such, there is a ready answer. On the 21st of June, 1847, the defendant, Samuel R. Potter, was administrator of his father, Samuel Potter, and supposing his deed of the 31st of May, 1847, to be void, he was a trustee of the property in his hands, and by the established rules of a court of equity, this agreement could not stand for a moment, at least so far as the personal estate is concerned.

In order to make an express confirmation available, it must appear that the party was then aware of his rights, and knew that the first transaction was impeachable. (*Lord Chesterfield v. Janssen*, before cited; *Boyd v. Hawkins*, 2 Dev. Eq., 215.)

If it be competent to look beyond the deed itself for a consideration to support it, and if there be sufficient proof to show that natural love and affection for the wife of the defendant Potter, constituted any part of the consideration, then the deed, *dated 31st of May, 1847, ought to be considered as a gift so far as it conveys anything over and above the value of the price paid or secured, and it ought to be governed by those rules which relate to voluntary conveyances.

Competency of Evidence.

It is insisted by the plaintiff that the deposition of Mauger London, one of the defendants, is not competent, because his answers were written by him, before he came before the commissioners.

Plaintiff insists that the correspondence between herself and her children, after the execution of the deed, dated May 31, 1847, is competent.

The defendant, Potter, in his answer says, that she received letters reproaching her before the 21st of June, 1847. The letters are thereby made evidence to disprove it. Defendant Potter said she loved none of her children; said letters are evidence to show the contrary. Said letters are evidence to discredit London, witnesses for the defendant, Potter.

The counsel for the appellees made the two following points, before examining the case upon its merits:

1. The rights of these very parties have been adjudicated upon in a state court. (*Potter v. Everett*, 7 Iredell, Eq. Cas., 152.)

2d. All the children, and the grandchild of Samuel Potter, the deceased, intestate, who are his heirs at law, and next of kin, ought to be parties to this suit. (*Story's Eq. Pl.*, secs. 72 to 76, inclusive; *Poor v. Clark*, 2 Atk., 515; *Mitford*, Eq. Pl., by Jeremy, 164.)

As to the merits: These depend upon the pure principles of English equity. There is nothing in the jurisdiction of this court, or the laws of the State from which it comes, to give to it any peculiarity. And its solution involves, mainly, the question, what guardianship, either for relief or restraint against their own action,

do courts of equity assume over persons of either sex, who are of mature age, of sound mind, and, in the case of women, not under coverture.

The execution of the deed, which it is sought by this bill to set aside, being admitted, it must stand here, as in a court of law, unless there were circumstances attending its execution which establish fraud and surprise in its procurement. The circumstances relied on are stated in the bill, from the lower part of pages 2 and 5 of the record; and, as summed up in the brief of the plaintiff's counsel, are, that on the 31st of May, 1847, when the deed was executed, she was sick, nervous, and afflicted; *without counsel; ignorant of her rights, [*49 and of the value of the estate of her husband; not competent to transact business; that the defendants availed themselves of the advantage afforded by this, her condition, and surprised and defrauded her into the execution of the deed, disposing of her whole worldly estate for a greatly inadequate consideration; and that the value of her interest in her husband's estate was misrepresented and underestimated by the defendants, Samuel R. Potter and London, who was his attorney.

The answers of both defendants are directly responsive to the bill, and both deny every material allegation in support of these charges, and explain every fact relied on to give them color. They deny that she was sick, nervous, or afflicted, to their knowledge, during the illness, or at the time of the death, of her husband, or at the time of the execution of the deed. On the contrary, they state circumstances, showing ordinarily good health, and extraordinary indifference and composure. They deny that she was ignorant of her rights, and of the value of the estate of her husband, and that she was not competent to transact business. They both state that she informed them, in conversation, that she had managed two estates of deceased persons in Philadelphia, before her marriage to Samuel Potter; that the defendant, London, expressly informed her of her legal rights, as the widow of her husband, before her execution of the deed; that she declared she knew what the estate was worth; verified this declaration by enumerating most of the articles of property of which it consisted, and said the whole was worth \$130,000, and that her dower was worth \$1,000 a year (all of which, defendants allege is an over-estimate), but that a primary motive with her for making the conveyance, was to benefit her granddaughter, the wife of the defendant, Potter, and himself.

As to being without counsel, they respond, that she was cautioned by the defendant, London, as to the importance of the business, and advised to call in D. B. Baker, Esq., an eminent lawyer, and P. K. Dickinson, Esq., an eminent man of business, both of whom were near to her house, the former, the son-in-law, and the latter, a partner of her late husband; but that she declined, preferring to act on her own judgment, and desiring to keep the affair secret.

They deny, second, that either of them misrepresented or underestimated the value of her interest in the estate of her husband, or advised or influenced her to make the conveyance in question; but, on the contrary, they aver, that

the whole arrangement originated with, and was proposed by her first, while the funeral ceremonies of her husband were in progress, and was persevered in and carried out with perfect composure and deliberation. *They deny that London was the attorney of S. R. Potter in general, or of the intestate Samuel Potter. The former states that he was averse to employing London as his counsel, in conducting the administration of his father's estate, and only consented to retain him upon the advice of his brother-in-law, the aforesaid D. B. Baker, himself a lawyer. They state that she, on returning from her husband's burial, requested London to call and see her the next morning on particular business; that he did so call; that she then mentioned the sale she proposed to make of her interest in her husband's estate to Samuel R. Potter, and gave him instructions to prepare the conveyances; that whatever circumstances of secrecy attended his visits to her house, were occasioned by her special request. They admit that the pecuniary consideration recited in the deed was not equal to the interest thereby conveyed, but allege that the plaintiff was so told by both of them, and was well aware of that fact, as she then declared, from her own knowledge of the estate. They state that the plaintiff, at the time of its execution, was well satisfied with her deed, and so continued until, a few weeks thereafter, she received a letter from her relatives in Philadelphia, complaining that she had made no provision for her lunatic daughter, Mrs. Babcock. This becoming known to the defendant, Potter, he told the plaintiff if she was dissatisfied with what she had done, he would surrender the deed to her. She declined this; but it was then agreed that the defendant, Potter, should pay to the said Mrs. Babcock, an annuity of \$150 per year, to commence immediately on the death of the plaintiff, and that the plaintiff should therefore confirm the conveyance to him; that she then sent again for the defendant, London, gave him instructions for written instruments to carry this agreement into effect, and that the annuity bond being signed by the defendant, Potter, she then, to wit: on the 21st of June, 1847, by her solemn deed, re-affirmed the conveyance of the 31st of May preceding. They deny that this last arrangement was made by either of the defendants with a view to avoid odium, which had been incurred by them on account of the original conveyance; but the defendant, Potter, alleges, that he entered into it because the plaintiff had been liberal to him, and was expected to continue an inmate of his family, and to enable her to silence the reproachful clamors of her friends in Philadelphia; that, upon its being completed, she professed herself fully satisfied, and said her Philadelphia friends could no longer complain.

Thus the parties are at issue, and the decree to be rendered depends wholly upon the finding of the facts as alleged by the one party or the other. The judges in the court below found in favor of the defendants. This being a court of errors in law, *will not reverse the decision there made upon a mere difference of opinion as to the conclusion to be drawn from the evidence upon the facts.

But supposing the questions of fact to be re-

tried here, what evidence is there to sustain any material allegation in the bill, or to contradict any material averment in the answers?

That of the plaintiff consists mainly of the depositions of certain persons in Philadelphia (for the most part her children and connections), who depose that she had children by her first marriage, and manifested for them, in her intercourse, the usual family affection; that she was a delicate person, not of strong mind, and had some relatives who were lunatics; and that she could not transact business; that the defendant, Potter's wife, is the daughter of a man of wealth, and has an estate independently of her father, and that the plaintiff had no estate, except her interest in the fortune of her husband.

In addition to these, she has taken the depositions of certain persons in Wilmington, which are found in the record, to show of what her husband's estate consisted, what was its value, the relations of friendship between S. R. Potter and London, and the state of London's credit in 1847, &c.

There is no witness who supports the allegations of her bill, which constitute her claim to be relieved, against her solemn deed, by the rules of justice administered in courts of equity. Namely, that at the time of its execution she was sick, run down with fatigue and watching, distressed, ignorant of her rights concerning her husband's estate, and of the value thereof, in need of counsel, which she would have had but for the fraudulent acts of the defendants; that the defendants, or either of them, misrepresented or underestimated the amount of the estate, almost all the articles of which are enumerated in her deed; or that they, or either of them, advised or urged her to make the conveyance to the defendant, Potter; or that the defendants conspired or colluded to defraud her. The bill should therefore be dismissed, for want of proof to sustain its material charges, which are contradicted by the answers of the defendants. The answers being directly responsive to the allegations and interrogatories of the bill in evidence for them, which must prevail, unless overborne by the testimony of two witnesses, or its equivalent. (Story's Eq., 528; *Lewis v. Owen*, 1 Ired. Eq. Cas., 290; *Arnsworth v. Cheshire*, 2 Dev. Eq., 456.) But the defendants have, moreover, disproved the plaintiff's charges by positive testimony. Their depositions show that the plaintiff was not sick, distressed, fatigued, or in anywise disconcerted by the sickness or death of her husband; that the defendant, Samuel R. Potter, was much grieved; that she was well acquainted with her husband's estate, and estimated it at its full value. That she told a witness, on her return from her husband's burial, on Sunday, that she had determined on the disposition of her property as conveyed by this deed. That she had been reading the Revised Statutes the same day while the company was at the burial. That she made a similar declaration to another witness, on the next morning, before London came to her house. That she afterwards expressed satisfaction with this arrangement, and gave good reasons for it, namely: 1st, that she was much attached to Mrs. S. R. Potter, and intended to live with her; 2d, that she had

made over her property to her children, at the time of marrying Mr. Potter, and thought it but right that his children should have his; 3d, that most of his property consisted in slaves, and she would not own one for any consideration 4th, that the management of the property would be troublesome to her, and that the amount to be paid her by Potter was as much as she wanted. 5th, that Samuel R. Potter might be enabled to buy the Point Peter plantation, and thus have an ample provision for his wife. The deposition of D. B. Baker, taken by plaintiff, shows that she was a person of bad disposition and temper, self-willed, and dictatorial. They prove, also, that she was content with the disposition of her property until she received a letter from her son, Joseph Eyre, in Philadelphia. That upon the new arrangement being made, by which an annuity was secured to her daughter, Mrs. Babcock, she was entirely satisfied, and deliberately ratified her conveyance, with a full knowledge of everything pertaining to the subject. This was on the 21st of June. In August ensuing, her son, Joseph Eyre, came to Wilmington, and she left with him for Philadelphia.

Aware of the effect of these proofs, the learned counsel for the plaintiff devotes the main stress of his argument to the inadequacy of the consideration of the deed, as a ground of relief. It will be insisted that the inadequacy, though considerable, is not gross, and that, regard being had to the nature of the property, and the relative capacities of the plaintiff and Samuel R. Potter to render it profitable, the arrangement as a sale was not so disadvantageous to her as it has been represented. With this object, reference will be made to the inventory of the administrator. But suppose the inadequacy, as a question of pecuniary value, to be gross, it alone affords no ground for relief, and requires some other accompaniment to taint the deed with fraud. (2 Cox, 320; *Coles v. Trecothick*, 9 Ves., 246; *Underhill v. Howard*, 10 Ves., 219; Lord Thurlow, in *Fox v. Macreth*, 16 Ves., 512, 517; *Story's Eq.*, 245; *Burrowes v. Lock*, 10 Ves., 471; *Greene v. Thompson*, 2 Ired. Eq., 365; *Moore v. Reid*, *Id.*, 580; *Osgood v. Franklin*, 2 53^a Johns. C. R., 28.) There is *no such accompaniment here. On the contrary, it is clearly shown that the pecuniary consideration was accompanied by that of affection. It is said that this circumstance cannot be taken into the account, because it only appears by parol evidence, and thus to prove it violates the rule that parol evidence cannot be received "to vary, add to, or contradict" a deed. The fallacy of this argument consists in applying a salutary rule in the construction of deeds, and the determination of rights under them, to inquire into the fraud or fairness of their execution; in fact, to the inquiry whether the alleged deed is a deed. If this circumstance attending the execution cannot be proved by evidence *dehors* the deed, what other can? How does the consideration appear to be inadequate, but by parol evidence? Is it to be allowed to impeach, but not to sustain? In investigations of this kind nothing is excluded which shows the acts or motives of either party. That it is admissible for this purpose is considered as settled. (*Springe v. Hawks*, 5 Ired., 83; 6 Ired. Eq. 88; 1 Phillips on Ev., 482, n., and cases cited; 3 Stark. Ev., 1004, *et seq.*; 1 Greenleaf, 408; 2 Story's Eq., 1531; Sudden on Vendors, 87; *Potter v. Everett*, 7 Ired., 152; *Hinde v. Longworthy*, 11 Wheat., 199; *Runyon v. Leary*, 4 Dev. & B., 233.) Even conveyances, voluntary on their face, may be shown by parol to have been for valuable consideration, and thus defeat the claims of creditors. (Sudden, 438; *Chapman v. Emery*, Cowp., 278.) And the cases are numerous where conveyances, absolute in their terms, have been allowed, by parol, to be shown to be mere securities for money. (*Stredger v. Jones*, 3 Hawks, 423; 2 Dev., 558; 1 Ired. Eq., 369; 6 Ired. Eq., 38.) The cases cited by the plaintiff's counsel on this point do not sustain his position.

There is a well-established distinction between the cases in which a specific performance will be refused in equity, where a contract is executory, and those in which it will be rescinded being executed. The circumstances of this case may class it with the former, but not the latter.

But, whatever may be thought in regard to the original transaction, there has been such complete recognition and confirmation on the part of the plaintiff that she cannot impeach her deed. (*Moore v. Reid*, 2 Ired. Eq., 580; *Chesterfield v. Janssen*, 2 Ves., 125; *Cole v. Gibbons*, 8 P. W., 289.)

As to Competency of Evidence.

London's deposition was properly allowed as evidence. After the certificate of the commissioners, dated April 14, 1849, of the execution of their commission, they were *functi officio* and no other certificate of theirs can be heard. If they are to be further *heard, [*54 it must be upon oath as witnesses. But if their certificate of the 12th November, 1844, is to be respected, the fact it sets forth is neutralized by their third certificate, on the same page that the irregularity of writing out the answers of witness, while out of their presence, was occasioned by themselves.

No observation is deemed necessary on the complaint that the plaintiff was not permitted to introduce as evidence the correspondence between herself and her children.

Mr. Justice Daniel delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of the United States for the District of North Carolina, by which decree the bill of the appellant (the complainant in the Circuit Court) was dismissed with costs.

The allegations in the bill, on which the interposition of the court was invoked, are substantially as follow: That Samuel Potter, deceased, the late husband of the complainant, died on the 29th of May, 1847, possessed of a large real and personal estate, consisting of houses in the towns of Wilmington and Smithville, in North Carolina, of a productive rice plantation, of an interest in one or more valuable saw-mills, of a large number of slaves, of a considerable amount of bank and railroad stocks, and of other personal property; that the complainant, who, at the time of her husband's death, was ignorant of the value of his property, had, from recent information, ascertained

that the annual value of the real estate was more than \$6,000, perhaps equal to twice that sum, and that her share in her husband's personal property was worth not less than \$15,000; that by the laws of North Carolina the complainant, in addition to one year's maintenance for herself and family (in this instance amounting to not less than \$1,000), was entitled, in right of her dower, to one third of her husband's real estate during her life, and to an absolute property in a child's part, or one sixth of the personality, her husband having left surviving him four children and one grandchild; that by the laws of the same state, she had the prior right of administration upon the estate of her husband, and thereby the control of his assets, and a right to all the regular emoluments resulting from that administration; that the complainant is an aged and infirm woman, predisposed to nervous affections, and wholly inexperienced in the transaction of business; that during the last illness of her husband, being overwhelmed by daily and nightly watchings and anxiety, she became ill; that, whilst she was thus sick and oppressed with affliction and infirmity, Samuel R. Potter, the son of her late husband, professing great sympathy and affection for the complainant, [55*] availing himself of her distressed and lonely condition, and of her ignorance of the value of the estate, with which he was familiar, having been several years the manager of it, combined with a lawyer by the name of Mauger London to defraud the complainant, and to deprive her of her rights and interest in the estate, and succeeded in accomplishing this scheme in the following manner: In the prosecution of their plan they in the first place induced the complainant under an assurance that the measure would be in accordance with the wishes of her late husband, and would prove the best means of protecting and securing her interests, to relinquish to the said Samuel R. Potter, her right to administer upon her husband's estate. In the next place, by false representations as to the value of the estate, and the expense and trouble of managing it, they prevailed upon her to sell and convey to the said Samuel R. Potter, by a deed bearing date on the 31st of May, 1847, her entire interest in this wealthy and productive estate, for the paltry consideration of \$1,000, and a covenant for an annuity of \$600, during the complainant's life; and that even this small allowance was not otherwise secured to the complainant than by the single bond of said Samuel R. Potter, for the sum of \$2,000. That in the eagerness to effect their iniquitous purposes, the said Potter and London, in total disregard of her feelings and even of decency, did, on the day of her husband's death and before his interment, urge her acquiescence in their scheme, and on that day or the day succeeding, accomplished it, by extracting from the complainant a deed bearing date on the 31st of May, 1847, conveying to Samuel R. Potter the complainant's entire interest in her late husband's estate, and the instrument of the same date, whereby she relinquished to the same individual her right to administer upon that estate. The bill makes defendants the said Samuel R. Potter and Mauger London; charges upon them a direct fraud by deliberate combination, by misrep-

resentation, both in the suppression of the truth and the suggestion of falsehood, and in the effort to profit by the ignorance, the sickness, the distress and destitution of the complainant. The bill calls for a full disclosure of all the facts and circumstances attending the transactions therein alleged to have occurred; prays that the deed of May 31st, 1847, from the complainant to said Samuel R. Potter may be canceled; that the property thereby conveyed may be released and reconveyed to the complainant, and concludes with a prayer for general relief.

It is now the office of this court to determine how far the foregoing allegations are sustained upon a proper construction of the pleadings, or upon the evidence adduced by either of the parties.

*And here it may be proper to premise, [*56 that in the examination of the case made by the bill, it cannot be considered as one of constructive fraud, arising out of some peculiar relation sustained to each other by the complainant and the defendants, and therefore to be dealt with by the law under the necessity for protecting such relation, but it is one of actual, positive fraud, charged, and to be judged of, according to its features and character, as delineated by the complainant, and according to the proofs adduced to establish that character. Although cases of constructive fraud are equally cognizable, by a court of equity, with cases of direct or positive fraud, yet the two classes of cases would be met by a defendant in a very different manner. It seems to be an established doctrine of a court of equity, that when the bill sets up a case of actual fraud, and makes that the ground of the prayer for relief, the plaintiff will not be entitled to a decree, by establishing some of the facts quite independent of fraud, but which might of themselves create a case under a totally distinct head of equity from that which would be applicable to the case of fraud originally stated. In support of this position may be cited, as directly in point, the case of *Price v. Berrington*, decided by Lord Chancellor Truro, in 1851. (*Vide English Law and Equity Reports*, Vol. VII., p. 254.)

The defendants, in this case, were clothed with no special function, no trust which they were bound to guard or to fulfill for the benefit of the complainant; they were not even the depositories of any peculiar facts or information as to the subject matter of their transactions, or which were not accessible to all the world, and by an omission or failure in the disclosure of which, they could be regarded as perpetrating a fraud.

Recurring to the pleadings in this case, there is not alleged in the bill one fact deemed material to the decision of this controversy, which is not directly met, and emphatically denied, by both the defendants.

Although the age assumed for the complainant seems to be controverted by none of the parties, yet the assertions that, at the period of her husband's death, she labored under any unusual infirmity; that she was exhausted by fatigue and by anxious watchings at the bed of sickness, or was overwhelmed with grief, or even discomposed by the event which severed forever her connection with her husband, are assertions directly met, and positively contradicted; and in further contravention of these

statements by the complainant, are the averments that the intercourse of the complainant with her late husband, was of a very unhappy character, evincing not indifference merely, but signs of strong antipathy. Equally direct and positive are the denials in the answers of both the defendants, of the charges of persuasion *or inducement of any kind, or of any concealment or misrepresentation moving from the defendants, by which the complainant was or could have been influenced; and it is expressly denied by each of the defendants, that any proposition was by them, or either of them, submitted to the complainant for the sale of her interest in the estate, or for the relinquishment of her right to the administration. These positive denials in the answers, being directly responsive to the charging part of the bill, the latter, by every rule of equity pleading, must be displaced by them, unless those denials can be overcome by evidence *aliunde*. But by the peculiar frame and structure of the bill, in this case, the complainant has imparted to the answers, a function beyond a mere response to the recitals or charges contained in the bill. The complainant has thought proper specifically to interrogate the defendants, as to the origin, progress, and conditions of the transactions impugned by her; and as to the part borne in them, both by the defendants and the complainant herself. By the answers to these interrogatories, the complainant must, therefore, be concluded, unless they can be overthrown by proofs. How stands the case, in this aspect of it, upon the interrogatories and the evidence? The defendants, being called on to disclose minutely, and particularly, their knowledge of, and their own participation and that of the complainant in, the transactions complained of, declare, that when those transactions took place, the complainant was in her usual health; was in possession of all her faculties, was exempt from any of those influences, such as grief and depression, which might have rendered her liable to imposition; was in possession, likewise, of all the knowledge as to the subject matter of the transactions requisite to judge of her own interests; that with such capabilities, and such knowledge, the complainant herself proposed the arrangement which was adopted, and although informed by both the defendants, that the consideration she proffered to receive was less than the value of her interests in the estate, she urged and insisted upon that arrangement, assigning for it, reasons which are deemed neither unnatural nor improbable, and which, although they might, to some persons, appear not to be judicious, she had the right, nevertheless, legally and morally to yield to.

How does the history, thus given by the defendants, accord with the proofs in this cause?

And first as to the state of complainant's health, and the condition of her mind and spirits as affected by the illness and death of her husband.

Benjamin Ruggles, who says that he is acquainted with the parties, states that he was with the husband of the complainant every 58*] day during his illness (which lasted eight or ten days), and sat up with him two nights; that he saw the complainant every day;

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that she did not sit up either night that the witness was there; that she exhibited no sign of distress at the sickness of her husband, nor devoted much of her time to him, nor showed any sign of grief at his death; that on the night of her husband's death, the complainant attended to getting his burial clothes, which she handed to the witness, seeming calm and composed. The complainant was not sick during the witness' stay.

Josephine Bishop, also acquainted with the parties, was at the house of the deceased on the day of his death, returned there on the second day after that event, and remained three or four weeks. On the morning of the witness' return, the complainant, in a conversation, informed her that complainant intended to propose to the defendant, Samuel E. Potter, to make over to his wife all the complainant's interest in her husband's estate. Some two or three weeks after, the complainant said to the witness that she had sent for Mr. London to arrange her business for her, and felt greatly relieved and satisfied at the manner in which he had arranged it; that she had conveyed her interest in her husband's estate to Samuel R. Potter, who was to give her \$2,000 in cash, \$600 a year during her life, to furnish her board and a servant, and would have given her more if she had asked it, but she was satisfied with the amount, which was as much as she would have use for. The complainant spoke of the defendant, London, in the strongest terms of approbation. She further remarked to the witness, that she knew her interest in the estate of her late husband was worth much more than she had asked for it. Yet at the time of her marriage with him, she had made over her own property to her children by a former marriage, and thought it nothing but right that his children should have the benefit of his property, besides that the greater part of the property consisted of slaves, and she would not own one for any consideration. Witness saw the complainant every day during the time she was at the house; she did not complain of ill health nor appear to be at all distressed; and witness had never seen her in better spirits. The conversations in which these declarations of complainant were made, were introduced by the complainant herself.

Margaret H. Wade, who is acquainted with the parties, states that she was three or four times at the house of defendant during his illness, and remained three or four hours during each time. Witness saw the complainant once only in the room of her husband; she staid in an adjoining room. Witness did not perceive that the complainant was indisposed in any way, nor *did the complainant appear to be [59] grieved during the illness of her husband nor after his death. In a conversation with witness some three or four days before decedent's death, the complainant asked the witness if she thought the decedent could live, and upon the reply of the witness that she did not think he could, the complainant observed that she was provoked at Samuel (the defendant) for forcing him to take first one thing and then another, "and make him live anyhow." Afterwards, on board of the steamboat returning from Smithville from the funeral of the decedent, the complainant told the witness, that she had

made over her property to Samuel R. Potter, or intended so doing, on account of his wife Marian; that she was very fond of her, and wished to stay with her the residue of her life, though she did not know that her friends at the north would be willing that she should do so.

Without a further and more protracted detail of the testimony adduced on the part of the defendants, it may be sufficient merely to advert to the depositions of Julia and Caroline Everett, of Edwin A. Keith, and of Sterling B. Everett (the last for many years the physician in the family of the decedent) and of the complainant herself, as fully sustaining the averments in the answers of the defendants, and the statements of the witnesses previously named, in relation to the capacity of the complainant, to her disposition and deportment towards her late husband, the effect of his illness and death upon her health and spirits, her knowledge of her rights and interest in the subject of her transactions with the defendants, the origin and fairness of those transactions, the objects for which, and the means and instrumentality by which, they were consummated. Nor can it escape observation, as a circumstance of great if not of decisive weight, that all this testimony is derived from persons familiar with the parties, living upon the immediate theater of the transactions in controversy, many of them more or less acquainted with the subjects embraced by them, witnesses, all of them free from imputation on the score of interest, and against whose veracity or intelligence no exception is even hinted.

Against an array of evidence like this, the question of equivalents or of exact adequacy of consideration cannot well be raised. The parties, if competent to contract and willing to contract, were the only proper judges of the motive or consideration operating upon them; and it would be productive of the worst consequences if, under pretenses however specious, interests or dispositions subsequently arising could be made to bear upon acts deliberately performed, and which had become the foundation of important rights in others. Mere inadequacy of price, or any other inequality in a bargain, we are told, **60*** is not to *be understood as constituting *per se* a ground to avoid a bargain in equity, for courts of equity, as well as courts of law, act upon the ground that every person who is not, from his peculiar condition or circumstances, under disability, is entitled to dispose of his property in such manner and upon such terms as he chooses; and whether his bargains are wise and discreet or otherwise, or profitable or unprofitable, are considerations not for courts of justice, but for the party himself to deliberate upon. (*Vide Story's Equity*, sec. 244, citing the cases of *Griffiths v. Spratley*, 1 Cox, 383; *Copis v. Middleton*, 2 Maddox, 409, and various other cases.)

Again, it is ruled, that inadequacy of consideration is not of itself a distinct principle of equity. The common law knows no such principle. The consideration, be it more or less, supports the contract. Common sense knows no such principle. The value of a thing is what it will produce, and it admits of no precise standard. One man, in the disposal of his property, may sell it for less than another would. If courts of equity were to unravel all

these transactions, they would throw everything into confusion, and set afloat the contracts of mankind. Such a consequence would of itself be sufficient to show the injustice and impracticability of adopting the doctrine, that mere inadequacy of consideration should form a distinct ground for relief. Still, there may be such an unconscionableness or inadequacy in a bargain, as to demonstrate some gross imposition or some undue influence; and in such cases courts of equity ought to interfere, upon satisfactory ground of fraud; but then, such unconscionableness or such inadequacy should be made out as would, to use an expressive phrase, shock the conscience, and amount in itself to conclusive and decisive evidence of fraud. (*Vide Story's Equity* sec. 245, 246, and 9 *Via.*, 246; 10 *Id.*, 219; and other cases there cited.)

But the contract between the parties in this case should not be controlled by a comparison between the subject obtained and the consideration given in a mere pecuniary point of view; added to this, were the motives of affection for the wife of the grantee, the granddaughter of the grantor, a conviction in the latter of what justice dictated towards the children of the decedent in relation to his property; the prospect of ease and independence on the part of this elderly female; her exemption from the expense, the perplexities, and hazards of managing a species of property to the management of which expense and energy and skill were indispensable; property to the tenure of which she entertained and expressed insuperable objections. Here, then, in addition to the sums of money paid, or secured to be paid, we see considerations of great influence which *naturally, justly [***61**] and lawfully might have entered into this contract, and which we think cannot be disregarded in its interpretation upon any sound construction of the testimony in the cause. Upon the first view of this case, it may, in the spectacle of the widow and the son bargaining over the unburied corpse of the husband and the father for a partition of his property, be thought to exhibit a proceeding revolting to decorum, and one, therefore, which a court of equity, equally with a court of morals, would be cautious in sustaining, or be inclined to condemn; yet, upon testing this proceeding by any principle of decency, as well as of law or equity, it is manifest that it could not be disturbed without benefit to the chief offender against such a test; for the evidence incontestably shows, that whatever in the conduct of the parties was inconsistent with the highest and most sacred relations in life—whatever may be thought to have offended against the solemnity and decorum of the occasion—was commenced and pressed to its consummation by the plaintiff in this case. Tried, then, by this standard, she should be left precisely where she has placed herself.

To avoid the consequences flowing from the acts of the complainant touching the matters of this controversy, the testimony of several witnesses, taken in the City of Philadelphia, has been introduced, to prove the mental as well as physical incompetence of the complainant. With respect to the character and purposes of this testimony, it may be remarked, that a position in a court of justice founded upon what is in effect the stultification of the person who

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assumes that position, is one to be considered with much diffidence, as it admits in general the *factum* which it seeks to invalidate; and if the averments on which such position rests be true, the person occupying that position should be in court by guardian or committee. But in truth this testimony establishes no such position, either directly or inferentially, in reference to the complainant. In the first place, all these witnesses resided in a different state, and at the distance of many hundreds of miles from the complainant; and not one of them appears to have had any intercourse with her or to have seen her even for a series of years preceding the contract which it is essayed to vacate; nor to have had any knowledge of the existence of that contract until after its completion; nor of the state of mind or of the health of the complainant at the period at which that contract was found. In addition to this ignorance of these witnesses, of the transaction under review, and of all the circumstances surrounding it, there is no fact stated by one of them which amounts to proof of incapacity on the part of the complainant to comprehend the character of her acts, and of the legal consequences incident [62*] to them; and much less do they establish, as to her, such an aberration or imbecility of mind as would justify a presumption, and much less a legal conclusion, against the validity of any and every act she might perform. To such a conclusion only could the general expressions of opinion and belief of these witnesses apply, and such a conclusion they come very far short of establishing.

We are therefore of opinion, that the decrees of the Circuit Court should be affirmed, and the same is hereby affirmed, with costs.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of North Carolina, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

Cited—10 Wall., 303; 14 Wall., 335; 16 Wall., 29; 1 Cliff., 279; 2 Cliff., 153.

HENRY O'REILLY, EUGENE L. WHITMAN, AND W. F. B. HASTINGS, *Appellants*,
v.

SAMUEL F. B. MORSE, ALFRED VAIL, AND FRANCIS O. J. SMITH.¹

1.—Mr. Justice CURTIS, having been of counsel, did not sit in this cause.

NOTE.—The above case of O'Reilly v. Morse is considered as having settled the question of extent of right secured to an inventor by his patent. *American Pin Co. v. Oakville Pin Co.*, 3 Blatchf., 180.

As to the question of unreasonable delay in filing a disclaimer, compare *Seymour v. McCormick*, 19 How., 96.

Patents. What re-issue may cover.
Re-issued letters patent must be for the same invention as that which formed the subject of the
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Morse patent for magnetic telegraph valid—Rules as to information or advice received by inventor—Prior, foreign, similar invention—Surrender and re-issue—disclaiming part—when neglect to not unreasonable—distinct patent may be taken for one of surrendered claims.

Morse was the first and original inventor of the electro-magnetic telegraph, for which a patent was issued to him in 1840, and re-issued in 1848. His invention was prior to that of Steinbiel of Munich, or Wheatstone or Davy of England.

Their respective dates compared.

But even if one of these European inventors had preceded him for a short time, this circumstance would not have invalidated his patent. A previous discovery in a foreign country does not render a patent void, unless such discovery or some substantial part of it had been before patented or described in a printed publication. And these inventions are not shown to have been so.

Besides, there is a substantial and essential difference between Morse's and theirs; that of Morse being decidedly superior.

An inventor does not lose his right to a patent because he has made inquiries or sought information from other persons. If a combination of different elements be used, the inventors may confer with men as well as consult books to obtain this various knowledge.

There is nothing in the additional specifications in the re-issued patent of 1848, inconsistent with those of the patent of 1840.

The first seven inventions, set forth in the specifications of his claims, are not subject to exception. The eighth is too broad and covers too much ground. It is this: "I do not propose to limit myself to the specific machinery or parts of machinery described in the foregoing specification and claims; the essence of my invention being the use of the motive power of the electric or galvanic current, which I call electro-magnetism, however developed, for making or printing intelligible characters, signs or letters at any distances, being a new application of that power, of which I claim to be the first inventor or discoverer."

The case of Neilson and others v. Harford and others, in the English Exchequer Reports, *ex- *463 affirmed; and also the American decisions. The Acts of Congress do not justify a claim so extensive.

But although the patent is illegal and void so far as respects the eighth claim, yet the patentee is within the Act of Congress, which gives him a right to disclaim, and thus save the portion to which he is entitled. No disclaimer having been entered before the institution of this suit, the patentee is not entitled to costs.

In 1846 Morse obtained a second patent for the local circuits, which was re-issued in 1848. It is no objection to this patent that it was embraced in the eighth claim of the former one, because that eighth claim was void. Nor is it an objection to it, that it was an improvement upon the former patent, because a patentee has a right to improve his own invention.

This new patent and its re-issue were properly issued. The improvement was new and not embraced in the former specification.

These two patents of 1848, being good with the exception of the eighth claim, are substantially infringed upon by O'Reilly's telegraph, which uses the same means both upon the main line, and upon the local circuits.

THIS was an appeal from the Circuit Court of the United States for the District of Kentucky, sitting as a court of equity.

It is difficult to make a fair report of this case

original letters. They must not contain anything substantially new or different. *Powder Co. v. Powder Works*, 98 U. S., 8 Otto, 123; *Wells v. Gill*, 4 Fish. Pat. Cas., 574.

The commissioner may allow the original specification to be amended in the re-issue, and he may permit the applicant for a re-issue to describe his invention, including in the new descriptions, and claims not only what was well described before, but also what was suggested or indicated in the original specification drawings, in patent office model. *Carew v. Boston Elastic Fabric Co.*, 3 Cliff.,

without writing a book. The arguments of counsel would fill a volume by themselves.

The history of the case was drawn up by the learned judge, who presides over the District Court of the United States in Kentucky, and whose decree was under review. Permission has been given by *Judge Monroe* that the reporter may use his statement as preliminary to this report, and he avails himself with pleasure of this kindness; because, although the narrative is occasionally interspersed with the opinions which induced the judge to decree an injunction in favor of Morse yet the history is given with great precision and clearness.

The following statement is extracted from the opinion of *Judge Monroe*:

The complainants, in their bill, allege that Samuel F. B. Morse, one of them, was the true and original inventor of the Electro-Magnetic Telegraph, worked by the motive power of electro-magnetism, and of the several improvements thereon, by which intelligence which is in one place is transmitted to other distant places, and that by the letters patent of the United States, duly issued to him, Samuel F. B. Morse, and by his partial assignments to F. O. J. Smith and Alfred Vail, the other complainants, they together are lawfully invested with the exclusive right of constructing and employing such telegraph for such purpose, throughout the United States, for the terms in the letters patent mentioned, and which have not yet expired—and they exhibit the letters patent.

They show that the practicability and great utility of the invention *was fully established by the telegraph constructed under the superintendence of Morse, by means of an appropriation made by the Congress of the United States for the purpose, and put in operation between the cities of Washington and Baltimore, in the year 1844.

That afterwards there had been constructed, by the agency and means of joint stock companies, promoted by the complainant, and operating under contracts and license of the patentee, Morse and his assignees, telegraphs along lines, amounting, in the aggregate, to upwards of four thousand five hundred miles, whereby telegraphic communication was established between the principle cities of the United States, from New Orleans to Boston; and that there were now in progress of construction, numerous additional and other lines, under contracts with them, for more widely extending the benefits of the invention, and they believe that if

they are protected in the lawful use of their rights, every section of the United States will, in a short time, have the benefits of their improvements in telegraphic correspondence.

They represent that, in all the lines of telegraphic communication now in successful operation in the United States in transmitting intelligence by means of electro magnetism, the improvement of S. F. B. Morse, or the chief and essential principles and parts thereof, are employed.

They show that they had caused to be established, a line of telegraphic communication from Louisville, by way of Frankfort and Lexington, to Maysville, Kentucky, which was in successful operation.

They represent that they had caused to be constructed, lines of posts and wires from Louisville in the District of Kentucky, by way of Bardstown, Glasgow, and Scottsville, in Kentucky, and thence by way of Gallatin to Nashville, in the District of Tennessee, for the transmission of intelligence, by means of their improved telegraph; and that they had expended great sums of money therein; and that this line is in the extension to New Orleans, State of Louisiana; and is connected by another line, with Memphis, Tennessee; and that large sums of money will be expended in this work; and all the lines in a short time completed, and the assignments.

They represent that their rights have been repeatedly and explicitly acknowledged and admitted in divers ways and by individuals and large bodies of associated citizens in various sections of the United States; that these had treated with them for the purchase of their rights, or parts thereof, and of licenses to use their patented improvements; and that they had made extensive sales, or licenses, to use them, to companies and individuals *up- [*65 on various lines, and amongst others, to the New York, Albany, and Buffalo line; the Washington and New York line; the New York and Boston line; the Washington and Petersburg line; the line from Petersburg to New Orleans; besides numerous shorter and side lines.

They state that they had been thus in the successful and uninterrupted exercise of the rights granted to them by the letters patent of the United States, and had been in nowise disturbed therein, until, by the operations of the defendant, O'Reilly, and the committing of the wrongs presently mentioned, by him and his co-defendants.

356; *Tucker v. Tucker Manuf. Co.*, 10 Off. Gaz. Pat., 464; *Battin v. Taggart*, 17 How., 74, 83.

New features, ingredients, or devices, neither described, suggested, nor indicated in the original specification or model, cannot be embodied in the new description. *Barew v. Boston Elastic Fabric Co.*, 3 Cliff., 356.

Defects in the description of an original patent may be cured by a re-issue, but the patentee may not strike out the entire description of one of the ingredients, and insert in lieu thereof other devices, unless it be alleged that such other devices are the equivalent of the device stricken out. *Tucker v. Tucker Manuf. Co.*, 10 Off. Gaz. Pat., 464.

A suggestion in the original specification, or an indication in the original drawing or model, may often justify an enlarged description of the invention upon re-issue; but if the new description embody a distinct invention, enough should be found in the original specification to apprise others that

such additional feature is included. *Kelleher v. Darling*, 14 Off. Gaz. Pat., 673; *Allen v. Blunt*, 3 Story C. C., 742; 8 Law Rep., 165.

A patent for a combination of old elements may be re-issued for a combination of fewer elements than were contained in the combination originally claimed. *Herring v. Nelson*, 14 Blatchf., 253.

Nothing can be given in the re-issue which was not in the original specifications or drawings, but minor amendments may be allowed. *Vogler v. Sempie*, 11 Off. Gaz. Pat., 923.

The patentee has a right to a re-issue of the patent in two divisions, one for a new product, and the other for a new process of making it, even though the original patent related to the process alone. *Badische Anilin & Soda Fabrik v. Hamilton Manuf. Co.*, 13 Off. Gaz. Pat., 673; *Badische Anilin & Soda Fabrik v. Higgin*, 15 Blatchf., 290.

Features contained in the patent office model may be incorporated into the drawings and specifications of the letters patent upon re-issue. They

This defendant, O'Reilly, they state, had, as early as 1845, entered into a contract with the complainants, and another, then having an interest in the patent, whereby he, O'Reilly, acknowledged their right; and that he had afterwards, in various ways, and for a long period of time, manifested his acquiescence in, and admissions of, the rights and privileges of them, the complainants, and even insisted on his right to the use of them himself, under his contract with them; that he had, under this contract and his claims under it, in fact, used and employed the improved telegraph of the complainants, and persisted in such, his claim, to employ it on all the lines embraced by his contract, without questioning the validity of their patents. But,

They allege that this defendant, Henry O'Reilly, had, by himself, his agents and servants, constructed a line of posts and suspended metallic wires thereon, from the City of Louisville, in the District of Kentucky, by way of Bardstow, to Nashville, in the State of Tennessee, and well knowing all the facts by the complainants set forth, he and his co-defendants had worked and employed upon said line, a telegraph substantially the same with the Electro-Magnetic Telegraph, invented by the complainant, Morse, and in his patents mentioned, against the will and without any authority from them, the complainants. They show that the terms of the contract, under which O'Reilly claimed their right to the use of the telegraph, on certain other lines where he employed it, did not extend to any country north of the Ohio River, and that there was no color for any claim by the defendants to the use thereof, within the District of Kentucky, or on any part of the lines by them lately constructed.

They represent, especially, that the defendants, in the operation and working of their line of telegraph, so by them constructed, used and employed instruments, apparatus and means, which are, in the material, substantial, and essential parts thereof, so upon the principle and plan of the said several improvements patented by the complainant, Morse, or the plan and principle of some of said improvements, and not other or different. And,

66*] They state, that by such means the defendants, their servants and agents, had been for the space of more than four months past, and were still, transmitting intelligence over said line, for any person who desired the same; and for such service, had been, and are yet, receiving compensation from the persons for

whom the same is performed; all which they allege is in violation of the rights granted by the letters patent, or of some of the parts thereof.

They further represent that the defendant, O'Reilly, was extending the line from Nashville to New Orleans, and had extended it to Memphis, and was operating upon the last-mentioned line to Memphis, in violation of the rights of them, the complainants, by the use of their patented improvements, or the principle and essential parts thereof; and that he had declared his intention of completing the other line from Louisville to New Orleans, and of then employing the same instruments as he was then using on the line from Louisville to Nashville.

They state that they are informed that the defendants sometimes give out in speeches, that the patents of the complainant, Morse, are void; and at other times, give out and pretend that the machinery and apparatus which they use for the transmission and the reception of the intelligence upon the said line, is a distinct and separate invention, which they, the complainants, are informed the defendants call the Columbian Telegraph:

Whereas, the complainants charge that the patents are good and valid in law, and that the defendant, O'Reilly, by his contract with the patentee, and by his having exercised, and his persisting in his claim to exercise, under it, the exclusive privileges by the patents granted, is estopped from denying their validity. And,

That the said pretended new invention is, in its essential principles, identical with, and upon, the plan of the patented improvements of Morse, and that the use of the same is a violation and infringement of the patent issued to the complainant, Morse.

They allege that the defendants had received, and were then receiving, considerable sums of money for transmitting intelligence on the line from Louisville, within the District of Kentucky, in violation of the rights of the complainants; and they complain that the defendants had, by their unlawful operations, greatly disturbed them in the lawful exercise of their rights, so granted and held by them, and had caused a great diminution of the business of them, the complainants, on their line of telegraph, which they had caused to be constructed, and had now in operation within the District of Kentucky; and that the defendants refuse to desist from such violation of the complainants' rights. Wherefore,

do not constitute new matter. *Reissner v. Anness*, 13 Off. Gaz. Pat., 870.

The purpose of a re-issue is to enable one to secure that to which he was entitled in his original patent, but which, through inadvertence or mistake, he did not then obtain. It cannot be made to cover anything not in the original invention. *Vogler v. Semple*, 11 Off. Gaz. Pat., 223.

A re-issue of a patent containing any new matter is prohibited and void. New matter in a composition means not merely the introduction of a new ingredient, but any change in the original claim whereby a substantially different composition is obtained. *United States Felted Co. v. Haven*, 1 Law & Eq. Reporter, 16.

It is in cases where a patent is inoperative or invalid, by reason of a defective or insufficient description, specification or claim, and not where the device is not described at all, that a re-issue of a patent is permitted. *Sarven v. Hall*, 9 Blatchf., 524; 1 Off. Gaz. Pat., 437.

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The re-issue must be for improvements described, suggested, or indicated in the original model, drawings or specifications. The claim or re-issue cannot be enlarged by testimony as to what the original invention was. *Cohart v. Austin*, 2 Cliff., 528.

Additional improvements are no longer allowed to be incorporated into original patent, but independent patent must be applied for. *Battin v. Taggart*, 17 How., 74; *Carver v. Brantree Manuf. Co.*, 2 Story C. C., 432.

The error sought to be corrected must be in the description, specification, or claim. Patent cannot be surrendered and re-issued to cure an error in the oath of citizenship. *Child v. Adams*, 1 Fish., 189.

Where patentee, by omitting in his original patent to claim a portion of his invention, has abandoned that portion to the public, he cannot, by surrendering, and procuring a re-issue, revoke this abandonment. *Battin v. Taggart*, 2 Wall., Jr., C. C., 101.

67*] *The complainants pray that the defendants, by an order, and the process of the court, may be enjoined from hereafter using or employing such telegraphs in the violation and infringement of the rights of them, the complainants, within the District of Kentucky; that they may be compelled to account for the money received by them in consideration of their unlawful operations and wrongful exercise of the rights, privileges, and property of the complainants; and that on due proceeding and final hearing, such order of injunction may be made final and effectual; and that the complainants may have such other relief as their case may require. And,

They propound numerous interrogatories, framed on all the material allegations of the bill, and pray, that each defendant may be compelled to answer, on his oath, such as are for him designated, and, to this end, and that they may have the relief which shall be adjudged them, they pray the writ of subpoena.

Answer and Grounds of Defense.

The defendants appeared by their counsel, and admitted that they had sufficient notice. O'Reilly read his answer to the complainants' bill.

The respondent admits the contract with the complainants, of 1845, stated in the bill, and seems to admit that he had used, under it, portions of the "machine or combinations" described in the patent to Mr. Morse, of 1840; but denies he had used others under this contract.

He says he was not scientific, and had not seen the patent until after the complainants had alleged he had forfeited his contract, and instituted a suit to have it vacated; and insists that he is not estopped to deny the validity of the patents.

He sets up no defense under this contract, and disclaiming any license from the complainants in respect to the line of telegraph in question, answers, that he believes, on grounds which he sets forth, that Mr. Morse is not the original and first inventor of the telegraph described in his patents, and insists that his patents are, on that ground, and upon their face, and for other causes he states, null and void.

He admits the construction and operation of the lines of telegraph in Kentucky, and elsewhere, by himself and others; but denying that the instruments employed on them are within the description of the complainants' patents, even on the supposition of their validity, denies the infringement.

But other grounds of defense, not presented by the answer, were assumed in the argument; and, the matter of the answer will be more fully stated under the several heads of the whole defense. The defendants all united in opposition to the motion.

68*] *The parties respectively read, without objection, a great mass of documentary proof, in support of their positions, and a model of the telegraph described in the letters patent, to Mr. Morse, and of the telegraph employed, and proposed to be employed by the defendants, was exhibited and subjected to the application of the proofs, the explanation of the parties, and the inspection of the tribunal.

The grounds of defense presented by the answer of O'Reilly, and assumed on the proofs,

will be comprehended under these heads of primary division:

I. The complainant, Morse, was not the true and original inventor of this telegraph.

II. The letters patent to him are null and void upon their face, and for other causes *dehors*.

III. The telegraph constructed and employed by them, the defendants, is substantially and in law, different from the telegraph described in the letters patent, to Morse, and of which he can lawfully claim the exclusive employment: And, therefore, on the supposition of the validity of the patents to any extent, there has been no infringement.

IV. The case on the pleadings and proofs, is not one, whatever might be considered of it on a final hearing of the bill, which will justify an order for injunction presently.

These subjects in their order.

Is Mr. Morse the original inventor of this telegraph, and of the several improvements thereon described in his letters patent?

It is necessary that we now ascertain and settle, what is the thing which was invented; and to this end it will be most convenient to begin at its conception, and accompany it in its progress down to its present state of apparent maturity and completeness.

History of the Invention.

Its conception is fixed by Mr. Morse himself, in October, 1832, on board the packet ship "Sully," on her passage from Havre, France, to New York.

He says that he was by profession, a historical painter, and had, in 1829, gone to Europe for perfecting himself in that art; that on his return home, in October, 1832, there were among the passengers in the ship, the Hon. William C. Rives, Minister of the United States to the Court of France, Dr. C. T. Jackson, James Fisher, Esq., of Philadelphia, William Constable, Esq., and other gentlemen of extensive reading and intelligence; and that soon after the voyage commenced, the then experiments and discoveries in relation to electro-magnetism, and the affinity of electricity to **69** magnetism, or their probable identity, became a subject of conversation.

In the course of this discussion, it occurred to him that, by means of electricity, signs representing figures, letters or words, might be legibly written down at any distance, and that the same effect might be produced by bringing the current in contact with paper saturated with some saline solution. These ideas took full possession of his mind, and during the residue of the voyage he occupied himself, in a great measure, in devising means of giving them practical effect.

Before he landed in the United States, he had conceived and drawn out in his sketch book, the form of an instrument for an electro-magnetic telegraph, and had arranged and noted down a system of signs composed of a combination of dots and spaces, which were to represent figures; and these were to indicate words to be found in a telegraphic dictionary, where each word was to have its number. He had also conceived and drawn out the mode of applying the electric or galvanic current, so as to mark signs by its chemical effects.

This is the account of the inventor himself; but it is supported by the testimony of disinterested witnesses.

Mr. Rives, under date of September 27, 1837, addressing himself to Mr. Morse, says:

"I remember perfectly, that you explained to me the idea of your ingenious instrument, during the voyage which we made together in the autumn of 1832. I also remember that during our many conversations on this subject, I suggested several difficulties to you, and that you obviated them with promptness and confidence."

Captain Pell, the commander of the ship, says, on the same day, addressing himself to Mr. Morse:

"When I examined your instrument a few days since, I recognized in it the same mechanical principles and arrangements which I had heard you explain on board of my vessel in 1832." And,

It appears by the depositions of two brothers of Mr. Morse, that on their meeting him on board the ship, immediately she had moored at New York, the greeting had hardly passed between the three brothers, and before they had reached the house of one of them, which they immediately proceeded to from the ship, he announced to them his discovery, and told them that he had, during his voyage, made an important invention, which had occupied almost all his time on shipboard, one that would astonish the world, and of the success of which he was perfectly sanguine; and that he said this invention was a means of communicating 70*] intelligence by electricity, so that a *message could be written down in characters, in a permanent manner, at any distance; and he took from his pocket and showed them, in his sketch book, a representation of his invention.

And this was the invention in October, 1832.

Mr. Morse further says:

"Immediately after his landing in the United States, he communicated his invention to a number of his friends, and employed himself in preparations to prove its practicability and value, by actual experiment. To that end, he made a mold, and cast, at the house of his brother, in New York, before the commencement of the year 1833, a set of type, representing dots and spaces, intended to be used for the purpose of closing and breaking the circuit in his contemplated experiments."

And this statement is also supported by other testimony.

But he was unable to proceed, for the want of money, to purchase the materials for a galvanic battery and wire, and was compelled, for subsistence, to return to his pencil; and having been led, in pursuit of employment, from place to place, from 1832 to the latter part of 1835, he had no opportunity of making experiments of his invention. But, he affirms, he never lost faith in its practicability or abandoned his intention of testing it as soon as he could command the means.

"In 1835, he was appointed Professor in the New York City University, and about the month of November, in that year, occupied rooms in the University buildings. Here he immediately commenced, with very limited means, to experiment upon his invention.

"His first instrument was made up of an old

picture or canvas frame fastened to a table; the wheels of an old wooden clock moved by a weight to carry the paper forward; three wooden drums, upon one of which the paper was wound and passed thence over the other two; a wooden pendulum suspended to the top piece of the picture or stretching frame, and vibrating across the paper as it passed over the center wooden drum; a pencil at the lower end of the pendulum in contact with the paper; an electro-magnet fastened to a shelf across the picture or stretching frame, opposite to an armature made fast to the pendulum; a type rule and type for closing and breaking the circuit, resting on an endless band, composed of carpet binding, which passed over two wooden rollers moved by a wooden crank, and carried forward by points projecting downwards into the carpet binding; a lever with a small weight on the upper side, and a tooth projecting downwards at one end, operated on by the type and a metallic fork, also projecting downwards, over two mercury cups; at the other end a galvanic battery of one *cup, and a short circuit of *71 wire embracing the helices of the electro-magnet, connected with the positive and negative poles of the battery, and terminating in the mercury cups.

"When the instrument was at rest, the circuit was broken at the mercury cups. As soon as the first type in the type rule (put in motion by turning the wooden crank), came in contact with the tooth on the lever, it raised that end of the lever and depressed the other, bringing the prongs of the fork down into the mercury, thus closing the circuit. The current passing through the helices of the electro-magnet, caused the pendulum to move and the pencil to make an oblique mark upon the paper, which, in the mean time, had been put in motion over the wooden drum. The tooth in the lever falling into the space between the two first types, the circuit was broken, when the pendulum returned to its former position, the pencil making another mark as it returned across the paper. Thus as the lever was alternately raised and depressed by the points of the type, the pencil passed to and fro across the strip of paper, passing under it, making a mark resembling a succession of V's, the points only, of which, however, were considered as telegraphic signs. The spaces between the types caused the pen to mark horizontal lines, long or short, in proportion to their own length.

"With this apparatus, made as it was, and completed before the first of the year 1836, he was enabled to mark down, intelligibly, telegraphic signs; and having arrived to that point, he exhibited it to some of his friends early in that year, and first of all, to Professor Leonard D. Gayle, who was a colleague Professor in the University.

"Here was an actual operation of the instrument, and a demonstration of its capacity to accomplish the end of the invention." And,

This statement is fully supported by the affidavit of Dr. Gayle. He says:

"That in the month of January, in the year one thousand eight hundred and thirty-six, I was a colleague Professor in the University of the City of New York, with Professor Samuel F. B. Morse, who had rooms in the University buildings, on Washington Square, in said city.

That during the said month of January, of the year aforesaid, the said Professor Morse invited me into his private room, in the said University, where I saw for the first time, certain apparatus, constituting his Electro-Magnetic Telegraph. The invention at that time consisted of the following pieces of apparatus."

Here the witness gives a full description of the apparatus, and of its operation, and of the result, and this result was the making of the permanent and legible record. And, 72*) *This was the state of the invention in January, 1836.

Thus far it had not been ascertained what was the limit of the magnetic power, and therefore it was not known on what length of wire it would be found of sufficient force to make the record, and there had been no means devised of extending the operation, further than the magnetic current of one battery would be effectual. But this matter had not escaped the attention of Mr. Morse, and he had been devising means for the supply of whatever defect might be found in this respect.

He says: "Early in 1836, he procured forty feet of wire, and putting it in circuit, found that his battery of one cup was not sufficient to work his instrument. This result suggested to him the probability that the magnetism to be obtained from the electric current would diminish in proportion as the circuit was lengthened, so as to be insufficient for any practical purpose at great distances; and to remove that probable obstacle to his success, he conceived the idea of combining two or more circuits together, each with an independent battery, making use of the magnetism of the first to close and break the second; that of the second to close and break the third, and so on.

"His chief concern, therefore, in his subsequent experiments, was to ascertain at what distance from the battery, sufficient magnetism could be obtained to vibrate a piece of metal to be used for that purpose, knowing that if he could obtain the least motion at the distance of eight or ten miles, the ultimate object was within his grasp."

A mode of communicating the impulse of one circuit to another analogous to the receiving magnet now in use, was matured early in the spring of 1837, and then exhibited to Professor Gayle, his confidential friend. And,

This statement is also fully confirmed by the statement of Dr. Gayle. He says:

"It was early a question between Professor Morse and myself, where was the limit of the magnetic power to move a lever. I expressed a doubt whether a lever could be moved by this power at the distance of twenty miles, and my settled conviction was, that it could not be done with sufficient force to mark characters on paper at 100 miles distance. To this, Professor Morse was accustomed to reply, 'If I can succeed in working a magnet ten miles, I can go around the globe.' The chief anxiety, at this stage of the invention, was to ascertain the utmost limits at which he, Morse, could work or move a lever by magnetic power. He often said to me, 'It matters not how delicate the movement may be, if I can obtain it at all, it is all I want.' Professor Morse often referred to the number of stations which might be required, and which he observed would add to

*the complication and expense. The said [*73 Morse always expressed his confidence of success in propagating magnetic power through any distance of electric conductors which circumstances might render desirable. His plan was thus often explained to me: 'Suppose,' said Professor Morse, 'that in experimenting on twenty miles of wire, we should find that the power of magnetism is so feeble that it will but move a lever with certainty a hair's breadth, that would be insufficient, it may be, to write or to print, yet it would be sufficient to close and break another, or a second circuit 20 miles further, and this second circuit could be made in the same manner, to close and break a third circuit, and so on around the globe.'

"This general statement of the means to be resorted to, now embraced in what is called the Receiving Magnet, to render practical, writing or printing by telegraph, through long distances, was shown to be more in detail, early in the spring of the year 1837 (one thousand eight hundred and thirty-seven), and I am enabled to approximate the date very nearly, from an accident that occurred to me, in falling on the ice formed of late snow in the spring of that year.

"The accident happened on the occasion of removing to Professor Morse's rooms in the New York University, some pieces of apparatus to prepare a temporary receiving magnet.

"The apparatus was arranged on a plan substantially as indicated in the drawings on sheet 2, accompanying this affidavit. 1 is a battery at one terminus of a line of conductors representing 20 miles in length, from one pole of which the conductor proceeds to the helix of an electro-magnet at the other terminus (the helix forming part of the conductor); from thence it returns to the battery, and terminating in a mercury cup o, from the contiguous mercury cup p, a wire proceeds to the other pole of the battery. When the fork of the lever c unites the two cups of mercury, the circuit is complete, and the magnet b is charged and attracts the armature of the lever d which connects the circuit of battery 2 in the same manner, which again operates in turn lever c, twenty miles further, and so on.

"This I depose and say, was the plan then and there revealed and shown to me by the said Professor Morse, and which, so far as I know, has constituted an essential part of his Electro-Magnetic Telegraph from that date till the present time."

The diagram referred to by the witness, is attached to the deposition, and exhibits the combination of the circuits of electricity claimed by Mr. Morse, as a part of his invention. Their construction is fully described, and their operation having been witnessed by the deponent, is described in his deposition. And,

This was the state of the invention early in the spring of 1837.

*It fully appears that the completing [*74 of the invention had been retarded by the want of means by Mr. Morse. But in the spring of this year he appears to have been excited by the publication of an account of the invention of a telegraph by two French gentlemen, M. Gouon and Servel, which it was at first apprehended, from the terms of its announcement, was no other than the Electro-Magnetic Tele-

graph; but which afterwards turned out to be only a form of the common telegraph formerly in use, and he consented to a notice being taken in one of the newspapers of New York, of his invention, and renewed and increased his exertions to perfect and demonstrate its great superiority and value.

He was assisted by his fellow Professor, Dr. Gayle, in trying experiments, and in consideration thereof, and of his further assistance in such work, he presented him an interest in the invention, and by the united work of the two, from April to September, they were enabled to exhibit it in an improved form.

In the latter part of August, Dr. Gayle states the operations of the instrument were shown to numerous visitors, in the University. And he continues:

"It was on Saturday, the second day of September, 1837, that Professor Dauberry, of the English Oxford University, being on a visit to this country, was invited, with a few friends, to see the operations of the Telegraph in its then rude form, in the Cabinet of the New York City University, where it then had been put up, with a circuit of 1,700 feet of copper wire, stretched back and forth in that long room. I well remember that Professor Dauberry, Professor Torrey, and Mr. Alfred Vail, were present among others. This exhibition of the Telegraph, although of very rude and imperfectly constructed machinery, demonstrated to all present, the practicability of the invention; and it resulted in enlisting the means, the skill, and the zeal of Mr. Alfred Vail, who early the next week called at the rooms and had a more perfect explanation from Professor Morse, of the character of the invention."

"The doubt to be dispelled in Mr. Vail's mind, as he then stated, and has since frequently stated, was, whether the power by magnetism could be propelled to such a distance as to be practically effective. This doubt was dissipated in a few minutes' conversation with Professor Morse; and I have ever been under the full conviction that it was the means then disclosed by Professor Morse to Mr. Vail, to wit: the plan of repeating the power of magnetism at any distance required, which I have stated, that induced Mr. Alfred Vail and his brother, George Vail, at once to interest themselves in the invention, and to furnish Professor Morse with the means, material, and labor for an experiment on a larger scale." And,

[75*] "This was the state of the invention in September, 1837.

Mr. Morse accordingly proceeded to have constructed a new, larger, and more perfect instrument for exhibition on an application for a patent to Washington.

Caveat.

In the mean time, on the — day of October, 1837, in order to protect his right to his invention, he filed his *caveat* in the Patent Office.

It is in these words:

"To the Commissioner of Patents.

The petition of Samuel F. B. Morse, . . . represents:—That your petitioner has invented a new method of transmitting and recording intelligence by means of electro-magnetism, which he denominates The American Electro-Magnetic Telegraph, and which he verily be-

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lieves has not been known or used prior to the invention thereof by your petitioner. Your petitioner further states, that the machinery for a full, practical display of his new invention is not yet completed, and he therefore prays protection of his right till he shall have matured the machinery; and desires that a *caveat* for that purpose may be filed in the confidential archives of the Patent Office, and preserved in secrecy, according to the terms and conditions expressed in the Act of Congress in that case made and provided; he having paid \$20 into the treasury, and complied with other provisions of the said Act.

New York, September 28th, 1837."

These are the specifications annexed to the *caveat*:

"The nature of my invention consists in laying an electric or galvanic circuit or conductors of any length to any distance. These conductors may be made of any metal, such as copper or iron wire, or strips of copper or iron, or of cords or twine, or other substances, gilt, silvered, or covered with any metal leaf, properly insulated in the ground, or through or beneath the water, or through the air, and by causing the electric or galvanic current to pass through the circuit, by means of any generator of electricity, to make use of the visible signs of the presence of electricity in any part of the said circuit, to communicate any intelligence from one place to another.

"To make the said visible signs of electricity available for the purpose aforesaid, I have invented the following apparatus, namely:

First. A system of signs, by which numbers, and consequently words and sentences, are signified.

*Second. A set of type adapted to regulate and communicate the signs, with cases for convenient keeping of the type, and rules in which to set up the type.

Third. An apparatus called a Port Rule, for regulating the movement of the type rules, which rules, by means of the type, in their turn regulate the times and intervals of the passage of electricity.

Fourth. A register, which records the signs permanently.

Fifth. A dictionary or vocabulary of words, numbered and adapted to this system of telegraph.

Sixth. Modes of laying the conductors, to preserve them from injury."

Here is a description of each of the articles of the invention, after which he concludes in these words:

"What I claim as my invention, and desire to secure by letters patent, and to protect for one year, is a method of recording permanently electrical signs, which, by means of metallic wires, or other good conductors of electricity, convey intelligence between two or more places."

The new instrument, which Mr. Morse was enabled to have constructed by his arrangement with Mr. Vail, was completed in the latter end of this year, and in the succeeding February, 1838, it was exhibited in the Franklin Institute at Philadelphia, where it operated with success through a circuit of ten miles of wire; and a committee of the Institute made a report of its success.

It was thence removed to the City of Washington, where it was publicly exhibited in the hall of the House of Representatives, and a committee having been appointed to examine it, made a favorable report, and recommended an appropriation of \$30,000, to have effectually tested the utility of the invention. And,

This was the state of the invention early in the spring of 1838.

Petition for Patent and its Specifications.

The caveat was followed, on the 7th of April, 1838, by the petition of Mr. Morse for the patent. It is to this effect:

"Be it known, that I, Samuel F. B. Morse, of the City, County and State of New York, have invented a new and useful machine and system of signs for transmitting intelligence between distant points, by the means of a new application and effect of electro-magnetism, in producing sounds and signs, or either, and also for recording permanently, by the same means and application and effect of electro-magnetism, any signs thus produced, *and representing intelligence, transmitted as before named, between distant points, and I denominate said invention the American Electro-Magnetic Telegraph, of which the following is a full and exact description, to wit:

"It consists of the following parts: First, Of a circuit of electric or galvanic conductors from any generator of electricity or galvanism, and of electro-magnets at any one or more points in said circuits."

Here he gives the several parts of which his invention consisted, and adds a long description of each of them, and then sums up what he had affirmed he had himself invented, in these words:

"What I claim as my invention, and desire to secure by letters patent, is as follows:

1st. The formation and arrangement of the several parts of mechanism constituting the type rule, the straight port rule, the circular port rule, the two signal levers, and the register lever, and alarm lever with its hammer, as combining, respectively, with each of said levers, one or more armatures of an electro-magnet, and as said parts are severally described in the foregoing specification.

2d. The combination of the mechanism constituting the recording cylinder, and the accompanying rollers and train wheels, with the formation and arrangement of the several parts of mechanism, the formation and arrangement of which are claimed as above, and as described in the foregoing specification.

3d. The use, system, formation and arrangement of type and of signs, for transmitting intelligence between distant points, by the application of electro magnetism, and metallic conductors combined with mechanism, described in the foregoing specification.

4th. The mode and process of breaking, by mechanism, currents of electricity or galvanism in any circuit of metallic conductors, as described in the foregoing specification.

5th. The mode and process of propelling and connecting currents of electricity or galvanism in and through any desired number of circuits of metallic conductors, from any known generator of electricity or galvanism, as described in the foregoing specification.

6th. The application of electro-magnets by means of one or more circuits of metallic conductors, from any known generator of electricity or galvanism, to the several levers in the machinery described in the foregoing specification, for the purpose of imparting motion to said levers and operating said machinery. *and for transmitting, by signs and [*78 sounds, intelligence between distant points, and simultaneously to different points.

7th. The mode and process of recording or marking permanently signs of intelligence transmitted between distant points and simultaneously to different points, by the application and use of electro-magnetism or galvanism, as described in the foregoing specification.

8th. The combination and arrangement of electro-magnets, in one or more circuits of metallic conductors, with armatures of magnets, for transmitting intelligence by signs and sounds, or either, between distant points, and to different points simultaneously.

9th. The combination and mutual adaptation of the several parts of the mechanism and system of type and of signs, with and to the dictionary or vocabulary of words, as described in the foregoing specification."

It appears that no objection was found to the issuing of the patent immediately, except that there had not been filed with the specifications a duplicate set of the drawings, and that the commissioner wrote in answer to an application for it, to this effect, on the 1st of May.

In England and France.

But Mr. Morse had conceived a hope, that he might secure a consideration for the use of his invention in foreign countries, as well as in the United States, and on the 15th of May he returned this answer to the Commissioner, and departed the next day for Liverpool:

"NEW YORK CITY UNIVERSITY,
May 15, 1838. }

"HON. HENRY L. ELLSWORTH.

Dear Sir—Excuse the delay in answering your letter of the 1st instant, relative to a duplicate set of drawings for my letters patent. May I ask the favor of you to delay issuing the letters patent until you hear from me in Europe, as I fear issuing them here will at present interfere with my plans abroad.

I sail to-morrow in the ship Europe for Liverpool. Farewell."

In England a patent was refused to the American inventor, on the ground that some description of his invention—the substance of which will appear hereafter—had been published in the London Magazine.

But he was otherwise received in France.

In the French Academy of Science.

He communicated a description of his invention, and exhibited *the instrument in [*79 operation, before the French Academy of Sciences, on the 10th of September, 1838. And,

This is the account of the invention published in the "*Comptes Rendus*," the weekly journal of the Academy:

Applied Physics.—Electro-Magnetic Telegraph of Mr. Morse, Professor in the University of New York."

"The instrument has been put in operation under the eyes of the Academy. The follow-

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ing is a literal translation of a large portion of the notice delivered by Mr. Morse to the Perpetual Secretaries:

"Mr. Morse conceives that his instrument is the first practicable application which has been made of electricity to the construction of a telegraph.

"This instrument was invented in October, 1832, whilst the author was on his way from Europe to America, in the packet ship Sully. The fact is attested by the captain of the ship and several of the passengers. Among the number of the latter, was Mr. Rives, the Minister of the United States near the French government.

(Here is given the account of Mr. Rives and Captain Pell, already set out. After which the account proceeds):

"The idea of applying galvanism to the construction of telegraphs, is not new; Dr. Coxe, a distinguished citizen of Philadelphia, makes mention of it in a note inserted by him in February, 1816, in the Annals of Dr. Thompson, page 162, First Series: but he did not give any means of effecting it.

Since the period to which the invention of Mr. Morse's telegraph goes back, other arrangements, founded on the same principles, have been announced, of which the most celebrated are those of Mr. Steinheil, of Munich, and of Mr. Wheatstone, of London. They differ very much in mechanism.

The American Telegraph employs but one circuit, the following is an abridged description of it:

At the extremity of the circuit where the news is to be received, is an apparatus called the Register. It consists of an electro-magnet, the wire covering of which forms the prolongation of the wire of the circuit.

The armature of this magnet is attached to the end of a small lever, which at its opposite extremity holds a pen; under this pen is a ribbon of paper which moves forward as required, 80*] *by means of a certain number of wheels. At the other extremity of the circuit, that is to say, at the station from which the news is to be sent out, is another apparatus called the Port Rule; it consists of a battery or generator of galvanism, at the two poles of which, the circuit ends; near the battery a portion of this circuit is broken; the two extremities disjoined, are plunged into two cups of mercury near each other.

By the aid of a bent wire attached to the extremity of a little lever, the two cups may be, at will, placed in connection with each other, or left separated; thus the circuit is completed and interrupted at pleasure. The movement of the mechanism is as follows:

When the circuit is complete the magnet is charged; it attracts the armature, the movement of which brings the pen into contact with the paper. When the circuit is interrupted, the magnetism of the horseshoe ceases, the armature returns to its first position, and the pen is withdrawn from the paper. When the circuit is completed and broken rapidly in suc-

1.—Suppose the places to be put in communication with each other occupy the three angles of a triangle, the four angles of a quadrilateral, or certain points of a line inclosing a space, a single wire passing through all those points would be sufficient, at least according to theory.

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cession, mere dots are produced upon the moving paper; if, on the contrary, the circuit remain complete for a certain length of time, the pen marks a line, the length of which is in proportion to the time during which the circuit remains complete. This paper presents a long interval of blank if the circuit remain interrupted during some considerable time. These points, lines, and blanks, lead to a great variety of combinations. By means of these elements, Professor Morse has constructed an alphabet and the signs of the ciphers. The letters may be written with great rapidity, by means of certain types which the machine causes to move with exactness, and which give the proper movements to the lever bearing the pen. Forty-five of these characters may be traced in one minute.

The register is under the control of the person who sends the news. In fact, from the extremity called the Port Rule, the mechanism of the register may be set in motion and stopped at will. The presence of a person to receive the news is, therefore, not necessary, though the sound of a bell which is rung by the machine, announces that the writing is about to begin.

The distance at which the American Telegraph has been tried, is ten miles English, or four post leagues of France. The experiments have been witnessed by a committee of the Franklin Institute of Philadelphia, and by a committee appointed by the Congress of the United States. The reports of these committees, which we have not copied, are extremely favorable. The committee of Congress recommended the appropriation of \$30,000.

**French Patent, 1838.* [*81

A patent was accordingly granted to Mr. Morse by the French government, but it yielded him no pecuniary profit.

It is dated on the 20th August, 1838, and was delivered to him on the 30th October afterwards. But,

The law of France required the invention to be put into use in two years, and on failure, the exclusive privilege of the patentee was forfeited. Mr. Morse had not the means of complying with the condition, and he returned home in 1838, with the hope of inspiring in his own countrymen sufficient confidence in his great invention. But the embarrassed condition of the country caused him to despair of success at that time, and being compelled to betake himself again to his pencil, he made no farther movement until the succeeding year.

American Patent, 1840.

On recurring to his former application for his patent, which had remained on the files of the office, the duplicate set of his drawings were still wanting; but having supplied this, and complied with some other directions of the Commissioner, the patent was issued.

It was sealed, and bears date June 20th, 1840.

The specifications filed in 1838, on the application for the patent, are annexed to it as part thereof. These specifications, or so much of them as may be necessary, will be set out hereafter, before or when they become the subject of discussion. But,

The confidence of the capitalists in an inven-

tion so extraordinary, and one promising such incredible results, could not be inspired, and the patentee was not able, himself, to construct a line of telegraphs, and introduce it into actual use, and he again applied to the Congress of the United States. This resulted in the appropriation of \$80,000, according to the recommendation of the committee in 1838, for the purpose of testing the practicability and utility of the system, under the superintendence of Mr. Morse. And,

This resulted in the construction of the line of telegraph from Baltimore to Washington, and a complete demonstration of the practicability and great public utility of his invention. And,

This was the state of the invention in June, 1844, twelve years after its conception.

Efforts were then made for the extension and multiplication of its advantages, but difficulties were encountered in the introduction and establishment of an affair of such novelty, §2*] and *requiring such a large amount of capital, and some time was necessary to overcome them.

The exertions were, however, continued, and with the success which the progress in the establishment of the telegraphs stated in the bill exhibits. And,

In the mean time, as will be presently seen, Mr. Morse continued his exertions to improve and perfect this great invention.

1840 Patent Re-issued, 1846.

In January, 1846, the specifications of the invention and description of the mode of its operation having been supposed to be in some respects, defective, the patent was surrendered, and a new patent taken out in its stead.

The specifications annexed to this patent will be adverted to hereafter. It will be sufficient, for the present, to state that, in the summing up of what the patentee affirmed he had invented, there is found one article corresponding to the fifth and some of the other clauses in the specifications of the patent of 1840. He says:

"I also claim the combination of two or more circuits of galvanism or electricity, generated by independent batteries, by means of electro-magnetism, as above described."

It appears that, originally, the design was that this part of the invention was to be resorted to only in case the galvanic current of one battery should be found insufficient on a long line, to afford the motive power necessary to work the register and record the intelligence, and it does not appear that it had been, before this date, ascertained that the one battery and circuit would not be sufficient for any distance.

Patent of 1846 for New Improvement.

But, on the 16th April, 1846, Mr. Morse applied for, and obtained another patent for an improvement on his own original invention. And,

It appears from his representations, contained in the specifications annexed to this patent, that it had then been ascertained that the galvanic current generated by one battery, would be sufficient to continue the electric current on any length of line, and afford sufficient motive power to open and close the battery; but that it would not be sufficient, at any considerable distance, to work, the register and

make the record, unless this battery was made of great magnitude; and that by such battery the expense of the operation would be greatly increased.

He had, therefore, contrived what he called a receiver or receiving magnet, worked by a local battery, or battery situated *at the [*83 place to which the intelligence is transmitted, by which a second, but short, local circuit, connected with the main circuit, was opened and closed, and sufficient force given to the register to make the record.

The second patent is for this, and for other improvements, which he sums up in these words:

"What I claim as my invention, and desire to secure by letters patent, is the receiving magnet, or a magnet, having a similar character, that sustains such a relation to the register magnet, or other magnetic contrivances for registering, and the length of the current or telegraphic line as will enable me to accomplish, with the aid of a main galvanic battery, and the introduction of a local battery, such motion or power for registering as could not be obtained otherwise, without the use of a much larger galvanic battery.

"I claim, as my invention, the use of a local battery and magnet, in combination with a battery and magnet connected with the main line or lines of conductors for the purpose above specified.

"I also claim the combination of the apparatus connected with the clock work, for setting off the paper and stopping it with the pen lever [M].

"I also claim the combination of the points affixed in the pen lever, with the grooved roller [N] for marking on paper as above described."

But, on the 18th June, 1848, on the supposition there were some defects in the specifications of each of these two patents then extant, they were both surrendered and canceled, and new patents obtained in the stead of each respectively. And,

These are the patents upon *which the exclusive right to the employment of the telegraph now before us is claimed by the complainant. But

It is necessary, to a fair and intelligible statement and discussion of the case, that large portions of the schedules be set out in their own words.

1840 Patent Re-issued 1848.

The patent itself, which is a re-issue of the patents of 1846, which was a re-issue of the original patent of 20th June, 1840, will be given at length, because the terms of it will be the subject of discussion hereafter, in connection with the Statute. It is in the following words:

THE UNITED STATES OF AMERICA,

To all to whom these letters patent shall come.

Whereas, Samuel F. B. Morse, Poughkeepsie, New York, *has alleged that he has [*84 invented a new and useful improvement in the mode of communicating information by signals, by the application of electro-magnetism (for which letters patent were granted on the 20th June, 1840, which letters patent were surrendered and rescinded on the 16th day of January, 1846, which last letters patent are hereby canceled on account of a defective speci-

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fication), which he states has not been known or used before his application; has made oath that he is a citizen of the United States, that he does verily believe that he is the original and first inventor or discoverer of the said improvement, and that the same has not, to the best of his knowledge and belief, been previously known or used; has paid into the Treasury of the United States the sum of fifteen dollars, and presented a petition to the Commissioner of Patents, signifying a desire of obtaining an exclusive property in the said improvement, and praying that a patent may be granted for that purpose.

These are therefore to grant, according to law, to the said Samuel F. B. Morse, his heirs, administrators or assigns, for the term of fourteen years from the twentieth day of June, one thousand eight hundred and forty, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said improvement—a description whereof is given in the words of the said Samuel F. B. Morse, in the schedule hereunto annexed, and is made part of these presents.

The schedule annexed is in these words:

To all to whom these presents shall come.

Be it known that I, Samuel F. B. Morse, now of —, the State of New York, have invented a new and useful apparatus for, and a system of, transmitting intelligence between distant points by means of electro-magnetism, which puts in motion machinery for producing sounds or signs, and recording said signs upon paper or other suitable material, which invention I denominate the American Electro-Magnetic Telegraph, and that the following is a full, clear, and exact description of the principle or character thereof, which distinguishes it from all other telegraphs previously known; and of the manner of making and constructing said apparatus, and of applying said system, reference being had to the accompanying drawings making part of this specification. . . .

Here follows a description of the instruments, and of the mode of their operation, which will be admitted here and adverted to hereafter.

These particular specifications and descriptions completed, the patentee sums up what **§5*** he intends it should be understood *he had and had not invented; and after disclaiming all pretensions to the invention of what he says was before known.

He specifies what he affirms he had himself discovered or invented, and thus designates his improvement or improvements, a description whereof he has just before given in this his schedule, and which is made part of the patent:

"First. Having thus fully described my invention, I wish it to be understood that I do not claim the use of the galvanic current, or current of electricity, for the purpose of telegraphic communications, generally; but what I specially claim as my invention and improvement, is making use of the motive power of magnetism, when developed by the action of such current or currents, substantially as set forth in the foregoing description of the first principal part of my invention, as means of operating or giving motion to machinery, which
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may be used to imprint signals upon paper or other suitable material, or to produce sounds in any desired manner, for the purpose of telegraphic communication at any distances.

The only ways in which the galvanic currents had been proposed to be used, prior to my invention and improvement, were by bubbles resulting from decomposition, and the action or exercise of electrical power upon a magnetized bar or needle; and the bubbles and deflections of the needles, thus produced, were the subjects of inspection, and had no power, or were not applied to record the communication. I therefore characterize my invention as the first recording or printing telegraph by means of electro-magnetism.

There are various known modes of producing motion by electro-magnetism, but none of these had been applied prior to my invention and improvement, to actuate or give motion to printing or recording machinery, which is the chief point of my invention and improvement.

Second. I also claim as my invention and improvement, the employment of the machinery called the register or recording instrument, composed of the train of clock wheels, cylinders, and other apparatus, or their equivalent, for removing the material upon which the characters are to be imprinted, and for imprinting said characters substantially as set forth in the foregoing description of the second principal part of my invention.

Third. I also claim, as my invention and improvement, the combination of machinery herein described, consisting of the generation of electricity, the circuit of conductors, the contrivance for closing and breaking the circuit, the electro-magnet, the pen or contrivance for marking, and the machinery for sustaining and moving the paper, altogether constituting one apparatus *of telegraphic machinery, which I denominate the American Electro-Magnetic Telegraph.

Fourth. I also claim as my invention, the combination of two or more galvanic or electric circuits, with independent batteries, substantially by the means herein described, for the purpose of obviating the diminished force of electro-magnetism in long circuits, and enabling me to command sufficient power to put in motion registering or recording machinery at any distance.

Fifth. I claim, as my invention, the system of signs, consisting of dots and spaces, and of dots, spaces, and horizontal lines, for numerals, letters, words or sentences, substantially as herein set forth and illustrated, for telegraphic purposes.

Sixth. I also claim as my invention the system of signs, consisting of dots and spaces, and of dots, spaces and horizontal lines, substantially as herein set forth and illustrated, in combination with machinery for recording them, as signals for telegraphic purposes.

Seventh. I also claim as my invention, the types or their equivalent, and the type rule and post rule, in combination with the signal lever or its equivalent, as herein described, for the purpose of breaking and closing the circuit of galvanic or electric conductors.

Eighth. I do not propose to limit myself to the specific machinery, or parts of machinery,

described in the foregoing specifications and claims; the essence of my invention being the use of the motive power of the electric or galvanic current, which I call electro-magnetism, however developed, for making or printing intelligible characters, letters or signs, at any distances, being a new application of that power, of which I claim to be the first inventor or discoverer."

1846 Patent Re-issued 1848.

This patent is the re-issue of the patent of April, 1846, and is for a new and useful improvement in "electro magnetic telegraphs." It grants the exclusive use to the patentee for the term of fourteen years, from the eleventh day of April, 1846, and refers in the common form to the schedule annexed for the specifications of the improvement. This schedule is in these words:

"Be it known that I, Samuel F. B. Morse, have invented a new and useful improvement in the Electro-Magnetic Telegraph, and I do hereby declare that the following is a full, clear, and exact description of the object, construction, and operation thereof, reference being had to the accompanying drawings, and making part of the same
87*] *Object of the invention.

The original and final object of all telegraphing, is the communication of intelligence at a distance by signs or signals.

Various modes of telegraphing, or making signs or signals at a distance, have for ages been in use. The signs employed heretofore have had one quality in common. They are evanescent—shown or heard a moment, and leaving no trace of their having existed. The various modes of these evanescent signs have been by beacon fires of different characters, by flags, by balls, by reports of firearms, by bells heard from a distant position, by movables, arms from posts, &c.

I do not, therefore, claim to be the inventor of telegraphs generally. The electric telegraph is a more recent kind of telegraph, proposed within the last century, but no practical plan was devised until about sixteen years ago. Its distinguishing feature is the employment of electricity to effect the same general result of communicating intelligence at a distance by signs or signals.

The various modes of accomplishing this end by electricity have been,

The employment of common or machine electricity, as early as 1787, to show an evanescent sign by the divergence of pith balls.

The employment of common or machine electricity, in 1794, to show an evanescent sign by the electric spark.

The employment of voltaic electricity, in 1809, to show an evanescent sign by the evolution of gas bubbles, decomposed from solution in a vessel of transparent glass.

The employment of voltaic electricity in the production of temporary magnetism, in 1820, to show an evanescent sign by deflecting a magnet or compass needle.

The result contemplated from all these electric telegraphs was the production of evanescent signs or signals only.

I do not, therefore, claim to have first applied electricity to telegraphing for the purpose of showing evanescent signs and signals.

The original and final object of my telegraph is to imprint characters at any distance as signals for intelligence; its object is to mark or impress them in a permanent manner.

To obtain this end, I have applied electricity in two distinct ways. 1st. I have applied, by a novel process, the motive power of electro-magnetism, or magnetism produced by electricity, to operate machinery for printing signals at any distance. 2d. I have applied the chemical effects of electricity to print signals at any distance.

The apparatus or machine with which I mark or imprint *signs or letters for [*88 telegraphic purposes at a distance, I thus describe."

Here follows a description of the instruments, and of how they are employed. After which the patentee sums up, and specifies what he affirms he had invented, and desires to have secured to him by the grant, in these words:

"First. What I claim as my invention, and desire to secure by letters patent, is the employment, in a main telegraphic circuit, of a device or contrivance called the Receiving Magnet, in combination with a short local independent circuit or circuits, each having a register and register magnet, or other magnetic contrivances, for registering, and sustaining such a relation to the register magnet, or other magnetic contrivances for registering, and to the length of circuit of telegraphic line, as will enable me to obtain, with the aid of a galvanic battery and main circuit, and the intervention of a local battery and local circuit, such motion or power for registering as could not be obtained otherwise without the use of a much larger galvanic battery, if at all.

Second. I also claim as my invention, the combination of the apparatus called the self-stopping apparatus, connected with the clock work by the register, for setting said register in action, and stopping it with the pen lever F, as herein described.

Third. I also claim as my invention the combination of the point or points of the pen and pen lever, or its equivalent, with the grooved roller, or other equivalent device, over which the paper, or other material suitable for marking upon, may be made to pass for the purpose of receiving the impression of the characters; by which means I am enabled to mark or print signs or signals upon paper or other fabric, by indentation, thus dispensing with the use of coloring matter for marking, as specified in my letters patent of January 15th, 1846."

But the Telegraph itself, constructed according to the specifications of the patents, and in actual use, having been exhibited and given in proof, it is necessary, in order to put on paper the case which has been heard, that the instruments themselves be described.

DESCRIPTION OF THE TELEGRAPH.

It consists of,

1. The main circuit with its battery.
2. The key with the signal lever.
3. The local circuit with its battery.
4. The receiver, or mutator, with its electro-magnet.
5. The register, with its electro-magnet, pen lever, and grooved roller.

*It will be observed, that in this de. [*89 scription the relay magnet, as it was called, by

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which the combination of the circuit was originally effected, will not be found. It has been substituted by the subsequently invented receiver or mutator, on the same principle by which the main circuit is combined with each local circuit, or circuit in the telegraph office, whereby sufficient motive power is obtained to work the register. And,

That the port rule is also absent. It has been supplied by the improved register and pen lever, with its pen point and grooved rollers in connection. And,

It will be observed that the telegraphic dictionary has been also abandoned; and that the characters indented by the pen constitute an alphabet, differing in little else beside the figure of the letters from the common alphabet; and which is therefore read, not by a peculiar dictionary, but as common manuscript.

Nothing occurred in the case which makes it necessary to describe the self-stopping apparatus.

The main circuit of conductors, in connection with the principal battery, and key with its pen lever, which operates upon it, may be thus described.

It is begun in a plate of copper buried in the ground under the first telegraph office, and consists of these conductors:

A copper wire, having one end inserted in the copper plate, and the other in one pole of the galvanic battery, in a room of the office.

Another copper wire, with one end inserted in the other pole of the battery, and after passed through the rooms as may be convenient, with the other end of it extended up and inserted in and under one end of a short bar of brass, which is part of the instrument called the key.

We will here stop the description of the circuit of conductors, and describe this instrument.

Key with its Signal Lever.

This key consists of a cross formed of two flat bars of brass, about two or three inches long, screwed down upon the table, or upon a pedestal fixed upon the table; on each end of the arms of this cross there rise similar bars, after the manner of the sights of a surveyor's compass, about a couple of inches high. These support the fulcrum of the signal lever. This fulcrum of the lever is a steel cylinder extended between the two upright bars on the arms of the cross, with its ends terminating in axles extending through the bars near the upper ends, so that it may be turned when the lever is worked.

The lever is a bar of brass fixed with its center upon this fulcrum. *It is horizontal when at rest, and is kept in its position by a spring fixed under its fulcrum and extended back. A sort of button of brass is fixed immediately under the front end of the lever, and in proximity to the foot of the cross; so that when the lever is pressed down it is brought into contact with it and the end of a wire which is extended up through its center. This button is so contrived that, by a short lever extended from it, it is turned from or brought into contact with the cross. We now return to the circuit of conductors.

It is in and under the head of this cross that the wire from the battery was inserted; and this bar constitutes the next conductor.

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There are now here two conductors—one the conductor when intelligence is not being transmitted from the office, and the other when intelligence is being transmitted from the office. When intelligence is not being transmitted, then, after this bar of the key, the button having the brass wire through its center is the conductor. But when the position of the button is so changed that it is not in contact with this bar, then it is not the next conductor, and the right and left hand arms of the cross and the fulcrum are the next conductors, and the signal lever pressed down and brought into contact with the button, is the conductor to it and the wire projecting up through it.

When intelligence is to be transmitted from the office, the operator changes the position of the button, brings it out of contact with the foot of the cross, and the circuit at this point is broken, and the lever constituted the conductor next the button towards the key. The operator has then command of the circuit for his operation. By pressing the key down into contact with the button, the circuit is closed; and the pressure off, the circuit is broken. This produces the corresponding action of the pen lever, which registers the intelligence he sends off.

We now return to the circuit of conductors.

The wire extended from the button is the next conductor. It is copper, and is extended down under the table, and then up through it near the pedestal of the receiving magnet, situated on the table at a convenient distance from the key, and inserted in a brass standard near its upper end, which stands on one corner of the pedestal of this receiver, which will be presently described. And,

This standard is the next conductor.

The next is a small brass wire, extending from the foot of this standard up through the pedestal into proximity to the horseshoe magnet. This wire, prolonged and covered with silk, is wound around the shanks of the horseshoe, first around the one end, and then around the other, and made to constitute *the [*91 helices of the magnet; after which it is returned down through the pedestal, and inserted in the foot of another standard on another corner of the pedestal of the magnet. And,

This standard is the next conductor.

The next, is the brass wire with one end inserted into the standard near its upper end, and the other, after its extension out of the office, united to the iron wire on the posts.

This iron wire is the next conductor to the next office. On entering this office, it is united to the end of a copper wire, which has its other end inserted in and under the head of the cross of the key in the office. Thence the circuit is continued through the instruments of this office as in the first office, when it is again extended out upon the posts to another office; and thus through any number, and over any distance, to the last office of the circuit. It is then, after being passed through the instruments of this office, as in the other offices, extended down and fastened in a plate of copper in the ground.

The earth, it is said, constitutes the conductor from this copper plate to the other, from which we set out, and thereby the circuit is completed.

We will now return and describe the receiver, more properly called the mutator.

Receiving Magnet.

This magnet rests on the pedestal, which has been already mentioned, eight or ten inches long, and four or five broad, with the axis of its helices horizontal, and parallel to the sides of its pedestal, and with what corresponds to the front part of the horseshoe presented to the left, in proximity to the two standards we passed on the circuit.

It is kept in position by a brass bar extended across the helices, near the heels of the horseshoe, and pressed, and kept firmly upon them, by a screw extended down from either end, into the pedestal.

Its heels present themselves to a horizontal armature of a movable upright lever, within their attractive power; and which, it will be presently found, is one of the conductors of the local circuit.

This local circuit can now be described. It begins in a galvanic battery in the office, and consists of these things:

A copper wire, with one end inserted in one pole of the local battery in a room of the office, and the other end brought up through the table, and screwed into an upright brass bar or standard near its upper end, standing on the back right hand corner of the pedestal of the receiver.

The next conductor is this standard. And then,

A copper wire extended from its lower end 92*] under the pedestal *and there connected with a steel cylinder; which constitutes the fulcrum, on which stands the movable lever already mentioned in describing the main circuit.

This cylinder is horizontal, parallel to the heels of the magnet, but below them, is fixed in a channel across the pedestal; and has its ends in sockets, in which it turns and allows the lever which stands upon it, to move forward and back. And,

This lever is the next conductor.

It stands perpendicular, and is held in this position by a spiral spring extended from behind it and holding it back against the end of a screw, projected in like manner against its back; but which, when the armature, fixed across it, is attracted by the heels of the magnet, readily consents to its motion forward, to meet near its upper end another conductor, which will be presently described, and when the attraction is not, as quickly withdraws it to its former position.

We will now return back to the local battery, and commence at its other pole.

The first conductor thence, in this direction, is another copper wire.

This has one end inserted in the battery, and after being extended around, according to the situation of the room, has its other end brought up under the table near the electro-magnet of the register, where it is united to a small wire, which is the next conductor.

It is prolonged and wound on the horseshoe bar, in like manner with the wire on the main circuit, and made to constitute the helices of this magnet, and then has its other end fastened to a large wire. And,

This wire is the next conductor.

It is extended under the table, and afterwards

brought up, and has its other end screwed into a brass standard, upon the right hand front or remaining corner of the pedestal of the receiver. And this standard is the next conductor.

It is succeeded by a brass wire, extended from its lower end under the pedestal, and brought up between the helices of the receiving magnet, to the under side of the horizontal bar, which we lately left extended across the helices near the heels of the magnet, and there inserted in this bar.

Immediately over this end of this wire, and fixed upon this horizontal bar, stands a perpendicular bar, which is the next conductor. And,

The last conductor, is a brass screw, which passed through this bar, near its upper end, and extended out horizontally from it, presents its platina point to the movable lever, which we lately left in describing the conductors from the other end of the *battery, ready to [*93 close the circuit whenever attracted forward by the heels of the magnet presented to its armature below.

When, by the act of the operator on his signal key, the main circuit is complete or "closed," as it is called, the horseshoe is instantly an electro-magnet, and the armature of the lever attracted towards, not to, its heels, the lever is brought into contact with the platina point of the brass screw, presented to its front, and the local circuit of conductors is "closed;" and the horseshoe whereon we just said the wire of the local circuit had formed the helices, being converted into an electro-magnet, for the register, instantly acts upon the pen lever, in the register, in the mode we will presently describe, and records the intelligence which the operator proposed.

This done, and the main circuit broken, the spiral spring behind the lever, which had before readily assented to its attraction forward, as quickly withdraws it to its former position, and awaits another signal.

Register, Pen Lever and Grooved Rollers.

The register consists of a horseshoe magnet, the pen lever, a spiral spring, the grooved rollers, and the clock work, all fixed in a proper frame upon a brass pedestal ten or twelve inches long, and about half that breadth, fixed down upon the table at a convenient distance from the other instruments.

The magnet is fixed on the right hand end of the pedestal, the axis of the helices perpendicular, and the heels upwards, presenting themselves to an armature of the pen lever within their attraction above.

The pen lever is a brass bar. It rests in a horizontal position, with one end extended to the right, across the heels of the magnet, where its armature is fixed across it, and the other extended to the left towards the rollers.

It has for its fulcrum a steel cylinder, fixed across its center, with its ends in sockets in the framework. It is held to the position by the spiral spring, extended from the lower end of a bar fixed in, and extended down from the center of the fulcrum and thence extended back toward the magnet, and made fast, which, by its facile extension, instantly assents to the action of the lever with its pen; and as quickly withdraws it.

The rollers are fixed each with its axis in the framework, one with its axis on a level with the lever, the other with its axis over the line

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of the periphery next the lever of the lower roller.

The pen, fixed upon this end of its lever, and projected forward, presents its point upwards, in proximity to the center of this upper roller, in proper direction for action upon the paper in its transit over it, when cast up by the attraction, down, of the other end of the magnet.

94*) *The paper is guided from above this upper roller, and passed around it, and between the two rollers, and by their revolution is drawn forward at a rate suited to the action of the pen.

There is around each roller, under the paper and exactly opposite the pen, a narrow groove of such depth that the pen point, in making its indentations on the paper, does not extend to the metal of the roller, whereby its point is preserved, and the line of characters on the paper is kept from contact with either roller, and protected from being dimmed by the compression of the paper, in its transit between them.

The revolution of the rollers is by the clock work on the left.

The rollers having been put in motion, the electro-magnet charged, the armature with that end of the lever attracted down, and the other cast up, the pen with its point indents a character upon the paper, and the magnet discharged, the spiral spring has brought down the pen, and holds it in position for a repetition of the act.

But we will return to the signal key, or correspondent, stationed in the distant office whence the intelligence is to be transmitted, and follow it in its course and see it recorded.

The operator, having been put in possession of the intelligence, and broken the circuit in the lower conductors of his key, and thereby made his signal lever a conductor of the main circuit, applies his hand upon the signal lever and presses it down upon the conductor below, the main circuit is instantly closed, the horseshoe within the helices of this main circuit is a magnet, the armature has drawn its movable lever into contact with the platina point, the local circuit is closed, the horseshoe within the helices of this circuit is an electro-magnet, the armature of the pen lever is upon its heels, the other end of the lever has cast up the pen, and indented an intelligible character upon the paper.

The operator's hand taken off, and the main circuit is broken, the receiver within it is not a magnet, the movable lever has been withdrawn, by its spring, from the platina point, the local circuit is broken, the register magnet is no longer a magnet, and the pen has been sprung down from the paper, and stands ready to repeat and add another character of the intelligence.

The operator's hand upon his lever, and another character is added. And,

These are the characters, recorded, and how they are read: -- is A, ---- is B, - - is C, - - - is D, - is E, - - - F, - - - is G, - - - is H, - - is I, - - - is J, - - - is K, - - - is L, - - is M, - - is N, - - is O, - - - is P, - - - is Q, - - - is R, - - - is S, - is T, - - - is U, - - - is V, - - - is W, - - - is X, - - - is Y, - - - is Z, - - - is &, and such is the alphabet.

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*Then --- is 1, --- is 2, --- [*95
--- is 3, --- is 4, --- is 5, ---
is 6, --- is 7, --- is 8, --- is 9,
--- is 0; and these are the numerals.

The holding down the lever an instant indented one dot (.), the holding it longer made a dash (—) of a length corresponding to the time. The dots were made at distances corresponding to the time the hand was held off the lever. And,

This is the Telegraph and its operations before us.

Judge Monroe then proceeded to examine the law and evidence upon all other points in the case, and then passed the following decree:

Decree of the Circuit Court, 12th November, 1849.

It is found and adjudged by the court that the letters patent of the United States to the complainant, Samuel F. B. Morse, for his invention of a new and useful improvement in the mode of communicating information by signals, by the application of electro-magnetism, originally issued June 20th, 1840, but re-issued on the 15th day of January, 1846, and afterwards finally re-issued on the 18th of June, 1848, in their bill exhibited and read on the hearing of this cause, are valid and effectual acts of the government; and that the complainants are thereby, and by the assignments by them in their bill alleged, vested with the exclusive rights thereby granted. And,

It is found and adjudged by the court, that the defendants have, in those rights, disturbed the complainants as in their bill alleged: that they, the defendants, after the grant thereof to the patentee, Samuel F. B. Morse, and his assignments to his co complainants, and after the final re issue of the letters patent above mentioned, did, within the district of Kentucky and elsewhere, wrongfully construct, and unlawfully employ, a telegraph, consisting of combined circuits of electricity, worked by the motive power of electro magnetism, substantially the same plan of construction and principle of operation with the telegraph of the said Morse in his letters patent described and specified; and by which intelligence, which was in one station, was, by the defendants, transmitted to other distant stations, by making thereat a permanent record thereof in the alphabetical characters described and specified in the letters patent to the said Morse, and did thereby violate and infringe the exclusive rights so granted by the United States to him, the said Samuel F. B. Morse, and invested in the complainants as above found; and it is considered that the injunctions heretofore granted herein was rightfully awarded and enforced.

It appears, however, by the document itself, read by the complainants *among their [*96 proof, that the patentee, Samuel F. B. Morse, had, on the 30th day of October, 1838, prior to the issuing of his original patent, awarded by the United States for his original invention, obtained of the government of France a patent for the invention of his Electro-Magnetic Telegraph, in principle and plan of construction the same with that described in his said letters patent so afterwards obtained of the United States. And,

It seems to the court that the exclusive right of the complainant, in respect to his original in-

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vention, is limited by this foreign patent to the term of fourteen years from its date.

It is therefore ordered, adjudged and decreed, that the defendants, their servants and agents be, and they are hereby enjoined and commanded that they, and each of them, do still desist, and shall for and during the term of fourteen years from the 30th day of October, 1838, altogether refrain, from all and every use of the Electro-Magnetic Telegraph, which the complainants in their bill charged was, by the defendants, employed in violation of their rights, which, in its several forms is described in the proofs of the cause, and denominated by the witness in the depositions, and by defendant, O'Reilly, in his answer, the Columbian Telegraph, in the transmission of intelligence which is in one place to another distant place, by making thereat a permanent record in the alphabetical characters in the patent of Samuel F. B. Morse for his original invention specified; or by making thereat, with the action of the instrument which would make such characters, alphabetical sounds, and out of them composing such characters or words in the ordinary alphabet; and from the using of such telegraph, or any part thereof, in any other mode, in violation of the exclusive rights so granted by the United States and vested in the complainants; and that they shall, for and during the said term of fourteen years, refrain from making, constructing, or vending to be used within the district of Kentucky, any other telegraph consisting of combined circuits of electricity, worked by the motive power of electro-magnetism, on the plan and principle of the Electro-Magnetic Telegraph of the complainant, Morse, described and specified in his letters patent, by which intelligence shall or may be transmitted by making, in the mode above stated, a record thereof in the said alphabetical characters of the said Samuel F. B. Morse, or in an alphabet formed on the same plan and principle, or by making in such mode sounds, whereof such characters shall or may be composed, in the violation and infringement of the exclusive right of the complainants as they are above adjudged.

It is also found and adjudged by the court, that the letters patent of the United States to **97***] Samuel F. B. Morse, for his invention *of "a new and useful improvement in electro-magnetic telegraph," originally issued on the 11th day of April, 1846, but afterwards re-issued on the 18th of June, 1848, with the amended specifications of the improvements invented, which is in the bill of the complainants exhibited, and made part of the record of this cause, is a valid and effectual act of the government; and that the complainants are thereby, and by the assignments in their bill alleged, vested with the exclusive rights thereby granted. And,

It is found and adjudged, that the defendants have disturbed the complainants in these their exclusive rights. It is found that the defendants, before and after the issuing of the said last-mentioned letters patent of the 18th June, 1848, in renewal of the said former patent, did, within the district of Kentucky and elsewhere, wrongfully cause to be constructed, and did unlawfully use and employ as a part of the Electro-Magnetic Telegraph, denominated the Columbian Telegraph, an instrument

denominated by them the mutator, in plan of construction, principle of operation, and in the purpose accomplished by it, substantially the same with the improvement described and specified in the said last-mentioned letters patent to the complainant, Morse, which consists of the contrivance called, in his schedule to his patent, the receiving magnet, and which is by this denomination described and specified under the head of the first claim of the improvements in his schedule. And,

That they did, in like manner, cause to be constructed, and unlawfully employ, as another part of the said Columbia Telegraph, certain other apparatus and instruments and combinations thereof, in plan of construction, principle of operation, and purpose, substantially the same with the improvements of the register invented by him, the said Samuel F. B. Morse, and in the schedule described and specified as the third thing claimed by him as his invention, consisting of the combination of the point of the pen and pen lever, with the grooved roller over which the paper is passed, and receives the indentations of his alphabetical characters, and whereby is dispensed with the use of the coloring material, as specified in the patent for the original invention of the telegraph, first above mentioned, issued and bearing date January 15th, 1846. And,

It is found that the said telegraph, called the Columbia Telegraph, containing and consisting in part of the said two improvements of the said Morse, described and specified in his said last-mentioned letters patent, was by the defendants employed, before and after the last issue of the said last-mentioned letters patent, within the district of Kentucky and elsewhere, in the transmission of intelligence in the mode above mentioned, *in violation and in- [*98]fringement of the exclusive right so granted by the United States by these last-mentioned letters patent, and held by the complainants as by them alleged and by the court adjudged.

It is therefore ordered and adjudged and decreed, that the defendants, their servants and agents, be, and they are hereby enjoined and commanded that they and each of them do still desist, and shall forever, and during the term of fourteen years from the eleventh day of April, eighteen hundred and forty-six, altogether refrain from all and every use and employment of the above mentioned telegraphic instruments, denominated the mutator, in the combination with the other above-described instruments of such telegraph, or in any other combination on the same plan and principle, in the transmission of intelligence in the district of Kentucky. And,

That they do still desist, and for and during the said term of fourteen years, refrain from all and every such employment in the transmission of intelligence within the district of Kentucky, of the above-mentioned improvement of the complainant, Morse, in the register of his telegraph, whereby is accomplished the making of his alphabetical characters before mentioned, described and specified by indentation instead of by coloring matter, in violation of the exclusive rights of complainants, by them held under the aforesaid letters patent as above adjudged. And,

That the defendants shall, for and during the

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said term of fourteen years from the said eleventh day of April, eighteen hundred and forty-six, refrain from constructing or vending to be employed in such transmission of intelligence, within the district of Kentucky, any of the above-mentioned improvements, either the instrument denominated the mutator, the improved register of said Morse, or any other of the improvements in the Electro-Magnetic Telegraph, so described and specified in said letters patent as the invention of the said Samuel F. B. Morse, and whereof the exclusive right is granted him; and that they shall in no otherwise, for the term aforesaid, violate, or in any wise infringe, the aforesaid rights of the complainants within said district of Kentucky. And,

It is ordered, that the complainants may have the proper writs of execution on what is above decreed.

(The decree then went on to provide for damages, which part is omitted.)

The defendants appealed from this decree.

The cause was argued in this court by *Messrs. Gillet and Chase* for the appellants, and *Messrs. Campbell and Harding*, of Philadelphia, and *Mr. Gifford*, of New York, for the appellees:

99*] *It is impossible for the reporter to do more than merely state the positions assumed by the respective counsel.

The counsel for the appellants contended.

First. Morse's patent of 1840 is void, because it runs fourteen years from the date of its issue, instead of that length of time from the date of his French patent.

Second. In construing a patent, and deciding what are the inventions patented thereby, the summing up is conclusive. Nothing is patented but what is expressly claimed, in the summing up, as the invention.

Third. What is described in a patent and not claimed, whether invented by the patentee or not, is dedicated to the public, and cannot be afterwards claimed as a part of his patent, in a re-issue or otherwise.

Fourth. A patent void in part is void in whole, except when otherwise provided by statute.

Fifth. An invention is not complete, so as to be patentable, or to bar the obtaining a patent by another inventor, until it is perfected and adapted to use.

Sixth. Where a patent is for a combination of parts, and not for the different parts composing the combination, the use of any of those parts less than the whole is not an infringement.

Seventh. Morse's patents of 1846 and 1848 are void, because he was not the first inventor of the things patented, or of substantial and material parts thereof.

Eighth. Morse's re-issued patents, dated June 13, 1848, are void, because he has not shown that the surrendered patents were inoperative or invalid for defective specification, or otherwise, so as to confer on the commissioner, jurisdiction to make such re-issues. The surrendered patents being set out, disprove any such jurisdiction.

Ninth. The patent of 1840, as secondly re-issued, is void, because the commissioner had no authority to accept a second surrender and make a second re-issue.

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Tenth. Morse's patent of 1840, as secondly re-issued, is void, because it is broader than the invention originally patented.

Eleventh. Morse's patent of 1846 is void.

1. Because material parts of it had been known and in public use before his application.

The first claim covers the inventions for connecting circuits used by Davy, Wheatstone, and Henry, in 1837.

2. Because the same was described by Henry in Silliman's Journal, and in the London Mechanics' Magazine, containing an account of Davy's invention; and by Vail, in giving Morse's and others.

3. Because the same invention, or a substantial part thereof, was patented by [*100 Wheatstone, Davy, and Morse himself, prior to his application for his patent of 1846.

This first claim in the re-issue of the patent of 1846, is the same thing as the fourth claim of the last re-issue of the patent of 1846.

The account given by Henry and Moss shows that Henry's, Wheatstone's, and Davy's, were the same as Morse's first claim of the re-issue of the patent of 1846.

Twelfth. Morse's re-issue of 1846 is void, because it is broader than the original.

1. He claims the employment of a receiving magnet, or its equivalent, in combination with a short, local, independent circuit, having a register magnet, to obtain power.

There is no such claim in the original. He there claimed the invention of the receiving magnet, or registering contrivances, which sustained certain relations, as would enable him to obtain power, &c., without mentioning a short, local, independent circuit. He now claims two short local circuits. The claim is materially enlarged.

2. His third claim is for a combination which includes the pen lever or "its equivalent," and for anything over which paper may be passed for the purpose of receiving the impression of characters, &c., by indentation on paper and other fabrics, dispensing with coloring matter, &c.

Here is a palpable enlargement of his claim.

3. His historical recital is an unauthorized addition, and not necessary to perfect his specification.

Thirteenth. The surrender and re-issue on account of a defective specification authorizes amendments only, and not changing the specification into a new one, nor does it authorize new claims.

Fourteenth. In the second re-issue of the letters of 1840, Morse patents a principle or effect, and not a machine, manufacture, or composition of matter, or an improvement upon either; and it is therefore void.

The counsel for the appellees considered the patents separately, viz.:

Patent of 1840. Re-issued 1848.

Patent of 1846. Re-issued 1848.

Patent of 1840. Re-issued 1848.

To this patent, and the claim under it, five defenses are presented:

It is alleged by the appellants—

I. That it is void by reason of an alleged error in date (*i. e.*, not date of French patent).

II. That the things claimed in the fifth, the sixth, and the eighth claims are not patentable.

101*] *III. That Morse was not the inventor of substantial parts of the improvement as claimed.

IV. That the description in the specification is insufficient.

V. That the appellants do not infringe.

(Each one of these heads was examined separately. The particular attention bestowed by the court to the following head, renders the insertion of the view of the counsel proper):

II. Are the 5th, 6th, 7th and 8th Claims Patentable?

1. Of the 5th and 6th. The fifth is a claim to the system of signs, composed of dots, spaces, and horizontal lines (susceptible of being variously combined, representing numerals, words, and sentences), for telegraphic purposes; being an improved instrumentality in the art of telegraphing by electricity or galvanism.

The sixth, is a claim to the art—consisting of the marking the signs, composed of dots, spaces and horizontal lines (susceptible of being variously combined, representing numerals, words and sentences), by closing and breaking a galvanic circuit more or less rapidly for telegraphing; combined with machinery to record them.

An art is patentable by the Act of 1836, and so is an improvement on it. (*Whittemore v. Cutter*, 1 Gall., 478; *Phillips on Patents*, 102, 110; *King v. Wheeler*, 2 Barn. & Ald., 349; *Crane v. Price*, Webster's P. C., 409; *Sch. Bk. v. Kneass*, 4 W. C. C., 9 and 12; *McClurg v. Kingsland*, 1 How., 204; Curtis on patents, sec. 37; *French v. Rogers*, Opinion Judges Grier and Kane; Pamphlet Kane, J., *Parker v. Hulme*, p. 7.)

The art is distinct from the means employed in its exercise; both may be, and under this patent are, patented.

II. Of the eighth claim.

This claim is declaratory, and is to the effect that, having been the first to conceive and carry into effect a plan for imprinting telegraphic characters by the power of electro-magnetism, he negatives the idea that the mere instrumentalities described in his patent constitute the whole of the invention claimed by him, or even the most important part thereof, or that he intended to surrender to the public the conception he had reduced to practical utility, should anybody else be able to devise other means for accomplishing the same end, by the use of the same power, but claims it as his property.

He who discovers a principle and devises one mode by which the same can be rendered practically useful, is entitled to a patent which shall protect him to the full extent of his invention and against all other devices for using it.

102*] *If Morse, therefore, was the first to discover that the power of electro-magnetism could be used for the purpose of recording telegraphic signs, and devised one practical mode for using it, he may, by a general claim, secure to himself the right of so applying it, as well as the particular devices by which he did so.

(London Jour. and Rep. Arts, 1850, p. 180; *Jupe v. Pratt*, Webster's P. C., 145, 146; For-

syth's Patent, Webster's P. C., 96, 97; *Crane v. Price*, Webster's P. C., 409, 410; *Park v. Little*, 8 Wash. C. C., 197.)

See the cases collected in Lund on Patents, Law Lib., Sept., 1851, p. 87, illustrating the proposition that the rights of the patentee are not restricted to the particular application or embodiment of his invention, but extend to the exclusion of other like applications.

(Judge Kane's opinion, *Blanchard's case*; Fr. Inst. Jour., 1847; and Pamphlet, *Parker v. Hulme*, Judge Kane's opinion.)

Patent of 1846. Re issued 1848.

The defenses suggested by the appellants to this patent are,

I. That the improvement is not sufficiently described, and that the improvement is not sufficiently discriminated.

II. That it is for the same invention that was patented to Morse in the patent of 1840.

III. That it was in use and on sale with patentee's consent, before his application for a patent.

IV. That Morse was not the inventor.

As to the 4th head, the counsel for the appellees contended that the following list was shown by the evidence to have been invented by Morse:

1. He was the first person who employed an electro-magnet placed in a long circuit for telegraphic purposes.

2. He was the first person who devised suitable machinery for recording, and adapted such machinery to an electro-magnet placed in a long galvanic circuit.

3. He was the first person who employed an electro-magnet placed in a long galvanic circuit to open and close another long galvanic circuit for telegraphic purposes.

4. He was the first person who employed an electro-magnet placed in a long galvanic circuit, to open and close a short local circuit at a distance for telegraphic purposes.

5. He was the first person who placed in the course of a long galvanic circuit at various distances apart, a series of electro-magnets, to open and close, at one and the same time, a corresponding series of short recording circuits, by means of which arrangement an operator at one station could simultaneously record at a series of distant telegraphic stations.

*6. He was the first person who [*103 adapted to an electro-magnet placed in a long galvanic circuit, suitable machinery for recording the establishment and duration of a galvanic current through such a long galvanic current.

7. He was the first person who devised a process or mode of establishing and continuing at determinate intervals of time a galvanic current through a circuit of conductors, and of recording the establishment of such current in dots and lines.

8. He was the first person who devised a system of signs formed of the combination of dots and lines, and so applicable to the above process of recording, as to render it available for representing at a distance, letters, words and sentences.

9. He was the first person who employed electro-magnetism, when developed in the manner and by the means specified, to produce distinguishable signs for telegraphing.

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10. He was the first person who adapted to an electro-magnet a lever with an adjustable reacting spring, and adjustable stops for limiting the play of such armature, and thus formed a receiving electro-magnet, susceptible of nice regulation so as to operate equally with the varying force of the galvanic currents in a long or main circuit.

11. He was the first person who combined

such an electro-magnet in a long circuit with a short recording circuit, to be opened and closed by such electro-magnet.

12. He was the first person who devised and constructed an apparatus or machine for telegraphing, consisting of the several following parts, sustaining to each other the several following relations, and performing the several following functions respectively:

1. A main circuit,	which consists of	a long conductor extending through several stations,	the function of which is	to transmit the galvanic current through its whole length whenever it is closed.
2. A main battery series,	"	a number of cups arranged along the main conductor,	"	to supply the main conductor with a current sufficient to work the electro-magnets in its course.
3. Operating keys,	each of which consists of	a small metallic lever,	"	to break and close the main circuit.
4. A series of receiving magnets,	"	an electro magnet, with lever and re-acting spring,	"	to close the office circuit when a current passes through the main circuit.
5. Adjusting screws,	"	movable screws to regulate force of re-acting spring and play of lever,	"	to render receiving magnets sensitive to varying force of main current.
6. *Office circuits,	"	a circuit of conductors limited to each office,	"	to transmit the [*104 power to mark the paper.
7. Office battery series,	"	a certain number of Grove cups at each station,	"	to generate and supply the office circuit with a current of greater force than the main circuit current.
8. Marking apparatus,	"	a fine-pointed piece of iron, pen lever, and grooved roller,	"	to indent dots and lines upon paper.
9. Registers,	"	a series of clock work moved by a weight regulated by a fly,	"	to move the paper uniformly under the point of the pen.
10. Office magnets,	"	an electro-magnet,	"	1. to develop the power by which the pen marks in the groove of a roller. 2. To produce audible, distinguishable sounds.
11. Certain process,	"	in establishing, continuing and interrupting a galvanic current through the main circuit at determinate intervals,	"	to record dots and lines at one or many distant stations at the will of a distant operator. 1. When applied to the record, to render such record intelligible.
12. A system of signs,	"	dots and lines to represent the letters of the alphabet and numerals,	"	2. When applied to the sounds of the office magnet, to render those sounds intelligible.

13. The art of recording dots and lines at a distance for telegraphing.

The counsel then examined the question of infringement of each patent, separately, and concluded with the following:

The Appellants infringe the Patents of 1840 and 1846 jointly considered.

It is proper to consider the claims of the patents together, and in connection with the specifications as well as separately, in order to secure the real invention to the patentee.

The joint effect of the several claims of the first patent, apart from the specific things

claimed in each, makes it a patent also for Morse's new art, process, and system of telegraphing, by recording the variable duration of the galvanic current, in dots and lines.

The second patent is for an improvement in the means by which that art was carried into effect.

The two together constitute the art, process, system and *means of telegraphing as [*105 improved; or, in other words, *the Telegraph*.

This whole system or telegraph so jointly considered, as used by the appellants, in all its main features, is copied from that of the appellees. That it is so, will appear from the follow-

ing table, showing the several parts of the apparatus used by each, and their several relations and functions.

The appellants and appellees agree in employ-

ing an apparatus for telegraphing, consisting of the following parts, sustaining to each other the several following relations, and performing the several following functions, respectively:

1. A main circuit,	which consists of	a long conductor extending through several stations.	the function of which is	to transmit the galvanic current through its whole length, whenever it is closed.
2. A main battery series,	"	a number of cups arranged along the main conductor,	"	to supply the main conductor with a current sufficient to work the electro-magnets in its course.
3. Operating keys,	each of which consists of	a small metallic lever,	"	to break and close the main circuit.
4. A series of receiving magnets,	"	an electro-magnet, with lever, and re-acting spring,	"	to close the office circuit when a current passes through main circuit.
5. Adjusting screws,	"	movable screws to regulate force of re-acting spring and play of lever,	"	to render receiving magnet sensitive to varying force of main currents.
6. Office circuits,	"	circuit of conductors limited to each office,	"	to transmit the power to mark the paper.
7. Office battery series,	"	a certain number of Grove cups at each station,	"	to generate and supply the office circuit with a current of greater force than the main circuit current.
8. A pen point, pen lever, and grooved lever,	"	a fine pointed piece of iron, lever and grooved roller,	"	to indent dots and lines upon paper.
9. Registers,	"	a series of clock work moved by a weight regulated by a fly,	"	to move the paper uniformly under the point of the pen.
10. Office magnets,	"	an electro-magnet,	"	1. To develop the power by which the pen marks in the groove of a roller. 2. To produce audible distinguishable sounds.
*11. A certain process,	which consists in	establishing, continuing and interrupting a galvanic current through main circuit at determinate intervals,	"	to record dots and [*108 lines at one or many distant stations, at the will of a distant operator.
12. A system of signs,	"	of dots and lines to represent the letters of the alphabet and numerals.	"	1. When applied to the record to render such record intelligible. 2. When applied to the sounds of the office magnet, to render those sounds intelligible.

Mr. Chief Justice Taney delivered the opinion of the court:

In proceeding to pronounce judgment in this case, the court is sensible, not only of its importance, but of the difficulties in some of the questions which it presents for decision. The case was argued at the last term, and continued over by the court for the purpose of giving it a more deliberate examination. And since the continuance, we have received from the counsel on both sides printed arguments, in which all of the questions raised on the trial have been fully and elaborately discussed.

The appellants take three grounds of defense. In the first place, they deny that Professor Morse was the first and original inventor of the Electro-Magnetic Telegraphs described in his two re-issued patents of 1848. Second, they insist that if he was the original inventor, the patents under which he claims have not been issued conformably to the Acts of Congress, and do not confer on him the right to the exclusive

use. And third, if these two propositions are decided against them, they insist that the Telegraph of O'Reilly is substantially different from that of Professor Morse, and the use of it, therefore, no infringement of his rights.

In determining these questions we shall, in the first instance, confine our attention to the patent, which Professor Morse obtained in 1840, and which was re-issued in 1848. The main dispute between the parties is upon the validity of this patent; and the decision upon it will dispose of the chief points in controversy in the other.

In relation to the first point (the originality of the invention), many witnesses have been examined on both sides.

It is obvious that, for some years before Professor Morse made his invention, scientific men in different parts of Europe were earnestly engaged in the same pursuit. Electro-magnetism itself was a recent discovery, and opened to them a new and unexplored field for their labors,

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and minds of a high order were engaged in developing its power and the purposes to which it might be applied.

107*] *Professor Henry, of the Smithsonian Institute, states in his testimony that, prior to the winter of 1819-20, an electro-magnetic telegraph—that is to say, a telegraph operating by the combined influence of electricity and magnetism—was not possible; that the scientific principles on which it is founded were until then unknown; and that the first fact of electro-magnetism was discovered by Oersted, of Copenhagen, in that winter, and was widely published, and the account everywhere received with interest.

He also gives an account of the various discoveries, subsequently made from time to time, by different persons in different places, developing its properties and powers, and among them his own. He commenced his researches in 1828, and pursued them with ardor and success, from that time until the telegraph of Professor Morse was established and in actual operation. And it is due to him to say that no one has contributed more to enlarge the knowledge of electro-magnetism, and to lay the foundations of the great invention of which we are speaking, than the professor himself.

It is unnecessary, however, to give in detail the discoveries enumerated by him—either his own or those of others. But it appears from his testimony that very soon after the discovery made by Oersted, it was believed by men of science that this newly-discovered power might be used to communicate intelligence to distant places. And before the year 1823, Ampere, of Paris, one of the most successful cultivators of physical science, proposed to the French Academy a plan for that purpose. But his project was never reduced to practice. And the discovery made by Barlow, of the Royal Military Academy of Woolwich, England, in 1825, that the galvanic current greatly diminished in power as the distance increased, put at rest, for a time, all attempts to construct an electro-magnetic telegraph. Subsequent discoveries, however, revived the hope; and in the year 1832, when Professor Morse appears to have devoted himself to the subject, the conviction was general among men of science everywhere that the object could, and sooner or later would be, accomplished.

The great difficulty in their way was the fact that the galvanic current, however strong in the beginning, became gradually weaker as it advanced on the wire; and was not strong enough to produce a mechanical effect, after a certain distance had been traversed. But, encouraged by the discoveries which were made from time to time, and strong in the belief that an electro-magnetic telegraph was practicable, many eminent and scientific men in Europe as well as in this country, became deeply engaged in endeavoring to surmount what appeared to be the chief obstacle to its success. And in this **108*]** state of *things it ought not to be a matter of surprise that four different magnetic telegraphs, purporting to have overcome the difficulty, should be invented and made public so nearly at the same time that each has claimed a priority; and that a close and careful scrutiny of the facts in each case is necessary to decide between them. The inventions were

so nearly simultaneous, that neither inventor can be justly accused of having derived any aid from the discoveries of the other.

One of these inventors, Doctor Steinheil, of Munich, in Germany, communicated his discovery to the Academy of Science in Paris, on the 19th of July, 1838, and states in his communication, that it had been in operation more than a year.

Another of the European inventors, Professor Wheatstone, of London, in the month of April, 1837, explained to Professors Henry and Bache, who were then in London, his plan of an electro-magnetic telegraph, and exhibited to them his method of bringing into action a second galvanic circuit, in order to provide a remedy for the diminution of force in a long circuit; but it appears, by the testimony of Professor Gale, that the patent to Wheatstone and Cooke was not sealed until January 21, 1840, and their specification was not filed until the 21st of July, in the same year; and there is no evidence that any description of it was published before 1839.

The remaining European patent is that of Edward Davy. His patent, it appears, was sealed on the 4th of July, 1838, but his specification was not filed until January 4, 1839; and when these two English patents are brought into competition with that of Morse, they must take date from the time of filing their respective specifications. For it must be borne in mind that, as the law then stood in England, the inventor was allowed six months to file the description of his invention after his patent was sealed; while, in this country, the filing of the specification is simultaneous with the application for patents.

The defendants contend that all, or at least some one of these European telegraphs, were invented and made public before the discovery claimed by Morse; and that the process and method by which he conveys intelligence to a distance is substantially the same, with the exception only of its capacity for impressing upon paper the marks or signs described in the alphabet he invented.

Waiving, for the present, any remarks upon the identity or similitude of these inventions, the court is of opinion that the first branch of the objection cannot be maintained, and that Morse was the first and original inventor of the telegraph described in his specification, and preceded the three European inventions relied on by the defendants.

*The evidence is full and clear, that, [***109** when he was returning from a visit to Europe, in 1832, he was deeply engaged upon this subject during the voyage; and that the process and means were so far developed and arranged in his own mind, that he was confident of ultimate success. It is in proof that he pursued these investigations with unremitting ardor and industry, interrupted occasionally by pecuniary embarrassments; and we think that it is established, by the testimony of Professor Gale and others, that early in the spring of 1837, Morse had invented his plan for combining two or more electric or galvanic circuits, with independent batteries for the purpose of overcoming the diminished force of electro-magnetism in long circuits, although it was not disclosed to the witness until afterwards; and

that there is reasonable ground for believing that he had so far completed his invention, that the whole process, combination, powers and machinery, were arranged in his mind, and that the delay in bringing it out arose from his want of means. For it required the highest order of mechanical skill to execute and adjust the nice and delicate work necessary to put the telegraph into operation, and the slightest error or defect would have been fatal to its success. He had not the means at that time to procure the services of workmen of that character; and without their aid no model could be prepared which would do justice to his invention. And it moreover required a large sum of money to procure proper materials for the work. He, however, filed his *caveat* on the 6th of October, 1837, and, on the 7th of April, 1838, applied for his patent, accompanying his application with a specification of his invention, and describing the process and means used to produce the effect. It is true that O'Reilly, in his answer, alleges that the plan by which he now combines two or more galvanic or electric currents, with independent batteries, was not contained in that specification, but discovered and interpolated afterwards; but there is no evidence whatever to support this charge. And we are satisfied, from the testimony, that the plan, as it now appears in his specification, had then been invented, and was actually intended to be described.

With this evidence before us, we think it is evident that the invention of Morse was prior to that of Steinheil, Wheatstone, or Davy. The discovery of Steinheil, taking the time which he himself gave to the French Academy of Science, cannot be understood as carrying it back beyond the months of May or June, 1837. And that of Wheatstone, as exhibited to Professors Henry and Bache, goes back only to April in that year. And there is nothing in the evidence to carry back the invention of Davy beyond the 4th of January, 1839, when [110*] his specification *was filed, except a publication said to have been made in the London Mechanics' Magazine, January 20, 1838; and the invention of Morse is justly entitled to take date from early in the spring of 1837. And in the description of Davy's invention, as given in the publication of January 20, 1838, there is nothing specified which Morse could have borrowed; and we have no evidence to show that his invention ever was or could be carried into successful operation.

In relation to Wheatstone, there would seem to be some discrepancy in the testimony. According to Professor Gale's testimony, as before mentioned, the specification of Wheatstone and Cook was not filed until July 21, 1840, and his information is derived from the London Journal of Arts and Sciences. But it appears, by the testimony of Edward F. Barnes, that this telegraph was in actual operation in 1839. And, in the case of *The Electric Telegraph Company v. Brett & Little*, 10 Common Pleas Reports, by Scott, his specification is said to have been filed December 12, 1837. But if the last-mentioned date is taken as the true one, it would not make his invention prior to that of Morse. And even if it would, yet this case must be decided by the testimony in the record, and we cannot go out of it, and take into con-

sideration a fact stated in a book of reports. Moreover, we have noticed this case merely because it has been pressed into the argument. The appellants do not mention it in their answer, nor put their defense on it. And if the evidence of its priority was conclusive, it would not avail them in this suit. For they cannot be allowed to surprise the patentee by evidence of a prior invention, of which they gave him no notice.

But if the priority of Morse's invention was more doubtful, and it was conceded that in fact some one of the European inventors had preceded him a few months or a few weeks, it would not invalidate his patent. The Act of Congress provides that, when the patentee believes himself to be the first inventor, a previous discovery in a foreign country shall not render his patent void, unless such discovery, or some substantial part of it, had been before patented or described in a printed publication.

Now, we suppose no one will doubt that Morse believed himself to be the original inventor, when he applied for his patent in April, 1838. Steinheil's discovery does not appear to have been ever patented, nor to have been described in any printed publication until July of that year. And neither of the English inventions are shown by the testimony to have been patented until after Morse's application for a patent, nor to have been so described in any previous publication as to embrace *any [111] substantial part of his invention. And if his application for a patent was made under such circumstances, the patent is good, even if in point of fact he was not the first inventor.

In this view of the subject, it is unnecessary to compare the telegraph of Morse with these European inventions, to ascertain whether they are substantially the same or not. If they were the same in every particular, it would not impair his rights. But it is impossible to examine them, and look at the process and the machinery and results of each, so far as the facts are before us, without perceiving at once the substantial and essential difference between them and the decided superiority of the one invented by Professor Morse.

Neither can the inquiries he made, or the information or advice he received, from men of science in the course of his researches, impair his right to the character of an inventor. No invention can possibly be made consisting of a combination of different elements of power, without a thorough knowledge of the properties of each of them, and the mode in which they operate on each other. And it can make no difference, in this respect, whether he derives his information from books, or from conversation with men skilled in the science. If it were otherwise, no patent, in which a combination of different elements is used, could ever be obtained. For no man ever made such an invention without having first obtained this information, unless it was discovered by some fortunate accident. And it is evident that such an invention as the Electro-Magnetic Telegraph could never have been brought into action without it. For a very high degree of scientific knowledge and the nicest skill in the mechanic arts are combined in it, and were both necessary to bring it into successful operation. And

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the fact that Morse sought and obtained the necessary information and counsel from the best sources, and acted upon it, neither impairs his rights as an inventor, nor detracts from his merits.

Regarding Professor Morse as the first and original inventor of the Telegraph, we come to the objections which have been made to the validity of his patent.

We do not think it necessary to dwell upon the objections taken to the proceedings upon which the first patent was issued, or to the additional specifications of the re-issued patent of 1848. In relation to the first, if there was any alteration at the suggestion of the commissioner, it appears to have been a matter of form rather than of substance; and, as regards the second, there is nothing in the proof or on the face of the re-issued patent to show that the invention therein described is not the same with the one intended to be secured by the original patent. It [112*] was re-issued by the proper lawful authority; and it was the duty of the commissioner of patents to see that it did not cover more than the original invention. It must be presumed, therefore, that it does not, until the contrary appears. Variations from the description given in the former specification do not necessarily imply that it is for a different discovery. The right to surrender the old patent, and receive another in its place, was given for the purpose of enabling the patentee to give a more perfect description of his invention, when any mistake or oversight was committed in his first. It necessarily, therefore, varies from it. And we see nothing in the re-issued patent that may not, without proof to the contrary, be regarded as a more careful description than the former one, explaining more fully the nice and delicate manner in which the different elements of power are arranged and combined together and act upon one another, in order to produce the effect described in the specification. Nor is it void because it does not bear the same date with his French patent. It is not necessary to inquire whether the application of Professor Morse to the Patent Office, in 1838, before he went to France, does or does not exempt his patent from the operation of the Act of Congress upon this subject. For, if it should be decided that it does not exempt it, the only effect of that decision would be to limit the monopoly to fourteen years from the date of the foreign patent. And, in either case, the patent was in full force at the time the injunction was granted by the Circuit Court, and when the present appeal stood regularly for hearing in this court.

And this brings us to the exceptions taken to the specification and claims of the patentee in the re-issued patent of 1848.

We perceive no well-founded objection to the description which is given of the whole invention and its separate parts, nor to his right to a patent for the first seven inventions set forth in the specification of his claims. The difficulty arises on the eighth.

It is in the following words:

"Eighth. I do not propose to limit myself to the specific machinery or parts of machinery described in the foregoing specification and claims; the essence of my invention being the use of the motive power of the electric or gal-

vanic current, which I call electro-magnetism, however developed, for marking or printing intelligible characters, signs or letters, at any distances, being a new application of that power of which I claim to be the first inventor or discoverer."

It is impossible to misunderstand the extent of this claim. He claims the exclusive right to every improvement where the motive power is the electric or galvanic current, and the result is the marking or printing intelligible characters, signs or letters at a distance.

*If this claim can be maintained, it [*113] matters not by what process or machinery the result is accomplished. For aught that we now know some future inventor, in the onward march of science, may discover a mode of writing or printing at a distance by means of the electric or galvanic current, without using any part of the process or combination set forth in the plaintiff's specification. His invention may be less complicated—less liable to get out of order—less expensive in construction, and in its operation. But yet if it is covered by this patent the inventor could not use it, nor the public have the benefit of it without the permission of this patentee.

Nor is this all; while he shuts the door against the inventions of other persons, the patentee would be able to avail himself of new discoveries in the properties and powers of electro-magnetism which scientific men might bring to light. For he says he does not confine his claim to the machinery or parts of machinery, which he specifies; but claims for himself a monopoly in its use, however developed, for the purpose of printing at a distance. New discoveries in physical science may enable him to combine it with new agents and new elements, and by that means attain the object in a manner superior to the present process and altogether different from it. And if he can secure the exclusive use by his present patent he may vary it with every new discovery and development of the science, and need place no description of the new manner, process or machinery, upon the records of the patent office. And when his patent expires, the public must apply to him to learn what it is. In fine, he claims an exclusive right to use a manner and process which he has not described and indeed had not invented, and therefore could not describe when he obtained his patent. The court is of opinion that the claim is too broad, and not warranted by law.

No one, we suppose, will maintain that Fulton could have taken out a patent for his invention of propelling vessels by steam, describing the process and machinery he used, and claimed under it the exclusive right to use the motive power of steam, however developed, for the purpose of propelling vessels. It can hardly be supposed that under such a patent he could have prevented the use of the improved machinery which science has since introduced; although the motive power is steam, and the result is the propulsion of vessels. Neither could the man who first discovered that steam might, by a proper arrangement of machinery, be used as a motive power to grind corn or spin cotton, claim the right to the exclusive use of steam as a motive power for the purpose of producing such effects.

Again, the use of steam as a motive power in printing presses is comparatively a modern [14*] discovery. Was the first inventor *of a machine or process of this kind entitled to a patent, giving him the exclusive right to use steam as a motive power, however developed, for the purpose of marking or printing intelligible characters? Could he have prevented the use of any other press subsequently invented where steam was used? Yet so far as patentable rights are concerned both improvements must stand on the same principles. Both use a known motive power to print intelligible marks or letters; and it can make no difference in their legal rights under the patent laws, whether the printing is done near at hand or at a distance. Both depend for success not merely upon the motive power, but upon the machinery with which it is combined. And it has never, we believe, been supposed by anyone, that the first inventor of a steam printing press was entitled to the exclusive use of steam, as a motive power, however developed, for marking or printing intelligible characters.

Indeed, the acts of the patentee himself are inconsistent with the claim made in his behalf. For in 1846 he took out a patent for his new improvement of local circuits, by means of which intelligence could be printed at intermediate places along the main line of the telegraph; and he obtained a re-issued patent for this invention in 1848. Yet in this new invention the electric or galvanic current was the motive power, and writing at a distance the effect. The power was undoubtedly developed, by new machinery and new combinations. But if his eighth claim could be sustained, this improvement would be embraced by his first patent. And if it was so embraced, his patent for the local circuits would be illegal and void. For he could not take out a subsequent patent for a portion of his first invention, and thereby extend his monopoly beyond the period limited by law.

Many cases have been referred to in the argument, which have been decided upon this subject, in the English and American courts. We shall speak of those only which seem to be considered as leading ones. And those most relied on, and pressed upon the court, in behalf of the patentee, are the cases which arose in England upon Neilson's patent for the introduction of heated air between the blowing apparatus and the furnace, in the manufacture of iron.

The leading case upon this patent, is that of *Neilson et al. v. Harford et al.* in the English Court of Exchequer. It was elaborately argued and appears to have been carefully considered by the court. The case was this:

Neilson, in his specification, described his invention as one for the improved application of air to produce heat in fires, forges and furnaces, where a blowing apparatus is required. And it was to be applied as follows: The blast [15*] or current of air produced *by the blowing apparatus was to be passed from it into an air vessel or receptacle made sufficiently strong to endure the blast; and through or from that vessel or receptacle by means of a tube, pipe, or aperture into the fire, the receptacle be kept artificially heated to a considerable temperature by heat externally applied. He then described

in rather general terms the manner in which the receptacle might be constructed and heated, and the air conducted through it to the fire: stating that the form of the receptacle was not material, nor the manner of applying heat to it. In the action above-mentioned for the infringement of this patent, the defendant among other defenses insisted, that the machinery for heating the air and throwing it hot into the furnace was not sufficiently described in the specification, and the patent void on that account; and also, that a patent for throwing hot air into the furnace, instead of cold, and thereby increasing the intensity of the heat, was a patent for a principle, and that a principle was not patentable.

Upon the first of these defenses, the jury found that a man of ordinary skill and knowledge of the subject, looking at the specification alone, could construct such an apparatus as would be productive of a beneficial result, sufficient to make it worth while to adapt it to the machinery in all cases of forges, cupolas and furnaces, where the blast is used.

And upon the second ground of defense, Baron Parke, who delivered the opinion of the court, said:

"It is very difficult to distinguish it from the specification of a patent for a principle, and this at first created in the minds of the court much difficulty; but after full consideration we think that the plaintiff does not merely claim a principle, but a machine, embodying a principle, and a very valuable one. We think the case must be considered as if the principle being well known, the plaintiff had first invented a mode of applying it by a mechanical apparatus to furnaces, and his invention then consists in this: by interposing a receptacle for heated air between the blowing apparatus and the furnace. In this receptacle he directs the air to be heated by the application of heat externally to the receptacle, and thus he accomplishes the object of applying the blast, which was before cold air, in a heated state to the furnace."

We see nothing in this opinion differing in any degree from the familiar principles of law applicable to patent cases. Neilson claimed no particular mode of constructing the receptacle, or of heating it. He pointed out the manner in which it might be done; but admitted that it might also be done in a variety of ways; and at a higher or lower temperature; and that all of them would produce the effect in a greater or less *degree, provided the air was [*116 heated by passing through a heated receptacle. And hence it seems that the court at first doubted, whether it was a patent for anything more than the discovery that hot air would promote the ignition of fuel better than cold. And if this had been the construction, the court, it appears, would have held his patent to be void; because the discovery of a principle in natural philosophy or physical science, is not patentable.

But after much consideration, it was finally decided that this principle must be regarded as well known, and that the plaintiff had invented a mechanical mode of applying it to furnaces; and that his invention consisted in interposing a heated receptacle, between the blower and the furnace, and by this means heating the air

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after it left the blower, and before it was thrown into the fire. Whoever, therefore, used this method of throwing hot air into the furnace, used the process he had invented, and thereby infringed his patent, although the form of the receptacle or the mechanical arrangements for heating it, might be different from those described by the patentee. For whatever form was adopted for the receptacle, or whatever mechanical arrangements were made for heating it, the effect would be produced in a greater or less degree, if the heated receptacle was placed between the blower and the furnace, and the current of air passed through it.

Undoubtedly, the principle that hot air will promote the ignition of fuel better than cold, was embodied in this machine. But the patent was not supported because this principle was embodied in it. He would have been equally entitled to a patent, if he had invented an improvement in the mechanical arrangements of the blowing apparatus, or in the furnace, while a cold current of air was still used. But his patent was supported, because he had invented a mechanical apparatus, by which a current of hot air, instead of cold, could be thrown in. And this new method was protected by his patent. The interposition of a heated receptacle, in any form, was the novelty he invented.

We do not perceive how the claim in the case before us can derive any countenance from this decision. If the Court of Exchequer had said that Neilson's patent was for the discovery, that hot air would promote ignition better than cold, and that he had an exclusive right to use it for that purpose, there might, perhaps, have been some reason to rely upon it. But the court emphatically denied his right to such a patent. And his claim, as the patent was construed and supported by the court, is altogether unlike that of the patentee before us.

For Neilson discovered, that by interposing 117* a heated receptacle between the blower and the furnace, and conducting the current of air through it, the heat in the furnace was increased. And this effect was always produced, whatever might be the form of the receptacle, or the mechanical contrivances for heating it, or for passing the current of air through it, and into the furnace.

But Professor Morse has not discovered that the electric or galvanic current will always print at a distance, no matter what may be the form of the machinery or mechanical contrivances through which it passes. You may use electro-magnetism as a motive power, and yet not produce the described effect, that is, print at a distance intelligible marks or signs. To produce that effect, it must be combined with, and passed through, and operate upon, certain complicated and delicate machinery, adjusted and arranged upon philosophical principles, and prepared by the highest mechanical skill. And it is the high praise of Professor Morse, that he has been able, by a new combination of known powers, of which electro-magnetism is one, to discover a method by which intelligible marks or signs may be printed at a distance. And for the method or process thus discovered, he is entitled to a patent. But he has not discovered that the electro-magnetic current, used as motive power, in any other method, and with any other combination, will do as well.

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We have commented on the case in the Court of Exchequer more fully, because it has attracted much attention in the courts of this country, as well as in the English courts, and has been differently understood. And perhaps a mistaken construction of that decision has led to the broad claim in the patent now under consideration.

We do not deem it necessary to remark upon the other decisions, in relation to Neilson's patent, nor upon the other cases referred to, which stand upon similar principles. The observations we have made on the case in the Court of Exchequer, will equally apply to all of them.

We proceed to the American decisions. And the principles herein stated, were fully recognized by this court in the case of *Leroy et al. v. Tatham et al.*, decided at the last term, 14 How., 156.

It appeared that in that case the patentee had discovered that lead, recently set, would, under heat and pressure in a close vessel, reunite perfectly, after a separation of its parts, so as to make wrought, instead of cast pipe. And the court held that he was not entitled to a patent for this newly discovered principle or quality in lead; and that such a discovery was not patentable. But that he was entitled to a patent for the new process or method in the art of making lead pipe, which this [*] 118 discovery enabled him to invent and employ; and was bound to describe such process or method, fully, in his specification.

Many cases have also been referred to, which were decided in the circuit courts. It will be found, we think, upon careful examination, that all of them, previous to the decision on Neilson's patent, maintain the principles on which this decision is made. Since that case was reported, it is admitted, that decisions have been made, which would seem to extend patentable rights beyond the limits here marked out. As we have already said, we see nothing in that opinion which would sanction the introduction of any new principle in the law of patents. But if it were otherwise, it would not justify this court in departing from what we consider as established principles in the American courts. And to show what was heretofore the doctrine upon this subject, we refer to the annexed cases. We do not stop to comment on them, because such an examination would extend this opinion beyond all reasonable bounds. (*Wyeth v. Stone*, 1 Story, 270, 285; *Blanchard v. Sprague*, 3 Sumn., 540.) The first-mentioned case is directly in point.

Indeed, independently of judicial authority, we do not think that the language used in the Act of Congress can justly be expounded otherwise.

The 5th section of the Act of 1836 declares that a patent shall convey to the inventor for a term not exceeding fourteen years, the exclusive right of making, using, and vending to others to be used, his invention or discovery; referring to the specifications for the particulars thereof.

The 6th section directs who shall be entitled to a patent, and the terms and conditions on which it may be obtained. It provides that any person shall be entitled to a patent who has discovered or invented a new and useful

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art, machinery, manufacture or composition of matter; or a new and useful improvement on any previous discovery in either of them. But before he receives a patent, he shall deliver a written description of his invention or discovery, "and of the manner and process of making, constructing, using and compounding the same," in such exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound and use the same.

This court has decided, that the specification required by this law is a part of a patent; and that the patent issues for the invention described in the specification.

Now, whether the Telegraph is regarded as an art or machine, the manner and process of making or using it must be set forth in exact terms. The Act of Congress makes no difference in this respect between an art and a machine. An improvement "in the art of making bar iron or spinning cotton must be so described; and so must the art of printing by the motive power of steam. And in all of these cases it has always been held, that the patent embraces nothing more than the improvement described and claimed as new, and that anyone who afterwards discovered a method of accomplishing the same object, substantially and essentially differing from the one described, had a right to use it. Can there be any good reason why the art of printing at a distance, by means of the motive power of the electric or galvanic current, should stand on different principles? Is there any reason why the inventor's patent should cover broader ground? It would be difficult to discover anything in the Act of Congress which would justify this distinction. The specification of this patentee describes his invention or discovery, and the manner and process of constructing and using it; and his patent, like inventions in the other arts above mentioned, covers nothing more.

The provisions of the Acts of Congress in relation to patents may be summed up in a few words.

Whoever discovers that a certain useful result will be produced, in any art, machine, manufacture or composition of matter, by the use of certain means, is entitled to a patent for it; provided he specifies the means he uses in a manner so full and exact, that anyone skilled in the science to which it appertains, can, by using the means he specifies, without any addition to or subtraction from them, produce precisely the result he describes. And if this cannot be done by the means he describes, the patent is void. And if it can be done, then the patent confers on him the exclusive right to use the means he specifies to produce the result or effect he describes, and nothing more. And it makes no difference, in this respect, whether the effect is produced by chemical agency or combination; or by the application of discoveries or principles in natural philosophy known or unknown before his invention; or by machinery acting altogether upon mechanical principles. In either case he must describe the manner and process as above mentioned, and the end it accomplishes. And anyone may lawfully accomplish the same end without infringing the patent, if he uses means substantially different from those described.

Indeed, if the eighth claim of the patentee can be maintained, there was no necessity for any specification, further than to say that he had discovered that, by using the motive power of electro-magnetism, he could print intelligible characters at any distance. We presume it will be admitted on all hands, that no patent could have issued on such a specification. Yet this claim can derive no aid from the specification filed. It is outside of it, and the [*120] patentee claims beyond it. And if it stands, it must stand simply on the ground that the broad terms above mentioned were a sufficient description, and entitled him to a patent in terms equally broad. In our judgment the Act of Congress cannot be so construed.

The patent then being illegal and void, so far as respects the eighth claim, the question arises whether the whole patent is void, unless this portion of it is disclaimed in a reasonable time, after the patent issued.

It has been urged, on the part of the complainants, that there is no necessity for a disclaimer in a case of this kind. That it is required in those cases only in which the party commits an error in fact, in claiming something which was known before, and of which he was not the first discoverer; that in this case he was the first to discover that the motive power of electro-magnetism might be used to write at a distance; and that his error, if any, was a mistake in law, in supposing his invention, as described in his specification, authorized this broad claim of exclusive privilege; and that the claim therefore may be regarded as a nullity, and allowed to stand in the patent without a disclaimer, and without affecting the validity of the patent.

This distinction can hardly be maintained. The Act of Congress above recited, requires that the invention shall be so described, that a person skilled in the science to which it appertains, or with which it is most nearly connected, shall be able to construct the improvement from the description given by the inventor.

Now, in this case, there is no description but one, of a process by which signs or letters may be printed at a distance. And yet he claims the exclusive right to any other mode and any other process, although not described by him, by which the end can be accomplished, if electro-magnetism is used as the motive power. That is to say, he claims a patent for an effect produced by the use of electro-magnetism distinct from the process or machinery necessary to produce it. The words of the Acts of Congress above quoted show that no patent can lawfully issue upon such a claim. For he claims what he has not described in the manner required by law. And a patent for such a claim is as strongly forbidden by the Act of Congress, as if some other person had invented it before him.

Why, therefore, should he be required and permitted to disclaim in the one case and not in the other? The evil is the same if he claims more than he has invented although no other person has invented it before him. He prevents others from attempting to improve upon the manner and process which he has described in his specification—and may deter the public

*from using it, even if discovered. He [*121]

can lawfully claim only what he has invented and described, and if he claims more his patent is void. And the judgment in this case must be against the patentee, unless he is within the Act of Congress which gives the right to disclaim.

The law which requires and permits him to disclaim, is not penal but remedial. It is intended for the protection of the patentee as well as the public, and ought not, therefore, to receive a construction that would restrict its operation within narrower limits than its words fairly import. It provides "that when any patentee shall have in his specification claimed to be the first and original inventor or discoverer of any material or substantial part of the thing patented, of which he was not the first and original inventor, and shall have no legal or just claim to the same," he must disclaim in order to protect so much of the claim as is legally patented.

Whether, therefore, the patent is illegal in part because he claims more than he has sufficiently described, or more than he invented, he must in either case disclaim, in order to save the portion to which he is entitled; and he is allowed to do so when the error was committed by mistake.

A different construction would be unjust to the public, as well as to the patentee, and defeat the manifest object of the law, and produce the very evil against which it intended to guard.

It appears that no disclaimer has yet been entered at the Patent Office. But the delay in entering it is not unreasonable. For the objectionable claim was sanctioned by the head of the office: it has been held to be valid by a circuit court, and differences of opinion in relation to it are found to exist among the justices of this court. Under such circumstances the patentee had a right to insist upon it, and not disclaim it until the highest court to which it could be carried had pronounced its judgment. The omission to disclaim, therefore, does not render the patent altogether void; and he is entitled to proceed in this suit, for an infringement of that part of his invention which is legally claimed and described. But as no disclaimer was entered in the Patent Office before this suit was instituted, he cannot, under the Act of Congress, be allowed costs against the wrong-doer, although the infringement should be proved. And we think it is proved by the testimony. But, as the question of infringement embraces both of the re-issued patents, it is proper, before we proceed to that part of the case, to notice the objections made to the second patent for the local circuits, which was originally obtained in 1846 and re-issued in 1848.

It is certainly no objection to this patent, that the improvement is embraced by the eighth [122*] claim in the former one. *We have already said that this claim is void, and that the former patent covers nothing but the first seven inventions specifically mentioned.

Nor can its validity be impeached upon the ground that it is an improvement upon a former invention, for which the patentee had himself already obtained a patent. It is true that under the Act of 1836, sec. 13, it was in the power of Professor Morse, if he desired it, to annex this improvement to his former specification, so as

to make it from that time a part of the original patent. But there is nothing in the Act that forbids him to take out a new patent for the improvement, if he prefers it. Any other inventor might do so; and there can be no reason, in justice or in policy, for refusing the like privilege to the original inventor. And when there is no positive law to the contrary, he must stand on the same footing with any other inventor of an improvement upon a previous discovery. Nor is he bound in his new patent to refer specially to his former one. All that the law requires of him is that he shall not claim as new, what is covered by a former invention, whether made by himself or any other person.

It is said, however, that this alleged improvement is not new, and is embraced in his former specification; and that if some portion of it is new, it is not so described as to distinguish the new from the old.

It is difficult, perhaps impossible, to discuss this part of the case so as to be understood by anyone who has not a model before him, or perfectly familiar with the machinery and operations of the Telegraph. We shall not, therefore, attempt to describe minutely the machinery or its mode of operation. So far as this can be done intelligibly, without the aid of a model to point to, it has been fully and well done in the opinion delivered by the learned judge who decided this case in the Circuit Court. All that we think is useful or necessary to say is, that after a careful examination of the patents, we think the objection on this ground is not tenable. The force of the objection is mainly directed upon the receiving magnet, which it is said is a part of the machinery of the first patent, and performs the same office. But the receiving magnet is not of itself claimed as a new invention. It is claimed as a part of a new combination or arrangement to produce a new result. And this combination does produce a new and useful result. For, by this new combination, and the arrangement and position of the receiving magnet, the local and independent circuit is opened by the electric or galvanic current, as it passes on the main line, without interrupting it in its course; and the intelligence it conveys is recorded almost at the same moment at the *end of the line of [*123 the Telegraph, and at the different local offices on its way. And it hardly needs a model or a minute examination of the machinery to be satisfied that a telegraph which prints the intelligence it conveys at different places, by means of the current, as it passes along on the main line, must necessarily require a different combination and arrangement of powers from the one that prints only at the end. The elements which compose it may all have been used in the former invention; but it is evident that their arrangement and combination must be different to produce this new effect. The new patent for the local circuits was therefore properly granted; and we perceive no well-founded objection to the specification or claim contained in the re-issued patent of 1848.

The two re-issued patents of 1848, being both valid, with the exception of the eighth claim in the first, the only remaining question is, whether they or either of them have been infringed by the defendants.

The same difficulty arises in this part of the

case which we have already stated, in speaking of the specification and claims in the patent for the local circuits. It is difficult to convey a clear idea of the similitude or differences in the two Telegraphs to anyone not familiarly acquainted with the machinery of both. The court must content itself, therefore, with general terms, referring to the patents themselves for a more special description of the matters in controversy.

It is a well-settled principle of law, that the mere change in the form of the machinery (unless a particular form is specified as the means by which the effect described is produced) or an alteration in some of its unessential parts; or in the use of known equivalent powers, not varying essentially the machine, or its mode of operation or organization, will not make the new machine a new invention. It may be an improvement upon the former; but that will not justify its use without the consent of the first patentee.

The Columbian (O'Reilly's) Telegraph does not profess to accomplish a new purpose or produce a new result. Its object and effect is to communicate intelligence at a distance, at the end of the main line, and at the local circuits on its way. And this is done by means of signs or letters impressed on paper or other material. The object and purpose of the Telegraph is the same with that of Professor Morse.

Does he use the same means? Substantially, we think he does, both upon the main line and in the local circuits. He uses upon the main line the combination of two or more galvanic or electric circuits, with independent batteries for the purpose of obviating the diminished force [24*] of the galvanic current, *and in a manner varying very little in form from the invention of Professor Morse. And indeed, the same may be said of the entire combination set forth in the patentee's third claim. For O'Reilly's can hardly be said to differ substantially and essentially from it. He uses the combination which composes the register with no material change in the arrangement, or in the elements of which it consists; and with the aid of these means he conveys intelligence by impressing marks or signs upon paper—these marks or signs being capable of being read and understood by means of an alphabet or signs adapted to the purpose. And as regards the second patent of Professor Morse for the local circuits, the mutator of the defendant does not vary from it in any essential particular. All of the efficient elements of the combination are retained, or their places supplied by well-known equivalents. Its organization is essentially the same.

Neither is the substitution of marks and signs, differing from those invented by Professor Morse, any defense to this action. His patent is not for the invention of a new alphabet, but for a combination of powers composed of tangible and intangible elements, described in his specification, by means of which marks or signs may be impressed upon paper at a distance, which can there be read and understood. And if any marks or signs or letters are impressed in that manner by means of a process substantially the same with his invention, or with any particular part of it covered by

his patent, and those marks or signs can be read, and thus communicate intelligence, it is an infringement of his patent. The variation in the character of the marks would not protect it, if the marks could be read and understood.

We deem it unnecessary to pursue further the comparison between the machinery of the patents. The invasion of the plaintiff's rights, already stated, authorized the injunction granted by the Circuit Court, and so much of its decree must be affirmed. But, for the reasons hereinbefore assigned, the complainants are not entitled to costs, and that portion of the decree must be reversed, and a decree passed by this court, directing each party to pay his own costs, in this and in the Circuit Court.

Messrs. Justices Wayne, Nelson, and Grier, dissent from the judgment of the court on the question of costs.

Mr. Justice Grier:

I entirely concur with the majority of the court, that the appellee *and complain- [*125 ant below, Samuel F. B. Morse, is the true and first inventor of the Recording Telegraph, and the first who has successfully applied the agent or element of nature, called electro-magnetism, to printing and recording intelligible characters at a distance; and that his patent of 1840, finally re-issued in 1848, and his patent for his improvements as re-issued in the same year, are good and valid; and that the appellants have infringed the rights secured to the patentee by both his patents. But, as I do not concur in the views of the majority of the court, in regard to two great points of the case, I shall proceed to express my own.

I. Does the complainant's first patent come within the proviso of the 6th section of the Act of 1839? And should the term of fourteen years granted by it commence from the date of his patent here, or from the date of his French patent in 1838?

If the complainant's patent is within the provisions of this section, I cannot see how we can escape from declaring it void. The proviso declares that "in all cases, every such patent (issued under the provisions of that section) shall be limited to the term of fourteen years from the date or publication of such foreign letter patent." It is true it does not say that the patent shall be void if not limited to such term on its face; but it gives no power to the officer to issue a patent for a greater term. If the patent does not show the true commencement of the term granted by it, the patentee has it in his power to deceive the public, by claiming a term of fourteen years, while in reality it may be not more than one.

But I am of opinion that the patent in question does not come within this proviso.

The facts of the case, as connected with this point, are these: On the 6th of October, 1837, Morse filed in the office of the Commissioner of Patents, a *caveat* accompanied by a specification, setting forth his invention, and praying that it may be protected, till he could finish some experiments necessary to perfect its details. On the 9th of April, 1838, he filed a formal application for a patent, accompanied by a specification and drawings. On the first of

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May, 1838, the Commissioner informs him, that his application has been granted. Morse answers on the 15th of May, that he is just about to sail to Europe, and asks the Commissioner to delay the issue of his patent for the present, fearing its effect upon his plans abroad.

On the 30th of October, 1838, he obtained his useless French patent. On his return to this country in 1840, he requests his patent to be perfected and issued. In this application, filed on the 9th of April, 1838, there was an oversight in filling up the day and month. This clerical omission was wholly immaterial [126*] *but *ex majori cautela* a second affidavit was filed, and the patent issued on the 20th of June, 1840, for the term of fourteen years from its date.

The application of 1838 had a set of drawings annexed to the specification. The second set of drawings, required by the 6th section of the Act of 1837, being for the purpose of annexation to the patent, they were entirely unnecessary till the patent issued, and are not required by law to accompany the application when first made, and the want of them cannot affect the validity of the application.

In many instances, owing to various causes, the patent is not issued till many months, and sometimes a year or more after the application. The Commissioner requires time to examine the specification; he may suggest difficulties and amendments; and disputes often arise, which delay the issuing of the patent. But the application does not require to be renewed, and is never considered abandoned in consequence of such delay. It still remains as of the date of its filing for every purpose beneficial to the applicant. The law does not require that the specification and its accompaniments should be in the precise form which they afterwards assume in the patent. It requires only that the application be "in writing," and that the applicant should "make oath that he is the original inventor," &c. The other requirements of the Act must precede the issuing of the patent, but make no part of the application, and are not conditions precedent to its validity.

In the present case, we have, therefore, a regular application in due form, accompanied by a specification and drawings, filed on the 9th of April, 1838. It has not been withdrawn, discontinued, or abandoned. There is nothing in the Act of Congress which requires that the patent should be issued within any given time after the application is filed, or which forbids the postponement of it for a time, at the suggestion either of the applicant or the officer. Nor is there anything in the general policy of the patent laws which forbids it. On the contrary, it has always been the practice, when a foreign patent is desired, to delay the issuing of the patent here, after application filed, for fear of injuring such foreign application. It forms no part of the policy of any of our Patent Acts to prevent our citizens from obtaining patents abroad.

By the Patent Act of 1793, the applicant must swear "that his invention was not known or used before the application." The filing of the application was the time fixed for determining the applicant's right to a patent. If a patent had issued abroad, or the invention had

been in use or described in some public work, before that time, it was a good defense to it. The time *of filing the application was, [*127 therefore, made by law the criterion of his right to claim as first inventor. A foreign patent subsequent to the date of his application, could not be set up as a defense against the domestic patentee. The American inventor who had filed his application and specification at home, was thus enabled to obtain his patent abroad, without endangering his patent at home. This was a valuable privilege to American citizens, and one of which he has never been deprived by subsequent legislation. And thus the law stood till the Act of 4th July, 1836.

Before this time the right to obtain a patent was confined to American citizens, or those who had filed their intentions to become such. The policy of this Act was to encourage foreign inventors to introduce their inventions to this country, but in doing so it evinces no intention of limiting our own citizens by taking away from them rights which they had hitherto enjoyed.

Accordingly it gave an inventor, who had obtained a patent abroad, and who was generally a foreigner, a right to have one here, provided he made his application here within six months after the date of his foreign patent. Neither the letter nor the spirit of this Act interferes with the right of an inventor who has filed his application here, from obtaining a patent abroad, or his right to a term of fourteen years, from the date of his patent.

In 1838, therefore, when complainant filed his application, he was entitled to such a patent. But in March, 1839, an Act was passed, by the 6th section of which it is alleged the complainant's rights have been affected. That section is as follows:

"That no person shall be debarred from receiving a patent for any invention, &c., as provided in the Act of 4th July, 1836, to which this is additional, by reason of the same having been patented in a foreign country, more than six months prior to his application. Provided, that the same shall not have been introduced into public and common use in the United States prior to the application for such patent. And provided, also, that in all cases, every such patent shall be limited to the term of fourteen years from the date of publication of such foreign letters patent."

Now, the Act of 1836, as we have shown, had given a privilege to foreign patentees to have a patent within six months after date of such foreign patent. It had not affected, in any manner, the right previously enjoyed by American citizens, to take out a foreign patent after filing their applications here. This section gives additional rights to those who had first taken out patents abroad, and holding out an additional encouragement to foreign inventors to introduce their inventions here, subject to certain *conditions contained in the [*128 proviso. Neither the letter, spirit, nor policy of this Act, have any reference to, or bearing upon, the case of persons who had just made their applications here. To construe a proviso, as applicable to a class of cases not within its enacting clause, would violate all settled rules of construction. The office of a proviso, is either to except something from the enacting

clause, or to exclude some possible ground of misinterpretation, or to state a condition to which the privilege granted by the section shall be subjected.

Here the proviso is inserted, to restrain the general words of the section and impose a condition on those who accept the privileges granted by the section. It enlarged the privileges of foreign patentees, which had before been confined to six months, on two conditions. 1st. Provided the invention patented abroad had not been introduced into public use here; and 2d, on condition that every such patent should be limited in its terms. The general words, "in all cases," especially when restrained to every such patent, cannot extend the conditions of the proviso beyond such cases as are the subject matter of legislation in the section. The policy and spirit of the Act are to grant privileges to a certain class of persons which they did not enjoy before; to encourage the introduction of foreign inventions and discoveries, and not to deprive our own citizens of a right heretofore enjoyed, or to affect an entirely different class of cases, when the applications had been filed here before a patent obtained abroad.

It is supposed, that certain evils might arise by allowing an applicant for a patent here to delay its issue till he can obtain a foreign patent. To which, it is a sufficient answer to say, that if such evil consequences should be found to exist, it is for Congress to remedy them by legislation.

It is no part of the duty of this court, by a forced construction of existing statutes, to attempt the remedy of possible evils by anticipation.

I am, therefore, of opinion that the complainant's patent, as renewed, contained a valid grant of the full term of fourteen years from its original date.

II. The other point, in which I cannot concur with the opinion of the majority, arises in the construction of the eighth claim of complainant's first patent, as finally amended. The first claim, as explanatory of all that follow, should be read in connection with the eighth. They are as follows:

"1st. Having thus fully described my invention, I wish it to be understood, that I do not claim the use of the galvanic current or currents of electricity, for the purpose of telegraphic communications generally; but what I specially claim as my invention and improvement, is making use of the motive power of magnetism, when developed by the action of such current or currents substantially as set forth in the foregoing description of the first principal part of my invention, as means of operating or giving motion to machinery which may be used to imprint signals upon paper or other suitable material, or to produce sounds in any desired manner for the purpose of telegraphic communication at any distances. The only ways in which the galvanic current had been proposed to be used prior to my invention and improvement, were by bubbles resulting from decomposition, and the action or exercise of electrical power upon a magnetized bar or needle; and the bubbles and the deflections of the needles thus produced, were the subjects of inspection, and had no power or were not ap-

plied to record the communication. I therefore characterize my invention as the first recording or printing telegraph by means of electro-magnetism.

There are various known modes of producing motions by electro-magnetism, but none of these had been applied prior to my invention and improvement to actuate or give motion to printing or recording machinery, which is the chief point of my invention and improvement."

"8th. I do not propose to limit myself to the specific machinery or parts of machinery described in the foregoing specification and claims, the essence of my invention being the use of the motive power of the electric or galvanic current, which I call electro-magnetism, however developed, for marking or printing intelligible characters, signs or letters, at any distances, being a new application of that power, of which I claim to be the first inventor or discoverer."

The objection to this claim is, that it is too broad, because the inventor does not confine himself to specific machinery or parts of machinery, as described in his patent, but claims that the essence of his invention consists in the application of electro-magnetism as a motive power, however developed, for printing characters at a distance. This being a new application of that element or power, of which the patentee claims to be the first inventor or discoverer.

In order to test the value of this objection, as applied to the present case, and escape any confusion of ideas too often arising from the use of ill-defined terms and propositions, let us examine,

1st. What may be patented; or what forms a proper subject of protection, under the Constitution and Acts of Congress, relative to this subject.

2d. What is the nature of the invention now under consideration? Is it a mere machine, and subject to the rules which affect a combination of mechanical devices to effect a particular purpose.

*3d. Is the claim true, in fact? And [*130 if true, how can it be too broad, in any legal sense of the term, as heretofore used, either in the Acts of Congress, or in judicial decisions?

4th. Assuming the hypothesis that it is too broad, how should that affect the judgment for costs in this case?

1st. The Constitution of the United States declares that "Congress shall have the power to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries."

The Act of Congress of 1836 confers this exclusive right for a limited time, on "any person who has discovered or invented any new and useful art, machine, manufacture or composition of matter, or any new and useful improvements on any art, machine, manufacture or composition of matter; not known or used by others before his or their discovery or invention thereof, and not, at the time of his application for a patent, in public use," &c.

A new and useful art or a new and useful improvement on any known art is as much entitled to the protection of the law as a machine or manufacture. The English patent acts are confined to "manufactures" in terms; but the courts have construed them to cover and pro-

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lect arts as well as machines; yet without using the term "art." Here we are not required to make any latitudinous construction of our statute for the sake of equity or policy; and surely we have no right, even if we had the disposition, to curtail or narrow its liberal policy by astute or fanciful construction.

It is not easy to give a precise definition of what is meant by the term "art," as used in the Acts of Congress—some, if not all, the traits which distinguish an art from the other legitimate subjects of a patent, are stated with clearness and accuracy by Mr. Curtis, in his *Treatise on Patents*. "The term 'art,' applies," says he, "to all those cases where the application of a principle is the most important part of the invention, and where the machinery, apparatus, or other means, by which the principle is applied, are incidental only and not of the essence of his invention. It applies also to all those cases where the result, effect, or manufactured article is old, but the invention consists in a new process or method of producing such result, effect, or manufacture." (Curt. on Pat., 80.)

A machine, though it may be composed of many parts, instruments, or devices combined together, still conveys the idea of unity. It may be said to be invented, but the term "discovery" could not well be predicated of it. An art may employ many different machines, devices, processes, and manipulations, to produce [181*] "some useful result. In a previously known art a man may discover some new process, or new application of a known principle, element, or power of nature, to the advancement of the art, and will be entitled to a patent for the same, as "an improvement in the art," or he may invent a machine to perform a given function, and then he will be entitled to a patent only for his machine.

That improvements in the arts, which consist in the new application of some known element, power, or physical law, and not in any particular machine or combination of machinery, have been frequently the subject of patents both in England and in this country, the cases in our books most amply demonstrate. I have not time to examine them at length; but would refer to James Watt's patent for a method of saving fuel in steam engines by condensing the steam in separate vessels, and applying nonconducting substances to his steam pipes; Clegg's patent for measuring gas in water; *Juhr v. Pratt*, Webster's Pat. Cas., 108; and the celebrated case of *Neilson's patent* for the application of hot blast, being an important improvement in the art of smelting iron.

In England, where their statute does not protect an art in direct terms, they have made no clear distinction between an art or an improvement in an art, and a process, machine, or manufacture. They were hampered and confined by the narrowness of the phraseology of their patent acts. In this country, the statute is as broad as language can make it. And yet, if we look at the titles of patents, as given at the Patent Office, and the language of our courts, we might suppose that our statute was confined entirely to machines. Notwithstanding, in *Knoiss v. The Bank*, 4 Washington, C. C., 19, Mr. Justice Washington supported a patent which consisted in nothing else but a

new application of copperplates to both sides of a bank bill as a security against counterfeiting. The new application was held to be an art, and, therefore, patentable. So the patent in *McClurg v. Kingsland*, 1 How., 204, was in fact for an improvement in the art of casting chilled rollers by conveying the metal to the mold in a direction approaching to the tangent of the cylinder; yet the patentee was protected in the principle of his discovery (which was but the application of a known law of nature to a new purpose), against all forms of machinery embodying the same principle.

The great art of printing, which has changed the face of human society and civilization, consisted in nothing but a new application of principles known to the world for thousands of years. No one could say it consisted in the type or the press, or in any other machine or device used in performing some particular *function, more than in the hands which [*132] picked the types or worked the press. Yet if the inventor of printing had, under this narrow construction of our patent law, claimed his art as something distinct from his machinery, the doctrine now advanced would have declared it unpatentable to its full extent as an art, and that the inventor could be protected in nothing but his first rough types and ill-contrived press.

I do not intend to review the English cases which adopt the principle for which I now contend, notwithstanding their narrow statute; but would refer to the opinion of my brother Nelson, in 14 How., 177; and will add, that Mr. Justice McLean, in delivering the opinion of the court in that case, quotes with approbation the language of Lord Justice Clerke, in the *Neilson* case, which is precisely applicable to the question before us. He says: "The specification does not claim anything as to form, nature, shape, materials, numbers, or mathematical character of the vessel or vessels in which the air is to be heated, or as to the mode of heating such vessels." Yet this patent was sustained as for a new application of a known element; or, to use correct language, as an improvement in the art of smelting iron, without any regard to the machinery or parts of machinery used in the application. Such I believe to be the established doctrine of the English courts.

He who first discovers that an element or law of nature can be made operative for the production of some valuable result, some new art, or the improvement of some known art; who has devised the machinery or process to make it operative, and introduced it in a practical form to the knowledge of mankind, is a discoverer and inventor of the highest class. The discovery of a new application of a known element or agent may require more labor, expense, persevering industry, and ingenuity than the inventor of any machine. Sometimes, it is true, it may be the result of a happy thought or conception, without the labor of an experiment, as in the case of the improvement in the art of casting chilled rollers, already alluded to. In many cases, it is the result of numerous experiments; not the consequence of any reasoning *a priori*, but wholly empirical; as the discovery that a certain degree of heat, when applied to the usual processes for curing India rubber, produced a substance with new and valuable qualities.

The mere discovery of a new element or law or principle of nature, without any valuable application of it to the arts, is not the subject of a patent. But he who takes this new element or power, as yet useless, from the laboratory of the philosopher, and makes it the servant of man, who applies it to the perfecting of a new and useful art, or to the improvement of one [133*] already *known, is the benefactor to whom the patent law tenders its protection. The devices and machines used in the exercise of it may or may not be new; yet, by the doctrine against which I contend, he cannot patent them, because they were known and used before. Or, if he can, it is only in their new application and combination in perfecting the new art. In other words, he may patent the new application of the mechanical devices, but not the new application of the operative element which is the essential agent in the invention. He may patent his combination of the machinery, but not his art.

When a new and hitherto unknown product or result, beneficial to mankind, is effected by a new application of any element of nature, and by means of machines and devices, whether new or old, it cannot be denied that such invention or discovery is entitled to the denomination of a "new and useful art." The statute gives the inventor of an art a monopoly in the exercise of it as fully as it does to the inventor of a mere machine. And any person who exercises such new art without the license of the inventor is an infringer of his patent, and of the franchise granted to him by the law as a reward for his labor and ingenuity in perfecting it. A construction of the law which protects such an inventor, in nothing but the new invented machines or parts of machinery used in the exercise of his art, and refuses it to the exercise of the art itself, annuls the patent law. If the law gives a franchise or monopoly to the inventor of an art as fully as to the inventor of a machine, why shall its protection not be co-extensive with the invention in one case as well as in the other? To look at an art as nothing but a combination of machinery, and give it protection only as such, against the use of the same or similar devices or mechanical equivalents, is to refuse it protection as an art. It ignores the distinction between an art and a machine; it overlooks the clear letter and spirit of the statute; and leads to inextricable difficulties. It is viewing a statue or a monument through a microscope.

The reason given for thus confining the franchise of the inventor of an art to his machines and parts of machinery is, that it would retard the progress of improvement, if those who can devise better machines or devices, differing in mechanical principle from those of the first inventor of the art; or, in other words, who can devise an improvement in it, should not be allowed to pirate it.

To say that a patentee, who claims the art of writing at a distance by means of electro-magnetism, necessarily claims all future improvements in the art, is to misconstrue it, or draws a consequence from it not fairly to be inferred from its language. An improvement in a known art is as much the subject of a patent as [134*] *the art itself; so, also, is an improvement on a known machine. Yet, if the original

machine be patented, the patentee of an improvement will not have a right to use the original. This doctrine has not been found to retard the progress of invention in the case of machines; and I can see no reason why a contrary one should be applied to an art.

The claim of the patentee is, that he may be protected in the exercise of his art as against persons who may improve or change some of the processes or machines necessary in its exercise. The court, by deciding that this claim is too broad, virtually decides that such an inventor of an improvement may pirate the art he improves, because it is contrary to public policy to restrain the progress of invention. Or, in other words, it may be said that it is the policy of the courts to refuse that protection to an art which it affords to a machine, which it is the policy of the Constitution and the laws to grant.

2d. Let us now consider what is the nature of the invention now under consideration.

It is not a composition of matter, or a manufacture, or a machine. It is the application of a known element or power of nature, to a new and useful purpose by means of various processes, instruments and devices, and if patentable at all, it must come within the category of "a new and useful art." It is as much entitled to this denomination as the original art of printing itself. The name given to it in the patent is generally the act of the commissioner, and in this, as in many other cases, a wrong one. The true nature of the invention must be sought in the specification.

The word telegraph is derived from the Greek, and signifies "to write afar off or at a distance." It has heretofore been applied to various contrivances or devices, to communicate intelligence by means of signals or semaphores, which speak to the eye for a moment. But in its primary and literal signification of writing, printing, or recording at a distance, it never was invented, perfected, or put into practical operation till it was done by Morse. He preceded Steinheil, Cook, Wheatstone, and Davy in the successful application of this mysterious power or element of electro-magnetism to this purpose; and his invention has entirely superseded their inefficient contrivances. It is not only "a new and useful art," if that term means anything, but a most wonderful and astonishing invention, requiring tenfold more ingenuity and patient experiment to perfect it, than the art of printing with types and press, as originally invented.

3d. Is it not true, as set forth in this eighth claim of the specification, that the patentee was the first inventor or discoverer of the use or application of electro-magnetism to print and record *intelligible characters or letters? It is [*135] the very ground on which the court agree in confirming his patent. Now, the patent law requires an inventor, as a condition precedent to obtaining a patent, to deliver a written description of his invention or discovery, and to particularly specify what he claims to be his own invention or discovery. If he has truly stated the principle, nature and extent of his art or invention, how can the court say it is too broad, and impugn the validity of his patent for doing what the law requires as a condition for obtaining it? And if it is only in case of a

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machine that the law requires the inventor to specify what he claims as his own invention and discovery, and to distinguish what is new from what is old, then this eighth claim is superfluous and cannot affect the validity of his patent, provided his art is new and useful, and the machines and devices claimed separately, are of his own invention. If it be in the use of the words "however developed" that the claim is to be adjudged too broad, then it follows that a person using any other process for the purpose of developing the agent or element of electro-magnetism, than the common one now in use, and described in the patent, may pirate the whole art patented.

But if it be adjudged that the claim is too broad, because the inventor claims the application of this element to his new art, then his patent is to be invalidated for claiming his whole invention, and nothing more. If the result of this application be a new and useful art, and if the essence of his invention consists in compelling this hitherto useless element to record letters and words, at any distance and in many places at the same moment, how can it be said that the claim is for a principle or an abstraction? What is meant by a claim being too broad? The patent law and judicial decisions may be searched in vain for a provision or decision that a patent may be impugned for claiming no more than the patentee invented or discovered. It is only when he claims something before known and used, something as new which is not new, either by mistake or intentionally, that his patent is affected.

The Act of Congress requires the applicant for a patent to swear that "he is the original and first inventor of the art, machine, &c." It requires the Commissioner to make an examination of the alleged invention, "and if it shall appear that the same has not been invented prior to the alleged invention, he shall grant a patent, &c. But if it shall appear that the applicant is not the original and first inventor or discoverer thereof, or that any part of that which is claimed as new, had before been invented," then the applicant to have leave to withdraw his application.

136*] *The 13th section treats of defective specifications and their remedy where the applicant, through mistake or inadvertency, had claimed "more than he had a right to claim as new."

The 15th section, in enumerating the defenses which a defendant may be allowed to make to a patent, states that *inter alia* he may show, "that the patentee was not the original and first inventor or discoverer of the thing patented, or of a substantial and material part thereof claimed as new." And the proviso to the same section allows the court to refuse costs, "when the plaintiff shall fail to sustain his action on the ground that, in his specification or claim, is embraced more than that of which he was the first inventor."

The 7th section of the Act of March 3, 1837, specially defines the meaning of the phrase "too broad," to be "when the patent claims more than that of which the patentee was the original and first inventor." And the 9th section of the same Act, again providing for cases where by accident or mistake, the patentee claims more than he is justly entitled to, de-

scribes it to be "where the patentee shall have in his specification claimed to be the original inventor or discoverer of any material or substantial part, of which he is not the first and original inventor, and shall have no legal and just right to the same."

Thus we see that it is only where, through inadvertence or mistake, the patentee has claimed something of which he was not the first inventor, that the court are directed to refuse costs.

The books of reports may be searched in vain for a case where a patent has been declared void, for being too broad, in any other sense.

Assuming it to be true, then, for the purpose of the argument, that the new application of the power of electro-magnetism to the art of telegraphing or printing characters at a distance, is not the subject of a patent, because it is patenting a principle; yet as it is also true, that Morse was the first who made this application successfully, as set forth in this eighth claim, I am unable to comprehend how, in the words of the statute, we can adjudge "that he has failed to sustain his action, on the ground that his specification or claim embraces more than that of which he was the first inventor." It is for this alone that the statute authorizes us to refuse costs.

4th. Assuming this eighth claim to be too broad, it may well be said, that the patentee has not unreasonably delayed a disclaimer, when we consider that it is not till this moment he had reason to believe it was too broad. But the bill claims, and it is sustained by proof, that the defendant has infringed the complainant's second patent for his improvement.

The court sustains the validity of this patent. Why, then, *is the complainant not en- [*137 titled to his costs? At law, a recovery on one good count is sufficient to entitle the plaintiff to recover costs; and I can see no particular equity which the defendants can claim, who are adjudged to have pirated two inventions at once.

I am of opinion, therefore, that the decree of the Circuit Court should be affirmed, with costs.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Kentucky, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed, except so much thereof as decrees that the complainants shall recover their costs, in the prosecution of this suit, of and from the defendants, and that that part of the said decree giving costs to the complainants be, and the same is hereby reversed, and annulled.

And it is further ordered and decreed by this court, that the parties, respectively, pay their own costs in this court, and in the said Circuit Court.

Cited—15 How., 141; 19 How., 108; 20 How., 388; 1 Wall., 576; 11 Wall., 544; 19 Wall., 392, 396; 4 Otto, 194; 12 Otto, 707, 725; 1 Biss., 173, 307; 2 Biss., 473; 1 Holmes., 22; 3 Blatchf., 191; 4 Blatchf., 167, 244; 5 Blatchf., 141; 6 Blatchf., 405; 7 Blatchf., 234, 477; 15 Blatchf., 364; 18 Blatchf., 395; 2 Bond., 72, 73; 2 Cliff., 222, 374; 4 Cliff., 230.

FRANCIS O. J. SMITH, *Plaintiff,*

v.

HEMAN B. ELY, HENRY O'REILLY,
ROBERT W. MCCOY, THOMAS MOODIE,
MICHAEL B. BATEHAM, LINCOLN
GOODALE, WRAY THOMAS, ALBERT
B. BUTTLES, AND ROBERT NEIL.

Pleading, technical points in—when not considered.

The preceding case of *O'Reilly v. Morse* having settled the principles involved in the controversy between them, this court declines to hear an argument upon technical points of pleading in a branch of the case coming from another state.

The case is remanded to the Circuit Court.

THIS cause came up from the Circuit Court of the United States for the District of Ohio, upon a certificate of division in opinion between the judges thereof.

An action was brought by Smith, as the assignee of Morse and Vail, against Ely, O'Reilly, and others, for an infringement of Morse's patent rights to the telegraph, which are particularly set forth in the report of the preceding case.

The first count of the declaration was upon the patent of 1840, surrendered and re-issued in 1846.

138* The second count was upon the patent for improvements in transmitting and recording intelligence, by the use of the motive power of electricity. Both of these patents were surrendered, and re-issued in 1848.

The defendants filed eighteen pleas. On the 2d, 3d, 4th, 5th and 10th, the plaintiff took issue. He demurred to the remaining pleas, and upon some of these demurrers the court were divided.

All that need to be stated in explanation of the case, will be to state the difference of opinion, and refer to the pleas.

And afterwards, to wit: on the twenty-third day of October, being in the year and at the time of said court last mentioned, "this cause came on to be heard at the present term upon the demurrers filed by the plaintiff to the sixth, seventh, eighth, ninth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth and eighteenth special pleas of the defendants. And thereupon, the arguments of counsel being heard, and due deliberation being had, the opinion of the judges of said court were divided as to the following questions, to wit:

I. Upon the demurrer to the sixth and seventh pleas, respectively, whether the said letters patent to the said Morse are void, for the reason that the same do not on their face respectively express that they are to run for fourteen years from the date of the patent issued to said Morse in the kingdom of France.

II. Whether, upon the demurrer to the eighth, ninth, and eighteenth pleas, said letters patent to said Morse assume, as to the matter alleged in said eighteenth plea, to patent a principle, or a thing which is not an art, machine, manufacture, or composition of matter, or any improvement on any art, machine, manufacture, or composition of matter; and if so, whether, and to what extent, said letters pat-

ent, or any part thereof, are void in consequence thereof; and also whether said pleas are bad, respectively, for the reason that they assume to answer certain material and substantial parts of the plaintiff's claim, without averring that there are no other material and substantial parts embraced in his claim, which can be distinguished from the other parts averred to be so claimed without right, and on which he would be entitled to recover.

III. Whether, upon the demurrers to the fourteenth and fifteenth pleas, said patent, issued April 11th, 1846, and re-issued June 18, 1848, is void; and if so, to what extent; for the reason that it embraces as a material and substantial part thereof, a material and substantial part of a former patent issued to said Morse.

IV. Whether, upon the demurrers to the eighth, ninth, fourteenth and fifteenth pleas, said letters patent issued to said Morse [*139] are void, for the reason, as averred in said pleas, that he was not the original and first inventor of the several matters in said pleas respectively set forth; but the same had been, prior to said invention by said Morse, known and used in a foreign country.

The substance of these pleas was as follows:

6th. This plea alleges, that on the 18th of August, 1838, Morse took out a patent in France for the same invention patented to him in his letters of June 20, 1840; but that the latter were made to run fourteen years from date, instead of fourteen years from the date of the French letters.

7th. This plea states the same as the sixth, and that Morse's French patent was issued more than six months next before he filed his specification and drawings, annexed to the letters patent of June 20, 1840.

Upon the demurrers to these two pleas the court were divided, as mentioned in the first question of division.

8th. This plea sets out with the patents of 1840, as re-issued, and then alleges that "the use of the motive power of the electric or galvanic current, however developed, for marking or printing intelligible characters, signs or letters, at any distances," is a substantial and material part of the thing patented; and it states that Morse was not the original and first inventor or discover of the thing patented, but that the same was known before to one Dr. Steinhell, of Munich, and used on a line from Munich to Bogenhausen.

The principles claimed and patented in the letters of 1840, referred to in the 8th and 9th pleas, are as follows, to wit:

"What I specially claim as my invention and improvement is, making use of the motive power of magnetism, when developed by the action of such current or currents substantially as set forth in the foregoing description of the first principal part of my invention, as means of operating, or giving motion to, machinery which may be used to imprint signals upon paper; or other suitable materials, or to produce sounds in any desired manner for the purpose of telegraphic communication of any distances."

Eighth. "I do not propose to limit myself to the specific machinery, or parts of machinery, described in the foregoing specification

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and claims, the essence of my invention being the use of the motive power of the electric or galvanic current, which I call electro-magnetism, however developed, for marking or printing intelligible characters, signs or letters, at any distances—being a new application of that power, of which I claim to be the first inventor or discoverer.”

9th. In this plea the defendants allege that 140*] the mode and *process of propelling and connecting currents of electricity, or galvanism, through two or more metallic conductors, is a substantial and material part of the thing patented in the letters of 1840; and they aver that Morse was not the original and first inventor or discoverer thereof, but the same was known to one Edward Davy, in England.”

18th. In this plea, the defendants allege that “the use of motive power of the electro-galvanic current, however developed, for marking and printing intelligible characters, signs or letters, at any distances,” is a substantial and material part of the thing patented, and is distinctly claimed by the patentee in the specification; and he avers that the thing, so patented and claimed, is not any art, machine, manufacture or composition of matter, or any improvement on them.

The demurrers to these three pleas raise the questions secondly certified to this court.

14th. In this plea the defendant sets out the patent of 1846, as re-issued to, and states that “the combination of a pen lever, pen point or points, and roller,” mentioned in the patent, is a substantial and material part of the thing patented; and they aver that it was before known, and formed a part of an electro-magnetic telegraph for which Morse had taken out letters patent in 1840.

15. In this plea the defendants allege that, “the mode of combining two or more circuits of electricity or galvanism, mentioned and described in the specification annexed to the said letters patent as an improvement, is a substantial and material part of the thing patented;” and they aver that in electro-magnetic telegraphs, before known, modes of combining, on the same principle described in the specification, two or more circuits of electricity or galvanism, existed, and formed a part thereof, to wit: in one patented to Morse, June 20, 1840; to Edward Davy, of London, July 4, 1838, by the Queen of Great Britain. This plea also states that Morse, in patent of 1846, does not specify and point out the improvement in the said mode of combining two or more circuits made by him, so as to distinguish the same from the said modes before known and patented by him and by Davy.

The third question certified to this court is raised by demurrers to these two pleas.

The fourth question is raised by demurrers to pleas 8, 9, 14, 15, above set forth.

Mr. Chief Justice Taney delivered the opinion of the court:

The plaintiff in error is the assignee, within a certain tract of country, of the two patents granted to Morse for his Electro-Magnetic [41*] *Telegraph, one in 1840, and the other in 1846, and both re-issued in 1848. And this action was brought in the Circuit Court for the District of Ohio, for infringements of both of

these patents, within the limits assigned to the plaintiff.

The defendants did not proceed in their defense in the manner authorized by the Act of Congress, but pleaded the general issue, and seventeen special pleas. Upon some of these pleas issue was joined, and others were demurred to; and, upon the argument of the demurrers, the judges of the court were divided in opinion on the following questions, which they have certified for decision to this court.

I. Upon the demurrer to the sixth and seventh pleas respectively whether the said letters patent to the said Morse are void, for the reason that the same do not on their face respectively express that they are to run for fourteen years from the date of the patent issued to said Morse in the kingdom of France.

II. Whether, upon the demurrer to the eighth, ninth, and eighteenth pleas, said letters patent to said Morse assume, as to the matter alleged in said eighteenth plea, to patent a principle, or a thing which is not an art, machine, manufacture or composition of matter, or any improvement on any art, machine, manufacture or composition of matter; and if so, whether, and to what extent, said letters patent, or any part thereof, are void in consequence thereof; and also whether said pleas are bad, respectively, for the reason that they assume to answer certain material and substantial parts of the plaintiff's claim, without averring that there are no other material and substantial parts embraced in his claim, which can be distinguished from the other parts averred to be so claimed without right, and on which he would be entitled to recover.

III. Whether, upon the demurrers to the fourteenth and fifteenth pleas, said patent, issued April 11th, 1846, and re-issued June 18th, 1848, is void; and if so, to what extent; for the reason that it embraces as a material and substantial part thereof, a material and substantial part of a former patent issued to said Morse.

IV. Whether, upon the demurrers to the eighth, ninth, fourteenth and fifteenth pleas, said letters patent issued to said Morse are void, for the reason, as averred in said pleas, that he was not the original and first inventor of the several matters in said pleas respectively set forth; but the same had been, prior to said invention by said Morse, known and used in a foreign country.”

The questions certified, so far as they affect the merits of the case, have all been substantially decided in the case of *Morris et al. v. O'Reilly et al.*, at the present term. But several *questions are presented by the [*142 certificate upon the construction of the pleas and the extent of the admissions made by the demurrers, and the legal effect of such admissions upon the plaintiff's right of action.

In relation to the questions which go to the merits, as they have been already fully heard and decided in the case above mentioned, they are not open for argument in this case; and it would be a useless and fruitless consumption of time to hear an argument upon the technical questions alone. For, however the points of special pleading might be ruled by this court, they could have no material influence on the ultimate decision of the case: because, if it is

found that errors in pleading have been committed by either party, injurious to his rights, an opportunity ought, and would certainly be afforded him to correct them in some subsequent proceeding, so as to bring the real points in controversy fairly before the court.

For these reasons, the motion of the counsel for the defendants for leave to argue the points certified, is overruled, and the case remanded to the Circuit Court.

Under such circumstances, we deem it proper to remand the case, without argument, to the Circuit Court for the District of Ohio, where either party may amend his pleadings, and where the defendants, if they can distinguish their case from that above mentioned, will have an opportunity of being heard.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Ohio, and on the points or questions on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion, agreeably to the Acts of Congress in such case made and provided, and it appearing to this court that the said questions, so far as they affect the merits of the case, have been substantially decided by this court at this term, in the case of *O'Reilly et al. v. Morse et al.*, it is thereupon now here ordered and adjudged by this court, that this cause, without argument, be, and the same is hereby remanded to the said Circuit Court, with directions to permit either party to amend his pleadings, and also to allow the defendants an opportunity to distinguish their case, if they can, from that above referred to.

S. C.—5 McLean, 76, rev'd in effect.

143*] *JAMES E. BROOME, Administrator
de bonis non of ARTHUR MACON, Deceased,
Plaintiff in Error,

v.

THE UNITED STATES.

Collector's bond, surety who died before its approval by comptroller, bound—sureties responsible for money received by collector from predecessor—also for moneys transmitted by another collector, when.

The Act of Congress passed on 2d March, 1799 (1 Stat. at Large, 705), requires the bond given by a Collector of the customs to be approved by the Comptroller of the Treasury.

But the date of such approval is not conclusive evidence of the commencement of the period when the bond began to run. On the contrary, it begins to be effective from the moment when the Collector or his sureties part with it in the course of transmission.

Hence, where the surety upon the bond of a collector in Florida, died upon the 24th of July, and the approval of the Comptroller was not written upon the bond until the 31st of July, it was properly left to the jury to ascertain the time when the collector and his sureties parted with the bond to be sent to Washington; and they were instructed that before they could find a verdict for the surety, they must be satisfied from the evidence that the bond remained in the hands of the Collector, or the sureties, until after the 24th of July.

Collectors are often disbursing officers; and they

and their sureties are responsible for the money which a collector receives from his predecessor in office; and also for money transmitted to him by another collector, upon his representation and requisition that it was necessary to defray the current expenses of his office, and advanced for that purpose.

THIS case was brought up by writ of error from the Circuit Court of the United States for the Northern District of Florida.

The facts are stated in the opinion of the court.

It was submitted on a printed brief, by *Mr. Charlton* for the plaintiff in error, and argued for the United States by *Mr. Cushing* (Attorney-General).

Mr. Charlton, for the plaintiff in error:

1. The first point we make is, that this bond never had a legal existence, so far as Macon was concerned. That he died before it was approved by the Comptroller of the Treasury; and having died before the time had arrived, when vitality was given to it by such approval, he was not a party to the contract; and his administrator is in no manner responsible for any default of Crane in the discharge of his duties.

This writing obligatory belongs to that class of sealed instruments which, though not strictly escrows, yet are delivered, subject to a condition prescribed either by the parties, or the law.

By the Act of Congress of 2d March, 1799 (1st vol., Little & Brown's edition, 705), the bond of a Collector of Customs must be approved by the Comptroller. If not so approved, it never becomes an official bond; the day of the date, we all know, is immaterial; and the manual delivery, even in such a case, coupled with the condition which the law itself annexes, does not give legal existence or vitality to the instrument. It is the approval by the Comptroller of the Treasury which breathes *into it its legal life. It is that which [*144 shows the *aggregatio mentium*; it is that which makes it a contract. (*Commonwealth v. Kendry*, 2 Barr., 448.) Suppose that the Comptroller had refused to approve this instrument, would it then have had any efficiency? Would it have held the persons signing as sureties, liable for any default of Crane? Certainly not; for, as to them, there had been no contract with the government; they had offered to contract, but the offer had been declined. Does not this show, conclusively, that the approval of the Comptroller is the act which, for the first time, gives any life to this paper? But when that life was given to it, Macon was dead; the offer he had made to become a surety for Crane, had never been accepted in his lifetime; his death withdrew the offer, and his administrator is not bound. (Chitty on Contracts, 6th Amer. Ed., p. 9, and note 2, p. 12, citing Pothier; that it may be retracted at any time before acceptance, p. 18; and that death retracts it, p. 14, citing Pothier; see, also, p. 15; *Macher v. Prith*, 5 Wendell, 112, 113.) If a contract was made at all, it was with Macon, not with his administrator. But can a dead man make a contract? The authorities cited, refer, it is true, to unsealed instruments, but there is the same principle here. If the paper was actually delivered, it was upon the condition that it should be approved by the obligee; that it was a condition that the law attached to it, and

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there was no *aggregatio mentium* until such approval; and in the mean time, death had retracted the offer.

We think, therefore, that His Honor, in the court below, committed error in ruling that the approval of the Comptroller was not the act that gave this instrument its legal vitality.

And we think, that even if we are not correct in that view, still, that he was in error in refusing the instruction asked for by the counsel for the defendant below; that it was the duty of the plaintiff below to prove that the said bond was delivered before the death of Macon.

I will not stop to argue that if this paper was signed by Macon in the presence of witnesses, but not actually delivered by him, that it never bound him. I think we will all agree that if he signed it in the presence of a thousand witnesses, who attested it as sealed and delivered, yet, that if he purposely kept possession of it himself, it did not bind him. It was therefore the duty of the plaintiff below to prove a delivery in the lifetime of Macon. If the fact existed, he could and ought to have proved it, as he held the affirmative of the issue. But he did not offer even *prima facie* evidence. The possession of it by the Comptroller would be evidence of its delivery; but when? Would it show a delivery in the lifetime of Macon? [145*] Would it *not rather show that the Comptroller did not receive it until the 31st July, 1837, the day on which he approved it; the presumptions of law being that an officer of the government discharges his duty with promptitude. (7 How., 132.)

Though there may be evidence, then, that this instrument was delivered to bind Crane and Swain, there is none, not even *prima facie*, that it was ever delivered to bind Macon. Its date does not afford that proof, for the date of a deed is not any vital part of it at all. It is equally good without a date, or with an impossible date, and this shows that a date is no legal part of it. If we were to hold otherwise, we would fall into the absurdity of being bound by the assertion of a sealed instrument that it had been made on the 30th of February. Whilst the law forbids you to contradict, add to, or vary any part of a sealed instrument by parol evidence, it allows you and requires you every day to prove the time of delivery, even though a date be stated, and even though the date of such delivery should directly contradict the alleged date of the instrument, thus clearly showing that it does not consider the date inserted as any part of the instrument.

There is not a tittle of proof that any officer of the government ever had the possession of this paper until the 31st July, and then, for the first time, arises the presumption of its delivery; there is no proof that any of these parties ever parted with the possession of this paper before the 31st July, 1837, when it reached the Comptroller, possibly from the hands of an agent of Macon, whose power to deliver would end with the death of his principal; and it is worthy of remark that, even according to the very vague and unsatisfactory testimony offered by the United States in the court below, as to the time it would take to transmit by mail, or messenger, from Tallahassee to Washington, that this paper could have been forwarded after the death of Macon, and reached Washington

by the 31st. The language of the witness being about eight or ten days for transmission by mail, and by individuals, seven or eight days. A bond may be delivered by the surety to his principal as an escrow. (4 Cranch, 221.)

His Honor below refused to give the instructions, as asked for, and ruled that the jury must be satisfied that the bond remained in the hands of Crane or the surety until after the death of Macon, thus virtually throwing the burden of proof upon us who held the negative, instead of requiring the plaintiff below to prove the act *in pais*, viz.: the delivery necessary to give vitality to the instrument. (4 Wheat., 77.)

2. But if this bond ever was legally delivered in the lifetime of Macon, the question remains, did his principal, Crane, ever *make [*146] such default in the discharge of the duties of his office, as would bind his sureties?

The condition of the bond is, that Crane "shall continue truly and faithfully to execute and discharge all the duties of the said office according to law."

What were the duties of his office according to law? The Statute of Congress of 2d March, 1799, prescribes them. (1st Vol., Little & Brown's edition, p. 642; see, also, 2d Act of same date, 708, top part of page.)

Is there here any authority on the part of government to authorize Crane to become their financial agent, and to authorize him to collect moneys for the government outside of his official duties; and if not, could his sureties be bound to such acts?

Where, then, was the authority to authorize him to draw upon, or receive money from Breedlove, the Collector at New Orleans?

Be that as it may, by what authority or law can the United States make the sureties responsible for the money collected by Crane from Willis? Is it part of the official duty of a Collector of Customs to collect from his predecessor the amount due by him to government? If there be such law, let it be shown. His Honor, in the court below, virtually concedes this point, but then he destroys the effect of such concession, by instructing the jury that, although the money might have been received outside of his official duty, yet, as the government adopted the act and charged the amount to him, it was of course conclusive upon him, and that his sureties could not, with any propriety, complain, because it appeared from his accounts that, at the time Crane received the \$1,279.92 from Willis, the United States were indebted to him (Crane) in a much larger amount, and that for some time thereafter, and after debiting his accounts with that sum, the balance was still against the United States, and in favor of Crane, and that the defalcation of Crane, for which his sureties were sought to be held liable, accrued long after that period, and that it was therefore immaterial to the sureties, &c.

We respectfully say that there is a mingling up, in this legal caldron, of very discordant materials, and that the reasoning is neither logical nor conclusive.

We are not going to deny that if a man, without any authority, collects the money belonging to another, that other may, if he pleases, confirm the act and sue the party who has assumed to act as his agent, for the amount he

has thus collected. And we do not, therefore, dispute the reasoning of His Honor in the court below, when he held, that after the government [147*] "adopted the act of the collection from Willis, and charged it to Crane, that it was, of course, conclusive upon Crane. What we object to is, the application of this principle, and the subsequent reasoning as to the sureties.

The government may, by an artificial and artistical way, make out the accounts between these parties, so as to obscure the true issue, but that cannot preclude us. It may make what rests it pleases in such accounts for such purposes, and it may, by inserting in the quarter ending the 30th September, an amount which their own evidence (that is, if there was any evidence at all of that receipt of money) shows was received on the 1st October. But the only true way of ascertaining whether the sureties are liable in this case, is to make out a general account of all sums received by Crane in his official capacity, and which it was his duty so to receive, and then to credit him with all payments which he properly made; and if the debits exceed the credits of such legitimate transactions, to that extent the sureties are responsible. When the judge below tells us, then, that although Crane had no right to receive this \$1,279.92 from Willis, in his capacity as Collector (in other words, though it was not an act for which his sureties were responsible), yet, that as the government owed him at that time (a fact which, by the way, is inconsistent with their proof), and for some time after, and as all his defalcations actually occurred afterwards, that, therefore, his sureties had no right to complain of this charge being made in the account, and that it was immaterial to them whether he had or had not received the sum in his official capacity, is, we repeat, not logical reasoning. If the sureties are charged in the general account with \$1,279.92, which ought not to be charged to them, are they not so much the losers? Does it not deduct from the credits to which they are entitled, in the general account, running through all the time for which they were so responsible, just so much, and produce a corresponding effect upon the balance at the foot of the account? If this sum had not been charged against them, would there not have been exactly so much more due by the government to Crane as Collector, for the payments legitimately made by him, as Collector, and to the benefit of which indebtedness the sureties would be entitled?

It seems difficult to answer these questions negatively. What possible difference can it make, then (even if it be so), that Crane, after receiving this money, was still the creditor of the government? It is to the general result, at the close of his term of office, that we must look, and that general result, after deducting this illegal debit, must show, so far as the sureties are concerned, exactly so much more due by [148*] the government to "Crane, as Collector, than now appears. How, then, was it immaterial to the sureties? And besides this error of law, the judge also erred in withdrawing the questions of fact from the jury, whether this money had ever been received by Crane, by virtually telling them that it was an immaterial fact in the case, and that the surety (the only person sued) was not sought to be charged by

it, thus taking away the fact itself from their scrutiny.

He was asked, by the counsel of defendant below, to charge that the receipt for \$1,279.92, given in the 4th quarter of 1837, is not a sufficient voucher to support the item of same amount in the account of third quarter, 1837 of Willis' transaction. This the judge refused to charge.

We respectfully insist that the government officers had no right to charge this receipt at all, either in the fourth or third quarter, against Crane, as collector. It was a fact that did not officially come within their knowledge; to which knowledge the law confines them, in making out their transcripts for evidence. Crane had never charged himself with it, as Collector, but the government officer undertook to discharge the sureties of Willis for money for which, as far as we know, they were responsible, and to charge the sureties of Crane, without their assent, and this upon no other proof than the exhibition of a receipt purporting to be Crane's, but not proved to be so. We think that this does not come within the purview of the Statute of 3d March, 1797, and that the transcript was not a sufficient voucher to support the item, the original receipt being the best evidence (if evidence at all) of the fact of payment. (*United States v. Buford*, 3 Pet., 29; *Cox and Dick v. United States*, 6 Pet., 202.) Nor is the case in 5 Pet., 375, hostile, for there Orr was entitled to draw on the treasury for money, and the officers knew that they had paid it. But in our case Crane had no right to receive the money at all, nor did he authorize the charge; and the United States had no right to relieve Willis by charging to Crane and his sureties. (See 3 Pet., 29; *Hoyt v. United States*, 10 How., 182, 183.)

Mr. Cushing, for the United States:

First point omitted.

II. The official bond of the Collector and inspector, Crane, and his sureties, Swain and Macon, bears date 2d June, 1837.

Indorsed July 4th, 1837, by the District Attorney of the United States, that the sureties are good and sufficient.

"July 31st, 1837: approved on the above certificate. George Wolf, Comptroller."

Arthur Macon died 24th July, 1837, after the approval of the "sureties by the District [*149] Attorney, but before the indorsement by the Comptroller.

The administrator of A. Macon contended, that the surety died before delivery of the bond, and therefore that, as to him, it was not obligatory. To this end various instructions were moved by the administrator. The rulings of them by the court are to be seen, p. 48 of the record.

The several instructions on this subject, moved on behalf of the administrator, need not be here repeated. The charges of the court were correct; they left to the jury the question of fact of delivery, under all the circumstances, without any improper instruction as to the matters of law.

"A deed may be delivered by the party himself that doth make it, or by any other by his appointment or authority precedent, or assent or agreement subsequent."

"And so, also, a deed may be delivered to

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the party himself to whom it is made, or to any other by sufficient authority from him; or it may be delivered to any stranger, for and in the behalf, and to the use of him to whom it is made without authority." (Touchstone, chap. 4, p. 57.)

If a man makes an obligation to F, and delivers it to B, if F gets the obligation he shall have action upon it, for it shall be intended that B took the deed for F, as his servant." (13 Viner, *Fails* K, plea 7, page 23.)

"If a man delivers a writing as an escrow, to be his deed, on certain conditions to be performed, and afterwards the obligor or obligee dies, and afterward the condition is performed, the deed is good, for there was *traditio inchoata* in the life of the parties; *sed postea consummata existens*, by the performance of the condition, takes its effect by force of the first delivery, without any new delivery." (Perryman's case, 5 Coke, 84-86; S. P., *Graham v. Graham*, 1 Ves. Jr., 272, 274; *Proset v. Walsh*, Bridgm., 51, from Year Book 27 Hen. VI., 7.)

"If I deliver an obligation or other writing to a man as my deed, to deliver unto him to whom it is made when he shall come to York, it is my deed presently; and if he deliver it to him before he comes to York, yet I shall not avoid it; and if I die before he comes to York, and afterwards he cometh to York, and he delivereth the deed unto him, it is clearly good, and my deed, and that it cannot be if it were not my deed before my death." (13 Viner *Fails*, M, plea 7, p. 24; and cites Perkins, sec. 143.)

"And where the deeds have a kind of double delivery, there they shall take effect from and have relation to the time of the first delivery or not, *ut res valeat*; for if relation may hurt, and for some cause make void the deed (as in some 150*) cases it may), *there it shall not relate. But if relation may help it, as in case where a *feme sole* delivers escrow, and before the second delivery she has married, or dieth, in this case, if there were not a relation the deed would be void, and therefore in this case it shall relate." (Touchstone, chap. 4, page 72, Relation; *Butler & Baker's* case, 3 Coke, 85 b, Resolve 1 and 2; *Cook's Adm'r v. Hendricks*, 4 B. Monroe, 502, 503.)

A, being indebted to his bankers, executed a deed, purporting to be a mortgage to them, for securing the debt. After executing it, he delivered it to his attorney, who retained it in his possession till A's bankruptcy, which occurred about a month afterwards. The attorney then delivered it to the mortgagee. Held, that this was a good delivery by A to the mortgagee. (*Grignon v. Gerrard*, 4 Younge & C., 119.)

If a deed is delivered by the grantor to any person in his lifetime to be delivered to the grantee after his decease, it was a good delivery upon the happening of the contingency and related back so as to divest the title of the grantor, by relation to the just delivery. (*Poster v. Mansfield*, 3 Metcalf, 412; *O'Kelly et al. v. O'Kelly*, 8 Metcalf, 436, 439; see *Exton v. Scott*, 6 Sim., 31.)

A delivers a deed, as an escrow, to J. S. to deliver over on condition performed, before which A becomes *non compos mentis*; the condition is then performed, and the deed delivered over; it is good, for it shall be A's deed from

the first delivery. (Brook's Reading on St. of Lim., p. 150.)

The present is not the case of an escrow; and if it were it would not avail the obligors in the bond; the relation of which is clearly stated by Chief Justice Parsons, in the case of *Wheelwright v. Wheelwright*, 2 Mass., 447, and repeated by Mr. Justice Sewall, in *Hatch v. Hatch*, 9 Mass., 307, 309, as follows:

"The delivery is an essential requisite to a deed, and the effect of it is to be from the time when it is delivered as a deed. But it is not essential to the valid delivery of a deed, that the grantee be present, and that it will be made to or accepted by him personally at the time. A writing delivered to a stranger, for the use and the benefit of the grantee, to have effect after a certain event, or the performance of some condition, may be delivered either as a deed or as an escrow. The distinction, however, seems almost entirely nominal, when we consider the rules of decision, which have been resorted to, for the purpose of effectuating the intentions of the grantor or obligor, in some cases of necessity. If delivered as an escrow, and not in name as a deed, it will, nevertheless, be regarded and construed as a deed from the first delivery, as soon as the event happens, or the condition is performed, upon which the effect had been suspended, *if this construction should be then necessary in furtherance of the lawful intentions of the parties. (See, also, 3 Coke on Littleton, by Day, 86 a, note 223; Perkins, secs. 187, 188, 142; *Bushel v. Passmore*, 6 Mod., 217; *Maynard v. Maynard*, 10 Mass., 486; *Bodwell v. Webster*, 13 Pickering, 411, 416; 4 Cruise, by Greenleaf, p. 28, note; *Elsey v. Metcalf*, 1 Denio, 323; *Brown v. Brown*, 1 Wood. & M., 325; *Doe, dem. Gurnons, v. Knight*, 8 Dowl. & R., 348; *Doe, dem. Lloyd, v. Bennett*, 8 Car. & P., 124.)

"The delivery of a deed may be inferred from circumstances," per Mr. Justice Story, *Gardiner v. Collins*, 3 Mason, 401.

The possession of the deed by the lessor or plaintiff, who offers it in proof, is *prima facie* evidence of its delivery. Under ordinary circumstances, no other evidence of the delivery of a deed than the possession of it by the person claiming under it, is required." (*Games v. Stiles*, 14 Pet., 327; *S. P. Hare v. Horton*, 2 Nev. & M., 428; 5 Barnwell & Ad., 715.)

"If the original deed remained in existence, proof of the handwriting, added to its being in possession of the grantee, would, it is presumed, be *prima facie* evidence that it was sealed and delivered. No reason is perceived why such evidence should not be as satisfactory in the case of a deed as in the case of a bond." (*Lessee of Sicard v. Davis*, 6 Pet., 187.) In that case the original deed was lost, but the execution and the delivery thereof were inferred from circumstances.

"All deeds do take effect from, and therefore have relation to, the time, not of their date, but of their delivery. And this is always presumed to be the time of their date, unless the contrary do appear." (Touchstone, chap. 4, sec. 8, p. 72.)

These principles seem to me to be sufficient to warrant the rulings and charges by the court, on the subject of the delivery of the bond.

If a bond, with surety required by law of an

officer, be signed and sealed by the parties who are named as obligors to the United States, and sent by mail, or by private conveyance, to the proper department, and be sued upon by the United States, such circumstances must be *prima facie* evidence of delivery; which delivery must be presumed to be the time of the date, until the contrary be made to appear; otherwise the great affairs of this government, spreading over such vast territories, requiring bond and security from officers intrusted with the collections or disbursements of public moneys, could not be administered safely, unless all the various officers, who are by law required to give bond with security, to be filed in the proper department, should be required to come with their sureties to the seat of government, and execute and deliver in person, in the proper office, their [152*] respective obligations. Such a rule would be highly inconvenient, excessively dilatory, if not impracticable. Such a rule could be endured only in a village, town, or city, or in a district of country of small extent.

That A. Macon signed the bond is admitted. After he signed and sealed he did not keep it in his possession; it was not found after his death among his papers; he delivered it to some person; the purpose for which he signed and sealed the bond was, that it should be delivered into the proper department of the government; it expresses that purpose on its face, and to that intent it expresses to have been "sealed and delivered in the presence of witnesses, Robert Lord, George G. Holt," who, as witnesses, have signed their names. It came to the possession of the proper department of the Government of the United States, and was given in evidence by the department.

From all these circumstances the inference is irresistible that, after A. Macon signed and sealed the bond, and caused it to be attested by the witnesses, he delivered it to some person to be sent to the proper department of the Government of the United States, the obligee named in the bond. The jury have found in favor of the United States; without any improper instruction from the court, and the verdict is conclusive.

III. The question raised for the defendant in the District Court, now plaintiff in error, as to the sum of \$1,279.92 appearing in the account against Mr. Crane, as Collector of the Customs for the District of St. Mark's, and Inspector of the Revenue for the port of Magnolia, is so properly and clearly treated of by the judge in his charge to the jury, as not to require of me anything in addition to what he has said.

As to the sums of \$3,000 and \$6,500, it appears in evidence that they were paid to Crane, upon his representation and requisition, to defray the current expenses of his office; and on this account the judge ruled that they were legitimate charges as against his sureties.

This view is supported by the provisions of law which require the Collector to pay the expenses of his office out of its revenue, or to disburse the money received by him from the government to supply any deficiencies in such revenue. (See Act of 1799, 1 Stat. at Large, 707; Act of 1823, 3 Id., 723.)

The government advanced money to Crane, under the statute cited, to defray the expenses of his office.

The conditions of the Collector's bond were to execute and discharge all the duties of his office faithfully. This condition was broken if the Collector made false statements to the Comptroller of the Treasury of the sums necessary to the current expenses of the district whereof he was collector, and false requisitions *up. [*153 on the Treasury Department, for moneys to pay those current expenses, it was a malfeasance in office, a breach of the condition of the Collector's bond, for which the surety was chargeable.

The Collector was, by law, the officer to pay the current expenses of the district whereof he was appointed Collector, and he and his surety were properly chargeable with all moneys put into the hands of the collector for such purposes.

Mr. Justice Wayne delivered the opinion of the court:

Ambrose Crane was appointed Collector of Customs for St. Mark's in Florida, and signed, with his sureties, Swain and Macon, what was meant by them to be an official bond. The form of the bond is given in the statute. This conforms to it in every particular. (1 Stat. at Large, 705.) Crane, the Collector, became a defaulter. This suit was brought to recover the amount of the defalcation from the administrator of Macon, one of the sureties of Crane. The bond is dated on the 2d June, 1837. Two indorsements are upon it. One of them was made by the District Attorney of the United States for Florida.

Office of the United States Attorney, Middle District of Florida, July 4th, 1837. I hereby certify, that Peter H. Swain and Arthur Macon, Esqrs., who appear to have executed the within bond as securities, are generally esteemed to be, and in my opinion undoubtedly are, good for the amount of this bond. They reside in Leon County, and I would take either of them, without hesitation, as security for a private debt of that amount. The signatures appear to be genuine.

CHARLES S. SIBLEY, District Attorney.

The other indorsement is as follows:

Comptroller's Office, July 31, 1837. Approved in the above certificate.

GEORGE WOLFE, Comptroller.

Macon died on the 24th July, seven days before the date of the Comptroller's approval, and twenty-four days after the date of the district attorney's indorsement. The evidence in the case shows that in the year 1837 the mail time between Tallahassee and Washington was from eight to ten days. The distance might have been traveled by an individual in less time, but not in less than seven or eight days. This testimony was introduced by the plaintiff to prove that the bond, if it had not been delivered before the 24th of July, the day of Macon's death, that it must have been in the course of transmission from the obligors before that day, as the Comptroller's approval is "dated the [*154 31st of the month. The Act directing bond to be taken from collectors, with sureties, to be approved by the Comptroller of the Treasury of the United States, will be found in 1 Stat. at Large, 705. It is, that every collector, naval officer, and surveyor, employed in the collection

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of the duties upon imports and tonnage shall, within three months after he enters upon the duties of his office, give bond, with one or more sureties, to be approved by the Comptroller of the Treasury of the United States, and payable to the United States, with condition for the true and faithful performance of the duties of his office, according to law. The condition of the bond is, that whereas the President of the United States hath, pursuant to law, appointed the said _____ to the office of _____, in the State of _____. Now, therefore, if the said _____ has truly and faithfully executed and discharged, and shall continue truly and faithfully to execute and discharge all the duties of said office, according to law, then the above obligation is to be void and of none effect; otherwise it shall abide, and remain in full force and virtue.

In this state of the case, a recovery upon this bond is resisted by an objection that it never had a legal existence as to Macon, the intestate of the appellant, because he died before it was approved by the Comptroller. It is not denied—or, if it be, the evidence makes it altogether probable—that the bond had been delivered before Macon died. We cannot admit that the date of the approval can be taken absolutely as the time when the bond was accepted, without any relation to the time when it was delivered. A bond may not be a complete contract until it has been accepted by the obligee; but if it be delivered to him to be accepted if he should choose to do so, that is not a conditional delivery, which will postpone the obligor's undertaking to the time of its acceptance, but an admission that the bond is then binding upon him, and will be so from that time, if it shall be accepted. When accepted, it is not only binding from that time forward, but it becomes so upon both from the time of the delivery. That is the offer which the obligor makes, when he hands the bond to the obligee, and in that sense the obligee received it. Such is just the case before us. The Act requires the Collector to give a bond, "with sureties to be approved by the Comptroller;" it must be done in three months after he has entered upon the duties of his office; it must be retrospective to that time, and be for the future also. The Comptroller may accept the sureties or reject them. He may call at any future time for other sureties, if circumstances shall occur, or information shall be received, which make it necessary that the United States should have a more responsible security. *Or he may call, under the direction of the Secretary of the Treasury, for a new bond. He may decide upon the sufficiency of the sureties before they have made themselves so, or after they have signed the Collector's bond. The first course is not the usual practice. The bond is commonly sent to the Collector with such sureties as he can get. The Comptroller receives it under the law, to be afterwards approved, upon such information as he has or may procure, concerning the responsibility of the sureties. The time is not limited for the use of his discretion for that purpose. He knows, and the Collector knows, that the bond ought to be given in three months after the Collector has begun to discharge the duties of his office. It is his duty to give the bond. It is the Comptroller's to see that it is

done. It is not necessary that it should be handed to the Comptroller. It may be handed to an agent appointed by the Comptroller to receive it, or it may be put into the possession of any person to deliver it, or it may be transmitted by mail. If done in any one of these ways, it is a delivery from the moment that the Collector and his sureties part with it. It is from that moment in the course of transmission, with the intention that the law may act upon it through the Comptroller's agency, and his subsequent approval is an acceptance with relation to the time beginning the transmission. The statute does not require the approval to be in writing. It may be so, and may be done verbally; or it may not be done in either way. Receiving the bond and retaining it for a considerable time without objection, will be sufficient evidence of acceptance to complete the delivery, especially when the exception is taken by the party who had done all he could to complete it. (*Postmaster General v. Norvell*, 1 Gilpin, 108-121.) And we add, that the retention of such a bond by the Comptroller without objection, for a longer time than the statute requires it to be given, would be presumptive evidence of its approval and acceptance. This presumption of acceptance has been ruled by this court, in the case of *The United States Bank v. Dandridge et al.*, 12 Wheat., 64. In that case, an objection was taken in the Circuit Court to the admissibility of evidence to show a presumptive acceptance of a cashier's bond, because the charter of the bank required a bond to be given satisfactory to the directors. The Circuit Court sustained the objection, and ruled that the approval must be in writing to bind the cashier's sureties. This court ruled otherwise. Presumptive evidence, then, being admissible to prove the acceptance of a bond—such as its being in the possession of the obligee—having been retained without objection, and the obligor continuing to act under it, without having called for a more formal acceptance, it follows that a written *acceptance, dated after [*156 a delivery, as was done in this case, is not to be taken as the time from which the completeness of the contract is to be computed; but that such an acceptance has a relation to the time of delivery, making that time the beginning of its obligation upon the parties to the bond. We remark, also, that there is no rule which can be applied to determine what constitutes the approval of official bonds. Every case must depend upon the laws directing such an approval. The purpose for which such a bond is required must be looked to. The character of the office and its duties must be examined. The time within which such a bond must be given and approved, and whether it is to be retrospective or for the future only, must be considered before it can be determined how and when the approval must be made. The differences suggested may be seen by comparing the terms of the Statute of 1825, requiring bonds to be given by postmasters directly to the Postmaster General, and not to the United States, with the phraseology of the section of the Act directing bonds to be taken from the collectors to the United States.

The case of *Bruce and others v. The State of Maryland, for the use of Loe*, in 11 Gill & Johnson, 382, which was supposed to have a bearing

upon the case, will illustrate fully the differences of which we have spoken.

The 42d article of the Constitution of Maryland, requires bonds from the sheriff of that State, with sureties, before they can be sworn in to act as such. The Act of Maryland, carrying that article into operation (2d vol. Laws of Maryland, November, 1794), fixes the time within which sheriffs shall give bonds, and the manner of taking them is prescribed. It must be done in a county court, or before the Chief Justice, or two associate justices, &c., but by whomsoever approved, the Act directs that the official doing so, shall immediately transmit it to the county court to be recorded. The case came before the Court of Appeals, from a county court, which had decided that the bond of the sheriff operated from its date, that bond having been given without the approval in the manner prescribed. The Court of Appeals overruled the court below, saying that the bond had been irregularly taken, and that a sheriff's bond was only obligatory from the time of its approval. Under that statute, the question, when a sheriff's bond became operative, could not properly occur, it having made the delivery and approval of the bond simultaneous, that there might be a compliance with the Constitution, which declared that no sheriff should act until he had given bond. The Act which we have been considering, does not require the Comptroller's approval to be in writing. A Collector may be permitted to discharge the duty ¹⁵⁷ of his office, for three months, before he gives a bond, if the Secretary of the Treasury shall think it safe to be done. But if otherwise, he may require a bond before the Collector enters upon the duties of the office. The statute means that the three months allowed for a bond to be given, is an indulgence to the Collector, and not a rule binding upon the government, when its proper functionary shall determine that a bond shall be given earlier. We think, too, that the approval by the comptroller is directory, and not a condition precedent to give validity to the bond. The doctrine that deeds and bonds take effect by relation to the time they are delivered, is well understood. The cases cited by the Attorney-General, in support of it, are sufficient for the occasion. We need not add to them. It applies to this case. Macon was bound as the surety of Crane, by the delivery of the bond before his death. The evidence in support of such a delivery, was fairly put to the jury.

We have compared the charge of the judge, with the instructions which were asked by the counsel of the defendant, upon the point we have been considering, and we think that it covers all of them correctly.

Another objection against a recovery upon this bond remains to be disposed of.

It is said that Crane, the Collector, received money belonging to the United States, out of the line of his duty, which has been improperly charged to make up the amount of the defalcation, which his sureties are now called upon to pay.

The duties of collectors have been much multiplied by other acts, since the Act of 1799 was passed. Scarcely an Act, and no general Act has been passed since, concerning the collection of duties upon imports and tonnage, with-

out some addition having been made to the collector's duties. They are suggested from experience. The Collector, too, has always been a disbursing officer for the payment of the expenses of his office, and may pay them out of any money in hand, whether received from duties or from remittances to him for that purpose, where the expenses are not unofficial, have been sanctioned by law, and have been incurred by the direction of the Secretary of the Treasury. For such payments, he may credit himself in his general account against the sums which may have been received for duties. He may retain his own salary, or fees and commissions; pay the salaries of inspectors and other officers attached to the office; make disbursements for the revenue boats, lighthouse buoys, &c., and apply money collected for duties, to all expenses lawfully incurred by himself or by his predecessors. For such as may have been incurred by his predecessor, he may receive ¹⁵⁸ from him any money in his hands, when he is going out of office, belonging to the United States, and which have been retained by him for the payment of such expenses.

When so turned over to a successor, he receives it officially, to be applied by him to the purpose for which it had been retained. Himself and his sureties are as much responsible for the faithful application of it as they are for his fidelity to his trust, for duties received by himself, or for other sums which may have been remitted to him by the order of the government. It has often been the case, and must be so again, as it now is, that the convenience of the government and the interest of its citizens, require collection districts to be established, which do not, and are not expected at first to pay expenses. Remittances, then, must be made for such purposes. They are made to the Collector, because it is under his personal supervision that the work is done, or the goods are furnished for the government, at the point of his office where the law requires him to reside. What we have said, covers all of the remittances which were made to Crane, by Breedlove, the Collector of Mississippi; and also the payment of \$1,279.92 received by him from Willis, his predecessor, when he was going out of office, and when Crane was coming in. It appears, from the accounts, that he received it as Collector. It cannot be denied that there was then a debt due by the government, on account of the expenses of the office, to which that sum ought to have been applied. Had it been so, he would have been credited with the sum in his next quarterly settlement. And if it was not so applied, it cannot be said that there was fidelity to his official trust in withholding it and applying other money of the government subsequently collected or received, to the payment of its antecedent debt. In this instance, there is less reason for not exempting the securities of Crane from responsibility for the sum received by the collector from his predecessor, because the evidence in the case shows it was afterwards sanctioned by the government, and that it might have been applied by the collector to the liquidation of an official debt, as far as it would go, due by this government to himself. What has been said, covers every instruction which the court below was asked to give upon this point. We do not

think that the judge erred in his general charge upon them to the jury, or that in making the charge which he did, that there is any error of which the defendant can complain.

We affirm the judgment below, and direct a mandate to issue accordingly.

Mr. Justice Campbell:

I dissent from the judgment of the court in this case.

159*] *The certificate of the Comptroller of the Treasury, of his approval of a bond which it is made his duty to accept on behalf of the government, is the best evidence of the time of its delivery, as a valid and operative obligation. If another date is asserted by the government, the burden of sustaining it by clear proof, devolves upon it.

The instruction to the jury by the District Judge, "that the time of the approval of the bond, at the Treasury Department, is not to be taken as the time of delivery," was, in my opinion, too general, and is erroneous.

The District Judge further instructed the jury, that although the bond "may not have come to the hands of the officers of the government" till after the death of one of the obligors, yet, "if they had parted with it for the purpose of sending it, or having it sent to Washington City, before that time," that would charge the legal representative of the person who had died.

The delivery of a bond is only complete when it has been accepted by the obligee, or a third person, "for, and in his behalf, and to his use."

The terms I have quoted from the Touchstone, imply a cession of the title to the paper in the act of delivery.

The third person, who thus represents the obligee, is not subject to the mandate of the obligor, nor amenable to his control.

The instructions of the District Judge would be satisfied by any surrender of the custody of the paper, if for the purpose of having it sent to Washington City; whether it be to the agent or servant of the obligors, who would be subject to their orders, or by its inclosure in a letter, the delivery of which might be countermanded; in other words, by acts which did not amount to a surrender of the property or legal right to control the paper. This, in my opinion, was erroneous. With respect for the opinion of this court, I enter, therefore, my dissent to the judgment which affirms these instructions.

ORDER.

This cause came to be heard on the transcript of the record from the Circuit Court of the United States for the Northern District of Florida, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with interest, until paid, at the same rate *per annum* that similar judgments bear in the courts of the State of Florida.

Cited—19 How., 76; 7 Otto, 582; 2 Woods, 98.

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*ELIJAH PHELPS, *Plaintiff in Error*, [*160

v.

JACOB MAYER.¹

Exceptions to instructions to jury—must appear in bill as made while jury at the bar.

In order to make a bill of exceptions valid, it must appear by the transcript not only that the instructions were given or refused at the trial, but also that the party who complains of them, excepted to them while the jury were at the bar.

The bill of exceptions need not be drawn out in form and signed before the jury retire; but it must be taken in open court, and must appear by the certificate of the judge who authenticates it, to have been so taken.

Hence, when the verdict was rendered on the 13th December, and on the next day the plaintiff came into court and filed his exception, it is not properly before this court. And no error being assigned or appearing in the other proceedings, the judgment of the Circuit Court must be affirmed, with costs.

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of Indiana.

It is not necessary to state either the facts or arguments of the case, inasmuch as it went off upon a point of practice.

It was argued by *Mr. Ewing* for the plaintiff in error, and *Mr. Jernegan* for the defendant in error.

Mr. Jernegan thus noticed the point upon which the case went off:

A preliminary objection arises. It appears from the record that the verdict was rendered on the 13th of December, and the bill of exceptions filed on the 14th. No exceptions were taken on the trial. It is therefore too late now to object to the instructions of the court, or its refusal to give the instructions required. (11 Pet., 185; 6 Blackford, 417; *Cully v. Doe*, 11 Adolph. & Ellis, 1008, *note*.)

Mr. Chief Justice Taney delivered the opinion of the court:

This action was brought by the plaintiff in error against the defendant in the Circuit Court of the United States for the District of Indiana, for the infringement of the plaintiff's rights under a patent granted to him for a new and useful improvement in the application of hydraulic power. The case was submitted to a jury under certain directions from the court, and the verdict and judgment were for the defendant.

This writ of error is brought for the purpose of revising this judgment—and the case has been fully argued upon the charge given by the Circuit Court, and also upon its refusal to give sundry directions to the jury which were requested by the plaintiff.

*But, although it appears by the certificate of the judge, sent up as part of the record, that these instructions were given and refused at the trial, yet it also appears that no exception was taken to them while the jury remained at the bar. The verdict was rendered

1.—*Mr. Justice Curtis* did not sit in this cause, having been of counsel for the patentee.

NOTE.—What particularity in exceptions is necessary in order to review in appellate court. General exception or objection, when not sufficient. See note to *Moore v. B'k of Metropolis*, 13 Pet., 302. Exception, when must be taken to be available on review.

Exceptions to the rulings or instructions of the

on the 13th of December, and the next day the plaintiff came into court and filed his exception. There is nothing in the certificate from which it can be inferred that this exception was reserved pending the trial and before the jury retired.

The defendant in error now objects that this exception was too late, and is not therefore before this court, upon the writ of error. We think this objection cannot be overcome.

It has been repeatedly decided, by this court, that it must appear by the transcript, not only that the instructions were given or refused at the trial, but also that the party who complains of them excepted to them while the jury were at the bar. The Statute of Westminster 2d, which provides for the proceeding by exception, requires, in explicit terms, that this should be done; and if it is not done, the charge of the court, or its refusal to charge as requested, form no part of the record, and cannot be carried before the appellate court by writ of error. It need not be drawn out in form and signed before the jury retire; but it must be taken in open court, and must appear, by the certificate of the judge who authenticates it, to have been so taken.

Nor is this a mere formal or technical provision. It was introduced and is adhered to for purposes of justices. For if it is brought to the attention of the court that one of the parties excepts to his opinion, he has an opportunity of reconsidering or explaining it more fully to the jury. And if the exception is to evidence, the opposite party might be able to remove it, by further testimony, if apprised of it in time.

This subject was fully considered in the case of *Sheppard v. Wilson*, 6 How., 275, where the cases previously decided in this court, affirming the rule above stated, are referred to.

There being, therefore, no exception before the court, and no error being assigned or appearing in the other proceedings, the judgment of the Circuit Court must be affirmed, with costs.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Indiana, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

court must be taken at the trial. *Turner v. Yates*, 16 How., 14; *Barton v. Forsyth*, 20 How., 532; *Nicol v. American Ins. Co.*, 3 Wood. & M., 539; *Emerson v. Hogg*, 2 Blatchf., 1; *Foot v. Slaby*, 1 Blatchf., 542; *Dufolt v. Gorman*, 1 Minn., 301; *Blumberg v. McNear*, 1 Wash. T., 161.

Where exceptions are not taken at the time to instructions to jury, they will be considered as waived. *Poole v. Fleegeer*, 11 Pet., 185; *Firman v. Miller*, 5 McLean, 218.

The record must show that an exception was taken at the time when the ruling or instruction objected to was given, or it will not be considered. *Brown v. Clarke*, 4 How., 4; *Phelps v. Mayer*, 15 How., 160; *Turner v. Yates*, 16 How., 14; *United States v. Breitling*, 20 How., 232.

Exceptions to evidence must be taken as soon as the court decides to admit or reject it; a note of the exception is then made, and it is usually reduced to form afterwards. 4 Pet., 102; 11 Pet., 185; 7 Serg. & R., 219; 8 Serg. & R., 211; 11 Serg. & R., 267; 1 Ala., 66; 1 B. Mon., 215; 1 J. J. Marsh., 58.

The exception must be taken immediately upon

Cited—20 How., 254, 436; 2 Black., 568; 20 Wall., 418; 8 Otto, 555; 2 Cliff., 563; 11 Bank. Reg., 232.

*CHARLES BISPHAM, *Appellant*, [*162
v.

ELI K. PRICE, Executor of JOSEPH ARCHER,
Deceased.

Partnership settlement—money retained by one to cover liability as surety for partnership—the other cannot recover back one half although surety's estate was afterwards exonerated from liability—Statute of Limitations applies to stated accounts between partners.

In the settlement of complicated partnership accounts by means of an arbitrator, Bispham was charged with one half of certain custom house bonds, which Archer, the other partner, was liable to pay, and which obligations had been incurred on partnership account.

There was a reservation in the settlement as to certain liabilities, but this one was not included. Archer's estate was afterwards exonerated from the payment of these bonds by a decision of this court, reported in 9 Howard, 83.

A bill cannot be brought by Bispham against Archer's executor to refund one half of the amount of the bonds, upon the ground that Archer had never paid it.

The reference to an arbitrator was lawful, and his award included many items which were the subject of estimates. It was accepted as perfectly satisfactory, and acquiesced in as such until long after the death of Archer.

No fraud or mistake is charged in the bill, and if an error of judgment occurred, by which the chance was overrated that the custom house bonds would be enforced against Archer, this does not constitute a ground for the interference of a court of equity.

The Statute of Limitations also is a bar to the claim.

THIS was an appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania, sitting as a court of equity.

The facts in the case are very fully stated in the opinion of the court.

It was argued by *Mr. Gerhard* for the appellant, and by *Mr. Meredith* for the appellee.

The counsel for the appellant made the following points:

First Point. The express terms and proper construction of the statement of the accounts between the parties by William Foster, entitle the appellant to a recovery.

The "settlement" or "statement" of the

the overruling of the objection. *Griggs v. Howe*, 31 Barb., 100; 3 Keyes, 166; 2 Keyes, 574.

An objection to the reception of incompetent evidence must be raised as soon as it is offered; and if a party allows such evidence to be taken without objection, a denial of a motion to strike it out, when the party finds it prejudicial to his cause, will not be a ground of exception. *Levin v. Russell*, 42 N. Y., 251; *Chesebrough v. Taylor*, 13 Abb., 227.

To this rule there is one exception. If the incompetency of the evidence is not apparent at the time it is offered, the party may make his objection afterwards. If this is done as soon as the fact of the incompetency is discovered, by motion to strike out the testimony given. *Heely v. Barnes*, 4 Den. N. Y., 73; *Mitchell v. Roulstone*, 2 Hall. N. Y., 351.

In New York an exception to the judge's charge should be made immediately upon its delivery, and in all cases must be made before the jury have delivered their verdict. *Life & Fire Ins. Co. v. Mechanics' Fire Ins. Co.*, 7 Wend., 31; 10 Johns., 312.

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accounts by Mr. Foster, giving rise to this suit, is careful to provide for any such contingency as that which has occurred. The amount to be paid by Mr. Archer to Mr. Bispham, is declared to be "in liquidation and full settlement between them, of all matters, claims, and demands, relating to or growing out of the transactions of their late firm, so far as they are now known, ascertained, or believed to exist."

This seems to include every future contingency, and to reserve to each party the benefit of it. To prevent any possible future misunderstanding, however, the paper goes on to provide.

First. "But as liabilities may hereafter be established or ascertained."

Second. "Or claims received, not now known to exist, growing out of transactions during the 163*] partnership for partnership *account, it is understood that the same are not embraced in the foregoing settlement and determination by me as the agent and umpire of the parties, and especially any matter of such character contingent on the result of pending suits, is excepted from this adjustment of the affairs of said firm."

It will be observed, that there were no pending suits unless a reference was intended, as was doubtless the case, to the suits by the United States against Mr. Archer on the custom house duty bonds in question—no others existed. There was one and one only, in New York, besides those, which are the foundation of this suit. And it is submitted that the court below erred in refusing to recognize, as pending suits, those in which judgments had been recovered, but the judgments themselves were unsatisfied—and that, too, when the phrase is used by mercantile men in an informal paper writing.

If a reference is only made to the second reservation above quoted, it is submitted that the appellant's case is made out. What difference is there between the actual facts, and the hypothetical case of a payment by Mr. Archer, and a repayment by Mifflin? Could there, in such a case, have been a doubt as to Mr. Bispham's right to participate in that recovery? The facts then would have been literally within the provision.

Second Point. If it is necessary to sustain the case for the appellant, the court, as a court of equity, would reform the agreement and statement made in pursuance of it, to give relief to the appellant in the present case. It is a case within the principles of both mistake and accident. It is clearly settled, that where, either in a settlement, award, or even a solemn adjudication by the judgment of a competent court, there has been a technical mistake, such as has occurred in the present case, courts of equity will relieve against such a mistake. Courts of equity will grant relief in cases of mistake in written contracts, not only when the fact of the mistake is expressly established, but also when it is fairly implied from the nature of the transaction. (Story's Equity, sec. 162.)

Equity will give effect to the real intentions of the parties, as gathered from the objects of the instrument, and the circumstances of the case. The general rule, "*Quoties in verbis nulla est ambiguitas, ibi*," &c., shall not prevail

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to defeat the manifest intent and object of the parties, where it is clearly discernible, on the face of the instrument, and the ignorance, or blunder, or mistake of the parties has prevented them from expressing it in the appropriate language. (*Id.*, sec. 168.)

"The same principle applies where a legacy is revoked, or is given upon a manifest mistake of facts." (*Id.*, sec. 182; 8 Hare, 222; *Osgood v. Jones*, 10 Shep., 812; *Williamson v. Johnson*, 3 Halsted, Ch., 537.)

*So also in the case of settlements, so [*164 called.

A settlement of accounts, where one of the parties had but little knowledge of the matters settled, will be considered as *prima facie* evidence, subject to be rebutted by satisfactory proof, under proper allegations, in the pleadings charging fraud or mistake as to particular items. (*Lee's Administrators v. Reed*, 4 Dana, 109.)

The court will open settlements made by mistake, although receipts in full have passed, and the note on which payments were made, has been taken up. (*M'Oras v. Hollis*, 4 DeSauss., 122; see, also, *Shipp v. Swann*, 2 Bibb, 82; *Waggoner v. Minter*, 7 J. J. Marsh., 173.)

Where a bond was in form only a joint bond, but it was suggested to have been the intention of the parties to have made it joint and several, the court referred it to the master to inquire whether this was the intention of the parties. Where such intention appears on the face of the bond, the court will treat it as a joint and several bond, although it is only a joint bond in form. (*Ex-parte Symonds*, 1 Cox, 200; see, also, *Rawstone v. Parr*, 8 Russ., 539.)

And so anxious is a court of equity to correct a mistake, that even parol evidence is admitted to prove one made by a solicitor in the draft of a settlement. (*Rogers v. Earl*, Dick., 294; see, also, *Shipp v. Swann*, 2 Bibb, 82.)

An account stated, may be set up by way of plea, as a bar to all discovery and relief, unless some matter is shown which calls for the interposition of a court of equity. But if there has been any mistake or omission, or accident or fraud, or undue advantage, by which the account stated is in truth vitiated and the balance is incorrectly fixed, a court of equity will not suffer it to be conclusive upon the parties, but allow it to be opened and re-examined.

Sometimes the account is simply opened to contestation, as to one or more items, which are specially set forth in the bill of the plaintiff. (Story's Equity, sec. 523.)

An award may be good for part and bad for part; and the part which is good will be sustained, if it be not so connected with the part which is bad, that injustice will thereby be done. (*Banks v. Adams*, 10 Shep., 259.)

To some extent the courts of equity and of common law exercise a concurrent jurisdiction on this point. (*Wilkins v. Woodfin, Administrator of Pearce*, 5 Munf., 183.)

Assumpsit lies for one against his copartner, for money paid him on a dissolution, and adjustment of the concerns of the copartnership, more than was actually due. (*Bond v. Hays*, 12 Mass., 34.) Or for one who has paid over by mistake more than his partner was entitled to receive. (*Id.*, 36.)

165*] *It is very plain that the error which occurs in the case before the court was not a mistake of law, but of fact, or a technical mistake, for the reason that, at the time when that settlement was made, there was an actual existing liability for which the appellant was obliged to account.

Where a party has been subjected by a decree to a contingent and probable liability, he may be compelled to account, with a view to that liability, when the state of things shall happen upon which it may depend. (*Bank of the State v. Rose*, 2 Strobbart, Eq., 90.)

If, therefore, the occurrence in question comes within the definition of a mistake, it was clearly one of fact; a mistake of fact in this, that the account was struck upon the basis, that the contingency would never happen by which those payments were discharged. This view of the subject, however, necessarily points out another light in which it may be viewed as within the scope of equitable relief, viz.: "accident."

The definition of "accident," as given by Mr. Jeremy, embraces this very case; he defines it to be "an occurrence in relation to a contract which was not anticipated by the parties, when the same was entered into, and which gives an undue advantage to one of them over the other in a court of "law."

And the exception, taken to this definition by Mr. Justice Story, is that the term "contracts" is not sufficiently general. (Story's Eq., sec. 78, note 3.) By the term "accident," is here intended not merely inevitable casualty, &c., but such unforeseen events, misfortunes, losses, acts or omissions, as are not the result of any negligence or misconduct in the party. Story's Eq., sec. 78.) It may be stated, generally, that where an inequitable loss or injury will otherwise fall upon a party, from circumstances beyond his own control, or from his own acts done in entire good faith, and in the performance of a supposed duty without negligence, courts of equity will interfere to grant him relief. (*Id.*, sec. 89.) Under this definition the unforeseen death of Mr. Archer fairly brings the appellant's case within that ground for equitable relief. (See, also, *Hatchell v. Pattie*, 6 Madd., 5.)

Third Point. There has been an entire failure of the consideration upon which the money sought to be recovered in this action was paid by the appellant to the appellee's testator. (*Parish v. Stone*, 14 Pick., 198, 210; *Fink v. Cox*, 18 Johns., 145; 8 Mass., 46; 15 Johns., 508; 5 Pick., 391; 2 Penn. State Rep., Barr, 200.)

This is the appellant's case, to which various defenses have been made. It is said that Mr. Bispham released Mr. Archer. There is no release (technical), express or by implication. (*Agnew v. Dorr*, 5 Whart., 181; *Tyson v. Dorr*, 166*] 6 Ib., 256.) Nor *if it were a release would it be binding in a court of equity, where there was ground for relief on account of mistake or accident. (Story's Eq., sec. 523; *McCrae v. Hollis*, 4 Desaus., 122; *Shipp v. Swann*, 2 Bibb, 82.) When construing the whole transaction together, with an effort and the right to arrive at the actual meaning of the parties, there can be no question that no such release, as is asserted in the answer, was de-

signed or intended. Even construing exhibit E as a strict technical release, the defendant cannot at all sustain his construction of it. Mr. Bispham exonerates Mr. Archer from any further claims; "further" than such as can be made under Mr. Foster's settlement, is the grammatical construction. And the plaintiff really asks for nothing beyond this.

Again, it is said by the appellee that the agreement to state the accounts was a submission to an arbitrament, and that Mr. Foster's statement was an award, and is conclusive on Mr. Bispham. The appellant denies that this was an award; but even if it was, the case has been shown to be carefully excluded from the effect of Mr. Foster's statement. It is submitted that an award, not made a rule of court, cannot be binding where, if it were a rule of court, it would be set aside, and it is a familiar principle of the law of awards that courts will set aside an award made upon a mistake appearing, as here, on the face of the award itself. (Watson on Arbitraments and Awards, 280.) In all awards, not made under a rule of court, it is the settled law that a court of equity will relieve against them on the ground of mistake in any such case as the present.

Another suggestion of the appellee is that the account stated between the parties bars the appellant. The law is otherwise where, as here, there was a mistake, accident, or any similar event. The court will open settlements made by mistake, although receipts in full have passed, and the note on which payments were made has been taken up.

Again, it is said by the court below, that Mr. Bispham confirmed the settlement of the accounts twenty-one months after he had had the opportunity of examining it. This would be very well if Mr. Bispham's absence from Philadelphia put him into legal default. But it appears, from the evidence and record, that, from the date of the settlement of November 18th, 1835, to the confirmation of the account by Mr. Bispham on the 18th of August, 1837, he was absent from Philadelphia, and had not seen Mr. Archer who was in England and Canton. He had not, therefore, at the date of the confirmation, been informed that no money had in fact been paid on this account by Mr. Archer, but he was justified in supposing, from his (Archer's) letter of the 16th of November, 1835, above referred to, that *the judgments [*167 had been actually satisfied by him. If upon this supposition (a clear mistake in point of fact) Mr. Bispham confirmed the settlement by Mr. Foster, he would, upon every principle, be entirely justified in asking a court of equity to correct this mistake, particularly as he had been led into it by the assertions of Mr. Archer himself, that the liability on his part was complete, and that funds were provided by him for its immediate payment, which would be made as soon as they should be realized by his father. Twenty-one months after this letter Mr. Bispham certainly had a right to suppose them to have been actually so applied, and that the charge was therefore a proper one.

But even if Mr. Bispham did abandon or waive his right, under a mistake, it will not conclude him. A party who abandons his rights under a contract, from a mistake as to their character, is not concluded by such aban-

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donment. (*Williams v. Champion and Goodrich*, 6 Ham., 169.)

The counsel for the appellant then argued that the Statute of Limitations did not apply.

Mr. Meredith, for the appellee, made the following points:

On behalf of the appellee it is contended that there is no equity whatever in the bill, for on this very subject matter there were—

1. A submission and award.
2. Freely ratified and confirmed by the parties after full consideration, and with full knowledge of all material facts.
3. Payment of the amount awarded, in satisfaction, and
4. Mutual releases. (See *Mr. Archer's* letter, Record, p. 22, and *Mr. Bispham's* letter, Record, p. 24.)

It is also conceived, that—

1. If the plaintiff has any claim, he has a complete remedy at law.
2. That he is barred by the Statute of Limitations.

3. That he is affected by such laches as would bar him in equity, independently of the Statute of Limitations.

1. There was a submission and award on the very subject matter in question. The submission is on the record, by which, after appointing *Mr. Foster* the joint agent of the parties in the settlement of all accounts between them, it is expressly agreed that his "decision shall be final and binding on all the parties concerned." By the award, dated 18th November, 1835, *Mr. Foster* did "award and determine" that *Mr. Archer* was indebted and should pay, &c. These bonds were part of the subject matter of that award.

168*] *We contend that this case shows both an award and a settlement.

2. This award was freely ratified and confirmed by the parties after full consideration, and with full knowledge of all material facts. It was ratified as a whole, and by *Mr. Archer*, on the express condition that the whole should stand or none. See his letter of 16th November, 1835, and the paper signed by him of 19th November, 1835 (Record, pp. 22, 23). That paper, which the bill alleges was delivered by *Archer* to the comptroller on the 19th November, 1835 (Record, p. 8), expressly provides that if *Mr. Bispham* objects to the settlement, *Mr. Archer* binds himself to abrogate the same, and open it for a new and final adjustment. On the 18th August, 1837, *Mr. Bispham* says, "the settlement . . . is perfectly satisfactory to me, and I do hereby confirm the same." He had taken, therefore, abundant time for the fullest consideration; and that he was acquainted with all the facts, not only appears from the evidence in the case, but has not been denied by *Mr. Bispham*.

3 and 4. The acknowledgment of payment, and the mutual exoneration are to be found in the letters above referred to. *Mr. Bispham*, in his letter of August 18th, 1837 (Record, p. 24), after acknowledging the receipt of the amount due under the award and settlement, and reciting what he understood to be the exception, adds, "and intending this letter as entirely exonerating you from any further claims from myself, heirs, or executors, I am," &c. The ap-

pellant (*Brief*, p. 16) contends that this was not a technical release; but being founded on a sufficient consideration, it cannot be denied that it is, for all the purposes of this case, just as much a release as if the most formal instrument had been executed. The word "further" in the release, evidently means further than any unsettled claims which might be made on the firm. To be sure *Mr. Bispham* understood the meaning of the award to be the same, as will hereafter be more fully shown, and therefore, in that sense, he may be considered to have meant further than could be made under *Mr. Foster's* settlement.

The appellant's counsel, in the brief, presents three points, on each of which a few words will be said.

They are substantially as follows, viz.:

1. That on a true construction of the award, which he calls a statement of account, the appellant is entitled to recover.

2. That the papers are, if necessary, to be reformed on the ground of mistake or accident, or both.

3. That there has been an entire failure of the consideration on which the money sought to be recovered in this action was paid.

*(The remarks of *Mr. Meredith* upon [*169 the first and third of these propositions, are necessarily omitted for want of room.])

2. The second point advanced in the brief of appellant's counsel, is, that if necessary, the papers are to be reformed on the ground of mistake or accident, or both.

It is to be observed on this, and the succeeding point, that the appellant's bill sets up no case in which they can arise; it does not allege any mistake or accident, or failure of consideration, nor does it pray that the papers may be reformed, or his release canceled, or that he may be relieved from his contract; on the contrary, it appears to claim that on the true construction of all the papers, agreements, &c., themselves, he is entitled to recover the money which he claims. Now, a party cannot set up in argument, a case different from or inconsistent with his bill, and, therefore, there is no necessity for answering either the 2d or 3d point of appellant's brief. Nevertheless, a brief notice will be given to both.

And first on the question of mistake, the appellant's brief has been in vain carefully examined on this head of his argument, to discover what mistake it is that he alleges. The bill does not allege any mistake, and it is conceived that the brief particularizes none. On page 12 of the brief, it is said "where there has been a technical mistake, such as has occurred in the present case, courts of equity will relieve." Again, on page 15: "It is very plain that the error which occurs in the case before the court, was not a mistake of law, but of fact, or a technical mistake," &c. And again, on the same page: "If, therefore, the occurrence in question comes within the definition of a mistake, it was clearly one of fact; a mistake of fact in this, that the account was struck upon the basis that the contingency would never happen by which these payments were discharged." From these extracts, the following positions may be gathered, pursuing the order in which they are found, viz.: That the mistake complained of was, 1. A technical mistake. 2.

Not a mistake of law. 3. A mistake of fact, or a technical mistake. 4. Clearly a mistake of fact, if the occurrence in question were a mistake at all.

What the "occurrence" was, that is here referred to, is not very clearly explained. It may be surmised (from what follows in the same sentence) to have been "the contingency by which these payments were discharged." If this be so, then the allegation is that Mr. Archer's dying six years after the settlement, was a mistake; but if so, it was not a willful mistake, and surely not such a mistake as would induce a court of equity to set aside all the contracts he had made in his lifetime.

If the ground really be, that Mr. Bispham [170*] was ignorant of *the rule of law which discharges the estate of a deceased surety, against whom a judgment has been obtained jointly with his principal, the answer is twofold.

1. That there is no evidence whatever that Mr. Bispham was, in fact, ignorant of that rule of law. He nowhere asserts himself to have been so ignorant; and this court have assumed, that this rule of law is known and established, and formed a part of the written conditions of the bonds in question.

2. If such ignorance were averred or proved, then it is abundantly clear, that it would be wholly immaterial. See for this familiar principle, 1 Story's Equity, ch. 5, secs. 111 to 115, inclusive, and the cases there cited. In the well-known case of *Hunt v. Rousmaniere*, 8 Wheat., 174; 1 Pet., 1, 13, 14, upon a loan of money, for which security was to be given, the lender took a letter of attorney, with power to sell the property (ships) in case of non-payment of the money, instead of a mortgage on the property itself, upon the mistake of law, that the security by the former instrument would bind the property as strongly as a mortgage, in case of death or other accident. The debtor died insolvent, and on a bill against his administrators to reform the instrument, or to give it a priority by way of lien on the property, the court denied relief.

On the head of accident, the case seems quite clear against the appellant. In matters of positive contract and obligation created by the party (such as this was), it is no ground for the interference of equity that the party has been prevented from fulfilling them by accident; or that he has been in no default; or that he has been prevented by accident from deriving the full benefit of the contract on his own side. (1 Story's Equity, ch. 4, sec. 101, *et seq.*, and the cases there cited.)

Thus, if an estate be sold by A, to B, for a certain sum of money, and an annuity, and the agreement be fair, equity will not grant relief, although the party dies before the payment of any annuity. (*Mortimer v. Capper*, 1 Bro. Ch., 156; *Jackson v. Lever*, 3 Bro. Ch., 605; and see 9 Ves., 246.)

There is a sort of suggestion on pages 17 and 18 of the brief, that Mr. Bispham, at the date of the confirmation of the settlement, supposed that Mr. Archer had actually paid the bonds, and that he had been led into this mistake by the assertions of Mr. Archer himself. Of Mr. Bispham, it ought to be observed that he has not in his bill, or elsewhere, so far as is known,

averred or insinuated that he supposed the bonds were paid. The settlement was made expressly on the footing that the bonds were not paid, and it was confirmed on the same footing. As Mr. Bispham does not appear to have made such a suggestion during Mr. Archer's lifetime, or hitherto since his death, it is not probable that he will ever sanction it.

*It is stated, in the appellant's brief, [*171 that the partners never met after the expiration of the copartnership. There is no evidence in the case on that point, but the appellee's counsel is instructed to say that they did meet, and that Mr. Archer, after a lingering illness, actually died in Mr. Bispham's house, at Mount Holly, N. J., where he had been staying for several weeks as a guest.

Now, still looking at the settlement as relating to the bonds alone, it will be observed that the position of the parties was this: Mr. Archer was absolutely liable to the United States for the whole amount of the judgments, long before obtained against him. Mr. Bispham was liable to him for one half of what he should be obliged to pay, unless Mr. Foster's proportion could be recovered, and the recovery of that was quite desperate. Notwithstanding the award, Mr. Archer left Mr. Bispham at perfect liberty to accept or reject its terms. Mr. Bispham might have determined either to wait till Mr. Archer had actually paid the judgments, and then contributed his proportion, in which case he would, in all human probability, have been obliged (failing Mr. Foster) to pay the full half of the whole amount; or he might accept the terms proposed in the award, and by paying at once less than half the amount, be entirely exonerated. He deliberately chose the alternative.

This case seems to differ in substance from *Hunt v. Rousmaniere*, and other cases cited above, only in this remarkable circumstance, that whereas, in those cases, the party complaining was worse off, by reason of the unforeseen death, and lost his money thereby, in the present case, it is evident that Mr. Bispham is no worse off by Mr. Archer's death, and has lost no money thereby. If Mr. Archer had lived, it is not pretended that Mr. Bispham would have been entitled to recover the money back, and his death merely leaves him in the same position.

Mr. Justice Campbell delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of the United States for the Eastern District of Pennsylvania.

Joseph Archer (the testator of the appellee) and the plaintiff (Charles Bispham), in June, 1828, provided for the extension of a partnership, which was existing between them, for a term of five years. The plaintiff was to form a connection with another house, and to remain at Valparaiso, on the Pacific coast, for the term; while Archer was to manage the affairs of the firm in the United States. During the latter years of this partnership, Archer formed a partnership connection with another firm, and went to Canton, in China. The partners agreed to be equally *concerned in the profit [*172 or loss of all their business, whether transacted on the coast of the Pacific, the United States,

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or elsewhere. At the termination of this partnership, one of the partners was at Valparaiso and the other at Canton. In April, 1834, Archer, then at Canton, signed a paper which declares, that from "the long and repeated absence" of the partners from the United States "it is believed their accounts are in a state of confusion," and "in case of the death of either," "some difficulty might be experienced in the settlement." William Foster was therefore constituted "the joint agent" of the partners, "in the settlement of all accounts between them," and "that his decision shall be final and binding." This paper was countersigned in the November following by Bispham, and the authority of Foster confirmed. Twelve months after (November, 1835), Foster executed this authority, by a statement of the accounts between the parties ascertaining a large balance to be due to Bispham, and awarded and determined that it should be paid to him "in liquidation and full settlement between them, of all matters, claims, and demands relating to, or growing out of the transactions of the firm so far as they are now known, ascertained, or believed to exist;" and provided, that "as liabilities might hereafter be established or ascertained, or claims recovered (received) not then known to exist, the determination was not to embrace them, and especially any matter of such a character, contingent on the result of pending suits, was excepted from this adjustment of the affairs of the firm."

Before the execution of this power, Archer had returned to the United States, and the settlement was evidently undertaken by Foster at his urgent solicitations. For, contemporaneously with the settlement, he gave to Foster a stipulation, reciting that Foster, having agreed to and ratified the final settlement of all accounts between the partners in relation to their business, that if it should happen that Bispham should, in his own name, object to this settlement, Foster is to be exempt from all blame, and he binds himself to "abrogate said settlement, and open it for a new and final adjustment."

At the same time, he wrote a letter to Bispham, stating that he had hoped to meet him in the United States, but that as he was about to embark for China, there seemed little chance of "their meeting for a number of years." He had resolved, in conformity with the letter of Bispham, of the 13th May (this letter is not a part of the record), to make a settlement of Archer and Bispham's affair with William Foster, as per statement, which he will forward, and he expresses the conviction that the settlement was made on liberal principles to Bispham. In this letter, after discussing various items of the account indifferently, he says, "if there is anything in this settlement which does not meet with your approbation, I wish you to state it candidly to William Foster, with your reasons, and let him, as your agent, appoint an arbitrator, and my father, as mine, will name another, and let them say what is just and right under all circumstances, embracing the gain allowed you, on the shipment of raw silk in settlement, and open the account anew for adjustment. If the settlement meets your approbation confirm it,

under your own hand, and send it to me at Canton." He promises, in this letter, to remit the balance against him from Canton.

A month later, he addresses a letter to Bispham, from England, in which he states, that "I wrote to our friend, William Foster, yesterday, about your settlement, and have stated to him, that if you were not satisfied with it, I was perfectly willing to leave it to an arbitration. He will show you the letter, if you desire it. I want the business closed, for should you or I make a finish of our career in this world, it never could be settled with any degree of certainty."

What communications were made during the year 1836, or the first half of 1837, between the partners or their agent, do not appear. The 18th of August, 1837, twenty-one months from the date of Foster's statement, Bispham, at Valparaiso, addressed Archer a letter at Canton, in which he acknowledges the receipt of a bill on London for the ascertained balance, dated June, 1836, declares that the settlement, made by William Foster, is "perfectly satisfactory," admits his responsibility for any unsettled claims which might be made, and concludes that "intending this letter as entirely exonerating you from any further claims from myself, heirs or executors. I am yours, &c."

It appears, from a particular averment in the bill of the plaintiff in this case, "that no liabilities have been established or ascertained growing out of transactions during the said partnership of Archer & Bispham for partnership accounts, or any payments on account of the same, other than those known to exist at the time of the settlement of the account of said Archer & Bispham by William Foster, and that no claims had been received by Bispham, growing out of the transactions of the firm." The record shows no other dealings between these partners during the life of Archer, who died in 1841. After his death, Bispham qualified as executor of his will, and acted for sixteen months, and was discharged upon his own petition.

The present controversy originates in the execution by Archer, in his individual name, of eight bonds to the United States for the payment of duties, as surety for James L. Mifflin, upon four of which William Foster was a co-surety. These bonds by arrangement, *were debts of the firm. Mifflin [*174] having become insolvent, the bonds were not paid, and, in 1829, judgments were rendered against the obligors jointly, in favor of the United States, by the Circuit Court of the United States at Philadelphia. In 1831, Foster petitioned for his discharge as an insolvent, which was granted in 1834. These liabilities are included in the settlement of 1835, under the title of "statement of J. L. Mifflin's bonds, for which Archer & Bispham are liable." In the statement of the account, the bonds are enumerated, their dates, and the amount of principal and interest due upon them described. The share of William Foster, notwithstanding his continued insolvency and the fact of his release, is deducted, and the balance divided between the partners.

From the balance found to be due on the accounting to Bispham from Archer, his share of this liability is deducted. In the letter of November, 1835, to which we have referred,

Archer says: "During our absence, my father endeavored to effect a compromise with the government for Mifflin's bonds, and since my return, I have also made an effort to do the same, but without effect, as the officers intrusted with such matters can make no abatement in the whole amount due with interest, unless the applicant produce all their books and papers, and affirm their inability to pay the whole amount. With these conditions I could not comply; and as there seems likely to be no benefit to us by longer delay, I have concluded to pay the amount. My father has funds enough of mine in his hands to pay the amount, which will be appropriated to that purpose as soon as he can realize them.

"You will observe, by the statement, that your proportion of the bonds has been deducted from the sum due you. I therefore absolve you from all claim for these bonds, your proportion having been paid to me in settlement." No other explanation of the transaction is found in the record. These judgments were not paid to the United States during the lives either of Foster or Archer; nor since by Mifflin, who is the survivor of both.

Upon the death of Archer we learn, from the bill and answer, that the executor of Archer "at all times" claimed, and now claims, the exemption of the assets in his hands from the judgments, for the reason that the remedy at law was extinct, and that equity would afford none. This court sustained that claim, for reasons reported, 9 Howard, 83.

This bill, in 1850, was a consequence of that decision. It charges that, in the settlement, it was assumed that the liability of Archer upon the bonds could be enforced by the United States, and on that assumption, the [175*] share of Bispham in the *liability was paid to Archer; and that the estate having been discharged without a payment, he is entitled to a return of his money. The bill does not claim that there was any want of information, or any mistake in reference to the state of the liability at the date of the settlement. The inference to be deduced from the age of the judgments, Foster's connection with a portion of them, and his discharge by the United States, the item for counsel fees in the accounts, the intimate relations of the plaintiff with Archer and with the estate of Archer, and the absence of all averment in the bill, either of error, ignorance, mistake or fraud, is, that accurate information of the judgments was possessed by all persons connected with the settlement. The bill does not aver that these judgments were designed to be included in the reservation contained in the latter part of Foster's report; but the extract we have made from the bill evinces that this is a claim whose situation was known, and the relations of the partners to it at that time ascertained and adjusted. The evidence is satisfactory that this reservation did not include this liability, or any contingency in which it was involved. The statement of the liability in the accounts is particular and exact. The portion of each partner is determined with precision. Archer acknowledges to have received Bispham's share, and "absolves" him from further claim; while Bispham expresses his satisfaction with the whole result, and exonerates Archer from

future responsibility. Whether we consider the averments in the pleadings, or the evidence, we must take the settlement as a sedate and deliberate adjustment of the affairs of the partnership, so far as they were ascertained and could be made the subject of an arrangement.

The design of the settlement was to extricate the affairs of the partners from the complication, uncertainty, and confusion in which they were involved. They had been engaged in distinct partnerships, carrying on business in different continents, apparently disconnected, and having but little opportunity even of correspondence. They had the prospect before them of a longer separation, and of diminished intercourse. Their partnership had ended. The ordinary mode of liquidating, after a dissolution, could not be followed. These partners, under these circumstances, and to attain their ends, consequently agreed to a reference of their accounts to a mutual friend, and clothed him with authority to make a final and binding decision. Was this lawful?

In *Knight v. Marjoribanks*, 11 Beav., 323, affirmed on appeal 2 Mc. & Gord., 10, the Master of the Rolls, after stating the usual course on a dissolution, said, "It is lawful for partners to deal with each other in quite a different way, if they think proper. *They may [*176] lawfully rely on the stock takings, valuations and accounts which appear in the books, and the accounts kept in the manner known to, or acquiesced in, by the partners. The stock takings and valuations will be more or less accurate, according to the nature of the business and the property employed or engaged in the concern. It would, in many cases, be absurd to expect perfect accuracy, or to conclude that a transaction between partners, founded on statements appearing on the valuations and accounts stated in the books, could be set aside on the ground of some subsequent discovery of unintentional inaccuracy. When a question arises, you must in each case look to the circumstances."

In that case, the seat of the partnership was Van Diemen's Land. The partners resided in London, having no personal knowledge of the business, and dependent upon the reports of agents, coming at distant intervals, and received several months after their date. A sale of the share of one partner to another was impeached for inadequacy of price, error, and fraud. The Master of the Rolls said, "these parties, situated as they were, might fairly and honestly deal with each other, with respect to the share of any one, notwithstanding the ignorance in which they were as to the exact value. After all inquiry which can be made with respect to matters of this kind, the question of value becomes comparatively immaterial, if there was no deception, no misrepresentation or fraud, no unfairness."

In the case before us, entire accuracy is not to be looked for. Bispham is credited with proportions of profit arising from "unfinished business," and is charged with proportions of "estimated gains." There are items, which Archer pointed to as debatable, which he had conceded, and there are allowances to him, which might be considered as narrow. He regarded the settlement as a liberal one to

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Bispham. He asked its acceptance as a whole, "to close the business," and provided for an arbitration if this was refused. There was not haste in the acceptance, but ample time employed for inquiry. After this, it was accepted as "perfectly satisfactory," and acquiesced in as such, until long after the death of Archer.

We cannot infer mistake or error under these circumstances. We adopt the language of Chancellor Walworth (4 Paige, 481), "that the practice of opening accounts, which the parties who could best understand them have themselves adjusted, is not to be encouraged," and "the whole labor of proof lies upon the party objecting to the account; and errors, which he does not plainly establish, cannot be supposed to exist."

In the absence of mistake, or fraud, does there arise an equity in favor of the plaintiff, by the averment that it was assumed in the settlement, *that there was a liability against Archer, which the United States might, at all times, and under all circumstances, enforce; and on this alone the money was paid to him, or allowed to him in settlement?

In the able argument submitted to us for the plaintiff, this assumption is treated as the motive to the contract, that which constitutes its obligation, in one word, its consideration. If this assumption had been so comprehensive, and had entered so thoroughly into the inducements to the contract, the consequence might follow; but the argument is not supported by the evidence. The parties certainly assumed that there existed an imminent liability over the firm which the United States could enforce against Archer, and for which it was prudent to provide.

Bispham, entertaining this opinion, by making a payment to the United States on the judgments to the extent of his share, would have been absolved from the claim either of the United States or of Archer. The United States having made no contract, except with Archer, and Bispham being liable only through him, might liberate himself by a payment to Archer, instead of the United States. This he accomplished.

It may be that neither party reckoned upon the neglect of the government officers about the collection of the debt, nor weighed the consequences of the death of Archer upon the binding efficacy of the judgments, but these were within the provisions of both of the parties to the contract, and its terms might have been molded to secure the rights of each, according to such circumstances. This court has no competency to supply a providence which the parties to the contract withheld. The *corpus* of this portion of the contract, a debt obliging Archer, and through him affecting the partnership, the collection of which could have been enforced, and which both parties had the right to assume would be enforced, had an unquestionable existence. If there was an error, it was in overlooking the fact that there were some contingencies in which the debt might be extinguished as to Archer without the payment of money, and in making no provision for these.

An error of this nature, if it were plainly proven to exist, could not be regarded as a ground for equitable relief.

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The case of *Okill v. Whitaker*, 1 De Gex & Smale, 83; 2 Phil., 838, was one in which premises had been sold, and enjoyed for several years, upon a contract for the sale of the residue of a term, both parties expressly contracting and settling the price on the belief that eight years only remained unexpired. Upon the discovery that there were twenty years, a bill was filed for relief. The Vice-Chancellor complained of the delay of the suit until after the death of the purchaser, wherefore *those who [*178 had to administer justice between the parties were deprived of all the assistance and information he could give if he were living." He said that the only reasonable ground upon which the bill could be treated was as a bill to rescind the entire contract, upon the alleged mistake, and adds, "that for the present purpose it is not too much to say, that it was their duty to know what was the state, what was the condition of the property they had to sell."

The Lord Chancellor said that the only equity presented was "that the thing turns out more valuable than either party supposed."

The nature of this settlement and the motives presented in the correspondence concerning it, would render it impossible for the court to modify one portion, and to leave the rest in force. It was presented to Bispham as a settlement made on liberal principles, with the option to accept it as it was, or to reject it altogether.

Without the benefit of the information and assistance that Archer and Foster might give, after so long an acquiescence, the case must be brought clearly within the limits in which courts of equity are accustomed to interfere, to justify such a decree. This has not been done. But if we could doubt upon the intrinsic equities of the parties, the Statute of Limitations affords a conclusive answer to the bill. The bill and the answer agree that this item of the account was ascertained and stated, and that all the liabilities of the firm were practically adjusted by this settlement. The amount of the liability of Bispham was credited to him, and he received the "absolution" of Archer, from all further claim. The exception in the Pennsylvania statute in favor of merchants' accounts, according to numerous authorities of the state courts, does not apply to the accounts of partners *inter se*, though this is not universally admitted. (1 Robin. Va., 79; 10 Pick., 112; 6 Monroe, 10. 4 Sand. Sup. C., 311, *contra*.) But however the law may be as to open accounts, the settled doctrine of the court is, that the exception in the statute does not apply to stated accounts. (*Spring v. Grey*, 6 Pet., 151; *Toland v. Sprague*, 12 Pet., 300.)

If we regard this money as a deposit in the hands of Archer, to be applied to a specific object, or to abide the action of the government against him, in either case the Statute would afford a bar. The *assumpsit* in the one would be to pay the money in a reasonable time, and a cause of action would accrue upon a neglect of this duty. (*Foley v. Hill*, 1 Phill., 399; *Brookbank v. Smith*, 2 Y. & Co. Ex., 58; 13 Barb., 632; 11 Ala., 679; 4 Sand. S. C., 590.)

In the other case, the liability of Archer was determined at his death, and the right [*179 of the United States then extinguished. The

facts were all known at that time, and the executor of Archer appreciated accurately the legal value of the facts, for the bill avers and the answer admits that he uniformly repelled the claim of the United States, and denied its validity. It is clear, therefore, if Bispham had placed this money to abide the issue of these obligations, the right to reclaim it arose at the death of Archer. (*Calvin v. Buckle*, 8 M. & W., 680; *Maury v. Mason*, 8 Port., 211.)

Our views upon this Statute correspond with those expressed by the Supreme Court of Pennsylvania. (*Hamilton v. Hamilton*, 18 Penn. State, 20; *Porter v. School Directors*, *Ibid.*, 144.)

Upon the whole case, we conclude there is no error in the record, and that the decree should be affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Pennsylvania, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

WILLIAM C. BEVINS AND OLIVER P.

EARLE, surviving Partners of the firm of BEVINS, EARLE & Co., Assignees, &c., who sue for the use of OLIVER P. EARLE, *Plaintiffs in Error*,

v.

WILLIAM B. A. RAMSEY, ROBERT CRAIGHEAD, JAMES P. N. CRAIGHEAD, THOMAS W. HUMES, AND JAMES McMILLAN, Administrator of ANDREW McMILLAN, Deceased.

In action on official bond of clerk of court for taking insufficient injunction bond—plea of satisfaction of the latter is good in bar.

Where a clerk of a court was sued upon his official bond, and the breach alleged was, that he had surrendered certain goods without taking a bond with good and sufficient securities, and the plea was, that the bond which had been taken was assigned to the plaintiffs, who had brought suit, and received large sums or money in discharge of the bond—this plea was sufficient, and a demurrer to it was properly overruled.

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of East Tennessee.

Ramsey was clerk of the Chancery Court, held at Knoxville, Tennessee. Bevins and Earle were citizens, the former of Arkansas, and the latter of South Carolina.

180* The action was one of debt, upon the official bond of Ramsey and his securities.

The declaration states that Ramsey was appointed clerk and master of the Chancery Court, in the declaration mentioned; and, on the 11th April, 1836, delivered to Newton Cannon, Governor of Tennessee, his bond, with the other defendants, his sureties, in the penalty of \$10,000, conditioned to discharge the duties of the office of clerk and master, according to law.

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That Ramsey failed to discharge the duties of that office:

1. That upon the dissolution of an injunction, awarded on a bill attaching certain property, brought by the plaintiffs against Chase & Bowen, which property had been put in the hands of Ramsey, clerk and master, as receiver, he was ordered to surrender the property attached on Chase & Bowen, giving bond and security to abide the decree; that it was the duty of Ramsey, as clerk and master, to take that bond; that he did not take their bond with sufficient securities, but, on the contrary, took the bond of Chase, with Thornburg and others, as sureties, who were then wholly insufficient for the performance of the judgment and decree; that plaintiffs finally got a decree for \$6,303.64, which is still unpaid.

2. That in the suit of *Bevins, Earle, and Brown v. Chase & Bowen*, the property attached in, which had been placed in the hands of Ramsey, clerk and master of the court, as receiver, he was ordered to surrender the property attached to Chase & Bowen, on their giving bond and security to abide by and perform the decree; and under that order, it was the duty of Ramsey, as clerk and master, before surrendering the goods, to take a bond from Chase & Bowen, with sufficient security conditioned according to the order. But Ramsey did not take such bond with sufficient security, but wholly neglected and failed so to do, and gave up the property without so doing. And plaintiffs afterwards obtained a decree against Chase & Bowen, for \$6,303.64, which is still unpaid by said Chase & Bowen.

3. That in the suit, and under the order above prescribed, it was the duty of Ramsey, as clerk and master, to take such bond as the order directed to be taken before surrendering the property; yet Ramsey did not take bond and security from Chase & Bowen to abide and perform the decree, but surrendered the property without taking bond and security; and a decree was afterwards rendered for \$6,303.64, in favor of the plaintiffs.

4. That in the suit, and under the order aforesaid, it was the duty of Ramsey, as clerk and master, to take from Chase & Bowen, bond and sufficient security to abide and perform the decree; yet he wholly failed and neglected to take bond and sufficient security, but surrendered the property held by him, as receiver, without taking bond and security as [*181 required by the order; and afterwards a decree for \$6,303.64 was in that suit rendered in favor of plaintiffs, which Chase & Bowen have failed to perform, and which yet remains due.

By reason of the premises, the bond of Ramsey, as clerk and master, became forfeited, and was assigned by the successor of the obligee, Governor of Tennessee, by his written assignment, on a copy of the bond, to plaintiffs, on the 22d July, 1847.

The defendants appeared and pleaded:

1st. That they had performed the condition of the bond.

2d. That it was no part of the right or duty of Ramsey, as clerk and master, to take the bond of Chase & Bowen with good and sufficient security or otherwise, but it was the duty of the receiver.

On these pleas there is an issue of fact.

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3d. That the filing the bill of the plaintiffs against Chase & Bowen, the attachment awarded, and the appointing the receiver, the order requiring the bond and the final decree, were null and void for want of jurisdiction in the Court of Chancery, the remedy being properly at law.

4th. That after the order on the declaration mentioned, and before the surrender of the property, Ramsey did take a bond conditioned as required by the order, which bond was, on application of Bevins, Earle & Co., by the court, ordered to be surrendered, and was accepted; and under it they have recovered \$2,000.

5th. That the defendants do not owe the debt.

7th. That at the date of the bond, the obligors and obligees were citizens of Tennessee, and the obligors and the obligee and his successors, have all continued to be citizens of Tennessee.

8th. That at the time of the cause of action the plaintiffs and defendants were citizens of Tennessee.

To these pleas the plaintiffs demurred.

To the 6th plea: that before surrendering the property, Ramsey took bond conditioned as required by the order; and in so doing, and judging of the sufficiency of the sureties, he acted *bona fide* in the exercise of his best judgment.

The plaintiffs replied, that Ramsey did not take bond from Chase & Bowen with sufficient surety, as was his duty.

To this replication the defendants demurred.

The court overruled the demurrers of the plaintiffs, and sustained the demurrer of the defendants to the replication to the sixth plea and to the declaration, and gave judgment for the defendant on the whole record.

182*] *In this state of things, the record was brought up to this court.

It was argued by *Mr. Davis* for the plaintiffs in error, and *Mr. Lee* for the defendants, with whom was *Mr. Cullom*.

Mr. Davis, for the plaintiffs in error, contended, that under the declaration they could recover on one of the two following propositions:

1. That the goods attached are alleged to be in the hands of the defendant Ramsey, in his character of clerk and master, according to the legal effect of the declaration; and that therefore it was his duty to take good bond and surety before surrendering the goods. (*Caruthers and Nicholson*, St. Tenn., 224, 162, 155; *Acts 1797*, ch. 22, sec. 3; *1794*, ch. 1; *1833*, ch. 47; *Waters v. Carroll*, 9 Yerger, 102, 108, 110; *McNutt v. Livingston*, 7 Sm. & Marsh., 641.)

2. That if the legal effect of the declaration be to charge that the goods were in the hands of Ramsey as receiver, and not as clerk and master, then that it was his duty, as clerk and master, to approve the bond on which the goods were ordered to be surrendered by him as receiver; and that, having approved a bad bond, in his capacity of clerk and master, he is liable in that character for the consequences of such approval—the loss following from the surrender of the goods by him as receiver, on the faith of the bond improperly approved by him as clerk and master.

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This may be maintained on the following grounds:

(a.) The declaration distinctly avers that, in point of fact, it was the duty of Ramsey, as clerk and master, under such an order as that for the surrender of the goods, on bond to be given, to take the bond; and this allegation has been traversed, and an issue of fact is now pending on it; and under this it will be competent for the plaintiff to show such to have been his duty: 1st, by adducing the rules of the court; or, 2d, showing the practice and course of the court in like cases. (*United States v. McDaniel*, 7 Pet., 1; *United States v. Fillebrown*, 7 Id., 28; *Duncan's Heirs v. United States*, 7 Id., 435; *United States v. Arredondo*, 6 Id., 714; *Minor v. Mechanics' Bank, Alex.*, 1 Id., 46; *Williams v. United States*, 1 How., 290.)

(b.) It is clearly a part of the duty of the master to approve such bonds. The bond is an official one, to be filed in court, not kept by the receiver. The receiver is to act only on such a bond as the proper officer of the court shall have approved. It is the duty of the receiver not to surrender the property till such a bond, properly approved, be filed. The order does not give the receiver the right, nor [*183 throw on them the duty of approving the bond. He is ordered to surrender the goods when such a bond is given, but is silent as to the person by whom it is to be taken and approved. That person is, plainly, from the nature of his office, the clerk and master. (See books above cited, and 1 Smith, Ch. Pr., 9.)

If it be supposed that the declaration contemplates only one of those grounds of liability; then,

8. The question, whether Ramsey be charged in his capacity of clerk and master, or as receiver, cannot, as is admitted by the brief of the defendants in error, be now the subject of inquiry on those demurrers; since "this supposed error in pleading is brought to an issue of fact, which is still undisposed of."

We are, therefore, entitled to charge Ramsey, on this declaration and at this stage, with the duty of taking or approving the bond as clerk and master.

4. We submit, that the bond of the clerk and master is assignable, under the Tennessee statutes. (*Caruthers and Nicholson*, 162, 155; *Acts 1794*, ch. 1; and *1797*, ch. 22, sec. 3.)

5. That the assignment here is not a copy of the bond, but the bond itself; the assignment happened to be indorsed or written on a copy of the bond.

6. The demurrer to the 3d plea must be sustained. The plea attempts to inquire collaterally into the regularity of the proceedings in the injunction suit. It does not raise the question of the jurisdiction of the tribunal; but whether the relief sought were properly to be had at law or in equity. To call that a question of jurisdiction, in order to open the case to collateral inquiry, is to misuse legal language.

7. The plea of *nil debet* is clearly had in reply to breaches assigned on a bond with collateral condition. (*Sneed v. Wister*, 8 Wheat., 690.)

10. The fourth plea contains no answer to the declaration in substance; and what it does contain is badly pleaded.

The *gravamen* of the action is the neglect to

take any bond, or if any were taken, the taking of insufficient surety.

This plea avers the taking of a bond which it sets forth, and so far it is good. But it does not aver the sureties to have been good or sufficient; and therefore, it does not in that meet the declaration.

That the plaintiffs sued on the bond does not show it to have been sufficient, but is, perhaps, the best way of proving its insufficiency. If it were good for part, and not all of the decree, the plaintiffs were entitled to have it, and get what they could, and perhaps bound so to do; but then they were at liberty to sue the officer, likewise, for his neglect in approving [184*] bad sureties, *or surrendering the property without taking good sureties. It was no case of election, where the suing on the bond concluded the plaintiffs' right to indemnity for its insufficiency.

11. If the replication to the sixth plea be perhaps not very formal, it is as good as the plea; and the plea itself is clearly bad on general demurrer.

The plea avers, 1st, that taking of bond with sureties, according to the order; and 2d, that in taking bond, Ramsey acted *bona fide*, and in the exercise of his best judgment. But,

1st. To meet the declaration, the defendant was obliged to aver the taking of bond as a performance of one of the duties provided for in the bond on which the suit was brought; but the bond should have been so stated or pleaded as to enable the court to judge of its conformity to the order of law. The plea does not state to whom it was payable, to whom it was delivered, what were its terms; its date, its condition, who were the sureties, nor who were parties to it.

2d. Nor does the plea aver that the sureties were sufficient at the date of the bond; nor that they were believed to be sufficient by Ramsey; nor that he made them swear as to their sufficiency. It merely avers, that he acted *bona fide*, and to the best of his judgment; but does not say what he did, nor on what he judged, nor that he took any means to inform his judgment. On that plea, the court must take his ideas of *bona fides* and his judgment as conclusive. (*Minor v. Mechanics' Bank, Alexandria*, 1 Pet., 46, 49, 66, 71; 4 Taunt., 34; *Wise v. Wise*, 2 Levinz, 152; *Steph. Pl.*, 406; 1 Chitty, Pl., 567, 573; 1 B. & P., 638; Co. Lit., 303, b.; *Finley v. Bochin*, 3 G. & J., 42, 51; *Hughes v. Sellers*, 5 H. & J., 432; *Townsend v. Jemison*, 7 How., 706, 722; 4 G. & J., 395, 401; *McNutt v. Livingston*, 7 Sm. & Marsh., 641; *McAlister v. Serice*, 7 Yerger, 277, 278.)

But the replication to the sixth plea may well be considered as a traverse of one of the two material allegations of the plea; for the plea alleged taking bond, without stating the parties; and the replication denies the taking bond with the proper parties, as well as the taking of sufficient surety.

The counsel for the defendant in error contended, that there is no rule of pleading better settled than that a demurrer reaches the first error in pleading; and, if it were universal in its operation, it might be contended for successfully, that this declaration shows on its face that the defendant Ramsey acted as receiver in the chancery case set forth in the declaration,

and as such was not liable, in his official character of clerk, but in his individual capacity, as commissioner of the court. (See 9 Yerger, *102.) There are, however, some exceptions to this rule; and amongst others is embraced the case where a supposed error in the pleading is brought to an issue of fact, which is still undetermined; we are therefore precluded, perhaps, from the argument of the point just suggested in this stage of the proceedings. There are two objections to the declaration, which are brought up by the demurrers, either of which are fatal. 1st. The bond of a chancery court clerk is not made assignable by the statutes of Tennessee; and 2d. If it is, the assignment must be made of the original bond, and not of a certified copy. It will be seen, by reference to the Act of 1794 (see Nich. & Car., pages 155, 147), that the bonds of the Circuit and County Court clerks are both made payable to the governor, and assignable in cases of default; but the Act of 1797 (see Nich. & Car., 162), which requires a bond from the Chancery Court clerk, does not make it assignable, and it remains as at common law. In confirmation of this view of the case, the court is referred to the case in 9 Yerg., p. 102, where the suit was instituted in the name of the governor. Certainly, there is no statute in Tennessee authorizing the assignment of a copy of a bond, as set forth in this declaration. It is true that profert may, by the statutes, be made of a copy, as the original remains in the office, but the assignment must be of the original bond.

The fourth plea of the defendants was a good and sufficient answer to the declaration, for several reasons. The law of Tennessee does not impose upon clerks and masters in chancery, in express terms, the duty of requiring bonds in cases of the dissolution of injunctions or judging of the sufficiency of the sureties thereto; the obligation arises simply from the order or interlocutory decree delegating him to this power by the court. It is exactly on a footing with any other requisition made upon him by the Chancellor in any cause, such as selling property, taking testimony, &c.; he is bound to perform the duty and make report thereof, and if no exceptions are filed by the parties, they are absolutely concluded, unless in cases of fraud. It would be hard indeed, if, after two years from the execution of an interlocutory decree, a clerk could be rendered liable for its faulty performance, when, perhaps, both the means of rectifying his error or disproving it would have passed away forever. The power is delegated by the court to its officer, and when he performs the duty and makes report of his action, and it is confirmed, the rights of the parties are fixed and neither of them can go behind the decree, unless some fraud should intervene.

If we should be mistaken in this view of the case, certainly the surrender of the bond to the complainants, after obtaining *their [*186] decree, their institution of a suit upon it, and obtaining judgment, execution, and part satisfaction of their debt, do constitute an election of their remedy, and a confirmation of the act of the clerk, which would estop them from suing him for neglect of duty. This question has been expressly decided in New York (see 1 Comstock, p. 433); and that, too, not in a case

where there was a faulty performance of duty on the part of the clerk, but where he had clearly exceeded his powers, and committed an illegal act. It is in consonance, too, with the general rules adopted by the courts in regard to the responsibility of other public officers. If a sheriff, on the execution of bailable process, should take the notes or property of the defendant in the process, and discharge him out of custody, although the discharge is illegal, and renders the sheriff liable for escape, yet, if the plaintiff accept the notes or property, he is foreclosed from his remedy against the sheriff. (See 2 B. & P., 151; 6 Cow., 465; and 4 Campb., 46.) The bond of the defendants, in the chancery case, was made payable to the complainants, and they, by their acceptance of it, and recovery of judgment, have converted it into a security of a higher character, and made it their own; thus disabling the defendant Ramsey from pursuing any recourse he might have had on the property originally attached, or the parties to the bond.

It may be urged, in answer to the authorities adduced, that they were cases of an illegal exercise of authority by public officers, and that these acts must be disavowed *in toto* by the parties interested, or their acceptance would conclude them; but in the case now at issue, the act of the clerk was *prima facie* legal, and the only mode of testing the insufficiency of the bond was by pursuing the obligors to insolvency. It will be seen, by reference to the cases themselves, that it was admitted by the counsel, that acts of omission could be cured by affirmance; and the only dispute there was, whether the same rule should be applied to cases of illegal exercise of powers, and the admission is true on principle. If the clerk is liable here at all, it must be on the ground that the bond was defective at the time of its reception; the complainants in the chancery suit, then, had the right of exception; if they did not except, and any right of action still remained to them, it must have been perfected on obtaining their decree, and that was the period for their election.

The demurrer to the sixth plea was not sustainable, and properly overruled; the plea was a full answer to the declaration, and should have been negatived. The clerk of the court, whether acting ministerially or judicially in the reception of the bond, was not an insurer; 187*] he was only bound to act *bona fide* *and with reasonable discretion. (See 7 Sm. & M., 641; 7 Yerg., 276.)

Mr. Justice Catron delivered the opinion of the court:

The defendant, William B. A. Ramsey, and his sureties, were sued on an official bond given by Ramsey as clerk of the Chancery Court held at Knoxville, Tennessee. The condition of the bond declares that the clerk shall "truly and honestly keep the records of said court, and discharge the duties of said office, according to law;" and the declaration alleges that said Ramsey did not truly and lawfully discharge the duties of his office, in this, that Bevins, Earle & Co. filed their bill in equity in the Chancery Court at Knoxville against Chase & Bowen, and that certain goods of theirs were attached, and put into the hands of said Ram-

sey, as receiver; and that by an order of court the injunction was dissolved, and the receiver, Ramsey, was directed to surrender the goods to Chase & Bowen. "upon their entering into bond with security to abide by and perform the judgment and decree of the court upon final hearing of the cause, if made against them;" and that by virtue of the order it became the duty of Ramsey, as clerk and master of said court, to take a bond as above prescribed. Nevertheless, he did not take from Chase & Bowen their bond, with sufficient sureties thereto, but, on the contrary, he took certain sureties (five in number), who were wholly insufficient to perform the decree of the court, and on said insufficient bond and security surrendered the goods to Chase & Bowen; and that afterwards, on a final hearing, a decree was rendered against Chase & Bowen in favor of Bevins, Earle & Co., for the sum of \$6,803.64, with interest thereon, which remained unpaid.

The second and third breaches aver that Ramsey surrendered the goods without taking any bond, "with good and sufficient sureties," from Chase & Bowen; and,

The fourth breach avers that no bond whatever was taken from Chase & Bowen, on the delivery of the goods to them.

The defendant relied on several pleas in defense, only two of which, the fourth and sixth, it is deemed necessary to notice. The fourth plea sets out the order dissolving the injunction, and the bond taken by Ramsey from Chase & Bowen, and their five sureties, and avers that after the final decree was made against Chase & Bowen, the bond was, on the application of Bevins, Earle & Co., by order of the court, surrendered to them by the clerk and master, and was accepted by them; and under and by virtue of said bond, Bevins, Earle & Co., have demanded and brought suit against and received of the sureties in said bond large sums of money, to wit: \$2,000, part and parcel of the penalty and condition of said bond; and *which were demanded, and re- [188

ceived on, and in discharge of, said bond. The sixth plea avers that the bond taken by Ramsey, as clerk and master, was for \$10,000, and was in due form; and that in judging as to the sufficiency of the sureties, and in surrendering the property, said Ramsey acted *bona fide*, and in the exercise of his best judgment.

To this plea the plaintiffs replied, re-affirming that said Ramsey had not taken bond with good and sufficient security, as was his duty; and to the replication there was a demurrer.

As the declaration did not charge the clerk with bad faith, and the presumption of good faith being *prima facie* in his favor, from the face of the bond, taken by him, neither the plea or replication could be of any force, because in their legal effect they are the same as that of the declaration; and so the court below held, and, going back to the declaration, declared it bad; and, second, overruled the demurrer to the defendant's fourth plea. The plaintiffs were offered the liberty to amend their declaration and pleadings, but this they declined doing, and final judgment was rendered against them. Whether it was necessary to aver in the declaration that insufficient security was taken wittingly and knowingly, and consequently in bad faith, we do not propose to

discuss, as it is a question more appropriately belonging to the State courts than to this court. But as judgment was given against the plaintiffs on the fourth plea, and as that judgment is conclusive, if the plea is good, we will consider that plea. The demurrer admits that Bevins, Earle & Co., obtained the bond of Chase & Bowen and their sureties; that they sued the sureties on it, and received of them \$2,000, part of the penalty; and which sum was received in discharge of the bond; whether the money was obtained by judgment or compromise, does not appear, nor is it material.

Chase & Bowen were principals to Ramsey, if he was in default for neglect of official duty; and so were the sureties to the bond responsible to him should he be compelled to pay in their stead. The clerk was the last and most favored surety, and if forced to pay the debt, he was entitled to all the securities Bevins, Earle & Co. had, to remunerate his loss; and, in such event, he would have been entitled to the bond on Chase & Bowen, and their sureties. And in the next place, it is manifest, that Ramsey cannot be in a worse situation than if he had been a party to the bond, in common with the other sureties; and in such case, it must be admitted that he would stand discharged.

We concur with the Circuit Court that the fourth plea was a good defense, and order the judgment to be affirmed.

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*ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of East Tennessee, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

THOMAS C. ROCKHILL, WADE T. SMITH,
AND WILLIAM P. ROCKHILL, *Plaintiffs*,

v.

ROBERT HANNA, ASA B. STRONG, EDWARD HEIZER, AARON ALDRIDGE, ROBERT B. HANNA, DAVID SHIELDS, THOMAS JOHNSON, JEREMIAH JOHNSON, AND GEORGE BRUCE.

Priority of liens—taking out ca. sa. on one of three judgments, entered on same day, gives priority to others—discharge of debtor under Insolvent Law of Indiana does not change priorities.

Three judgments were entered up against a debtor on the same day.

One of the creditors issued a *captas ad satisfaciendum* in February, and the other two issued writs of *fiert facias* upon the same day, in the ensuing month of March.

Under the *ca. sa.* the defendant was taken and imprisoned, until discharged by due process of law. The plaintiff then obtained leave to issue a

NOTE.—To what extent judgments are lien on land. See note to *Savage v. Best*, 8 How., 111.

Lien of judgment, how suspended or lost; territorial extent of. See note to *Raukly v. Scott*, 12 Wheat., 177.

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fi. fa., which was levied upon the same land previously levied upon. The marshal sold the property under all the writs.

The executions of the first *fi. fa.* creditors are entitled to be first satisfied out of the proceeds of sale.

Each creditor having elected a different remedy, is entitled to a precedence in that which he has elected.

Besides, the *ca. sa.* creditor, by imprisoning the debtor, postponed his lien, because it may happen, under certain circumstances, that the judgment is forever extinguished. If these do not happen, his lien is not restored as against creditors who have obtained a precedence during such suspension.

THIS case was brought up from the Circuit Court of the United States for the District of Indiana, upon a certificate of division in opinion between the judges thereof.

The facts in the case are succinctly stated in the opinion of the court, and also the questions certified.

It was submitted on the part of the plaintiffs by *Mr. Thompson*, upon a printed brief by *Messrs. Morrison and Mayor*, and submitted on the part of the defendants, upon a printed brief, by *Mr. O. H. Smith*.

Mr. Thompson, for plaintiffs:

We shall, in the outset, assume that the following principles must be carried into an examination of this case, and that, without a recognition of which, the questions submitted cannot be intelligently and correctly [*190 determined. It is, perhaps, superfluous to say that these principles are only a reiteration of the long-established and uniform decisions of this court, viz.:

1st. If the State of Indiana has a statute declaring and defining judgment liens on real estate, this court will give full effect to such statute.

2d. If the supreme judicial tribunal of the State has given construction to the statute, this court will follow that construction.

The transcript shows that in the court below there were three several judgments rendered on the same day, against the same defendant, but in favor of different plaintiffs, one of which was in favor of our clients, Rockhill, Smith & Rockhill; that the marshal sold real estate of the execution defendant, under executions issued upon all three judgments, offering to each set of plaintiffs a portion of the avails, according to the amount of their respective judgments; that Rockhill, Smith & Rockhill, the plaintiffs, rejected such apportionment, claiming the whole avails of the sale as their legal right, and that for refusing to pay over the whole, the plaintiffs instituted this suit against the marshal and his sureties on their bond.

We state the case thus briefly to call the special attention of the court to the two propositions above stated; and we insist that the questions submitted naturally and necessarily suggest the inquiry, as a first principle to be ascertained, has the State of Indiana a law on the subject of judgment liens.

"Judgments in the Circuit and Supreme Courts of this State shall have the operation of, and shall be liens upon the real estate of the person or persons against whom such judgments may be rendered, from the day of the rendition thereof." (Revised Statutes of Indiana, 1838, page 806, sec. 22.) The revised Statutes of 1843, page 454, are to the same effect.

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We do not insist that the literal reading of the statute above cited, determines the questions submitted, in our favor; neither does it determine anything against us. As to judgments of the same date, it is altogether silent. It neither in terms asserts the principle for which we contend, that priority should be accorded to the most vigilant creditor, nor the principle assumed and acted upon by the marshal, when he undertook to apportion the avails of the sale among the several creditors. They both rest upon the same foundation—a construction of the statute.

We proceed to show that the Supreme Court of Indiana has given the statute a construction that, if followed by this court, must determine the questions submitted in favor of the plaintiffs. The case of *Michaels v. Boyd et al.*, Indiana Rep., 100, while it recognizes the doctrine 191*] that judgments rendered at *the same time, have, under the statute, no priority of lien over each other, it yet decides that the creditor whose execution is first issued and levied, gains priority, as the most vigilant creditor.

If anything were required to add weight to the opinion, we might suggest that it was pronounced by Judge Blackford, whose reputation as a jurist, we suppose, is not entirely unknown to this court. It will be also noticed that the decision is sustained by the cases of *Adams v. Dyer*, 8 Johns., 347; *Waterman v. Haskin*, 11 Johns., 228, and 1 How. Miss., 89.

It was argued below, that the decision of the Supreme Court of Indiana could not be considered a judicial construction of the local law of Indiana, on the subject of judgment liens. We suppose the argument will be pressed in this court. We cannot, however, believe it will find any favor here. The very second paragraph in Judge Blackford's opinion, cites the statute, by book and page, and his whole reasoning is in direct reference to the statute. The statute is the basis, the *substratum* of the decision.

We trust we shall not be considered guilty of the slightest disrespect, or as transgressing any rule of propriety, by alluding to the circumstance that at one important conjuncture of this case, His Honor Judge McLean allowed his judgment to be controlled by the same authorities cited by Judge Blackford in his opinion, which, by the by, was previous to the decision in Indiana. Judge McLean then ruled, that by our superior vigilance in taking out execution, levying, and selling, we had gained such a priority as entitled us to the whole of the proceeds of the sale. Afterwards, however, and after the second sale (the first having been set aside by the court on the application of the attorneys for the other execution plaintiffs), the learned judge, on the authority of the opinion of Chief Justice Marshall, in *Rankin & Schatzell v. Scott*, 12 Wheat., 177, had his former opinion shaken.

We therefore propose to show that the case in 12 Wheat. is not applicable to the case before the court.

First. The judgments in that case were of different dates, and the court below had determined a priority in favor of the younger judgment, to the exclusion of the older one. The District Court of Missouri had decided that a sale by a sheriff, under a second

judgment, but first execution, divested the lien of a first judgment. The decision was properly reversed; but the learned and able judge, in his opinion, never once alluded to the case of judgments of the same date. That was a question not before the court. The question was one between prior and subsequent judgment liens.

*We are aware that the argument of [*192 the judge is said to be against us, but we cannot perceive it to be so. The opinion suggests an analogy between a statutory lien and a mortgage lien, as regards their similar binding effect. This we admit. The lien created by a prior judgment, in reference to a subsequent one, is very similar to that of a prior mortgage, duly recorded, in reference to a subsequent mortgage; and we feel that we can admit, without endangering our position, that in both the case of a judgment and a mortgage, the prior lien is entitled to prior satisfaction. The opinion, however, concedes, that even a prior lien might be displaced by some act of the party holding it; though it is said "the single circumstance of not proceeding on it, till a subsequent lien has been obtained and carried into execution, has never been considered such an act." Our case shows not only delay on the part of our adversaries, but delay for a consideration.

If, however, more is sought to be made of the analogy of the learned judge on the subject of the two kinds of lien than we concede, we shall insist not only that the case itself is not in point, but that there is a substantial dissimilarity between them. It was said, we believe, by Lord Mansfield, that there is nothing so apt to mislead as a simile; and the remark will certainly hold true in regard to the parallel supposed to exist between a judgment lien and a mortgage lien. While a judgment lien is general, a mortgage lien is specific. A judgment creditor acquires no distinct or independent interest in the estate of his debtor. A mortgagee has such an interest in the particular thing mortgaged. He may take possession; he may eject the mortgagor.

It will be noticed that the opinion under review, like that of Judge Blackford, assumes to give construction to a local statute, on the subject of judgment liens. The opinion commences by quoting the statute of Missouri, as Judge Blackford's does that of Indiana. The Missouri statute had, however, received no judicial construction. This court had, therefore, full authority to construe it. The Indiana statute had received a construction which, right or wrong, this court, according to its own admission, is bound to follow.

Second. We consider, that in perfect consistency with the most exalted estimate of the ability of the eminent judge who delivered the opinion in 12 Wheat., we have the right to suppose, that had the Supreme Court of Missouri given her statute the construction that the District Court did, he would have felt constrained to follow it, erroneous as he deemed it to be. This supposition we feel authorized to cherish, by the uniform decisions of this court on the subject of the adjudication of the state courts on their local statutes. The au- [*193

thorities on this subject are so numerous, and

so clear, and must be so familiar to this court, that an array of them might be considered uncalled for. We hope, however, to be excused for referring to a few of them.

In the case of *Shelby v. Guy*, 11 Wheat., 367, the court holds the following language: "That the statute law of the States must furnish the rule of decision to this court, as far as they comport with the Constitution of the United States, in all cases arising within the respective States, is a position that no one doubts. Nor is it questionable, that a fixed and received construction of their respective statute laws in their own courts, makes, in fact, a part of the statute law of the country, however we may doubt the propriety of that construction."

"In construing local statutes respecting real property, the courts are governed by the decisions of the state tribunals." (6 Wheat., 119.)

"Where the question upon the construction of the statute of the state, relative to real property, has been settled by any judicial decision in the state where the land lies, the Supreme Court, upon the uniform principle adopted by it, would recognize that decision as a part of the local law." (*Gardner v. Collins et al.*, 2 Pet., 58.)

We only add a few quotations from the case of *Green v. Neal*, 6 Pet., 291—a case in which this court, in following a then recent decision of the state court, overruled its former construction of a local law, on the sole ground that the State Court had changed its construction.

Mr. Smith, for defendants:

1. Did the plaintiffs obtain a preference by the issue and levy of the first execution? Certainly not; that execution was a *ca. sa.*, and the levy was on the body, not the lands.

2. Did the plaintiffs obtain a preference by the first sale of the lands, and the order of the court, to appropriate the proceeds to their execution to its amount? Certainly not; because the sale and the order were set aside by the court, and stood as if they had not been made.

3. Did the plaintiffs obtain a preference, by the order of the court, for the issue of the *vend. ex.* on which the lands were sold? Certainly not. As the clerk had full power to issue all the writs, without any order of court, as is the uniform practice, and all the writs were issued by the clerk on the same day, placed in the hands of the marshal at the same time, and the property advertised and sold under all the writs of the marshal at the same time.

194*] *4. Did the plaintiffs obtain a preference, by the delay of the other judgment plaintiffs, to issue their writs of *vend. ex.* on their levy? Clearly not. (See 4 McLean, 554; *Rankins v. Scott*, 12 Wheat., 177.)

5. The original general liens being equal, did the issuing and service of the *ca. sa.*, and imprisonment of Allen by the plaintiffs, suspend or displace the lien of their judgment, so as to give the other judgments a priority of lien on his real estate? We contend that they did, and rely upon the following authorities: *Taylor v. Thompson*, 5 Pet., 358; *Bigelow v. Cooper*, 1 Cowen, 56; *Ransom v. Keys*, 9 Cowen, 128; *Sunderland v. Loder*, 5 Wend., 58.

6. Did the issue of the writs of *fi. facias* by the other plaintiffs on their judgments, and their levy on the lands in controversy, pend-

ing the imprisonment of the defendant in execution on the *ca. sa.*, give to the judgments, executions, and levy a special lien on the lands levied upon, and a preference for the whole proceeds, to the amount of their judgments? So we contend, and rely upon the following authorities to sustain the position: *Adams v. Dyer*, 8 Johns., 347; *Waterman v. Hawkins*, 11 Johns., 228; *Burney v. Boyett*, 1 How. Miss., 39; *Michals v. Boyd et al.*, Smith's Indiana, 100.

Mr. Justice Grier delivered the opinion of the court:

This case comes before us on a certificate of division of opinion between the judges of the Circuit Court of the United States for the District of Indiana. It is an action on the official bond of the marshal, and the questions certified arise on the following facts: Rockhill & Co., the plaintiffs in this issue, and Price & Co., and Siter & Co. had each entered up judgments on the same day (19th November, 1838) against John Allen.

On 5th of March, 1839, Price & Siter issued *fi. fas.* which were levied on the lands of Allen. On the 7th of February, 1839, plaintiffs issued a *ca. sa.*, on which the defendant, Allen, was arrested and imprisoned till the passage of the Act of General Assembly of Indiana, of 13th of January, 1842, to abolish imprisonment for debt; by virtue whereof he was released, on the ground that this act had been adopted by Act of Congress. The plaintiff afterwards, in March, 1844, on affidavit and proof of the defendant's discharge by force of the insolvent law, had leave of the court to issue a *fi. fa.* which was levied on the same land previously seized in March, 1839, on the executions issued on the other judgments; and the marshal was proceeding to sell, when writs of *vend. exp.* on these judgments were put in his hands. A sale was made, *but [*195 afterwards set aside by the court. In May, 1844, writs of *vend. exp.* on all three of the judgments were put into the hands of the marshal—on these, the property of Allen was sold, the money raised being insufficient to pay all the judgments. Plaintiff (Rockhill) claimed that the money should be applied first to the satisfaction of his judgment; Price & Siter claimed that it should be applied to satisfy their judgments first. Whereupon the court certified a division of opinion on the following questions:

"1st. Whether or not the plaintiffs in this suit are entitled to more than their distributive share of the proceeds of the sale.

2d. Whether they are not entitled to the whole proceeds, to the extent of what is justly due on their judgment.

3d. Or whether the executions first levied are not entitled to the whole proceeds of the sale.

4th. Or whether there can be any preference recognized by reason of superior diligence, the judgments being of equal dates, and not impeached."

In the State of Indiana, judgments are liens upon "the real estate of persons against whom such judgments may be rendered, from the day of the rendition thereof." As the statute provides for no fractions of a day, it follows that all judgments entered on the same day

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have equal rights, and one cannot claim priority over the other. In England, when several judgments are entered to the same term (and by fiction of law the term consists of but one day), the judgment creditor, who first extends the land by *elegit*, is thereby entitled to be first satisfied out of it. The case would be much stronger, too, in favor of the first *elegit*, if one of three judgments had levied a *fi. fa.* on the goods and chattels of the defendant, the second taken his body on a *ca. sa.* and the third laid his *elegit* on his land. For each one, having elected a different remedy, would be entitled to a precedence in that which he has elected. This principle of the common law has been adopted by the courts of New York, as is seen in the cases of *Adams v. Dyer*, 8 Johns., 350, and *Waterman v. Haskins*, 11 Johns., 228; and also by the Supreme Court of Indiana in *Marshall v. Boyd et al.*, where it is said, the mere delivery of an execution, as in case of personal property, will not give a priority, but the execution first begun to be executed, shall be entitled to priority.

The application of these principles to the present case would give the preference to the judgments of Siter & Price, which were levied on the land five years before the plaintiff's levy on the same. An execution levied on land, is begun to be executed, and is an election of the [196*] remedy by sale of it; and *the mere delay of the sale, if not fraudulent, injures no one and cannot postpone the rights of the creditor who has first seized the land and taken it into the custody of the law for the purpose of obtaining satisfaction of his judgment. If he has obtained a priority over those whose liens are of equal date, by levying his execution, he is not bound to commence a new race of diligence with those whose rights are postponed to his own. There may be a different rule as to a levy on personal property, where it is suffered to remain in the hands of the debtor. But liens on real estate are matters of record and notice to all the world, and have no other limit to their duration than that assigned by the law.

But we do not think it necessary to rest the decision of this case, merely on the question of diligence, or to decide whether this doctrine has been finally established as the law of Indiana. The plaintiff's lien does not, by the statement of this case, stand on an equality as to date with that of the other judgments. By electing to take the body of his debtor in execution he has postponed his lien, because the arrest operated in law as an extinguishment of his judgment. It is true, if the debtor should die in prison, or be discharged by act of the law without consent of the creditor, he may have an action on the judgment, or leave to have other executions against the property of his creditor. The legal satisfaction of the judgment, which for the time destroys its lien and postpones his rights to those whose liens continue, is not a satisfaction of the debt, but, as between the parties to the judgment, it operates as a satisfaction thereof. The arrest waives and extinguishes all other remedies on the goods or lands of the debtor while the imprisonment continues, and if the debtor be discharged by the consent of the creditor, the judgment is forever extinguished, and the plaintiff remitted to such

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contracts or securities as he has taken as the price of the discharge. But if the plaintiff be remitted to other remedies by a discharge of his debtor by act of law, or by an escape, it will not operate to restore his lien on the debtor's property, which he has elected to waive or abandon as against creditors who have obtained a precedence during such suspension. The case of *Snead v. McCoull*, 12 How., 407, in this court, fully establishes this doctrine. It is to be found in the common law as early as the Year Books, and is admitted to be the law in almost every State in the Union. (See Year Book, 33 Henry VI., p. 48; *Foster v. Jackson*, Hobart, 52; *Barnaby's case*, 1 Strange, 653; *Vigers v. Aldrich*, 4 Burr., 2483; *Jaques v. Withy*, 1 T. R. 557; *Taylor v. Waters*, 5 Maule & Selwyn, 103; *Ex parte Knowell*, 13 Ves., Jr. 193, &c., &c., &c.) And in New York, *Cooper v. Bigelow*, 1 Cow.; *Ransom v. Keys*, 9 *Cow., 128; 5 Wend., 58. In Penn. [*197] *sylvania, Sharp v. Speckenyle*, 3 Serg. & R. In Massachusetts, *Little v. The Bank*, 14 Mass., 443.

The Insolvent Law of Indiana which discharges the person of the debtor from imprisonment upon his assigning all his property for the benefit of his creditors, provides that his after-acquired property shall be liable to seizure, and also that lines previously acquired shall not be effected by such assignment and discharge; but it does not affect to change the relative priority of lien creditors, as it existed at the time of the discharge, or to take away from any lien creditor his prior right of satisfaction, which had been vested in him previous to such discharge. Neither the letter nor spirit of the Act will permit a construction which by a retrospective operation would divest rights vested before its passage.

We are of opinion, therefore, that the several questions certified from the court below should be answered as follows:

1st. That plaintiffs in this suit are not entitled to more than their distributive share of the proceeds of the sale.

2d. That they are, consequently, not entitled to the whole proceeds to the extent of what is due on their judgment.

3d. The executions of Siter & Co. and of Price & Co. are entitled to be first satisfied from the proceeds of the sale.

4th. That the decision of the preceding questions being a disposition of the whole case, it is unnecessary to give any answer to the fourth question.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Indiana, and on the points or questions on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion, agreeably to the Act of Congress in such case made and provided, and was argued by counsel; on consideration whereof, it is the opinion of this court—

1. That the plaintiffs in this suit are not entitled to more than their distributive share of the proceeds of the sale.

2. That they are consequently not entitled to the whole proceeds to the extent of what is claimed on their judgment.

3. The executions of Siter & Co. and of Price & Co. are entitled to be first satisfied from the proceeds of the sale.

4. That the decision of the preceding questions being a disposition of the whole case, it is unnecessary to give any answer to the fourth question, which is an abstract proposition [198*] *not necessary to be decided by this court. Whereupon it is now hereby ordered and adjudged by this court, that it be so certified to the said Circuit Court.

CORNELIUS KANOUSE, *Plaintiff in Error*,
v.
JOHN M. MARTIN.

Right of removal from State to Circuit Court on petition filed—proceedings thereafter in State Court erroneous—Practice.

Where a citizen of New Jersey was sued in a state court in New York, and filed his petition to remove the case into the Circuit Court of the United States, offering a bond with surety, the amount claimed in the declaration being \$1,000, it became the duty of the state court to accept the surety, and proceed no further in the cause.

Consequently, it was erroneous to allow the plaintiff to amend the record and reduce his claim to \$499.56.

The case having gone on to judgment, and been carried by writ of error to the Superior Court, without the petition for removal into the Circuit Court of the United States, it was the duty of the Superior Court to go behind the technical record, and inquire whether or not the judgment of the court below was erroneous.

The defendant was not bound to plead to the jurisdiction of the court below; such a step would have been inconsistent with his right that all proceedings should cease when his petition for removal was filed.

The Superior Court being the highest court to which the case could be carried, a writ of error lies to examine its judgment, under the 25th section of the Judiciary Act.

THIS case was brought up from the Superior Court of the City of New York, by a writ of error issued under the 25th section of the Judiciary Act.

A motion was made at the last term of this court, by *Mr. Martin*, to dismiss the case, for want of jurisdiction, which is reported in 14 How., 23.

The facts are stated in the opinion of the court.

It was argued by *Mr. Garr* for the plaintiff in error, and *Mr. Martin* for the defendant.

The counsel for the plaintiff in error first filed an elaborate brief, to which the counsel for the defendant replied. Then there was filed a reply to defendant's argument, and then a counter statement and points by the counsel for the defendant in error. From all these the reporter collects the views of the respective counsel, as far as they concerned the points upon which the judgment of the court rested.

Mr. Garr, for the plaintiff in error:

The questions arising in this case are the following:

1st. Whether the Court of Common Pleas had jurisdiction to proceed further in the cause, [199*] and to render a judgment *therein, after the defendant had duly petitioned for the removal of it to the Circuit Court of the United States.

2d. Whether the Superior Court of the City of

New York erred in refusing to look beyond the judgment roll, and in excluding from its consideration the proceedings brought before it by the allegation of diminution and *certiorari*, that proved the existence of the errors complained of.

3d. Whether the Court of Appeals of the State of New York erred in holding that the defendant below was precluded from his writ of error, by it not appearing on the record that he had appealed from the order of the Court of Common Pleas, denying his application to remove the cause.

4th. As to the sufficiency of the matters set forth by the defendant in error in his plea to the special assignment of errors, and in the subsequent pleadings that terminated in a demurrer.

First. I. The defendant below had, at the time of entering his appearance in the Court of Common Pleas, a legal right to remove the cause to the Circuit Court of the United States, if the matter then in dispute exceeded the sum or value of \$500. (12th sec. of Judiciary Act of 1789.)

II. That the matter then in dispute exceeded the sum or value of \$500, was manifest by uncontradicted evidence of the highest nature, viz.: the declaration in the cause, the sum claimed in which (when the action is for damages) is the sole criterion by which to determine the amount in dispute. (*Martin v. Taylor*, 1 Wash. C. C., 2; *Muns v. Dupont*, 2 lb., 463; *Sherman v. Clark*, 8 McLean, 91; *Gordon v. Longest*, 16 Pet., 97; 1 Kent's Com., 6th ed., 302, note b; Opinion of Judges Nelson and Betts, in *Martin v. Kanouse*, U. S. Circuit Court, April 25, 1846, Appendix, p. 37.)

III. By the filing of the petition, and the offer of the surety prescribed by the statute (on the 18th of September, 1845), the defendant's right to a removal of the cause was perfected and absolutely vested; and it thereupon instantly became "the duty of the state court to accept the surety, and proceed no further in the cause." (12th sec. of Judiciary Act.)

IV. The Common Pleas erred in afterwards receiving (on the 1st of October) an affidavit of the plaintiff, reducing his demand below \$500, and thereupon denying (on the 6th of October) the motion for removal, because,

1. It is only where property, and not damages, is the matter in dispute, that the court, for the purpose of determining the amount, looks at any evidence beyond the declaration. In such a case, the court will receive affidavits, in order to ascertain the value. (*Cooke v. Woodrow*, 5 Cranch, 13.)

2. *Mr. Martin's* affidavit, had it even been admissible, was *insufficient. It did not [*200] deny any of the facts alleged in the petition, nor did it even allege that there had been a mistake in the declaration, and that he had not intended to demand by it a sum exceeding \$500. On the contrary, the affidavit merely states that the demand made by the declaration was more than "the actual amount due to him;" that such amount was less than \$500, and that he "now" (that is, at the time of making the affidavit, being thirteen days after the filing of the petition, and after the defendant's right to a removal had become perfect) limits and reduces his claim to the sum of \$499.56.

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8. The Act of Congress does not provide that the state court may retain its jurisdiction, if the plaintiff will reduce his demand below \$500.

4. The jurisdiction depends upon the state of things at the time of the action brought, and is not affected by any subsequent event. (*Mollan v. Torrance*, 9 Wheat., 537; *Keppel v. Heinrich*, 1 Barb., S. C., 449.)

If Mr. Martin, the plaintiff, had, after the bringing of his action, removed from the State of New York, and become a citizen of the same State with the defendant, his change of residence would not have restored jurisdiction to the Court of Common Pleas. (*Clark v. Mathewson*, 12 Pet., 164-171.) Upon the same principle, his making an affidavit reducing below \$500 the claim which he therein admitted he had made by his declaration, could not restore the jurisdiction.

5. By the defendant's application to remove the cause, the Court of Common Pleas lost jurisdiction over it; and as that jurisdiction could not be restored by any subsequent act of the plaintiff, or proceeding in that court, it follows that the plaintiff's affidavit reducing his demand, the amending of the declaration, and the subsequent proceedings in the cause, were *coram non iudice*, and, as such, erroneous and void. (*Wright v. Wells*, Pet. C. C., 220; *United States v. Myers*, 2 Brock. C. C., 516; *Gordon v. Longest*, 16 Pet., 97; *Hill v. Henderson*, 6 Sm. & Marsh., 351; *Campbell v. Wallin's Lessee*, 1 Mart. & Yerg., 266.)

6. The errors complained of were not in matters of mere practice, or matters in regard to which the court below had an arbitrary discretion. They were in matters of substance; they consisted in the court's withholding a right to which the defendant was entitled under the Act of Congress, and in their persisting to exercise jurisdiction, and to amend the declaration, and render a judgment, after it had "become their duty to proceed no further in the cause."

"Where the law has given to the parties rights, as growing out of a certain state of facts, 201*] there discretion ceases." (*Gordon v. Longest*, *supra*; *People v. Superior Court of New York*, 5 Wend., 125, and 10 *Ib.*, 291.)

Mr. Martin, for defendant in error:

First Point. The state court had jurisdiction of the cause until the plaintiff in error fully complied with all the requirements of the United States statute, and until the state court had so decided, and made an order for its removal.

The New York Common Pleas is a common law court, and had an original jurisdiction of this cause, of which it could not be deprived by a paramount statute. (*Ex-parte Bollman*, 4 Cranch, 75.) This jurisdiction, and the right of the state court to decide on the application for a removal of the cause, is conceded in the Act of Congress, by requiring the presentment of a petition for such removal.

But it is insisted by the plaintiff in error, at pages 14, 15 and 16 of his argument, that "by the filing of the petition, and the offer of the surety prescribed by the statute, the defendant's right to a removal of the cause was perfected and absolutely vested; and it thereupon instantly became the duty of the state court to accept the surety and proceed no further in the

cause;" and that, "by the defendant's application to remove the cause, the Court of Common Pleas lost jurisdiction over it."

The court will observe that nothing is here said about the appearance required by the Act; but it is contended that an instantaneous change of jurisdiction was effected by filing the petition and offering the surety only.

For the sake of argument, let it be supposed that a false appearance has been entered, and a spurious petition filed, and insufficient sureties offered—does a change of jurisdiction instantly follow? If it does, then a state court can have no opportunity to protect its own jurisdiction or the rights of its suitors against fraud—no time to look into the petition or bond, to see if the one be properly authenticated, or the other duly executed; or to ascertain whether the real amount in controversy exceeds \$500 or not.

Upon this theory the state court is paralyzed, and struck dumb and blind, by the mere presentation of a set of papers, no matter how defective in form or fraudulent in execution; and no matter what evidence may be produced—an affidavit or a bill of particulars, to satisfy the court that the amount is less than \$500—and no matter how well satisfied the court may be of fraud in the papers, or deficiency in the amount to entitle the applicant to remove the cause.

This is probably too absurd to be seriously maintained, even in this case; and it [*202 will doubtless be considered that the state court has a right to judge of the regularity and sufficiency of the applicant's papers; and that jurisdiction must remain with the state court long enough, at least, to enable the court to inspect them, and decide upon their sufficiency.

If this be conceded, as it is submitted it must be, it must also be conceded that the court may retain jurisdiction to ascertain the true amount in controversy; and if it may retain jurisdiction an hour for these purposes, it may retain it for such further time as may be reasonable and necessary to enable the parties to obtain the requisite evidence to satisfy the court upon any of the matters of which it may inquire. And this is destructive of the whole theory of an instantaneous change of jurisdiction.

These tests of the plaintiff's theory show its absurdity, and the correctness of the decision of the United States Circuit Court for the Southern District of New York, on the defendant's motion in this case in that court.

On that motion it was held, in substance and effect, that a cause was not actually removed into the United States Circuit Court, until certified copies of the papers in the state court, and of an order for their transmission, were sent to, and entered in the United States court.

This decision, if correct, sets the question of the actual jurisdiction of this case, pending the application for its removal, at rest. It also furnishes a sufficient reason for the plaintiff's unwillingness to apply to that court, as directed by the Supreme Court of the State, for a *mandamus* to compel the New York Common Pleas to grant an order for the removal of the cause. He had not filed copies of his papers in the United States court, so authenticated as to warrant the United States court in proceeding upon them, and therefore had not done what was

necessary to authorize him to ask the assistance of that court, had he been otherwise entitled to it.

Second Point. The plaintiff in error did not so comply with the requirements of the 12th section of the United States Judiciary Act, as to divest the state court of its jurisdiction and entitle himself to an order for the removal of the cause, because he did not enter his appearance in the state court at the time of filing his petition, &c. (See United States Stat. at Large, p. 79.)

Third Point. The state court properly retained its jurisdiction of the cause, and was not bound to grant an order for its removal into the United States court, because it did not appear to the satisfaction of the state judge that the amount in controversy exceeded \$500, exclusive of costs.

By the 12th section of the United States Act, 203] before cited, *this is expressly declared to be necessary to entitle the applicant to a removal of the cause. The terms of the statute are clear and unequivocal. The amount must "be made to appear to the satisfaction of the court.

This language is peculiar to the 12th section of this Act, and is not found in the 22d section of it, authorizing the removal of causes from the Circuit Courts to this court by writ of error, nor in the Act of 1803 (2 United States Stat. p. 244), authorizing like removals by appeal where the amount exceeds \$2,000; nor in the Act of 1816 (3 United States Stat. 261), authorizing writs of error to the United States Circuit Court of the District of Columbia, where the amount exceeds \$1,000.

In none of these sections is a discretion expressly given to the court from which the cause is to be removed, as in the 12th section.

This constitutes the basis of a very important distinction between this case and most of the cases cited by the plaintiff in error; and when taken in connection with the fact, that in no one of those cases was there any dispute about the amount in controversy before the state court, it renders them wholly inapplicable to this case, as authorities, to show that the declaration is conclusive as to amount.

Upon this point they leave the present case entirely free from the control of prior adjudications.

This distinction also furnishes a very conclusive proof that Congress did not intend that the same rules of evidence should be applied in ascertaining the amount in dispute in these two classes of cases—else why declare in the one that the amount must be made to appear to the satisfaction of the court, and remain silent in the other?

The inference from all this is irresistible, that Congress meant to give the state courts a discretion, not only as to the amount, but as to the evidence to show it.

In *Gordon v. Longest*, 16 Pet., 97 (which is the only reported case that has come before this court under the twelfth section), the general discretion of the state judge was admitted by this court; although "in that case" the court held that a claim of \$1,000 in the writ was conclusive, there being no evidence before the state judge, or in this court, that the amount was less.

Under this state of facts it was held that, although the state court had a discretion as to the amount in controversy, yet it was a "legal discretion," to be reasonably exercised, and that "on the facts of the case, the state judge had no discretion" in that case, and could not arbitrarily refuse to allow a removal of it, when it appeared by undisputed evidence that the amount exceeded \$500.

*This, it is submitted, is all that was [*204 decided in *Gordon v. Longest*; and if the court had gone as far as is contended for by the plaintiff in this case, and had declared the evidence furnished by the writ or declaration to be absolutely conclusive upon the state court, the decision would have been not only against the manifest meaning of Congress, but inconsistent with itself.

It would have been inconsistent with itself, because there is nothing concerning the amount in dispute upon which a "legal discretion" can be exercised, except evidence of the amount; and if this court were to take away all discretion concerning this evidence, by declaring this or that sort of evidence conclusive, it would be tantamount to a declaration that the state courts have no discretion at all.

The amount claimed must always be over or under \$500, or exactly that sum; and it must always be made by writ, declaration, or complaint. If the claim be exactly \$500 or under, no application for a removal will ever be made. The only case, therefore, in which any discretion at all can be exercised by a state court is, where a claim is made for more than \$500. And if the mere claim were always conclusive, the amount would thereby be unalterably fixed, and there would be no room left for discretion.

From this examination of the facts and opinion in the above case, it will be seen that it is a controlling authority for the defendant in error; and clearly shows that the state court is authorized by this statute to consider any legal evidence which the parties may offer to satisfy the court of the true amount in dispute; and that the judge had a right to receive and listen to an affidavit in this case, with which it was solemnly sworn: "that the amount of damages mentioned at the foot of the declaration in this cause, is not the actual amount due to this deponent as plaintiff in said cause, nor does it show the amount he seeks or expects to recover therein; and the whole of said amount really due deponent, and so sought to be recovered, is less than \$500; and that he is now ready and willing, and hereby offers, to settle and discontinue this suit on payment to him of a less sum than \$500 and to give the said defendant a full discharge of and from all claims and demands which this deponent, as plaintiff in this suit, has made, or can or may recover against the defendant."

After hearing this affidavit, and on considering the facts thereby disclosed in connection with the language of the Act, "and being satisfied that the actual amount in controversy herein is less than \$500," the judge denied the plaintiff's motion.

¶In doing so, he looked at no authority but the Act itself. Its language seemed too clear and plain to be questioned, and he exercised his judgment and discretion without

hesitation; and the plaintiff in error has not been able to find a court, from that day to this, which doubted that he had the discretion, and exercised it rightly.

On this point, the plaintiff's own authorities are against him; for, in *Wright v. Wells*, Pet. C. C., 220, *Mr. Justice Washington* said, "the state court was not bound to grant the removal, unless it was satisfied that the amount exceeded \$500."

In *Campbell v. Wallen's Lessees*, cited by the plaintiff from 1 Martin & Yerger, 288, the Supreme Court of Tennessee said, that "security need not be given until it has been judicially decided that, upon the facts set forth in the petition, as it respects citizenship, value of matter in dispute, &c., the applicant is entitled to a removal." In the case now here, the Supreme Court of the State of New York has said the same thing in effect. (See 2 Denio, 197.)

In *Carey v. Cobbet*, 2 Yeates, 277, the Supreme Court of Pennsylvania said that "a bill of exceptions will not lie against the opinion of the court, in refusing the removal of an action into the United States court;" and finally, this court itself, in *Gordon v. Longest*, concedes a like discretion to the state court.

All these cases arose on the twelfth section of the Act, except *Carey v. Cobbet*; and they are the only ones cited by the plaintiff which did so arise, except *Muns v. Dupont*, 2 Wash. C. C., 468; and in this latter case, *Justice Washington* listened to, and relied on an affidavit as evidence to fix the amount in controversy.

But it is said, at pages 14 and 15 of the plaintiff's argument, that the original declaration "was uncontradicted evidence of the highest nature," and that "the Common Pleas erred in afterwards receiving an affidavit of the plaintiff reducing the demand below \$500."

In the first place, it is not true that a declaration, while in paper, is evidence "of the highest nature." If it were so, it would settle the rights claimed under it, for it would be a record, and could not be contradicted even by a plea.

It would settle the facts alleged in it beyond all controversy; and the proposition is practically absurd.

A declaration before judgment is like any paper in the proceedings of a cause, and may be disputed and amended until the matters alleged in it have been finally adjudicated and settled, and until it has been enrolled, and 206*] then it becomes a record, *and is "the highest evidence," and not until then. (1 Salk., 329; 1 Ld. Raymond, 243-249; Johns., 290.) Neither was the declaration "uncontradicted," as has already been shown.

In the next place, the statement that the Common Pleas received the plaintiff's affidavit, "reducing his demand below \$500," is not true; the affidavit did not "reduce the demand," nor was it received for that purpose.

It merely showed the true amount of the demand, and that the plaintiff's attorney, Mr. Westerveit, had overstated it in the declaration, and that the affidavit was received for that purpose and for no other.

The true amount in controversy in this case was always less than \$500, and it never be-

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longed to a class of cases of which Congress intended the federal courts should have jurisdiction. And what reason, founded either on public policy or private right, can be assigned for depriving the state court of the means of satisfying itself whether the actual amount is such as to entitle the applicant to a removal or not?

In *The United States v. M'Donnell*, 4 Cranch, 316, a judgment had been obtained in a United States Circuit Court for more than \$2,000, on the penalty of a bond of which the condition was less than \$2,000. On a motion to dismiss the writ of error by which the judgment had been removed into this court, it was held that the amount of the condition of the bond, and not of the judgment, controlled the jurisdiction, and the writ was dismissed.

Why should not the true amount, and not the fictitious one, be allowed to control the jurisdiction in the present case, as well as in the one just cited? They both sound in damages; the fiction in the one case was in the judgment, in the other in the declaration. Why should a declaration be considered more conclusive than a judgment?

Fourth Point. "While a court has jurisdiction, it has a right to decide any question which occurs in the cause."

Fifth Point. The plaintiff in error did not present the decision of the New York Common Pleas in this case to the appellate courts of the State of New York, as required by the laws of that State, to enable those courts to review that decision; and they have so decided; and this court will be governed by their decisions on this point.

Finally, it is submitted, that the original jurisdiction of the state court was not divested, nor the cause removed, by any proceedings of the plaintiff in error.

First. Because the plaintiff in error did not pursue the regular course of practice in entering the cause in the United States Circuit Court. (See 1 Blatchf., 150.)

*Second. Because he did not enter [*207 his appearance in the state court at the time of filing his petition for a removal, as required by the United States statute.

Third. Because he did not make it appear, to the satisfaction of the state court, that the matter in dispute exceeded the sum of \$500, exclusive of costs, as required by the same statute.

Fourth. That the state court, having jurisdiction of the cause, had a right to make orders and proceed to judgment therein.

Fifth. That it appears, from the judgment of New York Superior Court and Court of Appeals, that no question arising under the Constitution or laws of the United States was decided by either of them; but only certain questions relating to their own jurisdiction under local state laws, to review a chamber order, made by a single judge of an inferior state court, and certain questions of costs. And it is further submitted, that such decisions will not be revised by this court. And that the refusal of *Judge Daly*, of the New York Common Pleas, to grant an order for the removal of the cause, is the only decision in this case which this court will review. And that his decision was right.

Mr. Justice Curtis delivered the opinion of the court:

This is a writ of error to the Superior Court of the City of New York. Upon the return of the writ at the last term, the defendant in error moved to dismiss it for want of jurisdiction. This motion was overruled, and the opinion of the court is reported in 14 How., 28. At the present term, the case has been submitted on its merits upon printed arguments filed by the counsel for the two parties.

The action was, originally, a suit in the Court of Common Pleas for the City and County of New York. The plaintiff was a citizen of the State of New York, and the defendant a citizen of the State of New Jersey; and at the time of entering his appearance, he filed his petition for the removal of the cause into the Circuit Court of the United States for the Southern District of New York, and offered a bond with surety. The form of this bond, or the sufficiency of the surety, does not appear to have been objected to. The declaration then on file demanded damages in the sum of \$1,000. That was the amount then in dispute between the parties. The words "matter in dispute," in the 12th section of the Judiciary Act, do not refer to disputes in the country, or the intentions or expectations of the parties concerning them, but to the claim presented on the record to the legal consideration of the court. What the plaintiff 208*] *thus claims, is the matter in dispute, though that claim may be incapable of proof, or only in part well founded. So it was held under this section of the statute, and in reference to the right of removal, in *Gordon v. Longest*, 16 Pet., 97; and the same construction has been put upon the eleventh and twenty-second sections of the Judiciary Act, which makes the jurisdiction of this court and the Circuit Court dependent on the amount or value of "the matter in dispute." The settled rule is, that until some further judicial proceedings have taken place, showing upon the record that the sum demanded is not the matter in dispute, that sum is the matter in dispute in an action for damages. (*Green v. Lister*, 8 Cranch, 229; *Wise v. Col. Turnpike Co.*, 7 Cranch, 276; *Gordon v. Ogden*, 3 Pet., 33; *Smith v. Honey*, 3 Pet., 469; *Den v. Wright*, 1 Pet. C. C., 64; *Miner v. Dupont*, 2 Wash. C. C., 463; *Sherman v. Clark*, 3 McLean, 91.)

Without any positive provision of any Act of Congress to that effect, it has long been established, that when the jurisdiction of a court of the United States has once attached, no subsequent change in the condition of the parties would oust it. (*Morgan v. Morgan*, 12 Wheat., 290; *Clark v. Mathewson*, 12 Pet., 165.) And consequently when, by an inspection of the record, it appeared to the Court of Common Pleas that the sum demanded in this action was \$1,000, and when it further appeared that the plaintiff was a citizen of the State of New York, and the defendant of the State of New Jersey, and that the latter had filed a proper bond with sufficient surety, a case under the twelfth section of the Judiciary Act was made out, and according to the terms of that law it was "then the duty of the state court to accept the surety, and proceed no further in the cause."

But the court proceeded to make inquiry into the intention of the plaintiff, not to claim of

the defendant the whole of the matter then in dispute upon the record, and allowed the plaintiff to reduce the matter then in dispute to the sum of \$499, by an amendment of the record. It thus proceeded further in the cause, which the Act of Congress forbids. All its subsequent proceedings, including the judgment, were therefore erroneous.

But it is objected that this is a writ of error to the Superior Court, and that by the local law of New York, that court could not consider this error in the proceedings of the Court of Common Pleas, because it did not appear upon the record, which, according to the law of the State, consisted only of the declaration, the evidence of its service, the entry of the appearance of the defendant, the rule to plead, and the judgment for want of a *plea, and the as- [*209 sessment of damages; and that these proceedings, under the Act of Congress, not being part of this technical record, no error could be assigned upon them in the Superior Court. This appears to have been the ground upon which the Superior Court rested its decision. That it was correct, according to the common and statute law of the State of New York, may be conceded. But the Act of Congress, which conferred on the defendant the privilege of removal, and pointed out the mode in which it was to be claimed, is a law binding upon all the courts of that State; and if that Act both rendered the judgment of the Court of Common Pleas erroneous, and in effect gave the defendant a right to assign that error, though the proceeding did not appear on the technical record, then, by force of that Act of Congress, the Superior Court was bound to disregard the technical objection, and inspect these proceedings, unless, which we shall presently consider, there was some defect in its jurisdiction which disabled it from doing so.

The reason why the Superior Court declined to inspect these proceedings was, that the defendant did not plead them to the jurisdiction of the Court of Common Pleas, and thus put them on the record. And it is generally true, that a party claiming a right under an Act of Congress, must avail himself of some legal means to place on record that claim, and the facts on which it rests; otherwise he cannot have the benefit of a re-examination of the judgment upon a writ of error. But this duty does not exist in a case in which he cannot perform it without surrendering some part of the right which the Act secured to him, and in which the court, where the matter is depending, is expressly prohibited from taking any further proceeding. In this case, the right of the defendant to remove the cause to the next term of the Circuit Court was complete, and the power of the Court of Common Pleas at an end. To require the defendant to plead, would deny to him his right to have all proceedings in that court cease, and would make all benefit of that right dependent on his joining in further proceedings in a court forbidden by law to entertain them. It would engraft upon the Act of Congress a new proviso that, although the court was required to proceed no further, yet it might proceed, if the defendant should fail to plead to the jurisdiction; and that, though the defendant had done all which the laws required, to obtain the right to re

move the suit, yet a judgment against him would not be erroneous, unless he should do more.

In our opinion, therefore, the Act of Congress not only conferred on the defendant the right to remove this suit, by filing his petition and bond, but it made all subsequent proceedings of the Court of Common Pleas erroneous, 210*) and necessarily *required the court, to which the judgment was carried by a writ of error, to inspect those proceedings which showed the judgment to be erroneous, and which could not be placed on the technical record consistently with the Act which granted the right of removal.

It should be observed that the judgment of the Superior Court did not proceed upon any question of jurisdiction. If it had quashed the writ of error, because the laws of the State of New York had not conferred jurisdiction to examine the case, this court could not have treated that judgment as erroneous. But entertaining jurisdiction of the writ of error, it pronounced a judgment, "that the judgment aforesaid, in form aforesaid given, be in all things affirmed and stand in full force and effect;" and it did so, because the plaintiff in error, by omitting to plead to the jurisdiction, had not placed on the record those proceedings which rendered the judgment of the Court of Common Pleas erroneous. The error of the Superior Court was therefore an error occurring in the exercise of its jurisdiction, by not giving due effect to the Act of Congress under which the plaintiff in error claimed; and this error of the Superior Court, in the construction of this Act of Congress, it is the province of this court to correct.

Though the point does not appear to have been made in *Gordon v. Longest*, yet it was upon this ground only that this court could have rested its decision to look into the proceedings for the removal of that suit from the state court. For it is as true in this court as in the Superior Court of New York, that, upon a writ of error, this court looks only at the technical record, and affirms or reverses the judgment, according to what may appear thereon. (*Ingle v. Coolidge*, 2 Wheat., 363; *Fisher's Lessor v. Cockerell*, 5 Pet., 248; *Reed's Lessee v. Marsh*, 13 Pet., 153.) But this is only one of the rules of evidence for the exercise of its jurisdiction as a court of error; it prescribes what shall and what shall not be received as evidence of what was done in the court below; and when an Act of Congress cannot be executed without disregarding this general rule, it becomes the duty of this court to disregard it. The plaintiff in error, having a right to have the erroneous judgment reversed, must also have the right to have the only legal proceedings, which could be had consistently with the Act of Congress, examined to show that error.

It is unnecessary to refer to the proceedings in the Court of Appeals any further than to say that the appeal was dismissed for want of jurisdiction, that court not having cognizance of appeals from the decisions of a single judge at a special term. It is stated by counsel, that 211*) when these proceedings took place *in the Court of Common Pleas, there was, by law, no distinction between general and special terms of the Court of Common Pleas, and that

therefore the plaintiff in error could not, by any proceeding, have entitled himself to go to the Court of Appeals.

We have not thought it necessary to inquire into this, because we are of opinion that the defendant was not bound to take any appeal to the general term, if there was such an one then known to the law. His right to remove the suit being complete, he could not be required, consistently with the Act of Congress, to follow it further in the Court of Common Pleas; and the power of that court being terminated, it could not lawfully render a judgment against him; and it is of that judgment he now complains. The only legal consequence, therefore, of his not appealing to the general term is, that the Superior Court is the highest court of the State to which his complaint of that judgment could be carried, and therefore, under the twenty-fifth section of the Judiciary Act, a writ of error lies to re-examine the judgment of that highest court.

The judgment of the Superior Court must be reversed, and the cause remanded, with directions to conform to this opinion.

ORDER.

This cause came on to be heard on the transcript of the record from the Superior Court of the City of New York, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Superior Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Superior Court, for further proceedings to be had therein, in conformity to the opinion of this court.

S. C.—14 How., 23.
Cited—5 Otto, 596; 12 Otto, 136; 2 Woods, 125; 3 Woods, 690; 13 Blatchf., 370.

*ARTEMAS L. BROOKS, IGNA- [*212
TIUS TYLER, WILLIAM W. WOOD-
WORTH, as Administrator of WILLIAM
WOODWORTH, Deceased, and also as Grantee,
AND JAMES G. WILSON, Appellants,

v.

JOHN FISKE AND NICHOLAS G. NOR-
CROSS, doing business under the firm of
FISKE & NORCROSS.¹

Patent—question of infringement.

A machine for planing boards and reducing them to an equal thickness throughout, which was patented by Norcross, decided not to be an infringement of Woodworth's planing machine, for which a patent was obtained in 1828, re-issued in 1845. The operation of both machines explained.

THIS was an appeal from the Circuit Court of the United States for the District of Massachusetts, sitting as a court of equity.

The appellants were the owners of the Woodworth patent for a planing machine, the documents respecting which are set forth in *extenso* in the report of the case of *Wilson v. Rousseau*,

1.—Mr. Justice CURTIS did not sit in this cause, having been of counsel for the patentee.

4 How., 646. They filed a bill against the appellees for an injunction to restrain them from using a certain planing machine, known as the Norcross machine, upon the ground that it was an infringement of their letters patent. Other matters were brought into the bill, which it is not material here to state. In their answer the appellees say, that they have jointly, under the firm of Fiske & Norcross, and not otherwise, used one planing machine and no more, since December 25th, 1849, at their mill in said Lowell, and nowhere else; but they believe, and therefore aver, that said machine is not the same in principle and mode of operation as the said Woodworth machine, but is substantially different therefrom, and contains none of the combinations claimed in the said Woodworth patent, but is a new and different invention, secured to said Norcross by letters patent, duly granted and issued to him by the United States of America, on the twelfth day of February, in the year one thousand eight hundred and fifty: to which, or a duly certified copy thereof, they refer as an exhibit, with this their answer, for the purpose of showing the substantial difference between said machines.

The answers then admit the filing of the bill of complaint charged in this bill to have been filed against them in 1844, and the making of the agreement recited in this bill; but they say that the machine referred to in that agreement, and which they were then using, was constructed according to a patent granted to one Hutchinson on the 16th July, 1839, but they admit that [213*] it embraced the first combination claimed in the Woodworth amended patent. The answers further contain the following averments:

"And these defendants, further answering, say that they believe, and therefore aver, that the said Woodworth patent is void in part, for want of novelty in the first claim therein, to wit: for the employment of rotating planes in combination with rollers, or any analogous device to keep the board in place; the same thing substantially having been before patented in France, to wit: in 1817 and 1818, by Sir Louis Victor, Joseph Mari Roguin, and in 1825 by Sir Leonore Thomas de Manneville, and described in the printed publication commonly called *Brevets d'Inventions*, Vol. XXIII, pages 207 to 212, plates 27 and 28, and Vol. XLI., pages 111 to 116, plate 12; and these defendants refer also to the Hill machine, mentioned in the said patent of Norcross, as publicly used by Joseph Hill, of Lynn, prior to the pretended invention of the said combination by the said William Woodworth, deceased."

"And these defendants further say, that they believe, and therefore aver, that the said patent issued to William W. Woodworth, July 8, 1845, is not for the same invention as the original patent issued to William Woodworth, December 27, 1828, exclusive of the part disclaimed January 2d, 1843, as alleged in the plaintiffs' bill."

"And these defendants, further answering, say that they are informed by numerous and able experts, and they verily believe, and therefore aver, that the machine used by them and patented by said Norcross, as aforesaid, is not an infringement of the said Woodworth patent, nor of any rights of the plaintiffs under the

same; and they pray that the question of infringement may be tried by a jury under the direction of the court."

To this answer a general replication was filed.

Much evidence was taken, and in March, 1852, the cause came on to be heard upon the bill annexed, general replication, and the proofs taken therein, before the judge of the District Court, *Mr. Justice Curtis* having been of counsel in the case. The court adjudged that the machine made and used by the defendants, and complained of in the said bill, is not an infringement of the right secured to the complainants under and by virtue of the letters patent re-issued and granted to William W. Woodworth, administrator, on the eighth day of July, in the year one thousand eight hundred and forty-five, referred to in the said bill, and under and by virtue of the several mesne conveyances recited in the said bill; and thereupon the court doth order, adjudge and decree, that the complainants' said bill be, and the same hereby is dismissed, with costs.

*The complainants appealed to this [*214 court.

It was argued by *Messrs. Keller and G. T. Curtis* for the appellants, and *Mr. Whiting* for the appellees.

The reporter finds himself unable to give an intelligible explanation of the arguments of counsel, without introducing engravings, which would be out of place in a law book. In fact, models were used in the argument before the court. He is compelled, therefore, to omit all the arguments of counsel.

Mr. Justice Catron delivered the opinion of the court:

The bill before us was filed against Fiske and Norcross by the assignees of Woodworth's patented machine for planing boards, and of tonguing and grooving them.

It is alleged that a planing machine, patented to Norcross, and used by the defendants, was substantially in its combination, and in the result it produced, the same as that assigned to the complainants, for a district in which the defendant's machine was used; that the complainant's patent was the elder, and that the use of Norcross' machine was an infringement of that invented by William Woodworth.

The Circuit Court dismissed the bill on the hearing; and it is this decree we are called on to revise. The contest in the court below could hardly have been more stringent; and much consideration was obviously bestowed on the case by the judge who decided it, as appears from his opinion, which is laid before us, the accuracy of which opinion and the decree founded on it, we are called on to examine. Before doing so, it is proper to state that the machine used by the defendants does not tongue and groove boards, and that this part of Woodworth's machine is not in controversy.

It is insisted that Woodworth's monopoly extends to his mode of reducing a plank to an equal thickness, and a principal question is whether the patentee sets up any such claim. It is provided by the 6th section of the Act of 1835, that in case of any machine the inventor shall fully explain the principle and the several modes in which he has contemplated

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the application of that principle and character, by which it may be distinguished from other inventions: "And shall particularly specify and point out the part, improvement, and combination, which he claims as his own invention or discovery." An improvement of a machine is here claimed as having been invented, and the statute requires that such improvement shall be particularly specified: it is to be done in writing, and the applicant is to swear that he believes he is the first inventor of the improvement. This is required, so that the public may know what they are prohibited **215*** "from doing during the existence of the monopoly, and what they are to have at the end of the term, as a consideration for the grant.

In the words of Lord Campbell, in *Hastings v. Brown*, 1 Ellis & Blackburn, 453, "The patentee ought to state distinctly what it is for which he claims a patent, and describe the limits of the monopoly;" or, in the language of this court, in *Evans v. Eaton*, 7 Wheat., 434: It is for the purpose of warning an innocent purchaser, or other person, using the machine, of his infringement, and at the same time of taking from the inventor the means of practicing upon the credulity or fears of other persons, by pretending that his invention was different from its ostensible objects.

Have these requirements been complied with by Woodworth, as respects a claim for planing boards to an equal thickness? He obtained a patent for his machine in 1828, which was surrendered by his executor in 1845, for want of a proper specification, and a second patent issued, and on this re-issued patent the case rests. For its better understanding we give extracts from the claim and specifications; they are the same that were relied on by the Circuit Court, and are as follows: "What is claimed therein as the invention of William Woodworth, deceased, is the employment of rotary planes, substantially such as herein described, in combination with rollers, or any analogous device to prevent the boards from being drawn up by the planes, when cutting upwards; or from the reduced or planed to the unplaned surface as described." And afterwards,

"The effect of the pressure rollers in these operations being such as to keep the boards, &c., steady, and prevent the cutters from drawing the boards towards the center of the cutter wheel, whilst it is moved through by machinery. In the planing operation the tendency of the plane is to lift the boards directly up against the rollers; but in the tonguing and grooving the tendency is to overcome the friction occasioned by the pressure of the rollers."

This language, so far from claiming the new truth or the result now contended for as the invention or discovery, does not describe or even suggest, either of them.

The claim, or summing up, however, is not to be taken alone, but in connection with the specification and drawings; the whole instrument is to be construed together. But we are to look at the others only for the purpose of enabling us correctly to interpret the claim.

The specification begins by saying, "the following is a full, clear and exact description of the method of planing, tonguing and grooving

plank or boards, invented by William Woodworth, deceased."

*Here the invention is denominated **[*216]** a method of planing, tonguing and grooving, but not of reducing to a uniform thickness.

The specification, then, after describing the mode of preparing the board, proceeds thus: "When the plank or boards have been thus prepared (on a separate machine), they may be placed on or against a suitable carriage, resting on a frame or platform, so as to be acted upon by a rotary cutting or planing and reducing wheel, which wheel may be made to revolve either horizontally or vertically, as may be preferred. The carriage which sustains the plank or board to be operated upon, may be moved forwards by means of a rack and pinion, by an endless chain, or band, by geared friction rollers, or by any of the devices well known to machinists for advancing a carriage, or materials to be acted upon in machines for various purposes. The plank or board is to be moved on towards the cutting edges of the cutters, or knives, on the planing cylinder, so that its knives or cutters, as they revolve, may meet and cut the plank or board, in a direction contrary to that in which it is made to advance. The edges of the cutters are in this method prevented from coming first into contact with its surface, and are made to cut upwards from the reduced part of the plank towards said surface; by which means their edges are protected from injury by gritty matter, and the board, or plank, is more evenly and better planed than when moved in the reversed direction."

There is afterwards a reference to, and explanation of, the drawings, as follows: "In the accompanying drawings, figure 1, is a perspective representation of the principal operating parts of the machine, when arranged and combined for planing, tonguing and grooving; and when so arranged as to be capable of planing two planks at the same time, the axis of the planing wheel being placed vertically."

And again, "the rollers f. f. f., which stand vertically, are to be made to press against the plank and keep it close to the carriage, and thus prevent the action of the cutters from drawing the plank up from its bed, in cutting from the planed surface upwards; they may be borne against it by means of weights or springs, in a manner well known to machinists. In a single horizontal machine, the horizontal friction rollers may be geared, and the pressure rollers placed above them to feed the board, with or without the carriage, a bed plate being used directly under the planing cylinder."

And afterwards, in describing the process for tonguing and grooving, he says: "The edges of the plank, as its planed part passes the planing cylinder, are brought into contact with the above-described tonguing and grooving wheels, which are so *placed upon these **[*217]** shafts, as that the tongue and groove shall be left at the proper distance from the face of the plank; the latter being sustained against the planing cylinder by means of the carriage, or bed plate or otherwise, so that it cannot deviate, but must be reduced to a proper thickness and correctly tongued and grooved."

"To meet the different thickness of the plank or boards, the bearings of the shaft of the cylinder must be made movable by screws, or other

means, to adjust it to the work; or the carriage or bed plate may be made so as to raise the board or plank up to the planing cylinder."

The means to produce the result of reducing the board to an equal thickness in a horizontal machine, are the pressure rollers *f. f.* above the plank, operating in connection with two feed rollers; and the pressure rollers (says the specification) "may be held down by springs or weighted levers, which it has not been necessary to show in this drawing, as such are in common use." These rollers are not claimed as new, but are here admitted to be old, and to have been in common use when the patent was granted; nor is any intimation given in the specification or claim, that the pressure rollers were intended to be used in any combination for the purpose of reducing a board to an equal thickness. In the description of the original machine, patented in 1828, the pressure rollers are not mentioned at all, but they are set forth as having belonged to the original machine in the amended specification of 1845: and which last-described machine, experts declare, materially differs from the original as patented in 1828. But as it is not necessary, in this case, to go into the allegation of variance set forth in the answer, we will proceed at once to examine the question of infringement. And to do this, we must first inquire what Woodworth's claim to novelty of combination and invention is. His rotary cutter wheel is old, his bed plate is old, and his pressure rollers are old likewise.

The invention relied on is a new combination in the machine of three elements, to produce the result of planing a plank against its motion through the machine; and the claim of monopoly is the employment of rotary planes in combination with the face of a bench, and pressure rollers, to prevent the board from being drawn up by the planes when cutting upwards, or from the reduced or planed to the unplaned surface, as described.

As the board advances on the rotary cutters they will strike it thirty times in a second, and violently tend to lift it into the knives; and to keep it down to the bench, a strong pressure is required. And in the next place, the cutters being over the horizontal bed, and stationary, at 218*] a fixed distance from it, and the board pressed down to it so forcibly as to crush out the winds in warped lumber, the machine will of necessity reduce the board to an equal thickness throughout.

Norcross' planing machine is an improvement of Hill's, which was in use when Woodworth invented his in 1828. Hill used the rotary cutter, which he placed on the under side of the bench, with a section cut through it; the cutters extending through the bench to the upper side, so far as to take from the board, passing over the flat surface above, the depth of wood desired. Feed rollers were employed to forward the board, and a steel spring (made of the section of a hand saw) was used to keep the board steady. The spring pressed a smooth metal surface on the board, and operated as a pressure roller does. But then, this spring was not used for the purpose that Woodworth used his pressure rollers, in this, that the face of the bench above the cutters prevented the board from being drawn into them; the cutters drew it down to the bench, so that this bench is the

analogous device to Woodworth's pressure rollers, and is also in combination with the rotary cutters; hence these two elements existed, thus combined, when Woodworth got his patent.

Hill's machine had a bar immediately over the cutters, and covering the cut through the bench, where the knives revolved; between this bar and the bench the feed rollers forced the board, but as the rest bar was stationary, and the cutter wheel also stationary, and the cutters extended to a fixed distance above the upper face of the bench, the consequence was that the board came through the machine of an unequal thickness. To overcome this defect, Norcross made the rest bar (previously stationary) the cap of a square frame, on the vertical side pieces of which he fixed the journals of his cutter wheel, the cutters and rest bar being stationary relatively to each other, and always the same distance apart. This frame is supported in a stationary guide frame fastened to the bench, and so made as to allow a free vertical movement up and down the rest bar and cutting cylinder. As the board passes over the face of the bench, and under the rest bar, the whole weight of the sliding frame rests on the board, and as the cutters strike it at a gauged distance from the bar, and as they move up and down with the bar, it follows that when the board in its rough state is of an unequal thickness, and the side presented to the cutters is pressed down to the bench, the thicker parts of the board will force up the movable frame and draw up the rest bar and cutters above the bench, equal to the increased thickness of the board, which will be dressed to the thickness of the space the cutters and rest are set apart. Opposite to the outer part of the rest *F*, that section of the bed over which the planed surface of the board passes, is a bar, horizontal to the rest. The two bars form a throat-piece, which serves to hold the board steady as it passes through the machine.

In view of this state of facts the rule is, that if a combination has, as here, three different known parts, and the result is proposed to be accomplished by the union of all the parts, arranged with reference to each other, the use of two of these parts only, combined with a third, which is substantially different in the manner of its arrangement and connection with the others, is not the same combination, and no infringement.

The combination and arrangement, as appears from the testimony of experts, and by a comparison of the models and drawings presented to us, was the only novelty in the invention of Woodworth. Bentham, in April, 1793, described a rotary cutter and an adjustable bench, which, when adjusted, became fixed, so that the board would be of a determinate thickness when passed between them.

The Hill machine cut the plank from its planed to its unplaned surface, and had feed rollers and a spring to keep it down to the bed; while the bed served to prevent the plank from being drawn into the cutters.

The Baltimore machine (as the one witness who describes it deposed) reduced the plank to a uniform thickness by passing it between a fixed bed and a fixed cutter, and kept it down on the bed by a pressure roller.

The French machine of Roguin, patented and

in use as early as 1818, had a rotary cutter and bench; they were stationary relatively to each other, and must have cut the board of an even thickness had it been pressed so hard to the bed as to force out the warps; but this seems not to have been the case. The cut of the planes was with the advance of the board through the machine, and from the unplanned to the planed surface; and for this reason the lift of the cutters was very slight. The plank was kept steady by a rest bar as in Hill's machine.

This is all we deem necessary to describe, in regard to other machines, to the end of passing judgment on the question of infringement. As to the question of originality of the Woodworth machine, compared with the other earlier planing machines produced in evidence, and explained by experts; and second, as to the question, whether the original machine, for which Woodworth obtained his patent in 1828, had, or had not pressure rollers in connection with other rollers, and which are now claimed as the main element of the machine repatented in 1845, we forbear from deciding, as we suppose these questions would be more appropriately left to a jury on issues, where the witnesses could be heard in open court. It is deemed **220*** proper to *remark that the fact of procuring a patent for a new and useful machine in 1845, under the assumption of a re-issue, which was not useful as patented in 1828, for want of feed and pressure rollers now used as is alleged in defense, would present a question of fraud, committed on the public by the patentee by giving his re-issued patent of 1845, date, as an original discovery, made in 1828, and thereby overreaching similar inventions made between 1828 and 1845.

There is one feature in Norcross' machine, and covered by his patent, which is not claimed to be an infringement. It is this: as the board passes under the rest bar F, it is weighted down on the edge of that section of the bed over which the plank first passes. The rest bar is slightly concave and bears heavily on the planed end of the plank; the further side of that section of the bed over which the board last passes, being somewhat depressed, and made lower by a beveling than the opposite section. By this means the board is bent, and struck by the cutters on a concave surface; the grain of the wood being condensed by the bend in the boards, so as to grasp the knots more firmly, and prevent them from being thrown out by the cutter, and also to prevent the fibres from eating into the planed surface. Because of the board being bent, the Norcross machine cannot be used for tonguing and grooving boards, as the edges of the boards must be straight to perform these operations.

From the distance the pressure rollers, in Woodworth's machine, have to be separated so as to give the cylinder room to rotate, the board tends to curve upwards, and is cut on a convex surface, thus loosening the knots, and causing them to be thrown out, and causing the surface of the planed board to be eaten in where the wood is cross grained or coarse, and also to be uneven, and full of small ridges.

We must, however, disregard this last improvement in Norcross's machine, and also discard the parts of Woodworth's machine which tongue and groove, and treat his invention as

a single machine for planing boards on one side only; and, on this state of the facts try the question of infringement. To infringe, Norcross must use all the parts of Woodworth's combination. 1. The use of rollers to keep the board firmly to the bed, and prevent it from being drawn into the cutters and torn to pieces, and to press out the warps, is the principal claim to invention. Norcross uses no such pressure rollers, nor can they be employed in his machine to such purpose.

But it is insisted that the section of the bed plate in Norcross' machine, over which the unplanned board passes before it reaches the cutter, is equivalent to the pressure roller of Woodworth; and that the throatpiece is equivalent, in its operation, to his *stationary [*221 roller. 2. That Norcross uses his rest F, as an equivalent to Woodworth's bed plate; that the front section of the bed being used for the pressure roller, and acting in combination with the rest F, representing Woodworth's bed plate, and the cutter operating alike in both machines, it follows that Norcross, in fact, used Woodworth's combination, but disguised it by turning Woodworth's machine upside down.

The remarks of Judge Sprague (who decided this cause in the Circuit Court), made in answer to the foregoing argument, are so distinct and satisfactory to us, that we deem proper that they should be adopted in this opinion. They are as follows:

"The plaintiff's witnesses, when asked in what part of the defendant's machine they find the plaintiff's pressure roller, are divided in opinion; some of them say that it is the bed, because that prevents the board from being drawn into the axis of the cutter, considering that function as the characteristic of the plaintiff's roller. Others find it in what is called the rest, because that presses the board down upon the bed. But in the Hill machine, the roller performed the same office of pressing the board down, and the bed the same office of preventing it being drawn towards the axis. If either of these sets of witnesses be correct, the Hill machine contained the plaintiff's pressure roller, and as it had also a bed piece and rotary cutter, it would follow that it had the plaintiff's combination. Such a construction, therefore, cannot be maintained. The truth is, that after the Hill machine it was only left to Woodworth to make some new arrangement of the three elements, that is, some new mode of combination. Woodworth's invention may be regarded as an improvement upon Hill's. If Norcross uses this improvement, then he infringes, whatever he may add to it, or with whatever new invention he connects it. If he does not use this improvement he does not infringe, although he may by other means work out the same ultimate result."

"What, then, is the improvement which Woodworth made on the Hill machine? He took the rotating cylinder, which was in a fixed position below the bed, and placed it in a fixed position above the bed. This is the only change in the arrangement of the three elements. But it transferred to the pressure roller a function which before had been performed by the bed. In Hill's machine the pressure roller only kept the board down upon the bed, the latter keeping it from being drawn into the axis of the

cutter. In Woodworth's, the pressure roller performs both these offices. The effect of this is to plane the board on the upper side instead of the lower, and the result of that is, that the board comes out of an uniform thickness, which was not accomplished by Hill. In his machine, 222*) the rotary cylinder being *placed below the bed, with the knife projecting above it, the edge of the knife was kept at a fixed distance above the upper surface of the bed, and cut from the lower side of the board, through its whole length and breadth, so much of it as was equal to that distance. Thus, if the edge of the knife was a quarter of an inch above the bed, and the board be pressed closely to it, it would take off a quarter of an inch of the under side of the board through its whole extent, and if it was of an unequal thickness before, it would remain of an unequal thickness. By placing the cylinder in a fixed position above, and keeping a certain distance between the edge of the cutter and the bed, and all of the board above that distance being taken off by cutting on the upper side, it necessarily comes out of a uniform thickness."

"Now let us look at the Norcross machine. If it has any part which is equivalent to the pressure roller, it is the rest. Let us, then, for the sake of clearness, consider that to be a pressure roller. What then has been done by Norcross? He has left the arrangement of the three elements the same as it was in Hill's. The rotary cylinder is below the bed; the pressure roller still keeps the board down upon the bed, and the bed keeps it from being drawn into the axis of the cutter. His improvement is this: he has made the cutting cylinder movable, vertically, which it was not before, and has connected it with his rest, that is, with the pressure roller, so that when the latter is forced upwards by the increased thickness of the board, it draws the cutter upwards with it, which thereby is made to cut just as much more from the under side of the board, as the roller is pressed up by the increased thickness. By this contrivance, the edge of the cutter is kept in a fixed relation to the rest, or in other words, the pressure roller; the space between them being always the same, whereas in Hill's, and also in Woodworth's, the edge of the knife had a fixed relation to the bed, and not to the pressure roller. The defendant, therefore, has made a new and independent invention, and does not use the arrangement, or mode of combination of the plaintiff."

For the reasons above stated, we are of opinion that the machine of the respondents did not infringe the patent of the complainants, and therefore order that the decree of the Circuit Court dismissing the bill be affirmed.

Messrs. Justices McLean, Wayne, and Nelson, dissented.

Mr. Justice McLean:

I dissent from the opinion of the court. The defendants rest their defense on three grounds: 223*) *1. A want of novelty in Woodworth's invention.

2. That in the new patent of Woodworth, issued on the surrender of the old one, to correct the specifications, a new invention is claimed, not contained in the first patent.

3. That the defendant's machine is substantially different from the plaintiff's.

The Woodworth patent has been a subject of investigation frequently before the Circuit Courts of the United States, and of this court. And although the originality of the invention has been, I believe, uniformly sustained, still, the fact of novelty depends upon proof, and may be disputed by anyone against whom suit is brought. The patent is *prima facie* evidence of right in the patentee. A defense which denies the novelty of the invention, must be proved.

The original patent of Woodworth is dated the 27th of December, 1838. He describes his invention to be an "improvement in the method of planing, tonguing, grooving and cutting into moldings, of either plank, boards or any other material, and for reducing the same to an equal width and thickness, and also for facing and dressing brick, and cutting moldings, or facing metallic, mineral or other substances. He then describes the machinery by which this result is produced. And he says, in the conclusion, that he does not claim the invention of circular saws, or cutter wheels, knowing they have long been in use; but he claims as his invention, the improvement and application of cutter or planing wheels to planing boards, &c., as above stated, &c.

There is no claim, in his written specifications, for pressure rollers on both sides of the cutting cylinder, which confine the board to its place, and necessarily reduced it to an equal thickness; but in the drawings, these rollers appear at the proper places, and are so arranged as to reduce the board to a uniform thickness.

The written specifications, including the drawings, constitute a part of the patent, and must be construed as the claim of the plaintiff. In *Ryan v. Goodwin*, 3 Sumn., 514, it is said, if the court can perceive, on the whole instrument, the exact nature and extent of the claim made by the inventor, it is bound to adopt that interpretation, and to give it full effect. The same is held in *Wyeth v. Stone*, 1 Story, 270, 286; and in *Ames v. Howard*, 1 Sumn., 482, 485, it is said "the drawings are to be taken in connection with the words, and if, by a comparison of the words, and the drawings, the one would explain the other sufficiently to enable a skillful mechanic to perform the work, the specification is sufficient." *Blaxam v. Elsee*, 1 Car. & P., 558, is to the same effect.

Formerly, patents were construed strictly as giving monopolies; *but of late years, in [*224 England, inventions are treated differently, and a liberal view is taken in favor of the right. (*Blanchard v. Sprague*, 3 Sumn., 535, 539.) This has been the settled doctrine in this country, and it is founded upon the highest considerations of policy and justice. The opinion, delivered by my brother Curtis this morning, as the organ of the court, cites the authorities.

No patent, it is believed, which has ever been granted in this country, has been so much litigated as this one. This affords no unsatisfactory evidence of its value. Very shortly after Woodworth's machine was put in operation, a system of piracy was commenced, and although twenty-five years have elapsed, numer-

HOWARD 15.

ous suits are still pending contesting the right. *Mr. Justice Story* was one of the first judges whose duties required him to scrutinize this patent in all its parts, and he sustained it in all. This was before the specifications were corrected. And this court also sustained it, in 7 How., 712, where it says "the specifications accompanying the application for a patent are sufficiently full to enable a mechanic with ordinary skill to build a machine." And this is what the law requires.

In the corrected specifications the patentee says: "Having thus fully described the parts and combinations of parts, and operation of the machine for planing, tonguing, and grooving boards or plank, and shown various modes in which the same may be constructed and made to operate, without changing the principle or mode of operation of the machine, what is claimed therein, as the invention of William Woodworth, deceased, is the employment of rotary planes, substantially as herein described, in combination with rollers or any analogous device, to prevent the boards from being drawn up by the planes, when cutting upwards, or from the planed to the unplanned surface, as described. And also the combination of the rotating planes with the cutter wheels, for tonguing and grooving, for the purposes of planing, tonguing and grooving boards, &c., at one operation, as described."

"And, finally, the combination of either the tonguing or grooving cutter wheel, for tonguing and grooving boards, &c., with the pressure rollers, as described; the effect of the pressure in these operations being such as to keep the boards, &c., steady, and prevent the cutters from drawing the boards towards the center of the cutter wheels, whilst it is moved through by machinery," &c.

L. Roguin, of France, in the years 1817 and 1818, invented a machine for planing, grooving wood, moldings, &c., it is alleged, substantially on the same principles as Woodworth's machine.

225*) *A considerable number of experts were examined in the Circuit Court, on both sides, and their opinions, as usual in such cases, were directly in conflict. Such testimony, being written, cannot lead the court to a satisfactory result, by weighing the evidence, as might be done by a jury, where the witnesses are examined in open court. There seems to be no other mode of arriving at a correct conclusion, than to read what the experts have said, and make up an opinion on the specifications of the patents, and on an examination of the models.

The French machine was improved in 1818. The patentee says: "The parent idea of the first machine could not vary. This parent idea consisted in subjecting the wood to the action of a tool of a particular shape, and to impart to this tool a rotary movement; but the choice remained, either of making the tool stationary, and causing the wood to advance under it with a slow and progressive motion—one rotary, the other progressive. The first was adopted in the construction of the machine described in support of the petition for letters patent; the second has been adopted in the construction of the improved machine."

After describing the structure of the cylinder, HOWARD 15.

he says: "It is borne by a cast iron carriage, and to the back part of this carriage is attached an iron axletree, bearing two brass pinions, which gear into a rack, and tend to regulate the movement of the carriage. The bench moves itself vertically by means of screws which support it, and tend to raise it or lower it, according to the thickness of the wood to be worked." "Four small, graduated plates of metal, placed in the interior angles of the superstructure, act as a regulator to fix this bench in a perfectly horizontal position." "Two iron squares about the bench at both ends." "Experience," he says, "has taught that the weight of the bench was not sufficient, singly, to prevent the vibration imparted to it by the machine when in operation, and there resulted from this vibration waves on the surface of the planed board." This was obviated by the weight of the carriage. "The carriage is of cast iron, and weighs about two hundred and forty-one pounds. It is necessary that the carriage should be of sufficient weight, so as not to be raised by the strain of the tool."

"The back part of the bench carries a claw, against which the wood is rested and stopped, like a carpenter's bench. At the other extremity, the wood is stopped by movable dogs, which pass under a bar through which passes pressure screws." And he further says: "We have seen, in the description of the first machine, that the piece called guide (because it serves effectually to guide the wood under the tool for grooving and *molding) was [*226 fixed on the superstructure of the bench. In the new machine, this piece is borne by the carriage."

From this description it appears that the planing cylinder is carried by an iron frame, and passes over the surface of the board, which is fastened on a bed by a claw at one end, and at the other by movable dogs." This bench, on which the board is placed, is movable vertically, so as to be adjusted by screws to the thickness of the wood to be worked.

The wood is fastened on this adjustable bed, and the iron frame which carries the cutting cylinder is of sufficient weight to keep the cutters on the board, but this machinery cannot reduce the plank to the same thickness. When the bench rises or falls, the whole surface of the plank rises and falls, and the cutting knives cannot so operate by pressure on so long a surface as to reduce the inequalities of the board. But this can be done by pressure rollers, as in Woodworth's machine, on each side of the cutting cylinder—one adjustable, so as to admit the unplanned plank; the other fixed, so as to admit the passage of the plank, when reduced to the required thickness. The French machine may present a smooth surface, but the inequalities of the board will not be removed. They will remain in the same proportion as before the planing operation.

It is argued, that the piece or bar which, in the first machine, was fastened to the bench, and which, in the improved one, was annexed to the carriage, operated as a pressure roller. If this were admitted, it would not remove the difficulty, as one pressure roller or bar could answer no valuable purpose. There must be two rollers, one adjustable, as above stated, or two fixed rollers, or bar and an adjustable bed,

to reduce the plank to an equal thickness. But if L. Roguin be permitted himself to describe the function of this bar, it is, "to guide the wood under the tool for grooving, tonguing and molding." Shall the language of the inventor be misapplied, and this bar be appropriated to a use which it would seem he never thought of, to render invalid Woodworth's patent?

Several of the witnesses on both sides gave their testimony from the description of L. Roguin's patent, published in a book called "*Brevets d'Inventions*;" but, as that book was not published until after Woodworth's invention, its description is evidence only so far as it agrees with the specification attached to the patent of L. Roguin. And it does appear, from the original specifications, filed by him, a certified copy of which has been recently procured by M. Perpigna, that there are some material variances. We must therefore look to the authentic paper and drawings, as certified, for evidence in regard to the machine.

The organization of this machine does not **227***) seem to be on *the same principle as Woodworth's, and the result is different.

The other French machine, alleged to be similar to that of Woodworth's, is De Manneville's. This machine was patented in France in 1825 and described in the printed work called "*Brevets d'Inventions*." The patent embraced two machines, having for (their) object the grooving, planing and reducing to a uniform thickness, wood intended for inlaid work; as well as all sorts of boards, whatever may be their dimensions. The inventor calls them a groover and planer.

The description of this machine by the inventor is confused and scarcely intelligible. One of the defendants' witnesses describes it as having two planes, one of which is called rough, the other smooth, both of which are kept down to the face of the board by a tool-bearer, and are moved backward and forward by a crank motion. The rough plane is movable to and from the board, by being held to it by a spring; the smooth plane, or finisher, is immovable, principally, from the board, except to separate the shavings from it. The position of the board is edgewise, resting on the horizontal rollers—friction rollers; and it is carried through by a pair of fluted cylinders or rollers, vertical, and parallel to each other; which rollers press upon each side of the board, one of which, the back one, is made to slide in its boxes, held up by a spring, and thus made to yield to the inequalities of the thickness of the board. Another pair of rollers, holding the same vertical position, called discharging cylinders, neither of which is yielding, nor are they fluted; and to adjust the different thicknesses, the inventor suggests rollers of different diameters, and on an adjustable bed.

Anyone can at once see that this is not an organization of machinery similar to Woodworth's machine. It is not the same principle, nor is it in substance like it. This remark is made in regard to the combination claimed by Woodworth, and not to all the elements of which that combination is formed. In the Manneville machine there is no combination of pressure rollers with rotary cutters, as in Woodworth's; the cutters have a reciprocating mo-

tion instead of a rotary one. Several of the elements in both machines are the same, but they are not so arranged as to act in the same manner or on the same principle.

Some of the witnesses for the defendants think, that from the two French patents, the Woodworth machine might be constructed without invention; but these machines must be considered singly, and not together. In the defense it is alleged, in reference to Woodworth's machine, that "the same thing substantially was patented in France, in 1817 and 1818, by L. *Roguin, and in 1825, by [*228 Manneville. The defense, in this respect, is not sustained, as neither of the patents are substantially the same as Woodworth's.

The next point for consideration is, whether, in the amended specifications of Woodworth's patent, in 1845, a new invention was claimed, not embraced in the original patent.

It must be admitted that the subject matter of the new patent is the same. The patent was surrendered, to correct defective specifications, which did not result from any fraudulent intent. This right was secured to the patentee by the thirteenth section of the Patent Act of 1836; and on an application to the Commissioner of Patents, he, finding there had been no fraud, a new patent was issued for the same invention, more accurately described, as the law authorized.

In the case of *Woodworth v. Stone*, 8 Story, 749, and *Allen v. Blunt*, *Id.*, 742, it was held, that the action of the Commissioner, in accepting a surrender of a patent and issuing a new one, concluded the parties, unless fraud be shown. And in *Stimson v. Westchester Railroad*, 4 How., 380, this court say: "In whatever manner the mistake or inadvertence may have occurred is immaterial. The action of the government in renewing the patent must be considered as closing this point, and as leaving open for inquiry, before the court and jury, the question of fraud only."

The corrected specifications of the new patent, on a surrender, would necessarily be different from those that were defective. And it is the duty of the Commissioner not to permit a new invention to be claimed under the pretense of correcting defective specifications.

Some things are omitted in the new patent which were claimed in the old one. But the principal objection on this ground seems to be, that pressure rollers were claimed in the new patent, and were not claimed in the old one. This is a mistake, as has already been shown. These rollers were represented in the drawings, and in that way were more accurately described than they could have been by a written specification. These drawings are a part of the patent. It does not appear that the corrected specifications embrace a new invention, not included in the original patent.

The third and last point is, whether the defendants' machine is an infringement of the plaintiffs'.

In the opinion of the Circuit Court in this case, it is said, "The defect in the Hill machine was, that it did not reduce the board to a uniform thickness. This *desideratum*' the plaintiff has obtained by an improvement, for which he was entitled to a patent. The defendant has accomplished the same purpose *with- [*229

out using the improvement of the plaintiff, but merely by a new invention of his own, and therefore does not infringe."

From these remarks it would seem, that the Circuit Court considered Woodworth as entitled to a patent, "for reducing boards to a uniform thickness," but that his patent does not cover it. In this the Circuit Court was mistaken, as I shall endeavor to show, in fact and in law.

It is not controverted that Woodworth's combination of machinery does reduce boards to an equal thickness. He did not and could not claim a patent for reducing a board to a uniform thickness; for an exclusive right could not be given for such a result. For centuries, boards have been reduced to a uniform thickness by hand planes, and perhaps by other means. What, under the patent law, could Woodworth claim? He had a right to claim, as he did claim, a combination of machinery which would produce such a result. Was it necessary, in the summing up of his claim, which is done to distinguish what he has invented from parts of his machine which he has not invented, that he should claim the combination of his machine for the purpose of reducing boards to a uniform thickness? This would have limited his invention to that purpose, when it was applicable, and was intended to be applied, to that and many other purposes.

By the sixth section of the Patent Law of 1836, an inventor is required to describe his invention in every important particular, in his application for a patent, so as to enable those skilled in the art or science to which it appertains, to make, construct, compound, and use the same; and if the invention be a machine, he is required to state "the several modes in which he has contemplated the application of the principle or character by which it may be distinguished from other inventions; and shall particularly specify and point out the part, improvement, or combination, which he claims as his own invention and discovery." He is required to accompany the whole with a drawing, and, if a machine, a model, &c.

Is it not clear that Woodworth has explained the principle, and the several modes in which he has contemplated the application of the principle or character of his machine, by which, in the language of the Act, it may be distinguished from other inventions? The plank is planed, tongued, and grooved, by an organization of machinery unknown before. This is all, in the summing up, which the Act requires.

It is objected that Woodworth does not include, in his claim, that of reducing a plank to a uniform thickness. The invention consists in the means through which this is done. A **230*** result or *an effect is not the invention. This appears to have been the turning point in the opinion of the Circuit Court.

But Woodworth has, in the specifications of his machinery, stated that the board is necessarily reduced to a uniform thickness. He says "The edges of the plank, as its planed part passes the planing cylinder, are brought into contact with the above-described tonguing and grooving wheels, which are so placed upon their shafts, as that the tongue and groove shall be left at the proper distance from the

face of the plank, the latter being sustained against the planing cylinder by means of the carriage or bed plate, or otherwise, so that it cannot deviate, but must be reduced to a proper thickness, and correctly tongued and grooved." Here Woodworth describes the combined operation of "planing, tonguing, and grooving; and by which the plank is reduced to a proper thickness, that is, the required thickness; and correctly tongued and grooved," &c. This is the effect of his machine in planing boards, clearly described.

He says, the board is kept against the planing cutters by means of the carriage, or bed plate, or otherwise. The pressure rollers are claimed in his specification written, and also in his drawings, which show how they are to be applied. He also says, "Fig. 7 represents the same machine with the axes of the planing cylinder placed horizontally, and intended to operate on one plank only at the same time. A A is the frame; B B the heads of the planing cylinder; C C the knives or cutters attached to said heads, to meet the different thicknesses of the plank; the bearings of the shaft of the cylinder may be made movable by screws or other means, to adjust it to the work, or the carriage of the bed plate may be made so as to raise the plank up to the planing cylinder."

The patent of the defendants was issued February 12th 1850. It is alleged to be an improvement upon Hill's machine. That machine, from the description, consisted of a planing cylinder, a platform bench, with an aperture in it, through which the planing cutters operated, so as to cut away any required thickness from the surface of the plank subjected to its action; the relation of the cylinder to the bench was permanent; a spring plate bore upon the plank nearly opposite to the cylinder, and forced it towards the cylinder and bench; feeding rollers carried the plank forward, the same as in Woodworth's machine.

By this operation a stratum of equal thickness was cut from the plank, leaving a smooth surface, but not removing the inequalities of the boards. The combination of machinery was different in principle from Woodworth's, and consequently the result was different.

*Norcross says, his invention is an **[*231]** improvement of Hill's machine, and "renders it capable of reducing or planing a board to an equal thickness throughout its length." He says "Hill's machine was capable of planing or reducing a board on one side, or removing from such side a stratum or layer of wood of an equal thickness," but this did not make the board of uniform thickness.

The amended machine contains rotatory planes which cut, from the planed to the unplaned surface of the plank; an adjustable bar and rest is at a fixed distance from the cutting action of the planes; the rotating planes and this rest bar were so connected together in a separate frame as to move vertically with the frame, and is borne downwards by their weight; two bars, one before and the other behind the rotating planes, and on the face of the plank cut by them, to cause its opposite face, in its progress through the machine, of whatever thickness and however warped, to pass in contact with the rest bar F. One of the said bars is termed a platform B, and the distance be-

tween this and the rest bar F, is variable and self-adjusting to the varying thickness of the plank before it is planed, and the other, called a horizontal bar or throat piece G, placed at the same distance from the rest bar F, as the line of the cutting action of the rotating planes, to act on the face of the plank which has been planed, and insure the contact of the opposite and unplaned face with the rest bar F.

Norcross says, what I claim as my invention is, the combination of the rotatory planing cylinder E, and the rest F, with mechanism, by which the two can be freely moved up or down, simultaneously and independently of the bed, or platform B B, or any analogous device, substantially in the manner and for the purpose of reducing a board to an equal thickness throughout its length, all as hereinbefore specified."

"I also claim the above-described improvement of making the under side of the rest concave, in combination with so extending the part B, under the rest F, and applying it to the concave part thereof, as to cause the board, as it passes across the rest, to be bent, and presented with a concave surface to the operation of the rotatory cutter planing cylinder, substantially as specified."

This organization of machinery seems to be the same in principle as that of Woodworth's, and produces the same result. If the concave surface of the board, on which the cutters operate, be an improvement, or any other slight change has been made, which may be an improvement on Woodworth's machine, that would give the defendants no right to use it without a license.

The difference between the machines appears 232* to be this: The "rotating planes and the plate or bed of Woodworth's are stationary in the main frame, and the roller or analogous device on that face of the plank to be planed, is movable toward and from the plate or bed to suit the varying thickness of the plank. While in the Norcross machine, two bars are substituted for the pressure rollers; and instead of making the one which acts on the plank before it is planed, movable, to suit the varying thickness of the plank, it is fixed permanently in the main frame; and the rotating planes and the plate or bed, termed by him the rest bar F, are connected together in a separate frame, and together move up and down, to adapt themselves to the inequalities in the thickness of the plank.

Norcross has made that part of his machinery movable, which in the Woodworth machine is fixed; and that which is movable in the Woodworth machine, he has made permanent. These changes, and the reversal of Woodworth's machine, is the difference in their structure. A cast of the eye on the models, will satisfy a machinist of the truth of this representation.

Whether the cutting cylinder operates above or below the bench on which the plank is laid, can be of no importance; nor is the difference material whether a pressure roller varies to suit the variable thickness of the plank, or the planing cylinder, connected permanently with the bench, shall be elevated or depressed to accomplish the same object. These devices, though different in form, are the same in principle, and produce the same effect.

I think there is an infringement, and that the decree of the Circuit Court should be reversed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Massachusetts, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

Cited—15 Wall., 194; 22 Wall., 23; 23 Wall., 367; 8 Otto, 38; 2 Cliff., 376; 4 Sawy., 696.

*THE NORTHERN INDIANA [*233
RAILROAD COMPANY, AND THE
BOARD OF COMMISSIONERS FOR
THE WESTERN DIVISION OF THE
BUFFALO AND MISSISSIPPI RAIL-
ROAD, Appellants,

v.

THE MICHIGAN CENTRAL RAILROAD
COMPANY.

Jurisdiction—Circuit Court cannot entertain bill to restrain one railroad from intruding within exclusive limits of another, lying out of its district—Necessary parties.

The Michigan Central Railroad Company, established in Michigan, made an agreement with the New Albany and Salem Railroad Company, established in Indiana, that the former would build and work a road in Indiana, under the charter of the latter.

Another Company, also established in Indiana, called the Northern Indiana Railroad Company, claiming an exclusive right to that part of Indiana, filed a bill in the Circuit Court of the United States for the District of Michigan, against the Michigan Company, praying an injunction to prevent the construction of the road under the above agreement.

The Circuit Court had no jurisdiction over such a case.

The subject matter of the controversy lies beyond the limits of the district, and where the process of the court cannot reach the *locus in quo*.

Moreover, the rights of the New Albany Company are seriously involved in the controversy, and they are not made parties to the suit. The Act of Congress, providing for the non-joinder of parties who are not inhabitants of the district, does not apply to such a case as the present.

THIS was an appeal from the Circuit Court of the United States for the District of Michigan, sitting as a court of equity.

The appellants were complainants below. They were corporations created by, and doing business in, the State of Indiana, claiming a prior right to make and use a railroad running from east to west across the northern part of Indiana. The defendants were a company incorporated by Michigan, and had made a

NOTE.—Jurisdiction of equity to restrain trespasses and wrongs.

Courts of equity have jurisdiction to interfere in cases of trespasses, in order to prevent irreparable mischiefs. 1 Maddock's Ch., 147, 148; West v. Walker, 2 Green's Ch., 279; Coop. Eq. Pl., pl. 152, 153, 154; Mitf. Eq. Pl., by Jeremy, 187; Hanson v. Gardiner, 7 Ves., 308, 309, 310; 2 Story's Eq. Jur., sec. 928; Norway v. Rowe, 19 Ves., 147, 148, 149; New York Printing and Dyeing Establishment v. Fitch, 1

road from Detroit to Michigan City. Being desirous to continue the road round the southern end of Lake Michigan, they entered into an agreement, for this purpose, with a company, incorporated by Indiana, called the New Albany and Salem Railroad Company. The appellants filed a bill in Michigan, the domicile of the Michigan Central Railroad Company, praying for an injunction to prevent them from entering upon or using the said lands of said complainants, and from grading and excavating upon the same, and from hindering the complainants from completing their road and using the same exclusively, and from constructing and using the railroad which the defendants have laid out, or any railroad upon or near the line where the same is located, and from doing anything in violation of the exclusive rights of the complainants.

To this bill the defendants demurred, and the Circuit Court dismissed the bill, with costs.

The complainants appealed to this court.

It was argued by *Mr. Bronson* for the appellants, and by *Messrs. Pruyn and Jay* for the appellees.

234*] *The arguments branched out into several heads, but it is only necessary to notice those bearing upon the question of jurisdiction, arising from locality and the want of proper parties.

Mr. Bronson, for appellants:

Sixth Point. The New Albany and Salem Company is not a necessary party.

First. The defendants have done, and threaten to do, the wrong of which we complain. It is a tort or trespass upon our rights, for which the wrong-doers are answerable, whoever may stand behind them. No one standing behind a trespasser, whatever may be the relation between them, has a right to say

that he must be a party, when the person injured seeks redress against the transgressor. We demand nothing as against the New Albany and Salem Company. (*Kerr v. Watts*, 6 Wheat., 550.)

If the New Albany and Salem Company was made a party, the rights existing between that Company and the defendants, whatever those rights may be, could not be adjusted in this suit.

Second. The relation between the New Albany and Salem Company and the defendants is that of grantor and grantee; and it is never necessary to make the grantor a party to a suit against the grantee, except in real actions, where the grantee vouches the grantor to warranty.

The New Albany and Salem Company has sold its franchise, so far as relates to the road in question, to the defendants, and the pretended right to repurchase is only colorable.

(1.) There is no mortgage, because there is no debt or obligation to pay. (*Conway v. Alexander*, 7 Cranch, 218, 287; *Almy v. Wilber*, 2 Wood. & M., 371; *Glover v. Payn*, 19 Wend., 518.)

(2.) There is nothing like the relation of principal and agent. The defendants are doing work for themselves only.

Third. If the relation between the two companies is that of mortgagor and mortgagee, or principal and agent, it is still enough that we bring into court the party who has done and is doing the wrong, when we ask no redress against the other.

The New Albany and Salem Company could not, by any form of contract with the defendants, entitle themselves to be made parties to assist against the defendants as tortfeasors.

Fourth. The New Albany and Salem Com-

Paige, 97; *Jeremy on Eq. Jurisd.*, B. 3, ch. 2, sec. 1, 311, 312; *Van Winkle v. Curtis*, 2 Green's Ch., 422; *Kerlin v. West*, 3 Green's Ch., 449; *Willards' Eq. Jur.*, 381, 382.

If the acts done or threatened to be done to the property would be ruinous or irreparable, or would impair the just enjoyment of the property in future, equity will restrain them. *Courthope v. Maplesden*, 10 Ves., 291; *Field v. Besamout*, 1 Swanst., 207, 208; *Crockford v. Alexander*, 15 Ves., 138; *Thomas v. Oakley*, 13 Ves., 184; *Livingston v. Livingston*, 6 Johns. Ch., 497, 498, 499.

Where a mere trespasser digs into and works a mine to the injury of the owner, an injunction will be granted, because it operates a permanent injury to the property as a mine. *Mitchell v. Dorris*, 6 Ves., 143; *Smith v. Collyer*, 8 Ves., 90; 2 *Story's Eq. Jur.*, sec. 327; *Grey v. Duke of Northumberland*, 17 Ves., 281; *Lord Falmouth v. Inneys*, Mos., 87, 88.

So, where timber is attempted to be cut down by a trespasser in collusion with the tenant of the land. *Courthope v. Maplesden*, 10 Ves., 290.

So, where there is a dispute respecting the boundaries of estates and one of the claimants is about to cut down ornamental or timber trees in the disputed territory. *Kinder v. Jones*, 17 Ves., 110.

So, where a party, who is in possession under articles, is proceeding to cut down timber trees. *Rawlins v. Burgis*, 2 Ves. & Bea., 387; *Crockford v. Alexander*, 15 Ves., 138; *Hughes v. Trustees of Morden College*, 1 Ves., 189; 8 Ves., 90; 9 Ves., 291; *Twort v. Twort*, 16 Ves., 130.

So, where lessees are taking away from a manor bordering on the sea, stones of a peculiar value. *Earl Cowper v. Baker*, 17 Ves., 128.

Also in all cases of timber, coals, ores, or quarries, where the party is a mere trespasser; or where he exceeds the limited rights with which he is clothed; upon the ground that the acts are, or may be, an irreparable injury to the property. *Grey v. Duke of Northumberland*, 13 Ves., 236; 17 Ves., 281; **HOWARD 15.**

Thomas v. Oakley, 13 Ves., 184; *Livingston v. Livingston*, 6 Johns. Ch., 497; *Field v. Beaumont*, 1 Swanst., 208; *Norway v. Rowe*, 19 Ves., 147, 148, 149, 154; *Whitechurch v. Holworthy*, 19 Ves., 213; *Richards v. Noble*, 3 Meriv., 656.

In a case of a mere trespass, and where the injury is not irreparable and destructive of the estate, but is susceptible of pecuniary compensation, and for which adequate damages may be obtained in the ordinary course of law, an injunction will not be granted. It must be a strong and peculiar case of trespass, going to the destruction of the inheritance, and incapable of remedy at law, which will induce a court of chancery to interfere. *Jerome v. Ross*, 7 Johns. Ch., 315; *Stevens v. Beekman*, 1 Johns. Ch., 318; *Shubrick v. Guerrard*, 2 Deraux, 618, and note 619; *Smith v. Pettingill*, 15 Vt., 82.

Where the defendant being a mere stranger and guilty of a forcible entry, may be turned out of possession immediately, an injunction will not lie. *Mortimer v. Cottrell*, 2 Cox, 205.

Where one tenant in common is in possession of the whole land, an injunction may issue against him to restrain the cutting of timber growing on the prairies, which is not needed for the necessary use of the farm. *Hawley v. Clowes*, 2 Johns. Ch., 122.

Where the right of a party is doubtful, the court will not grant an injunction to prevent an illegal interference with the same, until the right is established by law. *Hart v. Mayor of Albany*, 3 Paige, 213; *Nevitt v. Gillespie*, 1 How. (Miss.), 108; *Partridge v. Menck*, 2 Barb. Ch., 101; *Van Bergen v. Van Bergen*, 3 Johns. Ch., 232; *Dana v. Valentine*, 5 Meto., 8. *Contra*, *L. F. Co. v. L. G. & F. Co.*, 82 N. Y., 476.

To warrant an injunction to prevent a mere trespass, the party asking for same must have been in the previous undisturbed enjoyment of the property, under claim of right, or relief at law must be unattainable, from the irresponsibility of defendant, or otherwise. *Hart v. Mayor of Albany*, 3 Paige, 214; *Storm v. Mann*, 4 Johns. Ch., 21.

panty is not a necessary party, because it cannot be joined without ousting the jurisdiction of the court.

(1.) The jurisdiction of the Circuit Court, as the suit now stands, cannot be questioned. **235***] The matter in dispute exceeds *\$500 (page 10). The complainants are corporations created by, and doing business in, Indiana. The defendants are a corporation created by, and doing business in, Michigan. The suit is therefore between citizens of different States. (*Louisville R. R. Co. v. Letson*, 2 How., 497.) And the suit is brought in Michigan, where the defendants reside.

(2.) The New Albany and Salem Company is a corporation created by, and doing business in, Indiana (page 6).

That Company cannot be made a defendant in this suit, for the reasons,

1. It is a citizen of the same State with the complainants; and,

2. It cannot be arrested or served with process in the District of Indiana, where it resides, for trial in the District of Michigan, where the suit is brought, and the trial is to be had. (Judiciary Act of 1789, sec. 11.)

The courts of the United States have always been disposed to get rid of an objection for the non-joinder of a party who was beyond the jurisdiction of the court, or whose joinder would oust the court of jurisdiction.

And the case is now fully provided for by Congress and the rules of the court.

Act of February 28, 1839.

Sec. 1. "That where, in any suit at law or in equity, commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of, or found within, the district where the suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit, between the parties who may be properly before it; but the judgment or decree rendered therein shall not conclude or preclude other parties not regularly served with process, or not voluntarily appearing to answer; and the non-joinder of parties who are not inhabitants, or found within the district, shall constitute no matter of abatement or other objection to said suit."

Rules of Practice for the Court of Equity of the United States, adopted January Term, 1842.

Rule 22. "If any person, other than those named as defendants in the bill, shall appear to be necessary or proper parties thereto, the bill shall aver the reason why they are not made parties, by showing them to be without the jurisdiction of the court, or that they cannot be joined without ousting the jurisdiction of the court as to the other parties." (1 How., 48.) **236***] *The proper averment has been made in the bill, by showing that the New Albany and Salem Company is without the jurisdiction of the court, and cannot be joined without ousting the jurisdiction of the court. (*Ketchum v. Farmers' Loan and Trust Company*, 4 McLean, 1; *Culbertson v. Wabash Navigation Company*, *Id.*, 514.)

Rule 47. *Union Bank of Louisiana v. Stafford*, 12 How., 327, 341-343; *New Orleans Canal*

and Banking Company v. Stafford, Id., 343, 346; *McCoy v. Rhodes*, 11 *Id.*, 131, 141.

The counsel for the appellees made the following points:

As to want of jurisdiction from locality—The Circuit Court in Michigan had no jurisdiction in the case. Whether the defendants act under the authority of law or not, the alleged cause of complaint is local, and the bill can only be maintained in Indiana. (6 Cranch, 158; *Chitty*, Pl., 268; 1 Atk., 544; 3 Ves., 183; 10 Ves., 164; 3 Atk., 589; 1 Sumn., 504; 1 H. & J., 228; 1 Ves., 446; 1 Bibb, 409.)

As to the want of proper parties. The defendants contend that the case cannot go on, even to a hearing, without the presence of the New Albany and Salem Railroad Company. The injustice of hearing and deciding the case without giving that Company an opportunity to be heard, is manifest, and most clearly so. It claims the right and authority to construct a railroad from New Albany to the Illinois line, making Michigan City, at the head of Lake Michigan, the termination of the Michigan Central Road, a point, and to mortgage the whole or any part of the road constructed, or proposed to be constructed, to obtain money wherewith to build. It has entered into an arrangement with the Michigan Central Company to advance money enough to construct, and to construct as the agent of that Company, that part of the road west of Michigan City, and to take in addition thereto \$500,000 of stock, which said money is to be expended, one fifth south and four fifths north of Lafayette and south of Michigan City; and for the punctual payment of the subscriptions of stock it holds as absolute security all the road from Michigan City to the Illinois line complete and running; with the right to declare forfeited and null all the rights of the Michigan Central Company, in case of its default in paying its subscriptions of stock. It has mortgaged its entire line of road from New Albany to Michigan City, and upon the credit thereof, has obtained loans to large amounts, which are rapidly completing the road through its entire distance. It is still in the money market to dispose of about a million and a half of unsold mortgage bonds to complete entirely the work, the most important, by far, in the State of Indiana. The *farmer, merchant, and mechanic, from [*237 one end of the State to the other, are its stockholders.

Now, upon all these vast interests, the decree of this court, if it can make one against these defendants, must act directly. It is the charter of the New Albany and Salem Company which is in controversy. The powers claimed by it will be struck out of existence. Its arrangements with the Michigan Company will be declared null and void. Its road west of Michigan City will be struck out of legal existence. Its security for \$500,000 of stock destroyed. Its road south of Michigan City towards Lafayette complete more than half, and nearly complete the whole distance, blotted out. Its credit in the money market, its stock and its bonds sold, will be ruined, and all this in a suit where that Company cannot be heard. Is this possible in a court of equity? And yet this suit cannot go on, and the complainants succeed, without all these disastrous results. They

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are the direct results of the decree sought, and of the allegations in the bill; and the rights of the New Albany and Salem Company are all the rights in controversy; the Michigan Central Company claim none of themselves, and exercise none except as the New Albany and Salem Company are empowered to grant them.

That the welfare, nay, the fate, of the New Albany Company, of its stocks, bonds, its entire interests, depends upon this question, there can be no doubt. Can this case go on without making that Company a party? Shall a decision be had which may destroy it, when, if here, it might make a showing and a defense which the present defendants know nothing of? There needs nothing to show the injustice of thus acting.

"But the rule of law here runs with equity and justice. All persons interested, either legally or beneficially, in the subject matter of the suit, are to be made parties to it, either as plaintiffs or defendants, so that a complete decree shall be made, which shall bind them all. By this means the court will make a complete decree to prevent future litigation, and to make it perfectly certain that no injustice is done either to the parties before it or to others who are interested in the subject matter by decree, which might otherwise be grounded upon a partial view only of the real merits. When all parties are before the court the whole case may be seen, but it may not where all the conflicting interests are not brought out by the pleadings by the parties thereto." (Story's Pleadings, p. 74, secs. 73 and 75.)

"If the proper parties are not made to a bill, even though there be a decree, yet it will bind none but the parties to a suit, so that all the evils of fruitless or inadequate litigation may be visited upon the successful party to the 238*) original suit, by leaving *his title still open to future question and controversy." (Story, sec. 75.)

Here the New Albany Company would not be bound. It would, in its own courts, seek to enforce its rights under the contracts with the defendants. The state courts would not be bound even by a decree of this court construing the statutes of the State, and this court might be compelled to reverse its own decisions on such a question. What would be the position of the two companies in such a case?

This question is fully discussed also in the following cases: *Platt & Oliver*, 3 McLean, 305; 4 Pet., *202.

We are aware that there are exceptions to this rule, but they are all cases where complete justice can be done between the parties before the court, without prejudice to the rights and interests of parties not before it. (Story's Pleadings, secs. 77, 81, 83, 89, 94, 96, 154, 191, 192, 193.)

Agents are not proper parties to a bill because they have no interest in the subject matter. There is one instance, however, and that is where a discovery may be sought from a corporation in which officers may be joined, though Judge Story evidently did not think this exception founded upon principle. (Story's Pleadings, 204, sec. 235.)

We are not unaware of the remarks which fell from Mr. Justice Baldwin, in the case *Bonaparte v. The Camden and Amboy Railroad*

Company. He there seems to think that because an agent can be sued for a trespass, he can be impleaded in the Court of Chancery, and the principles upon which the two courts act in allowing suits against agents are the same, and he reasons from cases at law to cases in equity. There may be no doubt that an agent may be, in a multitude of cases, sued at law, when the rights of his principal could not be determined and settled in a suit in equity against him alone. The case of *Osborne* against *The United States* bears no analogy to this. There was in that case no possibility that the decree of the court could operate injuriously to any other parties; and in the case of *Bonaparte*, the Railroad Company was made a party, and could be heard.

That case also differs from this in many respects. There were no such relations there subsisting between the Railroad Company and its agents, as subsist between the defendants and the New Albany and Salem Company. The decree for an injunction would not cut through such vast interests, and work such wide, sweeping destruction to manifold interests as would an adverse decree in this case. That case differs from this also in this: that was a bill to enjoin against committing a trespass which would be the cause of an irreparable injury, and immediate *and decisive [*239] action was necessary to avert the ruin. Here is no such thing. Here the bill is merely to test the legal right, which in truth should be tried in an action of ejectment. It is not to prevent a trespass, but to procure a decision whether the New Albany and Salem Railroad Company have a legal right to maintain a railroad where it has constructed and laid it down, and is now operating it. It sufficiently appears from the bill that the road had been constructed before the bill was filed. It had, in fact, been constructed for some months, and passenger trains had been run over it for a long period of time. The controversy is, then, not to prevent an irreparable trespass, but to dispute the right of the New Albany and Salem Company to maintain its road where it has long been built and in operation, and was so before the road of the complainants was built; to dispute its right to mortgage it to the defendants, and to procure a decree that its asserted rights are null and void, and securities held by it and mortgages made by it are all null and void; and to enjoin against the maintaining and using its road; and all this without giving it a chance to be heard. It would seem as if there could be no need of argument in such a case in a court of equity.

It is no answer to these questions to say that the jurisdiction of this court will be ousted if the New Albany and Salem Company is made a party. The court cannot go on and do justice unless that Company is a party, and that is always a reason why the suit should be dismissed. (3 Sumn., 426; 3 Russell & Mylne, 83; 2 Mason, 181; 3 Swanst., 140-145.)

The Act of Congress of 1839 cannot aid the complainants in this case. That Act did not intend to overthrow the fundamental principles upon which a court of chancery acts, and determine the rights of one party in a suit against another. That Act simply provides that the court shall go on with the suit against the party

who shall appear; but the decree shall not affect the rights of the party who does not appear; that is, that the court shall exercise its jurisdiction where it may do so without prejudice to the rights of parties in interest who do not appear, or have not been made parties. (Act of Feb. 28, 1839, sec. 1.)

This does not at all change the principles which are fundamental with courts of equity upon questions of jurisdiction. (See 14 Pet., 66.)

In order to change the universal rule of the court, and alter its practice in fundamental points, the Act of Congress should be express, and its intention to do so expressed with irresistible clearness and force. (1 Peters's Cond. Rep., 425.)

240*] *Mr. Justice M'Lean* delivered the opinion of the court:

This is an appeal in chancery, from the Circuit Court of the District of Michigan.

The Northern Indiana Railroad Company, and the Board of Commissioners for the Western Division of the Buffalo and Mississippi Railroad, corporations created by, and doing business in, the State of Indiana, filed their bill in the Circuit Court, stating that an Act of the Legislature of Indiana, dated February 6th, 1835, incorporated the Buffalo and Mississippi Railroad Company. By a subsequent Act of the Legislature, of February 6th, 1837, the name of the corporation was changed to that of the "Northern Indiana Railroad Company;" that by an Act of the 8th of February, 1848, the "Board of Commissioners for the Western Division of the Buffalo and Mississippi Railroad," were incorporated. That several Acts of the Legislature of Indiana were passed, confirming, amending, and enlarging the charters and franchises of the same corporations; that by virtue of said laws the complainants are severally entitled to do and perform business in the State of Indiana, as authorized by their said charters.

That the Northern Indiana Railroad Company, after being duly organized, examined, surveyed, marked and located the route of their railroad, and by the means specified in the aforesaid Acts, procured the right of way for said railroad, as the same has been constructed, and become seised in fee of the right to the lands acquired for that purpose, with all the privileges and franchises in relation thereto, confirmed and declared by the said Acts; and that the route of that part of the western division of said railroad, lying between Michigan City, in the County of Laporte, and the Western line of the State of Indiana, was duly surveyed and located, and the right of way duly acquired. That a part included in said location consists of a strip of ground eighty feet in width, extending from Michigan City to the west line of the State of Indiana, and that the railroad has been constructed and is in operation, from Elkhart to Laporte, and from Michigan City to the west line of the State of Indiana.

And the complainants say that they have purchased, and now own in fee simple, certain other lands situated on or near the line of said railroad, which is deemed necessary for the business and purposes of said railroad. And they aver that they commenced their road within the time required, and have prosecuted

the same, as by the several Acts above referred to they were required to do. That among the rights and privileges under their charters, is the sole and exclusive right and privilege of building, maintaining, and using a railroad along "the general route of the road." [*241 And they insist that no charter can be lawfully granted to any other company to construct any other road or roads in the vicinity of said railroad, which would materially interfere, injuriously, with the profits of said road, without the consent of the complainants, which has not been given. That the Legislature of Indiana has no power to establish such a road, there being no such power reserved in the original charter.

And the complainants allege the Michigan Central Railroad, a Corporation created by, and doing business in, the State of Michigan, were incorporated for the purpose of constructing and using a railroad from Detroit, in the State of Michigan, to some point in the same State upon Lake Michigan, accessible to steamboats navigating said lake; and with authority to extend their road to the southern boundary of the State of Michigan; that said Company have constructed and now keep in use a railroad from Detroit to New Buffalo, and thence to the southern line of the State of Michigan in the direction towards Michigan City, in the State of Indiana; and that by an arrangement with the Commissioners of the Western Division of the Buffalo and Mississippi Railroad Company, the road has been extended and is now in use to Michigan City.

And the complainants further allege, that the New Albany and Salem Railroad Company is a Corporation created by and under certain Acts of the Legislature of the State of Indiana, and doing business therein, has no power or franchise to construct, or to authorize the construction, of any railroad whatsoever, except what is contained in certain statutes referred to in the bill. That said Company, and the defendants, the Michigan Central Railroad Company, on or about the 24th of April, 1851, entered into a contract with each other, which contract is in the possession of the defendants, and a discovery of the same is prayed, and that it may be produced. That by color of said contract the defendants claim the right to construct and use a railroad from Michigan City to the western line of the State of Indiana, by a route nearly parallel with the complainant's railroad, and in its immediate vicinity, and several times crossing the same; and also the right and power to locate, construct, and use such railroad, over and across the complainants' road, with the exclusive franchises and privileges aforesaid, as they, the defendants, shall see fit.

That the defendants have so laid out the route of their road from Michigan City to the western line of the State of Indiana, as to cross the complainants' railroad upon lands, the title of which was acquired by, and is now held by the complainants, and upon which their railroad has been constructed, with the "purpose" [*242 and intent of obstructing and unlawfully interfering with the possession, occupancy, and use of the complainants' lands, and with the intent to hinder and molest them in the enjoyment and use of the rights and franchises granted to them by the legislative Acts stated, and to de-

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feat the exclusive right to have and use a railroad within that vicinity.

And after stating many other facts having a bearing upon the New Albany and Salem Railroad Company, and, as they allege, conducing to show a want of right in that Company to extend their road to Michigan City, and from thence to the western line of the State of Indiana, near to and parallel with the complainants' road, as above stated, they pray that the defendants may be enjoined from the construction of their road, &c.

The defendants filed a general demurrer to the bill, and a decree was entered in the Circuit Court, sustaining the demurrer and dismissing the bill.

At the threshold of this case, the question of jurisdiction arises. It is not controverted that the road of the defendants, against which the injunction is prayed, has been constructed, not only from Michigan City to the western line of the State of Indiana, but to Chicago, in the State of Illinois. The demurrer admits the facts charged in the bill, and they are also established in part by surveys of both roads.

The jurisdiction of the Circuit Court of the United States is limited to controversies between citizens of different states, except in certain cases, and to the district in which it sits. In this case we shall consider the question of jurisdiction in regard to the district only. In all cases of contract, suit may be brought in the Circuit Court where the defendant may be found. If sued out of the district in which he lives, under the decisions he may object, but this is a privilege which he may waive. Wherever the jurisdiction of the person will enable the Circuit Court to give effect to its judgment or decree, jurisdiction may be exercised. But wherever the subject matter in controversy is local, and lies beyond the limit of the district, no jurisdiction attaches to the Circuit Court, sitting within it. An action of ejectment cannot be maintained in the district of Michigan for land in any other district. Nor can an action of trespass *quare clausum fregit* be prosecuted where the act complained of was not done in the district.

Both of these actions are local in their character, and must be prosecuted where the process of the court can reach the *locus in quo*.

The complainants allege that the defendants have built a railroad, crossing their road several times; have entered upon their grounds, and, by building a parallel road so near as to carry 243*] the same line of passengers and freight, their franchise has been impaired. That they have an exclusive right to run a railroad on the route stated, and that they have been seriously injured by the defendants' road.

This remedy by injunction is given to prevent a wrong for which an action at law can give no adequate redress. In its nature it is preventive justice. Where the wrong has been inflicted before an injunction was applied for, it may be a matter of doubt, in most cases, whether an action at law would not be, at first, the appropriate remedy. But whether the relief sought be at law or in chancery, the question of jurisdiction equally applies.

In his conflict of laws, Mr. Justice Story says (sec. 463), not only real but mixed actions, such as trespass upon real property, are prop-

erly referable to the *forum rei sita*. (*Skinner v. East India Company*, Law Rep., 168; *Douglas v. Matthews*, 4 Term R., 503; *Watts v. Kinney*, 6 Hill, N. Y., 82.) But he says a court of chancery, having authority to act in *personam* will act indirectly, and under qualifications, upon real estate situate in a foreign country by reason of this authority over the person, and it will compel him to give effect to its decree, by a conveyance, release, or otherwise, respecting such property." (*Foster v. Vassall*, 3 Atk., 589; 1 Equity Cases, Abr., 133; *Penn. v. Lord Baltimore*, 1 Ves., 444; *Lord Cranston v. Johnson*, 8 Ves., 182, 183; *White v. Hall*, 12 Ves., 323; *Lord Portarlington v. Souby*, 3 Mylne & Keen, 104; *Massie v. Watts*, 6 Cranch, 148, 160.) In this last case the Chief Justice says: "Upon the authority of these cases (cited), and of others which are to be found in the books, as well as upon general principles, this court is of opinion that, in a case of fraud of trust, or of contract, the jurisdiction of a court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree." In another part of the opinion he says: "Was this, therefore, to be considered as involving a naked question of title; was it, for example, a contest between Watts and Powell, the jurisdiction of the Circuit Court of Kentucky would not be sustained."

If the court had acquired jurisdiction of the person by his being within the State, they will compel him, by attachment, to do his duty under his contract or trust, and enforce the decree *in rem*, by his executing and conveying or otherwise, as justice may require, in respect to lands abroad. (*White v. White*, 7 G. & J., 208; *Vaughan v. Barclay*, 6 Whart., 392; *Watkins v. Holman*, 16 Pet., 25.)

The controversy before us does not arise out of a contract; nor is it connected with a trust expressed or implied. An exclusive right is claimed by the complainants, under their charters, *and the legislative Acts of Indl- [*244 ana connected therewith, to construct and use a railroad, as they have done, from the City of Michigan to the western line of the State. And they complain that the defendants have unlawfully entered upon their grounds, constructed a road crossing the complainants' road several times, and materially injuring it, by constructing a road parallel to it. Relief is prayed for an injury threatened or done to their real estate in Indiana, and to their franchise, which is inseparably connected with the realty in that State.

In the investigation of this case, rights to real estate must be examined, which have been acquired by purchase, or by a summary proceeding under the laws of Indiana. This applies, especially, to the ground on which the complainants' road is constructed, and to other lands which have been obtained, for the erection of facilities connected with their road. And, in addition to this, the chartered rights claimed by the defendants, and the right asserted by them to construct their road as they have done, crossing the complainants' road and running parallel to it, must also be investigated. Locality is connected with every claim set up by the complainants, and with every wrong

charged against the defendants. In the course of such an investigation, it may be necessary to direct an issue to try the title of the parties, or to assess the damages complained of in the bill.

It will readily be admitted, that no action at law could be sustained in the district of Michigan, on such ground, for injuries done in Indiana. No action of ejectment, or for trespass on real property, could have a more decidedly local character than the appropriate remedy for the injuries complained of. And is this character changed by a bill in chancery? By such a procedure, we acquire jurisdiction of the defendants, but the subject matter being local, it cannot be reached by a chancery jurisdiction, exercised in the State of Michigan. A state court of Michigan, having chancery powers, may take the same jurisdiction, in relation to this matter, which belongs to the Circuit Court of the United States, sitting in the district of Michigan. And it is supposed that no court in that State could assume such a jurisdiction.

But there remains another ground of objection to the jurisdiction in this case. The New Albany and Salem Railroad Company is not made a party to this suit. As an excuse for this omission, it is alleged, in the bill, that this company being a corporation by the laws of the State of Indiana, of the same State as the complainants, it cannot be made a party without ousting the jurisdiction of the court. This is true; and if the relief prayed for by the complainants can be given without impairing the rights of this Company, under the Act of 1839, the jurisdiction may be exercised. **245*]** *The complainants contend that this company is not a necessary party, and that no decree is asked against it.

The right claimed by defendants to construct their road as stated in the bill, was derived solely from the New Albany and Salem Company. The contract under which this claim is made, is referred to in the bill, and is, consequently, a part of it. It is stated in the contract that this Company, "both for the public good and their own interest, deemed it important to extend its road to Michigan City, and thence westward by the State line of Illinois, &c." And it is also stated that the Michigan Central Railroad Company were willing to subscribe for five hundred thousand dollars of the stock of the New Albany and Salem Railroad Company upon certain conditions, as well as to build the entire line of railroad from Michigan City to the Illinois State line, provided they can have the use and control of the same, until the costs of the same shall be re-imbursed to it, &c. The payment of the stock to the New Albany road, as one of the conditions, was to be made by installments stipulated, a large part of which are yet unpaid. And to re-imburse the Michigan Company a million of dollars were assumed as the cost of the road, from Michigan City to the western line of the State, which sum, if paid in forty years, with interest at five per cent. per annum, the railroad to be constructed by the Michigan Company, with all its equipments, shall become the property of the New Salem Company, and the mortgage or pledge of the contract shall cease.

In the argument it was contended by the complainants, that under no Act or Acts of the

Indiana Legislature have the New Albany and Salem Company a right to construct a railroad further north than Crawfordsville. That certain words used in the Act of February 11th, 1848, giving the Company power to "extend their road to any other point or points than those indicated by the location heretofore made by the authority of the State," were necessarily limited to the points named in previous Acts, New Albany, Salem, and Crawfordsville. And that in extending the road from Crawfordsville north to Michigan City, and thence west parallel with the complainants' road to the western line of the State of Indiana, it was located without any legal authority.

From the above it appears that the validity of the New Albany and Salem charter is involved in this case, for between two and three hundred miles, from Crawfordsville to Michigan City, and thence to the western line of the State of Indiana. The construction of that road has been nearly, if not entirely, completed, at an expenditure of between two and three millions of dollars. And in addition to this, it appears from the contract *made [*246] between this Company and the Michigan Company that, as one of the conditions of the contract, the latter Company subscribed in stock to the New Albany and Salem road, half a million of dollars, a part of which sum only has been paid.

Now, if this court, in giving the relief prayed for by the complainants, should find it necessary to declare that the above charter gave no authority to the New Albany Company to locate and construct their road north of Crawfordsville, it would be ruinous to that Company. And it is clear, that any decision which shall declare the road from Michigan City to the western line of the State of Indiana, without the protection of law, must equally apply to the road from Michigan City to Crawfordsville, as they were located and built under the same authority. This question is, therefore, vitally interesting to the New Albany Company; and by the bill we are called to decide that question, although that Company is not made a party to the suit. It is impossible to grant the relief prayed, without deeply affecting the New Albany Company. If their charter should be held good, as claimed by that Company, an injunction against the defendants would materially injure the New Albany Company, as it would not only impair the contract made with the defendants, in regard to the road from Michigan City westward to the State line, but it would, probably, release the defendants from a subscription of half a million to the stock of the Crawfordsville road, or at least from the payment of the part of that subscription which has not been paid.

The Act of 1839 provides, that "where, in any suit at law or in equity commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of, or found within the district, jurisdiction may be entertained, but the judgment or decree shall not conclude or preclude other parties. And the non-joinder of parties who are not inhabitants, or found within the district, shall constitute no matter of abatement, or other objection to said suit."

The provision of this Act is positive, and in ordinary cases no difficulty could arise in giving effect to it; but in a case like the present, where a court cannot but see that the interest of the New Albany Company must be vitally affected, if the relief prayed by the complainants be given, the court must refuse to exercise jurisdiction in the case, or become the instrument of injustice. In such an alternative we are bound to say, that this case is not within the statute. On both the grounds above stated we think that the Circuit Court has no jurisdiction.

The judgment of that court, in dismissing the bill, is therefore affirmed.

247*] *Messrs. Justices Catron and Campbell delivered separate opinions. Mr. Justice Daniel dissented.

Mr. Justice Catron:

The Northern Indiana Railroad Company and the Railroad Commissioners for the Western Division of the Buffalo and Mississippi Railroad Company, filed their bill against the Michigan Central Railroad Company, in the Circuit Court of the United States in the District of Michigan, seeking an injunction against the defendant to prevent the Michigan Company from laying down and using a railroad around the southern end of Lake Michigan, and within the State of Indiana; which road crosses the road of the complainants, and runs near to and parallel with it, and, as the complainants allege, will materially withdraw their profits. And the complainants insist that they have a monopoly by their charter to construct the only road near to and around the southern end of the lake, and that the defendant has violated the chartered rights secured to the complainants.

The bill was demurred to, and the demurrer was sustained by the Circuit Court. The first cause of demurrer set forth is, that the complainants have not, by their bill, made such case as entitles them to any discovery or relief against the defendant as to the matters contained in the bill, or any of them; and the judgment of the court is prayed whether the defendant shall be compelled to make further answer; and on this state of pleadings, the question standing in advance of all others is, whether the Circuit Court had jurisdiction to entertain the bill, as between these parties, independent of the merits of the case set forth. The bill alleges that the Northern Indiana Railroad Company, and the Commissioners of the Buffalo Company were, severally, corporations created by the State of Indiana, and were doing business in said State according to their charters; "and are, in meaning and contemplation of the Constitution and laws of the United States, citizens of the State of Indiana, and entitled to be deemed and taken as such citizens for all the purposes of suing and being sued, and for the purposes of this bill of complaint."

A corporation is composed of many individual members, having a joint interest, and a joint right to sue in their corporate name; and the consideration here presented is, whether a state law, creating the corporation, makes such corporation "a citizen," according to the Constitution, regardless of the fact where its members reside. If the corporation be such citizen,

then every member of the corporate body might reside in Michigan, and yet have the right to sue citizens of Michigan there in the United States court.

*The Constitution gives jurisdiction [*248 to the courts of the Union, "between citizens of different states." Now, if it be true, that corporations—such as for making roads, &c.—be citizens in the established sense of the Constitution, it must have been thus settled in the case of *The Louisville Railroad Company v. Letson*, 2 How., 5497; as, previous to that decision (made in 1844), this court did not suppose that a corporation was a citizen. Nor was any such question presented in *Letson's* case; far from it.

Letson sued the railroad company in covenant, by their corporate name, distinctly averring that the members of the company were citizens of South Carolina, and that the plaintiff was a citizen of New York.

The defendant pleaded in abatement, that Rutherford and Baring, two of the stockholders, were citizens of North Carolina; and that the State of South Carolina was also a stockholder. To this plea there was a demurrer, which was sustained in the Circuit Court and in this court.

It was held, 1. That the State could not object, as she stood on the foot of every other individual stockholder and need not be sued; and,

2. That fugitive stockholders, who were changing every day, and quite too numerous to be included in a suit, need not be made parties of record.

This, from the report of the case, seems to have been the unanimous opinion of the members of this court, who were present at the time; certainly it was my opinion.

The president and directors of the railroad company were alleged to be, and admitted to be by their plea, citizens of South Carolina; they represented the stockholders, and were their trustees, and whose acts were binding on the stockholders. This state of parties conformed to the Act of Congress of 1839, and the spirit of the 47th, 48th, 49th and 50th rules for the government of chancery practice in the federal courts, adopted in 1842.

It is now assumed, that *Letson's* case overruled the decision in *Strawbridge v. Curtis*, 3 Cranch, 276. That decision undoubtedly proceeded on the true rule.

There were various complainants to a bill in equity; and the bill alleged that some of the complainants were citizens of Massachusetts, where the suit was brought; and that the defendants were also citizens of Massachusetts, except Curtis, who was stated to be of Vermont, and a subpoena was served on him in that State. There, it was held, "that each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts." A bill thus framed could not at this day be treated seriously.

*The next case supposed to be in conflict with *Letson's* case is that of *The United States Bank v. Devereux*, 5 Cranch, 61. The old Bank of the United States sued Devereux and Robertson, in the Circuit Court of Georgia, alleging that it was a Corporation established under an Act of Congress of 1791; and alleging, further, that the petitioners, the President,

Directors and Company of the Bank of the United States, were citizens of the State of Pennsylvania; and that Devereux and Robertson, the defendants, were citizens of Georgia; and this averment was held sufficient by the court.

That *Letson's* case overruled that of *The R. R. Bank of Vicksburg v. Slocum et al.*, is true; and it was justly overruled, as I think. Slocum, Richards & Company sued the Bank, alleging that they were citizens of Louisiana, and that the President, Directors and Company of the Bank were citizens of Mississippi. The Bank pleaded in abatement, that Lambeth and Thompson, two of the stockholders, were citizens of Louisiana. And this court sustained that plea; whereas according to *Letson's* case, it was quite immaterial where the stockholders resided, so that the president and directors were citizens of the state where the suit was brought.

What a corporation is, was very fully discussed in *Devereux's* case, 5 Cranch; nor will I discuss it further here, as I do not feel called on to prove, to the legal profession of this country, that a corporation is not a citizen. And as no averment is made in the bill before us, that the president and directors of the corporations suing, are citizens of different states from the president and directors of the corporations sued, I think the demurrer ought to be sustained, and the court below instructed to dismiss the bill.

I view this assumption of citizenship for a corporation as a mere evasion of the limits prescribed to the United States courts by the Constitution. The profitable corporations are owned in a great degree in the cities; there the president and directors often reside; whilst the charter was granted in another state, and there the owners keep an agency, the business being in fact conducted in the city.

Now, these owners and directors may sue their next neighbors of their own state and city, in the United States courts, according to the rule that the corporation is a citizen of the state where it was created, and that jurisdiction depends on this sole fact.

Mr. Justice Daniel:

Could I consent to pronounce from this bench an opinion deemed by myself extrajudicial, and therefore without authority, I might attempt an argument to expose the irregularity and impotence of an adjudication confined, by [250*] law, within *prescribed geographical limits, with respect to subjects purely local, whenever it should be attempted to extend the operation of such adjudication beyond the *locus* to which the law has allotted it. For of this character has been the action of the Circuit Court upon the controversy of these two Corporations now before us. The Northern Indiana Railroad Company, incorporated by the State of Indiana, have complained of an invasion of their local rights, a tort to real property situated within the Territory of Indiana, by a company incorporated by, and situated within, the State of Michigan, and the Circuit Court for the State of Michigan, limited in its cognizance of local matters to the territory of that State, has undertaken to adjudicate upon the merits of this complaint. But irregular and futile as

is the action of the Circuit Court of Michigan, and as it is by all here admitted to have been, can it have been more irregular than is the undertaking, on the part of this tribunal, to pronounce authoritatively upon the character of the acts, or the relative rights and powers of the parties, over which the Circuit Court of Michigan has claimed cognizance? Is not the warrant for cognizance by the Circuit Court and by this tribunal essentially, nay, precisely, the same? Are they not both to be found, if existing at all, in the Constitution of the United States? And is it not indispensable that such a cognizance should be regularly and certainly vested in the Circuit Court, before this court can sanction its validity? If it be asked, by what provision of the Constitution the Circuit Court could assume jurisdiction of the present controversy, it must, of necessity, be referred to that (2 sec., 8d art.) provision which extends the judicial power to controversies between citizens of different states. This, indeed, is admitted; and the admission carries with it inevitably the implication that a corporation can and must, for certain purposes, become a citizen, and must, *ex necessitate*, possess the attributes of citizenship in order to obtain access to a court of the United States. Having, on a former occasion (*vide* the case of *Runde et al. v. The Delaware and Raritan Canal Company*, 14 How., 95), endeavored to expose the incongruities involved in, and incident to, this anomalous conception, I will not now attempt a further enumeration of them beyond this obvious remark, that citizenship and corporate existence, created by state authority, being decreed by this court to be, to some extent at least, identical, as must be the case to authorize this court to call the parties before them, it must follow that, to the same extent, a corporation can be a citizen, and a citizen can become a corporation. The process by which the latter transformation may be accomplished has not yet been pointed out, *we are told, by the [*251 English jurists, and by the decisions of the English courts, and so, too, in the case of *The Bank of the United States v. Devereux*, it is laid down by Marshall, *Ch. J.*, that a corporation is an invisible, intangible, artificial creature. In one sense, at least, the citizen may render himself invisible and intangible—he may abscond. In what signification he must become artificial, amongst the infinite varieties which may be imagined, will present a question more difficult to be determined. But in the possession of a portion even of his corporate attributes, the citizen may be deemed a *quasi* corporation, when it shall be thought convenient; and will, doubtless, in that chrysalis condition, furnish as just a representation of the integral legal entity, as the latter, in the shape of a *quasi* citizen, can ever supply of the real, material, and social being with whom it is sought to identify it.

Powerless and vain as probably ever will be the "still small voice" of a humble individual, in opposition to the united declaration of those justly considered the learned and the wise, still, under the most solemn conviction of duty, the effort can never be forborne to raise that humble voice in accents of alarm at whatever is believed to threaten even the sacred bark in which the safety both of the

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States and of the United States is freighted. I hold that, beyond the Constitution of the United States, there is no federal government, either in the mass or in the detail. That beyond the pale and limits prescribed by that instrument, to be interpreted, not by indirect or ingenious or forced constructions, or by remote implications, but by the plain and common-sense import of its language, a language familiar to the common and general understanding, all is unwarranted assumption and wrong—a termination of all legitimate federal power. Whilst, therefore, I profess, as I really feel, my belief in the wisdom and purity of those who think themselves justified in what I regard as an infringement upon the terms and objects of our only charter, I am constrained to record my solemn protest against their doctrine and their act.

On these grounds I dissent from the opinion just pronounced, and think that this cause should have been remanded to the Circuit Court, with directions to dismiss it, as one over which the courts of the United States can have no jurisdiction with respect to the parties.

Mr. Justice Campbell:

I concur fully in the opinion of the court denying jurisdiction to the Circuit Court to entertain this bill. The objection made in the opinion to the exercise of jurisdiction, and which is fairly presented by the record, is sufficient to dispose of the case. The court 252*] has declined to determine any question upon the averments of the bill, in regard to the citizenship of the parties. The question is left exactly where it was when this case was presented. I state these facts, that no inference may be drawn to the contrary, and that the decision of the court may not be misunderstood.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Michigan, and was argued by counsel; on consideration whereof, it is the opinion of this court, that the Circuit Court had no jurisdiction of the case, and on that ground the bill was properly dismissed; there was, therefore, no error in the decree of said court. Whereupon, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

Cited—16 How., 350; 6 Wall., 286; 8 Blatchf., 128; 12 Blatchf., 241; 3 Blatchf., 23; Woolw., 306; 2 McArthur, 471; 2 Woods, 419, 465.

ERASTUS CORNING AND JOHN F. WINSLOW, *Plaintiffs in Error*,

v.

PETER A. BURDEN.

Patents—differences between machine and process—Evidence—defendant's patent admissible.

NOTE.—*Patents; distinction between inventions and processes; where the latter patentable.*

There is a marked difference between the invention of a new process by which a known fabric, product, or manufacture is produced in a better and cheaper manner, and the discovery of a new compound, substance or manufacture, having qualities which do not exist in any other material.

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In a suit brought for an infringement of a patent right, the defendant ought to be allowed to give in evidence the patent under which he claims, although junior to the plaintiff's patent.

Burden's patent for "a new and useful machine for rolling puddlers' balls and other masses of iron, in the manufacture of iron," was a patent for a machine, and not a process, although the language of the claim was equivocal.

The difference explained between a process and a machine.

Hence, it was erroneous for the Circuit Court to exclude evidence offered to show that the practical manner of giving effect to the principle embodied in the machine of the defendants was different from that of Burden, the plaintiff; that the machine of the defendants produced a different mechanical result from the other; and that the mechanical structure and mechanical action of the two machines were different.

Evidence offered as to the opinion of the witness upon the construction of the patent, whether it was for a process or a machine, was properly rejected.

THIS case was brought up by writ of error from the Circuit Court of the United States for the Northern District of New York.

Peter A. Burden, as assignee of Henry Burden, brought his action against Corning and Winslow, for a violation of a patent granted to Henry, as the original and first inventor and discoverer of a new and useful machine for rolling puddle balls or other masses of iron, in the manufacture of iron.

What took place at the trial is set forth in the opinion of the court. Under the instructions of the Circuit Court, the jury found a verdict for the plaintiffs, with \$100 [*253 damages; upon which the defendants brought the case up to this court by a writ of error.

It was argued by *Messrs. Seymour and Keller* for the plaintiffs in error, and by *Messrs. Fitzgerald and Stevens* for the defendants in error.

Each one of the four counsel filed a separate brief. The points presented on the part of the plaintiffs in error are taken from the brief of *Mr. Seymour*, and those on the part of the defendant in error from the brief of *Mr. Stevens*.

Points and Authorities submitted on the part of the Plaintiffs in Error.

First Exception to the charge. The court erred in charging the jury that "the letters patent which have been given in evidence by the plaintiff are for a new process, mode or method of converting puddlers' balls into blooms by continuous pressure and rotation of the balls between converging surfaces, thereby dispensing with the hammer, alligator jaws and rollers, accompanied by manual labor, previously in use to accomplish the same purpose; and the said letters patent secure to the patentee the exclusive right to construct, use and vend any machine adapted to accomplish the objects of his invention, as' above specified, by the process, mode, or method above mentioned."

I. The court erred in charging the jury that Burden's patent was for a new process, mode, or method.

A process or mode may be patented. (Curtis,

In the first case the inventor can patent nothing but his process, and not his composition of matter; in the latter, both are patentable, as one discovery or invention. *Goodyear v. The Railroad*, 2 Wall., Jr., C. C. 356.

The application of an old process to the manufacture of an article to which it had never before been applied—as an improvement in the applica-

pp. 65-71, 73, and cases there cited, from sec. 77 to sec. 83.)

1. Burden did not patent a process, but a machine.

What he designed to cover by his patent is to be gathered from the patent itself, the specification, and its summing up. (Webster on Subject Matter, p. 18, and note Z; *Davoll v. Brown* 1 Wood. & M., 59; *Russell v. Crowley et al.*, 1 Crompt., Mees. & R., 864; *Moody v. Fiske*, 2 Mason, 112; *Ree v. Outler*, 1 Starkie, 288; *Leroy v. Tatham*, 14 How., 156, 171; *Wyeth v. Stone*, 1 Story, 285; *Gray v. James*, Peters' C. C., 394, 400; *Mr. Justice Nelson's Opinion*, in Appendix A, annexed.)

2. Burden's patent claims that he has invented a new and useful machine, &c., not a process.

3. The specification, which purports to be a part of the letters patent, states the invention to consist in a "machine," not in a process.

254*] 4. *The summing up of the specification, or the claim, is substantially for a "machine."

And he specifies three modes of applying the principle of his invention; thus complying with the requisition of the sixth section of the Act of 1836, in reference to all patents for machines, and for machines only.

The preparing of puddlers' balls is not claimed as an invention, nor could it be, for it is as old as the art of making iron by the process of puddling. (See *Encyclopædia Americana*, Vol. VII., art. Iron, p. 72.) The preparing puddlers' balls by pressure is not claimed, for that, too, is old. (*Id.*) But the claim is for the invention of the new mechanism for preparing puddlers' balls.

II. An invention, such as Burden's is described to be in the patent and specification, is, upon the authority of elementary works, and the decisions of our courts, a machine, and not a process.

The distinction between a patent for a machine and a patent for a process is well known.

1. A patent for a machine is defined by Curtis, sec. 93, as follows: "If the subject of the invention or discovery is not a mere function, but a function embodied in some particular mechanism, whose mode of operation and general structure are pointed out, and which is designed to accomplish a particular purpose, function or effect, it will be a machine in the sense of the patent law."

If the specification describes "not a mere function, but a machine of a particular structure,

whose modes of operation are pointed out to accomplish a particular purpose or end, the patent is for a machine, and not for a principle or function detached from machinery." (*Blanchard v. Sprague*, 3 Sumn., 540.)

A method or process may be the subject of a patent. (See Phillips, pp. 93, 94; Curtis, secs. 80, 81.)

Among the cases cited (see Curtis, sec. 79) of patents for a method, or, as the writer expresses it, "for the practical application of a known thing to produce a particular effect," are

Hartley's invention to protect buildings from fire by the application of plates of metal. (See, also, Webster's Patent Cases, pp. 54, 55, 56, and note, pp. 55 and 56.)

* Forsyth's patent for the application of detonating powder, which he did not invent, to the discharge of artillery, mines, &c.

In this case the patentee succeeded in an action against the party using a lock of different construction from any shown in the drawing annexed to his specification, and, as Curtis says, "thus established his right to the exclusive use and application of detonating powder as priming, whatever the construction of the lock by which it was discharged." (Webster's Patent Cases, pp. 95, 97, note.)

* Hall's Patent for the application of [*255 the flame of gas to singe off the superfluous fibres of lace, and other goods, is another of this class. (Web. Pat. Cases, p. 99.)

The plaintiff had a verdict founded on his sole right to use gas flame for the clearing of fibres from lace. (Curtis, p. 67, n. 1; Web. Pat. Cases, pp. 100, 108; *Neilson v. Harford*, Web. Pat. Cases, 191, &c.; *Neilson v. Thompson*, Web. Pat. Cases, 275; *The Househill Co. v. Neilson*, Web. Pat. Cases, 673; *Boulton v. Bull*, 2 H. Bl., 492; *Clegg's Patent*, Web. Pat. Cases, 103; *Morse's Patents*; *McClurg v. Kingsland*, 1 How., 202; *Russell v. Crowley*, Web. Pat. Cases, 459.)

2. The preparing a puddler's ball is reducing and compacting it by pressure into the form of a bloom. (See *Encyclopædia Americana*, Vol. VII., art. Iron, p. 72; Nicholson's Op. Mechanic, pp. 334, 335; Ure's Dic. of Arts and Manufactures, p. 703.)

If Burden's claim, then, is for the reducing and compacting the ball by pressure into the form of a bloom, it is a claim for a process long before known in the manufacture of iron, and would therefore be void for want of novelty.

To avoid this difficulty, the statement of the claim goes on to say that he claims the prepar-

tion of palm leaf to stuffing beds, which had been used in preparing hair for the same purpose—is not patentable. *Howe v. Abbott*, 2 Story, C. C., 190; *Brown v. Piper*, 1 Otto, 91 U. S., 37.

A process is a mode of treatment of certain materials to produce a given result; an act or series of acts performed upon the subject matter to be transformed or reduced to a different state or thing. A new and useful process is an art, and just as patentable as a piece of machinery. *Cochrane v. Deener*, 4 Otto, 94 U. S., 780.

A process may be patentable irrespective of the instrumentalities used. The machinery may not be new or patentable, while the process may be. *Id.* In such case the patent is not confined to the particular tool or machine designated. The use of any other, the general process being the same, is an infringement. *Id.*

Although an inventor has obtained a patent for a process, he may have another for the product. *Jones v. Sewall*, 3 Cliff., 568.

So an inventor of a new process in the arts can patent separately both the art and the manufacture. He cannot combine them in one claim. *Merrill v. Yeomans*, 1 Holmes, 331.

Combinations, some of the elements of which are old and some new, may be patented; and a separate patent obtained for whatever is new, although useless except in the combination. *Wheeler v. Clipper Co.*, 6 Fish. Pat. Cas., 1; *Hussey v. Wager*, 9 Off. Gaz. Pat., 300; *Birdsall v. McDonald*, 8 Off. Gaz. Pat., 682; *Sellers v. Dickinson*, 5 Exch., 312; 20 L. J. Exch., 417; *Newton v. G. J. Railway Co.*, 5 Exch., 331; 20 L. J. Exch., 427, n.; *Dew v. Ely*, 34 R. Eq., 496; 36 L. J. Chanc., 482; 15 L. T. N. S., 559.

The application of an old process to a new subject, without the exercise of the inventive faculty is not patentable. It is no new invention to use an old machine for a new purpose. *Brown v. Piper*, 1 Otto, 91, U. S., 37; *Putnam v. Verrington*, 9 Off. Gaz. Pat., 689; *Ormsen v. Clark*, 13 C. D. N. S., 37;

ing these balls by causing them to pass between curved or plane surfaces, in the manner described in his drawings, and in the specification of the several parts of the machine.

If the words "the particular method of the application" were correctly held in *Wyeth v. Stone*, before cited, to mean the particular apparatus and machinery described in the specification, is not the claim for preparing puddlers' balls, by causing them to pass through a certain machine, as clearly a claim for the invention of the machine?

Wyeth claimed not only the art or principle of cutting ice of a uniform size, but "the particular method of the application of the principle;" and this last part of the claim was held to be the only valid part of it, and to be a claim of the particular apparatus and machinery described in the specification to effect the purpose of cutting ice.

So Burden's patent, if it be sustained at all, must be held to be a patent for the particular apparatus and machinery, described in the specification to effect the "preparing the puddlers' balls." (See, also, the case of *Blanchard v. Sprague*, 3 Sumn., 535.)

It was objected, on the trial in this last case, "that the plaintiff's specification was defective; that he claimed the functions of the machine, and not the machine itself."

Mr. Justice Story, at p. 540, says: "Looking at the present specification, and construing all **256***) its terms together, I am clearly *of opinion that it is not a patent claimed for a function, but it is claimed for the machine specially described in the specification; that it is not for a mere function, but for a function as embodied in a particular machine, whose mode of operation and general structure are pointed out."

If to claim a "method" or mode of operation in the abstract, explained in the description of certain machinery, be a claim for a machine, as was adjudged in *Blanchard v. Sprague*, is not the claim of preparing puddlers' balls, by the operation of certain machinery, much more a claim of a machine? In other words, is the claim of a particular result before known, from the operation of a machine claimed to be new, anything else than a claim for the peculiar construction of the machine itself, by which that result is effected?

3. Again, the result claimed by Burden is to produce a bloom from a puddle ball by pressure, welding together the particles of iron, and expressing in part the impurities, and partly

shaping the mass for the after-operation of converting it into bars, also by pressure.

It cannot be pretended that Burden invented this, or any part of it. This was all done before his invention, under the hammer and the alligator jaws. But it may be said that he invented an improvement in this process. This cannot be; for he only compresses the mass to cement the particles, express the impurities, and give shape; all this was done before by the hammer and the jaws, and in the opinion of many, better done than he does it.

4. Again, it may be said that he made an improvement in the operation by making it continuous. This brings the matter to a true test, and shows that it is the invention of a machine to render the operation continuous which before had been intermittent.

5. It may be claimed that he has invented or introduced the element of self-action. This establishes the defendant's proposition that Burden's patent is only for a machine. For the meaning of this is, as the term self-action must be predicated of material substances, that he has substituted an organization of machinery to perform automatically what was before performed partly by hand and partly by machinery. Machines for nail cutting, making hook-head spikes, carding and spinning, weaving, felting, are self-acting machines, which have been invented to carry on known processes; all have the element of self-action, and yet all of them have been recognized as machines, and not processes.

III. The plaintiff in his declaration counts upon his patent as a patent for a machine only, and not for a process.

*He ought to be permitted to recover [**257** only *secundum allegata et probata*.

IV. But suppose the patent be for a process, and not for a machine; then we submit that the court erred in sustaining the patent as a patent for a new process of preparing puddlers' balls, by continuous pressure and rotation of the balls between converging surfaces.

1. For this process itself is a well known and common process in the arts, and therefore could not be patented at the time of the alleged invention.

The operation to which the puddlers' ball is subjected, that is, the process, produces common results necessarily arising from pressure on all soft and porous substances, to wit: condensation, expression of matter, and change of form.

2. All the experts testify that Burden's inven-

9 Jur. N. S., 749; 3 L. J. G. P., 8; 11 W. R., 118; 14 C. B. N. S., 475; 11 W. R., 787.

To sustain a patent for a manufacture, invention or discovery must have been exercised in producing it. It is not enough that it is a new article. *Mulligan Glue Co. v. Upton*, 6 Off. Gaz. Pat., 357.

The arrival at greater excellence in that which was already known; the doing substantially the same thing in the same way, by some means, with better results, is not patentable as an invention. *Putnam v. Yerrington*, 9 Off. Gaz. Pat., 689; *Roberts v. Ryer*, 1 Otto, 91 U. S., 150.

The novel organization of co-operative elements or devices, whether the separate elements be new or old, into a useful mechanism, is invention. *Gould v. Commissioners of Patents*, 1 McArthur, 410.

The application of a known process to a new article, the mode of application not being new, cannot be the subject of a patent. *Brook v. Aston*, 8 El. & Bl., 473; 1 Jur. N. S., 279; 27 L. J. Q. B., 145; 6 Jur. N. S., 1025; 23 L. J. Q. B., 175.

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But this principle does not apply where the process is chemical. *Young v. Pernie*, 10 Jur. N. S., 925; 12 W. R., 901; 10 L. T. N. S., 861; 4 Giff., 577.

The application of a known tool to work previously untried materials, or to produce new forms, or a better article, is not the subject of a patent. *Bottle Envelope Co. v. Seymour*, 5 C. B. N. S., 164; 5 Jur. N. S., 174; 22 L. J. C. P., 22; *Horton v. Merbon*, 12 C. B. N. S., 437; 31 L. J. C. P., 255; 10 W. R., 582; 16 C. B. N. S., 141; 12 W. R., 491.

If the combination and application of old machinery are new and beneficial, the invention of this combination may be patented. *Harrison v. Anderton Foundry Co.*, 1 L. R. App. Cas., 574.

A principle, or process *communis*, is not the subject of a patent. Invention consists of some practical application of the same. *Piper v. Brown*, 4 Fish. Pat. Cas., 175; 3 Off. Gaz. Pat., 97; *Roberts v. Dickey*, 4 Brens., 280; 3 Pittab., 352; 1 Off. Gaz. Pat., 4; 4 Fish. Pat. Cas., 532; *Detmold v. Reeves*, 5 Pa. Law Rep., 99.

tion consists in carrying on the old process of reducing a puddler's ball to a bloom, by pressure created and continued by his machinery.

That the machinery by which such pressure may be applied is patentable, is obvious. But aside from the peculiar construction of Burden's machinery, there is nothing new in its application. It is merely the application of a known mode of operation in the arts, to produce a known result, that is, mechanical pressure, to produce a bloom out of a puddler's ball. (See *Curtis*, p. 78, sec. 88.)

That this form of applying mechanical pressure is not new, was proved by, &c., &c.

3. Notwithstanding the condition embodied in the second proposition contained in the charge of the court, as follows: "The machines for milling buttons, milling coin and rolling shot, which have been given in evidence by the defendants, do not show a want of novelty in the invention of the said patentee, as already described, if the processes used in them, the purposes for which they were used, and the objects accomplished by them, were substantially different from those of the said letters patent;" yet taken in connection with the construction given by the court to the patent, in the first proposition contained in the charge, the defendants were deprived of the defense to which they were entitled, to wit: That the reducing puddlers' ball to blooms, by their rotation and pressure between converging and continually approximating surfaces, was but a double use of a process or machine, long before used in milling buttons, milling coins and rolling shot.

For the court had decided, in the first proposition of the charge, that Burden's patent was "for a new process of converting puddlers' balls into blooms, by continuous pressure and rotation of the ball between converging surfaces."

258*] "In other words, that the application by the plaintiff's machine to the puddlers' ball, of the old method of reducing and compacting metals by the continuous pressure of converging surfaces, constituted such a novel process in the manufacture of iron, that (its utility not being questioned) the plaintiff's patent was good, notwithstanding the previous use of the milling machine on copper, silver, and gold, and of the shot machine on lead, in compacting and reducing those metals by the rotation of the metals and the continuous pressure of converging surfaces."

4. *Burden's patent* is clearly a case of double use. (See *Curtis* on Patents, secs. 85 to 89, and notes and cases therein cited; *Losh v. Hague*, Webster's Pat. Cas., 207; *Howe v. Abbott*, 2 Story, 190-193.)

To this defense the defendants were clearly entitled. The processes of milling the coin, finishing the edges of the buttons, making the shot or balls and making the blooms, are strictly identical.

V. The court erred in charging the jury as they did in the latter clause of the first proposition contained in the charge, to wit: "And the said letters patent secure to the patentee the exclusive right to construct, use and vend any machine adapted to accomplish the objects of his invention as above specified, by the process, mode, or method above mentioned."

Also in laying down the third proposition in

his charge, to wit: "That the machine used by the defendants is an infringement of the said letters patent, if it converts puddlers' balls into blooms by the continuous pressure and rotation of the balls between converging surfaces, although its mechanical construction and action may be different from that of the machines described in the said letters patent."

Also in excluding the testimony offered by the following question, to wit: by changing the form of the rolling surfaces in Mr. Winslow's machine, can it be made to roll a sphere?

Also the testimony offered as follows: "The counsel for the defendants then offered to prove by this witness that the machine used by the defendants differed, in point of mechanical construction and mechanical action, from the machines described in Burden's specification."

All these propositions were thus erroneously adjudged against the defendants, as a sequence or corollary following from the first main proposition which the court had laid down against the defendants, to wit: that the plaintiff's patent was for a process and not for a machine. The court in substance held, that although the mechanical construction and action of the defendants' machine might be different from that of the plaintiff's, *it was still [*259 an infringement if it reduced the balls to blooms by continuous pressure and rotation.

This was an erroneous position. For one thing was certain: We had the right to reduce puddlers' balls to blooms by any machine having a different action from that of the plaintiff. (*Curtis*, sec. 96, n. 2; *Whittemore v. Cutter*, 1 Gall., 478-491; *Barrett v. Hall*, 1 Mason, 470.)

In the light of these authorities, proof of different mechanical construction and different action was competent and highly pertinent to establish "a peculiar structure," and the production of a new effect.

VI. The court erred in excluding the evidence offered to be given by the witness, Hibbard, to wit: "That the practical manner of giving effect to the principle embodied in the machine used by the defendants was entirely different from the practical manner of giving effect to the principle embodied in Mr. Burden's machine—that the principle of the two machines, as well as the practical manner of carrying out those principles, was different; and that the machine used by the defendant produced by its action on the iron a different mechanical result, on a different mechanical principle, from that produced in Burden's machine."

The witness was an expert, and no objection was urged on that score, or to the form of the question. (*Silby v. Foote*, 14 How., 218, 235.)

This offer embraced legitimate proof tending to establish a general proposition material to the issue, to wit:

That the defendant's machine was constructed on a different principle, or had a different mode of operation from the plaintiff's.

Proof that the principle of one machine was different from that of the other, was tantamount to proof that their mode of operation was different; for two machines, different in principle, cannot well have the same mode of operation, although they may produce the same result.

But the defendant not only offered to prove

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that the machines were different, but also that they produced on the iron a different mechanical result. (See Curtis on Pat., p. 264, sec. 222; also p. 285; also p. 286, sec. 241.)

In conclusion, the court in this case should have held that the plaintiff's patent was for a machine. And on the question of novelty the court should have left it to the jury as a question of fact, to find upon the testimony whether the plaintiff's machine was the same in its principle or *modus operandi* as the milling, button or shot machines. And on the question of infringement, the court should have left it to the [260*] jury, upon the *testimony, to find whether the defendants' machine was the same in its distinctive character or principle as the plaintiff's.

Brief on the part of Defendant in Error.

First. The whole question in this cause depends upon the correctness of the construction contended for by the counsel for the defendant in error, and which the judge gave to the patent on the trial. If this construction be correct, the other two instructions given by the learned judge to the jury are also correct and follow as necessary corollaries. (Curtis on Patents, secs. 146-148.)

Second. The construction of the patent given by the court on the trial, by the first instruction to the jury, was correct.

I. The patent (that is the parchment) made out at the Patent Office, by the proper officer in that department, does not in any case, according to the patent law of this country, describe the thing patented. To ascertain the thing patented, the specification, which is filed before the patent is issued, is the test in all cases, as to what the patent secures to the patentee; and to ascertain that, the whole specification must be consulted; and the modern decisions have declared, that a liberal construction must be given to it in favor of the patentee. (Patent Act of 1836, sec. 5; Curtis on Patents, secs. 122, 123, 126, 127; *Ames v. Howard*, 1 Sumn., 482, 485; *Hogg v. Emerson*, 6 How., 437, 482; *Davoll v. Brown*, 1 Wood. & M., 53, 57.)

It is undoubtedly true, if the description or title of the invention, as stated in the patent, is irreconcilably repugnant to the description of the invention contained in the specification, as if the description in the patent be a machine for making nails, and the invention described in the specification is of a machine for carding wool, the patent would be void, upon the ground that the government had not given to the patentee a legal exclusive title to his invention. But nothing can be deduced from this principle of law to sustain the position that the invention is only what it is stated to be in the title stated in the patent, but on the contrary, the very reverse of that position is what renders the patent void in such cases.

In this case there is no such repugnancy. True, the patent states the invention to be of a new and useful machine for rolling puddle balls, &c., but this is not so repugnant to the description of the invention contained in the specification, as would preclude the court from adjudging that the government intended to and did grant the patent, for the invention described in the specification, to wit: for an improvement in the process, &c. Unless the title of

the invention described in the patent is clearly repugnant to the description of the invention in the *specification, the patent will be [*261 deemed to be a grant of the exclusive right to the invention described in the specification, but it cannot diminish the extent of the invention described, and claimed in the specification.

In short, the description of the invention in the specification is the act of the inventor, for which, if it be new and useful, the government is bound to grant him a patent. The granting of the patent is the act of the government, and if the description in that grant be not clearly repugnant to that which the inventor claimed and was entitled to, it will be deemed to be a grant of the thing to which he was entitled.

II. By any just or legal construction of the specification forming a part of the patent in question, and giving the only description of the invention for which the patent issued, said patent is for a new process, mode or method, of converting puddlers' balls into blooms, by continuous pressure and rotation of the ball between converging surfaces; thereby dispensing with the hammer, alligator jaws and rollers, accompanied with manual labor, previously in use to accomplish the same purpose, and is not confined to the particular machines described in the specifications and drawings.

The specification commences in these words: "To all whom it may concern, be it known, that I, Henry Burden, of the City of Troy, in the County of Rensselaer, and State of New York, have invented an improvement in the process of manufacturing iron." Now, let us here pause, for an instant, to inquire if the patentee really intended to represent his invention as one consisting in a new or improved machine, to be used in the manufacture of iron; why, with his thoughts upon the subject, did he not say so, instead of calling it an "improvement in the process of manufacturing iron?" I confess my utter inability to divine any reasonable answer to this question. The improbability of such a willful misnomer, is greatly enhanced by the conceded and well-known fact, that a new or improved process is patentable, no less than a new or improved machine: process or method, which, in the patent law, are said to be synonymous, are among the few words in familiar use, machine being another of these words, expressive of the few proper subjects of a patent; so that to hold this to be a patent for a machine, is to impute to the patentee the absurdity not only of omitting to call his invention by its proper name, but of substituting, at the outset, another name of well known signification in law, expressly appropriated to another and widely different subject of a patent.

But the specifications contain other expressions which are in strict accordance with the language already quoted, and require the same interpretation. After particularly and clearly describing *the process in question, and [*262 the means by which it is accomplished, the patentee proceeds as follows: "It will be readily perceived also, by the skillful machinist, that the principle upon which I proceed may be carried out under various modifications, of which I have given two examples; and these might be easily multiplied, but this is not necessary, as I believe that those which have been

given must suffice to show, in the clearest manner, the nature of my invention, and point out fully what I desire to have secured to me under letters patent of the United States." Does this look like only claiming to be the inventor of a specific machine? On the contrary, the patentee refers to the descriptions he has given of the mechanical contrivances by which his process may be carried on, as illustrative only of the "principle" on which he "proceeds;" and, referring to the two machines thus described, he adds: "and these might be easily multiplied." Does this language import an intention to limit his claim to them? But an equally decisive test of the patentee's claim remains yet to be considered. His specification concludes with a summary. "In order to ascertain the true construction of the specification in this respect, we must look to the summing up of the invention, and the claim thereof asserted in the specification; for it is the duty of the patentee to sum up his invention in clear and determinate terms; and his summing up is conclusive upon his right and title." (*Wyeth v. Stone*, 1 Story, 273, 285.)

The patentee's summary is as follows: "Having thus fully made known the nature of my said improvement, and explained and exemplified the manner in which I construct the machinery for carrying the same into operation, what I claim as constituting my invention, and desire to secure by letters patent, is the preparing of the puddlers' balls as they are delivered from the puddling furnace, or of other similar masses of iron, by causing them to pass between a revolving cylinder and a curved segmental trough adapted thereto, constructed and operating substantially in the manner of that herein described and represented in figures 2 and 3, of the accompanying drawings, or by causing the said balls to pass between vibratory or reciprocating curved surfaces, operating upon the same principle, and producing a like result by analogous means."

Now, by his "improvement," mentioned at the commencement of this summary, it is indisputable that the patentee means his invention; and this he describes as being carried into operation by means of machinery constructed for the purpose. With what propriety, then, can it be said that the invention claimed is of the machinery itself? "What I claim," he adds, "as constituting my invention, is the 263*] preparing of the puddlers' 'balls,' &c. Is the process of preparing puddlers' balls a machine? If not, is it not a flat contradiction of the language of the patentee to say that he claims to be the inventor of a machine and not of a process? And what is there in the other parts of the specification to neutralize this explicit and unequivocal language? It is said that the patentee describes and has furnished drawings representing two several machines used by him, the one in the first essays and the other subsequently. This is true, and it is also true, that the two are wholly different, not only in form, but in mechanical construction, having, in fact, nothing in common except their mutual adaptation to a like process and effect.

Besides, the court will please to observe that the specification claims no particular form of apparatus for carrying his mode or method of

converting puddlers' balls into blooms, into effect. The patent cannot, therefore, be construed as confining the invention to the two particular machines which he has described, that would accomplish that mode, method, or process. (*Curtis on Patents*, secs. 80, 81; *Minter v. Wells*, *Webs. Pat. Cas.*, 130.)

The specification should be so construed as to make the claim co-extensive with the actual discovery, if the fair import of the language used will admit of it. (*Curtis on Pat.*, sec. 132.)

III. The patent is not for a principle merely, but for a mode, method or process, giving two practical means for accomplishing it.

The patentee shows, by specification, that he has succeeded in embodying the principle by inventing some mode of carrying it into effect, and thus converting it into a process. "You cannot," said *Alderson, B.*, in *Jupe v. Pratt*, *Webs. Pat. Cas.*, 146, "you cannot take out a patent for a principle; you may take out a patent for a principle coupled with a mode of carrying the principle into effect. If you have done that, you are entitled to protect yourself from all other modes of carrying the same principle into effect, that being treated by the jury as a piracy of your original invention."

"A mere principle," says *Mr. Curtis*, "is an abstract discovery; but a principle, so far embodied and connected with corporeal substances as to be in a condition to act and produce effects in any art, trade, mystery, or manual occupation, becomes the practical manner of doing a practical thing. It is no longer a principle, but a process." (*Curtis on Patents*, sec. 72; see, also, secs. 77, 78, and notes, pp. 59, 66.)

With the requirements of the law in this respect, the patentee has complied in a manner perfectly unexceptionable, and perfectly consistent with the construction of his patent, insisted on by the plaintiff. There is not, in the specification, a single *expression indicative of an intention to limit his claim as an inventor to one or both of the machines described by him, while, on the contrary, the language plainly infers a fixed purpose to guard against such an interpretation. (*Curtis on Patents*, sec. 148, and note 1.)

IV. If this construction of the patent is correct, it necessarily follows that the patent protects the patentee from all other modes of carrying the same mode, process or method into effect, which is in substance and effect the principle held by the judge in the last clause of his first instruction to the jury. (*Jupe v. Pratt*, *Webs. Pat. Cas.*, 146; *Curtis on Patents*, sec. 148, and note 1.)

Third. The rejection of the evidence offered on page 84 of the record, constitutes no ground of error.

I. The decision, if wrong, was cured by the evidence of the same facts afterwards elicited by the witnesses.

II. If the construction of the patent contended for by plaintiff below, and held by the court, is correct, the testimony was properly excluded. (*Jupe v. Pratt*, *Webs. Pat. Cas.*, 146, *supra*; *Curtis on Patents*, sec. 148, and note 1.)

Fourth. The decision excluding the evidence of Winslow's patents, was clearly right.

If the machine used by defendant was an infringement of plaintiff's patent, the fact that

Winslow had obtained a patent for it would be no defense, and if it was not an infringement of plaintiff's patent, it was not material in this suit whether it had or had not been patented.

Fifth. In the argument in the court below, on the motion for a new trial on this bill of exceptions, the counsel for the defendants objected that there was a variance between the declaration and the patent given in evidence, unless the court held the patent was for a particular machine or machines. That objection was, however, justly and legally disregarded by both members of the court in their decision of the motion.

The objection is technical, and it is entirely settled by the practice of the State of New York, that such objection cannot avail the party unless taken when the evidence is offered.

No such objection was taken on the trial of this cause, nor was there any decision of the court, or any exception on any such question raised on the trial. (*Watson's Executors v. McLarien*, 19 Wend., 563.)

Many other authorities might be cited, but it is unnecessary. The member of this court from the State of New York knows this to be the rule, and both the judges of the court below disregarded the objection.

Besides, if the objection had been made at 265*] the trial, that the *patent given in evidence varied from that described in the declaration, the court would have directed the declaration to be amended by substituting the word "process" in the place of "machine." The defendants could not have been misled or prejudiced by such inaccuracy of description. (2d Revised Statutes of New York, 3d ed., p. 504, sec. 98, p. 520, sec. 7, subdivision 14, and sec. 8; 2d Revised Statutes of New York, 4th ed., p. 510, secs. 169, 170.)

Sixth. No question as to the novelty of the invention for which this patent was issued, is presented by the record in this cause, except that contained in the 2d instruction of the judge to the jury. That instruction was right in point of law, and the jury found the fact with the plaintiff below (defendant in error).

Mr. Justice Grier delivered the opinion of the court:

Peter A. Burden, who is assignee of a patent granted to Henry Burden, brought this suit against the plaintiffs in error for infringement of his patent. The declaration avers that Henry Burden was "the first inventor of a new and useful machine for rolling puddle balls," for which a patent was granted to him in 1840, and that the defendants, Corning and Winslow, "made, used, &c.," this said new and useful machine in violation and infringement of the exclusive right so secured to plaintiff."

The defendants below, under plea of the general issue, gave notice that they would prove, on the trial, that Henry Burden "was not the first and original inventor of the supposed new and useful machine for rolling puddle balls, &c.;" that the machine of the plaintiff, and the principle of its operation was not new, and that the common and well-known machines called nobbling rolls, which were in use long before the application of Burden for a patent, embraced the same invention and im-

provements used for substantially the same purpose. And after setting forth many other matters to be given in evidence, affecting the novelty of plaintiff's machine, the notice denies that the machine used by the defendant was an infringement of that patented by plaintiff, and avers that the machine used by them was described in a patent issued to the defendant, Winslow, in December, 1847, "for rolling and compressing puddlers' balls," differing in principle and mode of operation from that described in the plaintiff's patent.

To support the issue, in his behalf, the plaintiff gave in evidence a patent to Henry Burden, dated 10th of December, 1840, for "a new and useful machine for rolling puddlers' balls and other masses of iron in the manufacture of iron;" and followed it by testimony tending to show the novelty and utility of his *machine, and that the machine used [*266 by the defendants was constructed on the same principles, and there rested his case.

The defendants then offered to read in evidence the patent of Winslow for his "new and useful improvement in rolling and compressing puddlers' balls." The plaintiff objected to this evidence as irrelevant, and the court sustained the objection and overruled the evidence. This ruling of the court forms the subject of defendant's first bill of exceptions.

The defendants then proceeded to introduce testimony tending to show want of originality in the plaintiff's machine; and also that the principle and mode of operation of the defendant's machine was different from that described in the plaintiff's patent; and finally called a witness named Hibbard. This witness gave a history of the various processes and machines used in the art of converting cast iron into blooms or malleable iron. He spoke of the processes of puddling, shingling and rolling, and attempted to define the difference between a process and a machine. The introduction of this philological discussion seems at once to have changed the whole course of investigation, to the entire neglect of the allegations of the declaration and of the issues set forth in the pleadings, in support of which all the previous testimony had been submitted to the jury. The defendant's counsel then proposed the following question to the witness: "Do you consider the invention of Mr. Burden, as set forth in his specification, to be for a process or a machine?" This question was objected to, overruled by the court, and a bill of exceptions sealed.

The counsel for the defendants then offered to prove, by this witness, "that the practical manner of giving effect to the principle embodied in the machine used by the defendants, was entirely different from the practical manner of giving effect to the principle embodied in Mr. Burden's machine; that the principles of the two machines, as well as the practical manner of carrying out those principles, were different; and that the machine used by the defendants produced, by its action on the iron, a different mechanical result on a different mechanical principle from that produced in Mr. Burden's machine." To the introduction of this testimony the plaintiff's counsel objected, and it was overruled by the court, and, at the defendant's instance, a bill of exceptions sealed.

The defendant's counsel then proposed to prove "that the machine used by the defendants differed in point of mechanical structure and mechanical action from the machines described in the plaintiff's specification." This testimony was also overruled and exceptions taken.

After some further examination of witnesses, 267*] the learned judge *announced his intention of instructing the jury, in the three following propositions, upon which the defendant's counsel declined to give further testimony, and excepted to his instructions:

"1. The letters patent to Henry Burden, which have been given in evidence by the plaintiff, are for a new process, mode, or method of converting puddlers' balls into blooms, by continuous pressure and rotation of the ball between converging surfaces; thereby dispensing with the hammer, alligator jaws and rollers, accompanied with manual labor, previously in use to accomplish the same purpose. And the said letters patent secure to the patentee the exclusive right to construct, use, and vend any machine adapted to accomplish the objects of his invention as above specified, by the process, mode or method above mentioned."

"2. The machines for milling buttons, milling coin and rolling shot, which have been given in evidence by the defendants, do not show a want of novelty in the invention of the said patentee, as already described, if the processes used in them, the purposes for which they were used, and the objects accomplished by them, were substantially different from those of the said letters patent."

"3. That the machine used by the defendants is an infringement of the said letters patent, if it converts puddlers' balls into blooms by the continuous pressure and rotation of the balls between converging surfaces, although its mechanical construction and action may be different from those of the machines described in the said letters patent."

As the first instruction of the court contains the most important point in the case, and a decision of it will dispose of most of the others, we shall consider it first in order.

Is the plaintiff's patent for a process or a machine?

A process, *eo nomine*, is not made the subject of a patent in our Act of Congress. It is included under the general term "useful art." An art may require one or more processes or machines in order to produce a certain result or manufacture. The term "machine" includes every mechanical device or combination of mechanical powers and devices to perform some function and produce a certain effect or result. But where the result or effect is produced by chemical action, by the operation or application of some element or power of nature, or of one substance to another, such modes, methods or operations, are called processes. A new process is usually the result of discovery; a machine, of invention. The arts of tanning, dyeing, making water-proof cloth, vulcanizing India rubber, smelting ores, and numerous others, are usually carried on by processes, as distinguished from machines. One may dis- 268*] cover a new and useful *improvement in the process of tanning, dyeing, &c., irrespective of any particular form of machinery

or mechanical device. And another may invent a labor-saving machine by which this operation or process may be performed, and each may be entitled to his patent. As, for instance, A has discovered that by exposing India rubber to a certain degree of heat, in mixture or connection with certain metallic salts, he can produce a valuable product, or manufacture; he is entitled to a patent for his discovery, as a process or improvement in the art, irrespective of any machine or mechanical device. B, on the contrary, may invent a new furnace or stove, or steam apparatus, by which this process may be carried on with much saving of labor, and expense of fuel; and he will be entitled to a patent to his machine, as an improvement in the art. Yet A could not have a patent for a machine, or B for a process; but each would have a patent for the means or method of producing a certain result, of effect, and not for the result or effect produced. It is for the discovery or invention of some practicable method or means of producing a beneficial result or effect, that a patent is granted, and not for the result or effect itself. It is when the term "process" is used to represent the means or method of producing a result that it is patentable, and that it will include all methods or means which are not effected by mechanism or mechanical combinations.

But the term "process" is often used in a more vague sense, in which it cannot be the subject of a patent. Thus we say that a board is undergoing the process of being planed, grain of being ground, iron of being hammered or rolled. Here the term is used subjectively or passively as applied to the material operated on, and not the method or mode of producing that operation, which is by mechanical means, or the use of a machine, as distinguished from a process.

In this use of the term it represents the function of a machine, or the effect produced by it on the material subjected to the action of the machine. But it is well settled that a man cannot have a patent for the function or abstract effect of a machine, but only for the machine which produces it.

It is by not distinguishing between the primary and secondary sense of the term "process," that the learned judge below appears to have fallen into an error. It is clear that Burden does not pretend to have discovered any new process by which cast iron is converted into malleable iron, but a new machine or combination of mechanical devices by which the slag or impurities of the cast iron may be expelled or pressed out of the metal, when reduced to the shape of puddlers' balls. The machines used before to effect this compression, were tilt hammers *and alligator's jaws, [*269 acting by percussion and pressure, and by nobbling rolls with eccentric grooves, which compressed the metal by use of the inclined plane in the shape of a cyclovolute or snail cam. In subjecting the metal to this operation, by the action of these machines, more time and manual labor is required than when the same function is performed by the machine of Burden. It saved labor, and thus produced the result in a cheaper, if not a better manner, and was therefore the proper subject of a patent.

In either case the iron may be said, in the

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secondary sense of the term, to undergo a process in order to change its qualities by pressing out its impurities, but the agent which effects the pressure is a machine or combination of mechanical devices.

The patent of Burden alleges no discovery of a new process, but only that he has invented a machine, and, therefore, correctly states the nature of his invention.

The patent law requires that "every patent shall contain a short description or title of the invention or discovery, indicating its nature and design," &c. The patent in question recites that,

"Whereas Henry Burden, of Troy, New York, has alleged that he has invented a new and useful machine for rolling puddle balls, or other masses of iron, in the manufacture of iron, which he states has not been known or used before his application; has made oath that he is a citizen of the United States; that he does verily believe that he is the original and first inventor or discoverer of the said machine, &c."

The specification declares that his improvement consists in "the employment of a new and useful machine for rolling of puddlers' balls;" again he calls it "my rolling machine," and describes his "machine as consisting of a cast iron cylinder," &c. In fine, his specification sets forth the "particulars" of his invention, in exact accordance with its title in the patent, and in clear, distinct, unequivocal and proper phraseology.

It is true that the patentee, after describing his machine, has set forth his claim in rather ambiguous and equivocal terms, which might be construed to mean either a process or machine. In such case the construction should be that which is most favorable to the patentee, "*ut res magis valeat quam pereat*." His patent having a title which claims a machine, and his specification describing a machine, to construe his claim as for the function, effect, or result of his machine, would certainly endanger, if not destroy, its validity. His claim cannot change or nullify his previous specification with safety to his patent. He cannot describe a machine which will perform a certain function, and then claim the function itself, and all other machines that may be invented to perform the same function.

270*] *We are of opinion, therefore, that the learned judge of the court below erred in the construction of the patent, and in his first proposition or instruction to the jury. And as the second and third instructions are based on the first, they must fall with it. Taking the bills of exception to rejection of evidence in the inverse order, it is clear that the last two rulings, being founded on the erroneous construction of the patent, are, of course, erroneous. The testimony offered was directly relevant to the issues trying, and should have been received.

The refusal of the court to hear the opinion of experts, as to the construction of the patent, was proper. Experts may be examined as to the meaning of terms of art on the principle of "*cuique in sua arte credendum*," but not as to the construction of written instruments.

It remains only to notice the first bill of exceptions, which was to the rejection of the defendant's patent.

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This is a question on which there may be some difference of opinion. In some circuits it has been the practice, when the defendant has a patent for his invention, to read it to the jury without objection; in others it is not received, on the ground that it is irrelevant to the issue, which is a contest between the machine of the defendant and the patent of the plaintiff, and that a posterior patent could not justify an infringement of a prior one for the same invention.

By the Patent Act of 1793, any person desirous of obtaining a patent for an alleged invention, made application to the Secretary of State, and received his patent on payment of the fees, and on a certificate of the Attorney-General that his application "was conformable to the Act." No examination was made by persons qualified to judge whether the alleged invention was new or useful, or had been patented before. That rested wholly on the oath of the applicant. The Patent Act of 1790 had made a patent *prima facie* evidence; but this Act was repealed by that of 1793, and this provision was not re-enacted in it. Hence a patent was not received in courts of justice as even *prima facie* evidence that the invention patented was new or useful, and the plaintiff was bound to prove these facts in order to make out his case. But the Act of 4th of July, 1836, introduced a new system, and an entire change in the mode of granting patents. It provided for a new officer, styled a commissioner of patents, to "superintend, execute and perform all acts and things touching and respecting the granting and issuing of patents," &c. The commissioner was authorized to appoint a chief clerk, and three examining clerks, machinist and other officers.

On the filing of an application the commissioner is required *to make, or cause to [*271 be made, an examination of the alleged invention, in order to ascertain whether the same had been invented or discovered by any other person in this country, prior to the application; or whether it had been patented in this or any foreign country, or had been on public use or sale, with the applicant's consent, prior to his application; and if the commissioner shall find that the invention is new and useful, or important, he is authorized to grant a patent for the same. In case the decision of the commissioner and his examiner is against the applicant, and he shall persist in his claim, he may have an appeal to a board of examiners, to consist of three persons, appointed for that purpose by the Secretary of State, who, after a hearing, may reverse the decision of the commissioner in whole or in part. By the Act of 1839, the Chief Justice of the District of Columbia was substituted in place of the board of examiners.

It is evident that a patent, thus issued after an inquisition or examination, made by skillful and sworn public officers, appointed for the purpose of protecting the public against false claims or useless inventions, is entitled to much more respect, as evidence of novelty and utility, than those formerly issued without any such investigation. Consequently such a patent may be, and generally is, received as *prima facie* evidence of the truth of the facts asserted in it. And in cases where the evidence is

nically balanced, it may have weight with a jury in making up their decision as to the plaintiff's right; and if so, it is not easy to perceive why the defendant who uses a patented machine should not have the benefit of a like presumption in his favor, arising from a like investigation of the originality of his invention, and the judgment of the public officers, that his machine is new, and not an infringement of the patent previously granted to the plaintiff. It shows, at least, that the defendant has acted in good faith, and is not a wanton infringer of the plaintiff's rights, and ought not, therefore, to be subjected to the same stringent and harsh rule of damages which might be justly inflicted on a mere pirate. It is true the mere question of originality or infringement generally turns on the testimony of the witnesses produced on the trial; but if the plaintiff's patent in a doubtful case may have some weight in turning the scale in his favor, it is but just that the defendant should have the same benefit from his; *valeat quantum valeat*. The parties should contend on an equal field, and be allowed to use the same weapons.

We are of opinion, therefore, that the court erred in refusing to permit the defendants' patent to be read to the jury.

The judgment of the Circuit Court is therefore reversed, and a venire de novo awarded.

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*ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Northern District of New York, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to award a *venire facias de novo*.

Cited—15 How., 342; 8 Wall., 425, 430; 9 Wall., 795; 12 Otto, 722; 3 Blatchf., 195; 7 Blatchf., 477; 1 Holmes, 22, 58.

JOHN GARROW, THOMAS Y. HOW, JR.,
JAMES SEYMOUR, AND GEORGE MILLER, *Appellants*,

v.

AMOS DAVIS, GEORGE M. PICKERING,
WILLIAM MCCRILLIS, AND EPHRAIM PAULK.

Action for fraudulent deprivation of benefit of one's good will on sale of lands—what proof insufficient.

Black, as agent for the owners, contracted to sell a large quantity of land in Maine, which contract was assigned by the vendee, until it came, through mesne assignments, into the hands of Miller and others.

Payments were made from time to time on account; but at length, in consequence of a failure to make the payments stipulated in the contract, and by virtue of a clause contained in it, the contract became void.

In this state of things, Miller employed one Paulk to ascertain from Black the lowest price that he would take for the land, and then to sell to others for the highest price that he could get.

Paulk sold and assigned the contract to Davis for \$1,050.

Upon the theory that Paulk and Davis entered into a fraudulent combination, still, Miller and others are not entitled to demand that a court of equity should consider Davis as a trustee of the lands for their use. They had no interest in them, legal or equitable, nor anything but a good will, which alone was the subject matter of the fraud, if there was any.

But the evidence shows that this good will did not exist, for Black was not willing to sell to Miller and others for a less price than to any other person.

Although Paulk represented himself to be acting for Miller and others, when in reality he was representing Davis, yet he did not obtain the land at a reduced price thereby; but, on the contrary, at its fair market value.

The charges of fraud in the bill are denied in the answers, and the evidence is not sufficient to sustain the allegations.

THIS was an appeal from the Circuit Court of the United States for the District of Maine, sitting as a court of equity.

The appellants were complainants below, whose bill was dismissed under the circumstances stated in the opinion of the court.

The cause was argued by *Mr. Seward* for the appellants, and by *Messrs. Shepley and Rowe*, for the appellees.

**Complainants' Points.* [*273

Point I. The complainants, assignees of the contracts of February 17, 1835, for 28,804 acres of pine lands, had an interest in those contracts and lands, which subsisted until they were surrendered by Davis to Black, in November, 1844; and this interest was, if not a legal chose in action, at least a chose in equity of some, and even considerable value. These instruments were executory contracts for the purchase of land, of a value, variously estimated at different times, of from \$36,000 to \$172,000.

Point II. The complainants are proper parties, and are entitled to maintain their suit against the defendants.

Point III. The defendant Paulk, while acting as agent of the complainants, in procuring possession of the contracts and the power to assign them, and in conducting the negotiations in their behalf with Colonel Black, on the one side, and with the defendants and others, as purchasers, on the other side, committed the frauds charged in the complainants' bill. The allegations of the bill on this important issue are sustained.

Point IV. The defendants, Davis, Pickering, and McCrillis, by means of frauds committed by Paulk with their knowledge, had, by colluding with him in the perpetration of these frauds against the complainants, acquired from Colonel Black, at the cost of the complainants, and under false representations to him that they were the assignees of the complainants, and that the complainants were the real beneficiaries, the contracts for the 28,804 acres of pine land in Maine, which was of very considerable value.

Point V. The defendants' excuses and attempts to explain are unavailing.

Point VI. The complainants are entitled to a decree, according to the prayer of their bill. The account to be decreed is an account of future as well as past profits; and the defendants ought to be decreed to assign the contract of Black to the complainants upon just terms, so as to secure the defendants their advances, and to the complainants their profits.

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Defendants' Points.

1. None of the parties plaintiff had any interest in or under the Black contract at the time of the alleged fraud.

2. The claim, if any, is stale, and is lost by laches of the plaintiffs.

They have never refused to Davis the money he paid, nor offered to do so.

274*] "They never offered to repay the cash payment of \$7,500; or to take up, or to indemnify Davis and Paulk against the notes given for the land; but waited till September, 1847, till the result of the operations on the township showed the speculation to be a good one; and then they filed their bill claiming the benefit of it.

No court can allow one party to hold himself prepared to take advantage of all favorable contingencies, without being affected by those which are unfavorable. (Marshall, *Ch. J.*, in *Brashier v. Gratz*, 6 Wheat., 528; 13 Ves., 238; 4 Dall., 345; 14 Pet., 170; *Benedict v. Lynch*, 1 Johns. Ch., 370.)

3. The plaintiffs had not the means nor the intention of purchasing the lands at such a price as they would fetch in the market. They were embarrassed in their finances, disgusted with speculations in Eastern lands, and "in ignorance, doubt and uncertainty, as to the real value of said lands, and the true quantity of pine timber thereon;" their only intention being to sell the contracts. Paulk was directed to ascertain the final and lowest price that Black would take for the lands of the persons holding the contracts, for the purpose of aiding him in the sale of the contracts, and not for the purpose of enabling his principals to decide whether they would or not become purchasers of the lands.

Years after, when the price had been quite or nearly repaid, by the proceeds of the timber, plaintiffs claim to be the equitable owners, without having advanced, or offered to advance, a single dollar.

That of which the bill charges that the defendants defrauded the plaintiffs—that is, the difference between the price at which Black would sell the lands to the plaintiffs, and the price at which he would sell to others; or, "so much as the said John Black, by compromise, should agree to take less than the fair value of the lands"—did not exist.

4. There was no fraud on the part of either of the defendants.

Each denies all combination, fraud, &c., on his own part; and knowledge, or belief, of any, on the part of his co-defendants, &c.

As each stands, in relation to this question of fraud, in a position different from the others, it will be necessary to consider their positions separately.

Paulk was the agent of Miller alone of plaintiffs (p. 48); and of Norton. The case shows no precedent authority, or subsequent ratification, from the others.

By his answer, it appears that the only instructions he had from Norton were to sell, for **275*]** \$1,000; and if he could not get *that, to take less, and "to close the matter in the shortest possible time."

That Miller's instructions were, to endeavor to find some one who would buy the lands, and give the holders of the bonds some portion of
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the lands, or of the profits (if any) of the speculation; and, "if he could not make such an arrangement, to sell the contracts for the most he could get, as the holders had neither the intention nor the means of buying themselves."

He attempted to make such an arrangement with Pickering, and failed. Any further attempt would have been useless, as Black asked him more for the land than it would fetch in the market.

He then sold the contracts for the highest sum offered.

Upon these points, the answer is responsive and uncontradicted.

There is no evidence that he could have got any more for the contracts; there is no evidence that they were worth any more.

The answer denies that he was bound by his instructions to ascertain Black's lowest price before selling; and is not contradicted.

He did, however, first ascertain all that was material on this point, namely: that Black would make no reduction in favor of his principals, nor sell the lands for less than the full market value.

The answer denies all improper disclosures to the defendants.

The answer denies that any false statement was made to Miller or Norton; and sets out the statements which were made.

There is no evidence which contradicts it, in this respect, in any material point.

The agreement, that he should continue the negotiation with Black for Davis' benefit, was not a provision for his own private benefit, but a necessary consequence of the idea of reduction in price, which he held out as inducement to Davis.

The answer denies that he had any interest in the purchase from Black, and that he received any money, property, or securities from any of the defendants, for anything done before the assignment to Davis.

The payment of \$1,500 was for honest and proper services rendered to Davis afterwards.

The answer on this point is responsive, and not contradicted—that he acted with fidelity to his principals, to the extent even of wronging Davis, by suppressing facts which he should have disclosed to him.

(Then followed an analysis of all the answers.)

***Mr. Justice Curtis** delivered the **[*276]** opinion of the court:

This is an appeal from a decree of the Circuit Court of the United States for the District of Maine, dismissing the complainants' bill. The substance of the bill is, that John Black, as agent for the trustees under the will of William Bingham, on the 17th of February, 1835, contracted, in writing, with Charles Ramsdale to sell to him a township and adjacent tracts of land in that State, containing 20,804 acres, for the price of \$8 per acre, payable one fifth in sixty days, and the residue in four equal annual payments—the contract of sale expressly providing that, in case of failure to make either of these payments, the contract was to be void. That, on the 1st day of April, 1835, Ramsdale assigned these contracts to Nathaniel Norton and Jairus Keith, in consideration of their agreement to pay to him the sum of \$2 for each

acre of the said lands; and that, at a still further advance of \$1 on an acre, the contracts of Black came to the complainants and one Herman Norton, by assignment, in November, 1835.

That Ramsdale made the first, and the complainants some other payments, amounting in the whole to about \$4,000, but failed to pay the residue. That subsequent to the year 1840, nothing was done by them concerning the lands until after July, 1844, when one of the complainants received from Black a letter stating that, though all their rights were terminated many years since, he desired to know whether they wished to do anything respecting the payment for the lands. That, thereupon, Miller, one of the complainants, employed Ephraim Paulk, one of the defendants, to negotiate with Black, and finally instructed him to ascertain from Black the lowest price at which he would let the complainants have the land, and then to sell the complainants' rights and interests under the contracts for the highest price he could obtain—the supposition of the complainants being, that Black would sell the lands to them for much less than he could obtain from others, by reason of their having already paid a large sum towards the purchase money, under the contracts above mentioned. The bill further states, that Paulk sold and assigned to Davis for the sum of \$1,050; and it charges that, before doing so, he entered into a fraudulent combination with Davis and the other defendants to obtain from the complainants an assignment of these contracts for a trifling sum, and then to negotiate with Black as if for the complainants, and thus defraud the complainants of what Black should be willing to discount from the fair value of the lands, on account of their peculiar equities; that he, in 277*] combination *with the other defendants, actually executed this scheme, and obtained the lands from Black for a much less price than could have been got from others, by reason of Black's belief that he was abating the price for the benefit of the complainants. And the bill prays that the defendants may be treated as trustees of the complainants, in respect to these lands, and for an account, and for other relief.

So far as respects the title to these lands, or any claim of the complainants to have them charged with a trust in their favor, we think the complainants, upon the statements in their bill, and upon the proofs, have made no case. They had no legal or equitable title under their contracts with Black. Being in default for more than seven years, and about four years having elapsed since anything had been done by them under these expired contracts, they were not in a condition to insist on any rights or claims to the land; and, as will be presently more fully stated, Black did not treat with them or their agent upon the basis of any legal or equitable right, nor is it alleged that they had any intention or took any measures to acquire the lands. In consequence chiefly of Black's letter, of the 22d of July, 1844, inquiring what they wished to do about the payments, they conceived that Black might be willing to sell the lands to them for less than he would sell them to others, and that this good will might be a valuable subject of sale. To dispose of it, they employed the defendant, Paulk. If

they have been defrauded, in its sale, defendants, they are entitled to relief. The lands themselves they had no interest in; did not intend, by Paulk's agency, to sell them; and if all the fraud charged in the bill was perpetrated, it affected not any interest in the land, or any negotiation or acquisition, but solely the compensation they might otherwise have obtained for the good will towards them, as the holders of expired contracts. This was the only matter upon which the alleged fraud could operate.

To this subject matter our inquiries are limited. To entitle themselves to relief, the complainants must prove fraud and injury, or, to state the principle less abstractly, must show that their agent disposed of the land for less than its fair value, and was employed to sell, for less than its fair value, and that he did this fraudulently.

The value of the complainants' interest in the lands, as alleged by the bill to have consisted in the intention of Black to sell the lands to the complainants for less than their fair value; the intention is alleged to have been actually executed by Black, by a sale to the defendant, Davis, at a price far less than he could have obtained from others, under the belief that the payment of price was for the benefit of the complainants. If this were so, *it could not be doubted that the complainants' interest was a valuable one, and that its value, capable of being precisely ascertained, would then amount to the sum which thus abated from the market price of the lands.

But the proofs not only fail to show that Black intended to abate anything in the price, but they leave no doubt that he sold the lands for their fair market value, without any abatement whatever. The complainants have taken his testimony, and he testifies that he did not consider the complainants any legal or equitable claims originating in the contracts; that he never intended to allow them any allowance or consideration for the renewal of the bonds or contracts; that when he sold the lands, he did not consider that he had made any deduction on account of the claims of the complainants; that if any person had offered him more for the lands than Paulk did, he should have sold them to that other person; and if Paulk had not sold the lands at \$30,000, he should have sold them at any price to anyone who offered it. So far, as respects the motives of Black, his own views of the nature of the transaction, his testimony is in direct conflict with the allegations in the bill. And so far as it tends to prove that he did not sell the lands for less than he could have obtained from others, he demanded and received the fair market value for them, it is corroborated by every witness who has been examined concerning its value. Dwinal and George N. Black, two of the complainants' witnesses, say \$30,000 was a fair price for the lands; and Addison Dodge, who is proved to be a person of uncommon experience and judgment concerning the timber lands of that country, and whose testimony was taken by the defendants, explored these lands in 1843 for Black, and reported to him that \$30,000 was all they were worth; and he testifies that this was his opinion, formed from a care-

ful examination. Though Black does not so state, there can be no doubt that he fixed this price in consequence of Dodge's report to him; for he employed Dodge to make the examination, and he expresses, in his deposition, entire confidence in his skill and integrity. It follows from this, as well as from what Black directly testifies to, that the price at which the lands were actually sold, was fixed as the fair market value of the lands, for which Black, as an agent to sell, was willing to sell to anyone, though he preferred to sell to the complainants, if no one should offer more.

It is true Black at first demanded of Paulk \$43,206 for these lands. This was before the sale by Paulk to Davis, of the complainants' interests; and it has been argued that as the lands were actually obtained for \$30,000, this 279*] proves that Davis was "benefited by the acquisition of the complainants' interest to the extent of \$13,000. If Davis, when he purchased the complainants' interests, had been aware that Black asked \$43,000 for the lands, and had been willing to acquire the complainants' interest to endeavor thereby to get them for a less sum, this would have a tendency to prove that he was willing to give somewhere about \$13,000, and that any reduction, below that sum, might be treated as the value of the complainants' interests. But it is explicitly denied by the answers of Paulk and Davis, and there is nothing in the case to control that denial, that Davis knew, when he negotiated with Paulk, that Black asked \$43,000 for the lands.

We think the fair result of the evidence is that Paulk concealed this fact from Davis, and that Davis believed he could get the lands for \$1 per acre. So that he actually paid the fair value and something more than he expected to pay.

Upon these facts we are unable to come to the conclusion that when the complainants parted with this expectancy of good will from Black for \$1,050, they received less than they could have justly obtained; or that when Davis purchased, he got any appreciable pecuniary advantage from representing the complainants.

Upon this ground, therefore, the case fails.

But inasmuch as there are charges of fraud contained in the bill, we think it proper briefly to examine them.

As respects the two defendants, McCrillis and Pickering, they were not connected with the purchase from Paulk by Davis. They came into the purchase subsequently, in the manner stated in their answers, which it is unnecessary to detail, and there is no evidence which tends to show that they were guilty of any fraud.

In reference to Paulk and Davis, there are circumstances which, if unexplained, would certainly be fraught with much suspicion, to say the least.

After the sale by Paulk to Davis of the complainants' interests, Paulk continued to act in the negotiation with Black, and it is admitted that he received \$1,500 from Davis. But the explanation offered is, that from the necessity the case of Paulk must continue to negotiate with Black as if for the complainants; that they understood he was to do so; that only in this way

could their expectancy of favor from Black be sold; and that no contract was made or understanding had with Davis by Paulk, save what appears on the face of the papers, that Davis was to pay him for his services subsequent to the assignment. That when Davis gave his notes to Black, the latter required a surety, and the parties being at Ellsworth, *Davis for the first time requested Paulk [*280 to sign the notes. That Paulk at first declined, saying he was insolvent, but at last consented on being assured that Davis would pay him what Pickering, a mutual friend, should say was proper, and Pickering afterwards fixed the sum at \$1,500 for all his services. The answers of both Davis and Paulk, deny, with clearness and precision, every charge of fraud, and especially negative the fact that this payment of \$1,500 had any connection with or influence upon the sale by Paulk to Davis of the complainants' interest. Their account of the matter may be true. There is no evidence to prove it is not so, and grave as the causes of suspicion may be, they are not sufficient to overcome these precise and clear statements in the answers.

The letters of Paulk to the complainant Miller and his failure to give him notice of an inquiry by Black what was the most they could afford to pay, are relied on to show that Paulk kept Miller in ignorance of the material facts, and pressed him to a sale in undue and unnecessary haste and with unfair intentions.

In his note of the 24th of October, 1844, Paulk tells Miller, that "what is done with Col. Black must be done this week." It does not appear affirmatively that Black had said so, and he does not remember saying so. But after the lapse of six years he might have forgotten it, if he did say so, and he testifies that he does not recollect the particulars of the different conversations with Paulk. But however this may be, the negotiations actually went on until the 16th of November, before a sale was made by Paulk, and upon learning from Miller that he thought he could effect something by personally visiting Black, he wrote to Miller informing him he had sold the bonds for \$1,050, but that he had obtained the consent of the purchaser to suspend the transfer until the 25th of November; that they were not willing to wait longer, because they desired to operate on the lands the coming winter, and in order to do so the matter must be decided on immediately; and he then strongly urges Miller to come at once to Bangor, in season to avail himself of the contract he had made, if he should find that to be most for his interest. This letter he sent to him by express to insure its reception in season.

This can hardly be reconciled with the charges in the bill, or the deductions made by the complainants from some of the circumstances, that Paulk had unduly hastened the transfer, and intended to keep Miller in the dark and to sell to Davis for less than he might have obtained from another.

Upon consideration of the charges of fraud in the bill, and the answers denying those charges, and the proofs in the case, we are of opinion that the complainants have failed to make out the fraudulent combination [*281 between Paulk and Davis which they have al-

leged, and that upon this ground also the bill must be dismissed.

The decree of the Circuit Court is affirmed, with costs.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Maine, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

HOLLINGSWORTH MAGNIAC, DANIEL SMITH MAGNIAC, AND WILLIAM JARDINE, late trading under the firm of MAGNIAC & COMPANY, *Appellants*,
v.

JOHN R. THOMSON.

Compromise discharge of imprisoned debtor construed.

A plaintiff in a judgment having the defendant in execution under a *ca. sa.*, entered into an agreement with him that the plaintiff should, without prejudice to his rights and remedies against the defendant, permit him to be forthwith discharged from custody under the process, and that the defendant should go to the next session of the Circuit Court of the United States, and on the law side of that court make up an issue with the plaintiff, to try the question whether the defendant was possessed of the means, in or out of a certain marriage settlement, of satisfying the judgment against him.

The debtor was released; the issue made up; the cause tried in the Circuit Court; brought to this court, and reported in 7 Pet., 348.

By suing out the *ca. sa.*, taking the defendant into custody, entering into the arrangement above mentioned, and discharging the defendant from custody, the plaintiff, in all legal intendment, admitted satisfaction of his demand, released the defendant from all liability therefor, and destroyed every effect of his judgment as the foundation of legal rights.

In such a state of things a court of equity will not interfere at the instance of the plaintiff.

The allegation of fraud in the marriage contract is not sustained by the evidence; nor was the refusal of the defendant to apply the property which accrued to him upon the death of his wife, to the discharge of the debt, a violation of the agreement under which he was released.

The averment in the bill that the rights of the plaintiff under the judgment, remained unimpaired, is incompatible with a right to resort to a court of equity.

THIS was an appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania, sitting as a court of equity.

Magniac & Company, being English subjects, had two judgments against Thomson, one in the Circuit Court of the United States for Pennsylvania, in 1827, and the other in the Circuit Court for New Jersey, in 1829.

282*] *On the 1st April, 1829, the appellants sued out a writ of *capias ad satisfaciendum* on the judgment in the Circuit Court of the United States for the Eastern District of Pennsylvania to April session, 1829, to which the marshal, on the 8th April, 1830, returned *non est inventus*, and on the same day an *alias*

capias ad satisfaciendum was sued out to April session, 1830, Number 9, to which, on the 12th April, 1830, the marshal made return of "C. C. and enlarged by agreement of plaintiff's attorney."

The appellee was discharged out of custody by the consent of the plaintiffs in the judgment, under the following agreement, viz.:

Magniac v. Thomson, No. 18, Circuit Court of the United States, Pennsylvania District, October, 1826.

Defendant having been taken by *ca. sa.* in this suit, at his instance it is agreed that he be set at liberty on giving security to abide the event of an issue to be formed for ascertaining, by judicial decision, whether he has the means, by the property in his marriage settlement or otherwise, of satisfying the judgment, which issue is to be formed by plaintiff's affirmation and defendant's denial of such means; both parties hereby consenting to try such issue at the ensuing session of the Circuit Court of the United States for this district, on the merits, without regard to form or to the time when the jury may be summoned; it being expressly acknowledged by defendant that this agreement is made for his accommodation, without any prejudice whatever to arise to the plaintiff's rights by the defendant's enlargement on security as aforesaid or otherwise howsoever.

April 8th, 1830.

JOHN R. THOMSON.

I hereby become answerable for the performance of the terms above stated, which I guarantee.

R. F. STOCKTON.

Witness, J. P. Norris, Jr.

On the part of the plaintiffs in this case, I hereby consent to the defendant's enlargement on the terms stated in his within proposition and agreement of this date.

9th April, 1830.

C. J. INGERSOLL,

Attorney.

In pursuance of this agreement, a new suit was entered by agreement on the 3d June, 1830, in the Circuit Court of the United States for the Eastern District of Pennsylvania, in the third circuit, by these appellants against the appellee, to try the issue to be formed under the above agreement of the 9th April, 1830.

The case was tried and is reported in Baldwin's Reports, 344. It resulted in a verdict for the defendant. Being brought to this court upon a bill of exceptions, the judgment of the Circuit Court was affirmed, as reported in 7 Pet., 348.

*The death of Mr. Thomson's wife [*283 being supposed to place at his disposal certain property which might be properly applied to the payment of the judgment, Magniac & Co. applied for a rule to show cause why a *scire facias* should not issue to revive the judgment. Thomson set up his arrest and discharge under the *ca. sa.* as a legal satisfaction of the judgment. Magniac & Co. then withdrew the rule and filed the present bill.

The substance of the bill is very fully stated in the opinion of the court, and need not be repeated. The bill was demurred to, and, upon argument, the Circuit Court sustained the demurrer and dismissed the bill.

The complainants appealed to this court.

The cause was argued here by Messrs. E.

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Ingersoll and C. Ingersoll for the appellants, and by **Messrs. John M. Read and Cadwallader** for the appellee.

Only such of the points will be mentioned as are involved in the opinion of the court.

Appellants' Points.

Construction of the Agreement of 8th of April, 1880. If the meaning of this paper were less than is insisted by the plaintiff, its last sentence, beginning "it being expressly acknowledged," would have been omitted altogether. That sentence is not merely without purpose or sense, but is directly in the teeth of the meaning of the parties to the contract, if not intended to bind the defendant by a promise to stand by the judgment after the discharge as much as before. The words "or otherwise howsoever," which the defendant supposes we rely upon, may be rejected without injury to the plaintiffs. Such general words, in the case of extremely formal papers, in which the meaning of the parties is expressed at great length, might perhaps have little force, but in a brief stipulation, such as this, drawn up in haste, probably, and in order to an immediate and pressing object, they ought to have their full force and popular construction. They should be interpreted to signify that if by the words which precede them the plaintiff's interests under the judgment are not fully guarded, the defendant shall give them protection "otherwise howsoever." They amount to a covenant for further assurance.

The agreement, interpreted in any other way, leads to this absurd conclusion, namely: that the plaintiff Periled his whole debt without a motive, while the defendant obtained his enlargement from custody, giving no equivalent therefor.

If the plaintiff had refused all arrangement, 284*] and simply permitted *the defendant to remain in custody, he would have resorted to the insolvent law of Pennsylvania, or of the United States. In the former case he must have given fuller security than he gave under the agreement of 8th of April, 1880, and there would have been a trial of the question whether the defendant was possessed of property, more advantageous to the plaintiff than the trial in the federal court. In the latter case, of an application by the defendant under the United States Insolvent Law of 1800, the plaintiff, had he succeeded in breaking the trust, would have got the whole trust property, and whether he failed or succeeded, would have had security of the most binding sort in the custody of the defendant's person. The plaintiff therefore gained nothing by the agreement, for it is not pretended, on the other side, that he got anything by it if he did not get security of a superior character for his debt, or a better trial of the question upon which it turned. He simply, as expressed by the agreement, set the defendant at liberty at the defendant's instance. He did an act of kindness, upon the defendant's agreement that it should be without prejudice.

The defendant, on the other hand, acquired, first, his immediate liberty, which he could get only by agreement; and second, a trial of the question of property in the federal court; a better trial for him than one in the Common Pleas, and much better than under the Insolvent Law

of 1800, because that would have detained him in custody during the time the cause was pending, which was about three years.

It is submitted, that to give any other interpretation to the agreement would be to stultify the plaintiff, who dealt with the defendant liberally enough, but did not go the length of giving away his debt.

The question whether, under this agreement, the plaintiff was entitled to a second *ca. sa.*, is one which is without difficulty, the fact once established that the defendant has evaded by fraud, or violated the agreement; for *Baker v. Ridgway*, 2 Bing. 41, and other cases, are precedents for a second *ca. sa.*, when the plaintiff has been fraudulently induced to discharge from the first.

In *Baker v. Ridgway*, a commission of bankruptcy having been sued out against a defendant in custody, under a *ca. sa.*, the plaintiff, in order to prove his debt, discharged defendant from the execution. The commission having afterwards been superseded, plaintiff took defendant in execution again. Defendant moved for his discharge, but the plaintiff alleging that the commission had been fraudulently procured to induce him to discharge the defendant from the original *ca. sa.*, the court refused the motion, referring it to a jury to try the question of fraud, *holding that if there were fraud [285 in defendant's procurement of discharge from the first *ca. sa.*, the second was well issued.

Best, *Ch. J.*, says: "If there has been no fraud in the transaction, I am of opinion the defendant is entitled to his discharge; if there has been fraud, we are all of opinion he is not so entitled. I have looked through all the cases on execution against the person, from the earliest period down to the present time, and I am aware of the great jealousy of the law on the subject of personal restraint. I am aware that where a party had been discharged on account of privilege of Parliament, it was doubted whether he could be retaken after that privilege expired, and the interference of the Legislature became necessary to sanction such a proceeding; so, when he died in confinement, it was doubted whether the creditor, having resorted to the highest remedy the law afforded, could have any further means for the recovery of his debt, though the debtor left property behind him: that doubt was also set at rest by the authority of the Legislature. I am therefore clear, that where a commission of bankrupt is sued out against a party in execution, he not being privy thereto, if the plaintiff abandons his execution and proceeds against the effects of the party, by proving his debt under the commission, he has taken his chance, and though there should be no assets forthcoming, the defendant is secure in his discharge. (However, I consider myself no more bound by an opinion delivered in the present summary mode of treating the question than I should be by an opinion delivered at *nisi prius*.) But if the debtor, in concert with others, procures a commission of bankrupt to be sued out against him, or it is procured with his approbation and consent, in order to entrap the plaintiff to come in and prove his debt, and is then superseded for some latent defect unknown to the plaintiff, that does not entitle the debtor to his discharge; and if we were to hold otherwise, we should violate a

principle of law which has never been broken in upon, namely: that a party shall not be allowed to take advantage of his own wrong. I say this, because in *Jacques v. Wilkey*, though Ashhurst, J., says, 'I know of only one case where a debtor in execution, who obtains his liberty, may afterwards be taken again for the same debt, and that is when he has escaped, and the reason of that is, because he was not legally out of custody,' yet Buller J., did not assent to the generality of the proposition thus laid down by Ashhurst, J., and wished to introduce qualifications. Indeed, even according to the proposition laid down by Ashhurst, J., if this discharge has been obtained by a fraudulent commission, and the plaintiff has afterwards been cheated by a *supersedas* out of the benefit sought by the proof of his debt, the defendant may be taken again, *because the fraud has avoided the whole transaction, and the defendant has never been legally out of custody."

That it may be seen that under the insolvent laws of Pennsylvania a second *ca. sa.* would have issued against the defendant had he been defeated in the Insolvent Court upon the question of the validity of the marriage settlement, the following extract is given from *Ingraham on Insolvency*, pp. 28, 29:

"Where, from any cause, the petitioner is refused the benefit of a discharge, he must surrender himself to prison."

"Where a party gives bond and fails to comply with the condition, either by not attending, in consequence of which his petition is dismissed, or by not surrendering himself if the prayer of his petition be not granted, another execution may be issued against him; and if he neglect to file his petition within the time prescribed by law, the creditor is not obliged to wait for the day of hearing, but may issue another execution the moment he can legally ascertain the fact. The surety in the bond would be liable, in such a case, notwithstanding the second execution, which would be no discharge of his responsibility, being for his benefit."

Also, with the same object, is quoted part of the syllabus of *Pulethorpe v. Lesher*, 2 Rawle, 272:

"Where a defendant in custody gives bond with surety to take the benefit of the insolvent laws and forfeits his bond, a second execution may be issued against him."

Section 1 of the United States Insolvent Law of the 6th of January, 1800 (2 Stat. at Large, 4, 5, 6), shows that the debtor remains in custody until his right to discharge is finally decreed; and therefore that, had the defendant applied for the benefit of this Act, he must have laid in prison pending the question of the validity of the settlement.

Assuming, then, our construction of the agreement to be the true one, the next question is,

Whether the case is one for relief. On the part of the plaintiff, the defendant's reasoning is not appreciated, whereby he denies the plaintiff's right to relief under the head of fraud and mistake. It is submitted, however, that whatever may be the appropriate term for his title to relief, the principles and cases found under these two heads of equity are directly applicable to the facts before the court. And know-

ing no other names under which to classify those facts, the question of relief will be considered under the two titles of fraud and mistake.

Fraud. If it were a case of mere breach of contract, as alleged by defendant, it would not be cognizable in equity. Nor would it be cognizable in equity if it were a case of fraudulent breach of contract, and not more, for even fraud is cognizable *at law unless there [*287 be in the case something to oust the jurisdiction.

If A purchase commodities of B, and do not pay for them, this is a breach of contract cognizable at law. If A purchase commodities of B, with the preconceived design not to pay for them, afterwards carried into effect, this is a fraud as well as a breach of contract, but does not entitle the party to relief in equity.

But here is a case where there can be no relief at law, because (we assume for the sake of argument) the courts of law have declared that a judgment is paid when the defendant is taken under a *ca. sa.*, and that even the defendant's own agreement to the contrary shall not change the rule. That a defendant's conduct, in entering into such an agreement and then violating it, is "scandalous," as the courts have termed it, but that there is no remedy at law.

The fraud is palpable. The defendant is in custody. He says to the plaintiff, the rule of law is, that if you discharge me the judgment is satisfied; but I pledge myself that, as between you and me, there shall be no such rule, and that if you will let me go your judgment shall stand exactly as it did before your *ca. sa.* was issued. This solemn agreement the defendant, having had the benefit of it, utterly violates. He declares the judgment to be good for nothing, and the agreement good for nothing, and when the plaintiff takes proceedings at law he sets them at defiance. That is, having trepanned the plaintiff into the bargain by means of a promise that he will not exact the penalty of the position, he turns round and insists upon it.

The plaintiff then comes into equity. This case is like that of a man who, holding a note five years and eleven months old, is told by the drawer to wait six weeks longer before he sues, and that the note shall be as good at six years old as it was before, and then, being refused payment, and having gone into court, the defendant pleads the Statute of Limitation against him. The case is like that of a plaintiff, in a judgment, who enters satisfaction in order that the defendant may be able to make title to a certain portion of the real estate bound by the judgment, the defendant having agreed in writing that the satisfaction should be canceled, and the lien of the judgment restored, as to the rest of his real estate, immediately after his sale was effected, and then is told by the defendant, your judgment is gone, and you will never get another. Like the case of one who, having given his receipt in full, but without value, to a debtor, in order that he might settle with a third person, is turned upon by the debtor, and told that his debt is paid, and here is the receipt for it. Like the case of an obligee who, *having released one of two co- [*288 obligors, for the mutual purposes of obligee and obligors, and, with the agreement that the

discharge should be without prejudice as to the remaining obligor, is informed by him, after the object of the discharge has been accomplished and the advantages from it attained, that he does not mean to hold himself liable after the release of his co-obligor.

These are cases not distinguishable from that before the court, and they are obviously for relief in equity. They are all cases in which a party has gained a fraudulent advantage of another, which, not being relievable at law, will be relieved in equity, unless something can be shown to the contrary.

It is pretended by the defendant here, to the contrary, that to relieve under this agreement, of 8th April, 1830, would be to run counter to that policy which, favoring liberty of the person, has refused to permit a second *ca. sa.* for the same debt. To this the answers are:

1. The whole question of the liberty of the person, so far as *ca. nas* affect it, is now at rest, for they have been abolished by statute, and though not abolished when this agreement was entered into, they were when the violation of it took place, and the present question arose.

2. There are two cases to the point, that this rule concerning the liberty of the person yields before proof of the defendant's fraud in procuring his discharge. (*Baker v. Ridgway*, 2 Bing., 41; 9 Moore, 114; *Holbrook v. Champlin*, 1 Hoff. C., 148.)

3. On principle it would be strange, indeed, if that policy of law and equity, and of all society which sets its face against fraud, should give way before the so-called policy here invoked, which amounts to nothing at all since arrest for debt has been abolished, and which never did amount to more than a train of unfortunate decisions, which, if they could be recalled, would never be made again.

It is also pretended by the defendant, that to relieve the plaintiff would be to favor a stale claim.

(The counsel then proceeded to examine this branch of the subject.)

Points for Appellee.

On the principal question of law involved in the case, the position of the appellee is, that by his release from imprisonment, on the 8th of April, 1830, the execution and judgment against him were satisfied, and the original debt wholly extinguished.

This position is the necessary result of the fundamental principles of English law on the subject of executions, their various sorts and 289] *relative effects. The whole doctrine of the common law, as understood both in England and America, and as applicable to the present case, may be stated thus: the creditor, by issuing a *capias ad satisfaciendum*, chooses the body of the debtor in preference to his lands or goods, as the source of his satisfaction. By making an arrest, he secures to himself the satisfaction he has chosen, and is thereby estopped from resorting to any other mode of execution. As long as he holds the body in custody, he is in the possession and receipt of a continuing satisfaction; and when, with his consent, the body is released, he confesses that his satisfaction is complete, and the debt for which he demanded it thereby extinguished; and if the release is accompanied by any agree-

ment with the debtor, or third parties acting for him, such agreement (whatever may be its terms) is a new and original contract, which can in no way affect the completeness of the satisfaction previously received.

From a series of decisions upon these points, covering full four centuries, it is believed that only a single case can be cited in conflict with the rule thus stated. As *Blumfield's case*, 5 Rep., 87, is much relied upon, it is proper to examine it at some length. The statement of facts by Lord Coke is simply this: "Two men were bound jointly and severally in a bond—one was sued, condemned, and taken in execution, and afterwards the other was sued, condemned, and taken in execution, and afterwards the first escaped and thereupon the other brought *audita querela*." Judgment was given against the prayer, and the decision is undoubtedly clear law, and is perfectly in harmony with the principles above laid down. Lord Coke, however, in his annotation, cites the case of *Jones v. Williams* (elsewhere reported), "where two men were condemned in debt, and one was taken and died in execution, yet the taking of the other was lawful." This case may also be very good law, but makes nothing against the present appellee. Lord Coke proceeds, "and then" (in *Jones v. Williams*) "it was resolved by the whole court, that, if the defendant in debt dies in execution, the plaintiff may have a new execution by *elegit* or *fi. fa.* for divers reasons," which he goes on to enumerate. It is for this passage that the case has been often heretofore and is now cited, the value of the authority being merely this: that Lord Coke, in reporting a principal case, which is entirely with us, refers to an unreported case, which is also with us, but in which there is a *dictum* against us of which he appears to approve. But whatever may have been its original authority, this *dictum* has been repeatedly declared not to be law. *Blumfield's case* was argued in 39 Eliz., and published *in 3 [290] James, and must consequently have been well known in 4 James, when the case of *Williams v. Cutleris*, also cited as *Cutter v. Lamb*, was decided. (Croke Jac., 136.) Yet, in the last-mentioned case, the defendant having died in execution, the court held that the plaintiff had no further remedy. In *Forster v. Jackson*, Hobart, 52, 57, where the same point arose, Hobart, *Ch. J.*, makes the same decision, and in the course of an elaborate opinion, approves the cases of *Blumfield*, and *Jones v. Williams*, but condemns the *dictum* which accompanies them. Since then, in *Sir Edward Coke's case*, and in *Case v. Fleetwood*, it was pronounced "not to be law;" and in *Taylor v. Waters*, where a similar point arose, and counsel urged its authority, it was wholly disregarded by the court. (Godbolt, 294; Littleton, 325; 5 Maule & S., 103.) From that time up to the present, though similar questions have frequently risen, it is believed that this citation has never been offered to the consideration of an English tribunal.

Having disposed of this *dictum*, we will proceed to examine, in the first place, those cases in which it has been held, that the release of a debtor in execution, by the plaintiff's consent, is a satisfaction of the judgment and execution, and also an extinguishment of the debt.

The counsel then cited and commented upon the following cases: *Cro. Car.*, 75; *Styles*, 117, 387; 2 *Mod.*, 136; *Barnes' Notes*, 205; 4 *Burr.*, 2432; 1 *T. R.*, 557; 1 *Bos. & P.*, 242; 6 *T. R.*, 525; 7 *Id.*, 420; 2 *East*, 243; 1 *Barn. & Ald.*, 303; 2 *Moore*, 235; 6 *Man. & Gr.*, 755; 4 *Jur.*, 600; 11 *Id.*, 800; *Law Com. Rep.*, 48; 15 *Law Magazine*, 132, 133.

In all the above cases, the discharge was by the plaintiff's consent, and it is believed that they establish incontrovertibly the position assumed, that every such discharge operates to satisfy the judgment, the execution, and the original debt. It remains, in the second place, to examine into the effect of an arrest and imprisonment upon a *ca. sa.* generally; the position of the defendant being, that such an arrest and imprisonment, if regular, constitute a perfect satisfaction, so long as the imprisonment continues, and that the nature of the satisfaction can only be impaired by an interruption of the imprisonment through the tortious act of the defendant himself, or the operation of the law in *invitum*, as against the plaintiff.

In *Year Book*, 33 *Hen. VI.*, it is said by *Davers*, "Suppose a man recover against me, and take my body in execution, he shall have neither *elegit* nor *fi. fa.*, nor any other executions, because this amounts in law to satisfaction." (Page 48, 1455.) So, in 18 *Hen. VII.*, it is said by *Keble*, "If, on a *ca. sa.*, the sheriff return *cepi corpus*, the plaintiff shall never 291*] have another **ca. sa.*, for he learns, from the return of the sheriff, that he was in execution, and then he had the object of his suit." (Page 1.)

But perhaps the most carefully considered case on this whole subject is that of *Foster v. Jackson*, where the defendant died in execution, and the plaintiff brought *scire facias* against his executors. After examining *Blumfield's* case, and reviewing the subject at length, *Ch. J. Hobart* says: "But now singly out of the very point, I hold that a *capias ad satisfaciendum* is against that party as not only an execution, but a full satisfaction by force and act and judgment of law, so as against him he can have no other, nor against his heirs or executors, for these make but one person at law." And, in concluding, he lays down the broad principle on which many of the decisions already referred to are based, especially those where an agreement to surrender has been held to be void, "that the body of a free-man cannot be made subject to distress or imprisonment by contract, but only by judgment." (*Hobart*, 52.)

The law, as laid down in *Foster v. Jackson*, governed all subsequent cases of death in execution, until Parliament interfered, and, by the Statute of 21 *Jac. I.*, ch. 24, gave the creditor a further remedy against the estate of the deceased. (1 *Strange*, 653; 8 *T. R.*, 123; *Ambler*, 79; 5 *Maule & S.*, 73; 13 *Ves.*, 193; 8 *Mer.*, 224, 233-235; 20 *L. J.*, Ch., 174; 15 *Jur.*, 49; 18 *Beav.*, 229; 1 *Eng. L. & E. R.*, 146; 8 *Dow. & Ry.*, 42.)

The above cases not only sustain the position to which they are cited, but they also prove that it is not merely a sharp point of law, adhered to out of respect for ancient authority, but that it has been treated at all times, both by judges and chancellors, as a

well-founded principle, to which a controlling force should be given, in every case where it is either directly or collaterally involved. The original debt has uniformly, and for all purposes for which it has ever been attempted to be used, whether as a set-off, the foundation of an *assumpsit*, or of a claim in bankruptcy, been held to be satisfied, and the judgment to be valueless.

It only remains, in the third place, to examine some particular cases, which are considered by the plaintiffs as exceptions to the general rule, but which in reality go far to illustrate and strengthen it.

1. Cases of escape. By the oldest authorities an escape was considered as effectual a discharge of the debt as a release, and *Blumfield's* case is the first decision to the contrary. (*Y. B.*, 33 *Hen. VI.*, p. 17.) The opposite doctrine was finally established in *Whitecross v. Hamkinson*, and the reason of it was given by *Ashhurst, J.*, in *Jacques v. Withey*: "I know of only one case where a debtor in execution, who obtains his liberty, *may [*292 afterwards be taken again for the same debt, and that is where he has escaped; and the reason of that is, because he was not legally out of custody." (*Sup.*, pp. 11, 12.) The result of these cases then is, that where the prisoner has escaped of his own wrong, although the satisfaction which the plaintiff was receiving is temporarily interrupted in fact, yet, in intentment of law, the defendant is still in custody, and may be retaken.

2. Cases of rescue, which depend upon the same principle as those of an escape. The defendant was never, in contemplation of law, out of custody. (*Jacques v. Withey, ut sup.*)

3. Arrest of privileged defendants. The arrest of a member of parliament has, from the earliest times, been held irregular; and it was occasionally doubted whether such an arrest, followed, as it necessarily was, by a discharge, either upon writ of privilege or without it, did not operate, like a release by consent, as a total discharge of the debt. (1 *Hatsell*, 45; *May's Practice of Parliament*, 107, 113, 114; 2 *Man. & Gr.*, 437, 471; 1 *Cr. M. & R.*, 525; 5 *Tyrrwhitt*, 147; 10 *Ad. & Ellis*, 225; 1 *Ad. & El. N. S.*, 525; 2 *Gale & Dav.*, 473; *Godbolt*, 327.)

4. Cases of discharge from imprisonment by the lord's act, &c. The discharge in these cases has always been held to be the act of the law, and not to imply any consent on the part of the plaintiff. In compliance, therefore, with the old maxim, the courts have taken care that this act of law shall in no way injuriously affect the plaintiff's rights. Thus, in *Nadin v. Battie et al.*, 5 *East*, 147, where two were in prison, and one was discharged because of the plaintiff's refusal to pay the prison charges, Lord Ellenborough, on an application to discharge the other, decided that "the discharge cannot be said to have been with the plaintiff's assent, because he did not choose to detain the party in prison at his own expense. Nor can the law, which works detriment to no man, in consequence of having directed the discharge of one defendant, so far implicate the plaintiff's consent against the fact, as to operate as a discharge of the other."

The same, as will be seen hereafter, has

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been the ruling of the American courts, and for the same reasons here assigned.

5. Cases of debts payable by installments. Where the judgment is to be satisfied by installments, and execution is to issue upon non-payment of any of the installments, it is held that a release from imprisonment upon one installment with the plaintiff's consent, will not affect the remedy, or bar the execution upon a second installment. (*Davis v. Gompertz*, 2 Nev. & Man., 607.) This is expressly upon the ground that the two executions are not for the same debt. Such was the principle ^{293*} that governed the case of *Atkinson v. Bayntun*, which has been relied upon as authority against the appellee. (1 Bing. N. C., 444.)

6. It may be proper, in this connection, to notice the case of *Baker v. Ridgway*, which has also been cited against the appellee. (3 Bing., 41; S. C., 9 Moore, 114.)

There, the defendant was in custody under a *ca. sa.*; a commission of bankruptcy was issued against him; the plaintiffs were compelled, by the statute 49 Geo. III., ch. 121; to discharge him out of custody, before they could be admitted to prove their debt under the commission; the commission was afterwards superseded on the ground of irregularity; and the defendant was again arrested. Affidavits were submitted by the plaintiffs, and relied on by the court, tending to prove that the irregularity, by which the commission had been avoided, was the result of fraudulent collusion between the debtor and a portion of his creditors. This was a motion to discharge the defendant, and enter satisfaction upon the judgment. The rule was discharged.

Such being the facts, it does not seem that the case differs materially from that of an escape. It was, in reality, an escape effected by an abuse of the forms of law, and the same may be said of it, as Ashhurst, J., said of *Jacques v. Withey*, "The defendant was never legally out of custody." At any rate, he was never discharged by the consent of the plaintiff. That these were the grounds of the court's opinion, may be seen from many of the remarks reported by Bingham. Thus Best, Ch. J.: "If this discharge has been obtained by a fraudulent commission, and the plaintiff has afterwards been cheated by a *supersedeas* out of the benefit sought by the proof of his debt, the defendant may be taken again, because the fraud has avoided the whole transaction, and the defendant has never been legally out of custody."

From all the cases, then, we draw the conclusion that the English law is, and has been for more than four centuries, that the writ of *ca. sa.* is the highest sort of execution known; that it is capable of affording the plaintiff complete and absolute satisfaction; and that its execution will satisfy the judgment and extinguish the debt, unless this its regular legal effect be avoided by some after-contingency. The only after-contingencies, whether existing at common law or provided for by statute, which are allowed to have this effect are, an escape by the defendant's own wrong, or effected by his actual fraud; a rescue; an avoidance of the writ for irregularity; an enlargement of the prisoner by act of law; or

(since the 21st Jac. I.) his death in execution. Upon the happening of any of these contingencies, *the plaintiff having been de- [²⁹⁴prived, without his own default, of the complete satisfaction to which his writ entitled him, the law will supply him with other means of enforcing it. If, however, after the execution of the writ, the plaintiff voluntarily consent to the discharge of the defendant from custody, while by such execution and discharge the judgment is satisfied and the debt extinguished at law, so the plaintiff's consent operates further as a confession of such satisfaction, and if properly presented to the court, will be entered of record on the roll. The policy of the law, moreover, prohibits the defendant from entering into any agreement by which the judgment or debt, upon which he is in custody, shall, for any purpose whatever, be made to survive his release, and pronounces all such agreements null and void. Nevertheless, the discharge of the defendant shall be a good consideration for an original and independent contract, which, if afterwards violated, may be enforced by new proceedings. This last rule avoids the hardship to which creditors might otherwise, even against their inclination, be compelled to subject their imprisoned debtors, who are unable to liquidate their debt by actual payment, but can give satisfactory security in consideration of a discharge. (Archbold's New Com. Law Pr., p. 257, ed. 1853; Sewell on Sheriffs, 198.)

We have next to ascertain whether the American courts have adhered to the doctrines of the common law as expounded in England.

The precise question as to the effect of the voluntary discharge of the debtor from custody, has, it is believed, never been decided by this court. But, in two cases, the nature of the writ of *ca. sa.* has been incidentally discussed, so far as it bore collaterally upon points then before the court. It was only necessary, therefore, to enter into the subject, and to press the conclusions far enough to meet the particular question presented. Thus, in *The United States v. Stansbury*, 1 Pet., 578, the question before Ch. J. Marshall was, whether the rights of a particular debtor were to be governed by the common law or by an Act of Congress. Having decided in favor of the latter position, he waives all argument upon the common law, and introduces his opinion by stating it in a form that was unquestioned on either side. "It is not denied, that at common law, the release of a debtor whose person is in execution, is a release of the judgment itself. Yet the body is not satisfaction in reality, but is held as the surest means of coercing satisfaction. The law will not permit a man to proceed at the same time against the person and estate of his debtor; and when the creditor has elected to take the person, it presumes satisfaction, if the person be voluntarily released. The release of the judgment is therefore *the legal con- [²⁹⁵sequence of the voluntary discharge of the person by the creditor."

So, in the case of *Snead v. M' Coull*, 12 How., 407, the question was, whether a creditor's lien upon the lands of his debtor could survive the execution of a *ca. sa.* upon his person. Judge Daniel, delivering the opinion of the court, after showing that no lien on lands can be of

superior binding force to that of an *elegit*, the capacity to issue which never survives a fully executed *ca. sa.*, incidentally alludes to the nature of this latter writ, and the effect of a plaintiff's voluntary releasing a defendant who is in custody under it. In so doing, he cites at length the strong language of the Lord Chancellor in *Ex parte Knowell*, sup. 23, and refers to the leading cases of *Vigers v. Aldrich*, *Tanner v. Hague*, and *Blackburn v. Stupart*.

But, in *The United States v. Watkins*, 4 Cranch, C. C., 271, the whole subject was fairly brought before the Circuit Court of the United States for the District of Columbia, and *Ch. J. Cranch*, in the course of a most learned opinion, in which almost every English authority is examined, fully sustains all the positions taken by the appellee as to the English law, recognizes them as forming part of the law of Maryland, and therefore binding in the District of Columbia.

Since this decision, the case of *Harden v. Campbell*, 4 Gill, 29, has been adjudicated in Maryland, and *Ch. J. Martin* fully sustains the conclusions arrived at by *Ch. J. Cranch*.

The counsel then commented upon the following American cases: 2 Leigh, 361, 367; 5 Leigh, 186; 6 Mass., 58; 16 Mass., 63; 3 Cush., 463; 16 Law Reporter, 629; 1 Chipman, 151; 1 R. I., 143; 5 Johns., 364; 1 Cowen, 56; 8 Cowen, 171; 9 Cowen, 128; 2 South., 508, 799; 2 Green, 102; 10 Ohio, 362; 6 Blackf., 36; 3 M'Cord, 165; 4 Dall., 214; 3 Serg. & R., 463.

In Pennsylvania, the Statute of 21 James I., ch. 24, for the relief of creditors against such persons as die in execution, was reported by the judges to be in force, but not the Statute of 1 James I., ch. 13, relative to privilege of Parliament, nor that of 8 & 9 William III., ch. 27, sec. 7, where in case a prisoner escapes, it is provided he may be retaken on a new *capias*.

This law was altered by the 31st section of the Act of 16th June, 1836, which enacted that "a judgment shall not be deemed to be satisfied by the arrest or imprisonment of the defendant upon a *capias ad satisfaciendum*, if such defendant die in prison, or escape, or be discharged therefrom by reason of any privilege, "or at his own request," but the party entitled to the benefit of the judgment may have such remedies at law for the recovery thereof as he would have been entitled to if such *capias ad satisfaciendum* had not been issued: saving, 296*] nevertheless, all *rights and interests which may have accrued to any other person between the execution of such writ and the death or escape of such party."

This section was taken from the 32d section of the bill reported by the revisers of the Civil Code on the 4th of January, 1836, but the words in italic, "or at his own request," were inserted by the Legislature.

The section as reported by the revisers, is stated by them to be "derived from the Statutes 1 Jac. I., ch. 13; 21 Jac. I., ch. 24; and 8 & 9 William III., ch. 27, sec. 7."

The case of *Jackson v. Knight*, 4 Watts & S., 412, decided in 1842, occurred after the passage of the Act of Assembly, and was governed by the 31st section of the Act of 16th June, 1836. The agreement to discharge the defendant from imprisonment was dated 10th October, 1840, and on the argument the

counsel for the plaintiff in error cited the said 31st section.

Mr. Justice Daniel delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of the United States for the Eastern District of Pennsylvania.

The appellants, by their bill in the Circuit Court, alleged, that being creditors of the appellee in a very large amount of money previously lent and advanced to him, they, in the year 1828, instituted their action for its recovery on the law side of the court, when it was agreed, by writing filed of record, that a judgment should be entered against the appellee as of the 26th of November, 1827, in favor of the appellants, for the sum of \$22,191.71. That this judgment, with a large accumulation of interest, remained unappealed from and unsatisfied, either in whole or in part. That the appellants, after obtaining this judgment, believing that the appellee was possessed of concealed means of satisfying it, and especially that when in a state of insolvency, and with a view of defeating his creditors, he had settled upon his wife a large amount of property, and, as afterwards appeared, made transfers of property to her between the date of the judgment and of the execution thereon, they sued out upon the said judgment a writ of *capias ad satisfaciendum*, returnable to the April Term of the court, 1830, and in virtue of that process caused to be taken into actual custody the body of the appellee. That under the exigency of this process and arrest, the appellee would have been compelled to continue in close confinement, or could have obtained his release therefrom solely by the laws of Pennsylvania passed for the relief of insolvent debtors, which laws would have exacted of the appellee an assignment to his creditors of all estate, property, or interests whatsoever, held by himself or by others for him, or unlawfully settled upon his *wife; and would have con- [*297 ferred upon him only an immunity against further bodily restraint by reason of the non-payment of such debts as were due and owing from him at the date of such proceedings in insolvency; but that the appellee, being at the time of his arrest a citizen of the State of New Jersey, could not have been admitted to the benefits of the insolvent laws of Pennsylvania until after remaining three months in actual confinement under the writ of *capias ad satisfaciendum*.

That on the 19th of November, 1825, a marriage contract was executed between the appellee and Annis Stockton, his intended wife, and Richard Stockton, the father of said Annis, by which agreement the said Richard Stockton was invested with a large amount of real and personal property in trust for the benefit of the appellee and his intended wife during their joint lives, and if the said appellee should survive his intended wife and have issue by her, in trust for his benefit and for the maintenance and support of his family, and if there should be no child or children of the said marriage, then after the death of the husband or wife, in trust to convey the property to the survivor in fee simple.

That the appellee being arrested and in

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actual custody under the *capias ad satisfaciendum*, sued out as aforesaid, it was then and there agreed in writing between the appellants and the appellee, that the former should, without prejudice to their rights and remedies against the latter, permit him to be forthwith discharged from custody under the said process, and that the appellee should go to the next session of the Circuit Court of the United States for the Eastern District of Pennsylvania, and on the law side of that court make up an issue with the appellants, to try the question whether the appellee was possessed of the means, either in or out of the marriage settlement, of satisfying the judgment against him; the said issue to be tried without regard to form, or to the time when the jury for the trial thereof should be summoned; the appellee also giving security to abide the result of the trial of said issue. That upon the execution of his agreement, the appellee was released from custody, and the Marshal for the Eastern District of Pennsylvania, to whom the writ of *capias ad respondendum* was directed, made a return upon the writ that he had taken the body of the appellee into custody, and that he had been discharged by the consent and direction of the appellants. That the trial of the issue, which was provided for in the said agreement, actually took place and resulted in a verdict by which, so far as concerned the purposes of the said trial, it was found that the appellee had not the means, either in or out of the said marriage settlement, of satisfying the judgment of the appellants. 298*] *The bill alleges that by the force and effect of the agreement in writing and of the proceedings in pursuance thereof, the appellee obtained no farther or other right or advantage, than a present discharge from close custody, and the judgment of a court of competent jurisdiction that he was then possessed of no means, whether in or out of the said marriage settlement, wherewith to satisfy the judgment of the appellants. It further states, that since the judgment upon the issue made up and tried as aforesaid, the wife of the appellee had died without issue, and in consequence of that fact, all estate and property vested in the trustee by the marriage settlement and found by the issue tried as aforesaid to be then protected thereby from the creditors of the appellee, had become the absolute property and estate of the appellee, and had either by the original trustee in the marriage settlement or by his successor, been conveyed and delivered over to the appellee as his own estate and property, free and clear of any trust whatsoever.

That the trust created by the marriage settlement, and by which the above property comprised therein was adjudged to be protected against creditors, having expired by its own limitation, that property had become liable to the creditors of the appellee, who was bound to a full account of the value thereof, and for the satisfaction of the rights and demands of the appellants out of the same. That the appellants had accordingly applied to the appellee for payment of their judgment, to be made out of the property comprised in and protected by the marriage settlement or out of any other resources at his command, but had been met by a refusal on the part of the appellee, founded not upon his inability to

satisfy the just claim of the appellants for money actually loaned, but upon an alleged exemption from all liability resulting from the facts of his having been once arrested under a *capias ad satisfaciendum*, and subsequently released from custody by consent of the appellants. The bill alleges this refusal, and the foundation on which it is placed, to be in direct violation of the written agreement, which explicitly declared that it was made for the accommodation of the appellee, and without any prejudice whatever to arise to the plaintiffs' (the appellants') rights, by the defendant's (the appellee's) enlargement. It charges the refusal and objection now interposed to be fraudulent, and made in bad faith, and as such, though it might avail at law to embarrass or prevent the enforcement of the judgment of the appellants, yet that a court of equity should prohibit a resort thereto on account of its unconscientious and fraudulent character. The bill concludes with a prayer, that the appellee may be enjoined from setting up, as a discharge, from the judgment against him, his release from custody under the *circumstances of the case set forth; [*299 that an account may be taken of the several subjects of property comprised in the marriage settlement, and of the rents, profits, interest and dividends accruing therefrom, since the death of the wife of the appellee; that satisfaction out of those subjects, of the judgment and claim of the appellants, may be decreed: the bill seeks also for general relief.

To this bill the appellee (the defendant in the Circuit Court) demurred, assigning, for causes of demurrer, that if the taking into custody of the body of the defendant under the *capias ad satisfaciendum* was a legal discharge of the alleged debt, the complainants are not relievable in equity from the effect thereof for or by reason of any act, matter, or thing in the bill alleged; and if the taking into custody was not such a legal discharge, then the complainants have full, adequate and complete remedy at law; and further, that the taking into custody under the said writ was and is to be deemed to have been a discharge and extinction of the judgment of the plaintiffs at law, and a discharge and extinction as well at law as in equity of the debt for which the same was obtained; and the cause coming on to be heard upon the demurrer, the court by its decree sustained the demurrer and dismissed the complainants' bill with costs.

The correctness, or incorrectness of the decree thus pronounced, are now the subjects of our consideration.

Extensive or varied as may be the range of inquiry presented by the bill with respect to what is therein averred to appertain to the merits of this controversy, or to the character of the acts of the parties thereto, the view and the action of this court in relation to that cause must be narrowed necessarily to the questions of law arising upon the demurrer. In approaching these questions there may be propounded as postulates or legal truisms, admitting of no dispute, the following propositions:

1. That wherever the rights or the situation of parties are clearly defined and established by law, equity has no power to change or unsettle those rights or that situation, but in all

such instances the maxim *equitas sequitur legem* is strictly applicable. 2. That wherever there exists at law a complete and adequate power, either for the prosecution of a right or the redressing of a wrong, courts of equity, with the exception of a few cases of concurrent authority, have no jurisdiction or power to act.

To the test of these rules the case before us, in common with every appeal to equity, should be brought, and if the effect of such test should prove to be adverse, that effect should be sought in the character of the appeal itself, and not in objections to maxims which judicial experience and wisdom have long established. Recurring now to the history of this cause, let us inquire [300*] *what was the precise situation of the parties, what their legal rights and responsibilities at the date of the judgment and arising therefrom, what have been their acts and proceedings subsequently to that judgment, and the consequences flowing from their acts to their previous relative position. Upon the recovery of their judgments the appellants had their election of any of the modes of final process known to the courts of law, or they might in equity have impeached the marriage settlement for any vice inherent in its consideration, or for an attempt fraudulently to interpose that settlement between the appellants' judgment and its legal satisfaction. But in their election of any of the forms of final process, the appellants must be held to have known the nature of that process, and the consequences incident to its choice and consummation. To permit an ignorance of these, or in other words, an ignorance of the law, to be alleged as the foundation of rights, or in excuse for omissions of duty, or for the privation of rights in others, would lead to the most serious mischief, and would disturb the entire fabric of social order. In choosing the writ of *capias ad satisfaciendum*, therefore, for the enforcement of their judgment, the appellants can derive no benefit from a presumption of ignorance or misapprehension as to the effects of calling into activity this severest and sternest attribute of the law. Such a presumption is wholly inadmissible. They must be affected with knowledge of whatever has been settled as to the nature of this writ, and of whatever regularly follows a resort to its use. They were bound to know, 1st, that the service of a *capias ad satisfaciendum*, by taking into custody the body of the debtor, operates a satisfaction of the debt; and for that reason deprives the creditor of all recourse to the lands or chattels or property of any description belonging to his debtor. For a doctrine well settled and familiar as is that, it may appear superfluous to cite authorities; but we may refer to some of these, commencing with the early cases of *Foster v. Jackson*, Hob., 52; *Williams v. Orleris*, Cro. Jac., 136, and Roll. Abr., 903; and coming down through the more modern authorities of *Mr. Justice Blackstone's Commentaries*, Vol. III., p. 415; 4 Burr., 2482; 1 T. R., 557; 2 East, 243, and 13 Ves., 193. To these cases might be added many decisions in the courts both of England and in the different States of this country; and, as conclusive of the same doctrine, in this court, the case of *Snead v. M'Coll*, 12 How., 407. So unbending and stringent was the application of the doctrine

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maintained by the earlier cases, that prior to the Statute of 21st Jac., 1, cap. 24, the death of a debtor whilst charged in execution, an event which rendered the process absolutely unavailable to the creditor, deprived the latter nevertheless of a right to a farther *execution; [*301 the jealousy of the common law denying to him any power beyond that he had exerted in the privation of the personal liberty of the debtor. The statute of James authorized the exception of the death of the debtor to this inhibition of the common law, and to this exception has been added the instances of escape or rescue, seemingly upon the ground that in these instances the debtor should not be regarded as legally out of custody. The taking of the body under a *capias ad satisfaciendum* being thus held the complete and highest satisfaction of the judgment, it would follow *ex consequenti*, that a discharge of the debtor by the creditor would imply an acknowledgment of such satisfaction, or at any rate would take from that judgment the character of a warrant for resorting to this highest satisfaction in repeated instances for the same demand. But the authorities have not stopped short at a mere technical restraint upon the creditor who may seek to repeat the arrest of the debtor whom he once had in confinement; they have gone the length of declaring that if a person taken on a *capias ad respondendum* was discharged, the plaintiff had no further remedy, because he had determined the choice by this kind of execution, which, affecting a man's liberty, is esteemed the highest and most rigid in the law. (See the cases from Hobart, Croke Jac., and Rolle's Abr., before cited.) Again, it has been ruled that if the plaintiff consent to the defendant being discharged out of execution, though upon an agreement, he cannot afterwards retake him, although the security given by the defendant on his discharge should be set aside, 4 Burr., 2482; 1 T. R., 557; 2 East, 243; and the Lord Chancellor, in 13 Ves., 193, uses this explicit language: "It is clear, that by taking the body in execution, the debt is satisfied to all intents and purposes."

Many American cases may be avouched in support of the same doctrine. In the case of *The United States v. Stanbury*, 1 Pet., 573, Chief Justice Marshall says: "It is not denied that at common law the release of a debtor 'whose person is in execution,' is a release of the judgment itself. The law will not permit a man to proceed at the same time against the person and estate of his debtor; and when the creditor has elected to take the person, it presumes satisfaction if the person be voluntarily released. The release of the judgment is, therefore, the legal consequence of the voluntary release of the person by the creditor."

In the case of *Wendrum v. Parker*, 2 Leigh, 361, it is said by Carr, J., that the "levy of a *ca. sa.*, and the release of the debtor from execution by the plaintiff or his agent, is an extinguishment of the debt, I have considered as well settled as any point can be by an unbroken series of decisions." And in *the case [*302 of *Noyes v. Cooper*, 5 Leigh, 186, Brockenbrough, J., says: "It has been undoubtedly established by a series of decisions, that where a defendant in execution has been discharged from imprisonment by direction or with the

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consent of the plaintiff, no action will ever again lie on the judgment, nor can any new execution issue on that judgment, even though the defendant was discharged on an express understanding that he should be liable again to be taken in execution on his failure to comply with the terms on which the discharge took place."

Upon a collation of the authorities applicable to the acts and proceedings of the parties to this controversy at the time, and subsequently to the judgment in favor of the appellants against the appellee, we are led to the following conclusions, viz.: that by suing out a *capias ad satisfaciendum* upon their judgment, and by taking into actual custody the body of the appellee under this process, the appellants had obtained that complete and highest satisfaction of their demand, of which they could be deprived only by the act of God, by operation of law, or by their own voluntary acknowledgment, or by a release of their debtor; that by entering into the arrangement stated in the bill, and by discharging the appellee from custody, the appellants have, in all legal intentment, admitted satisfaction of their demand, released the appellee from all liability therefor, and destroyed every effect of their judgment as the foundation of legal rights. Such being our conclusions upon this branch of the case, and the same conclusions being implied in the application of the appellants for equitable interposition, the inquiry here presents itself, whether a court of equity can be called upon to abrogate or impair, or in any manner or degree to interfere with clear, ascertained, and perfect legal rights. The simple statement of such an inquiry suggests this ready and only correct reply:

Equity may be invoked to aid in the completion of a just but imperfect legal title, or to prevent the successful assertion of an unconscientious and incomplete legal advantage; but to abrogate or to assail a perfect and independent legal right, it can have no pretension. In all such instances, equity must follow, or in other words, be subordinate to the law. With the view doubtless of giving color to their application, the appellants have intimated (for they can hardly be said to have charged it positively and directly) that the marriage settlement of the appellee was made in fraud of his creditors, and they have directly averred that the refusal of the appellee after the death of his wife to apply the property comprised in that settlement, in satisfaction of the judgment of the appellants, was at once fraudulent, and in direct violation of the agreement in pursu-
[303*] ^{ance} of which the appellee was discharged from custody. With respect to each to these allegations, however, the appellants are entirely deficient in their proofs, and in the latter, the statement does not accord with the document, that is, the written agreement between the parties, on which this averment is founded. No evidence seems to have been adduced upon the trial which took place in pursuance of the agreement, to impeach the fairness of the marriage contract; and the absence of any attempt to establish its unfairness, together with the charge of the court to the jury, would seem to exclude the existence, or at that time the belief of the existence, of fraud in the

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settlement. The agreement entered into at the time of the appellee's release from custody contains no stipulation that he would hold himself liable to another execution dependent on the event that the issue contemplated by that agreement, or that he would consider the judgment as still in full force against him. And if there had been a stipulation of the kind, we have seen that it could not have averted the consequences flowing from the discharge of the appellee from custody; but the only conditions for which appellee covenanted were that he would make up and try the issue proposed, and would abide the result of the trial; with both of which conditions the appellee has literally complied. This charge of fraud, then, even if it could in any aspect of this question have been available, is entirely unsustained.

With regard to the question raised by the demurrer as to the obligation of the appellants to pursue their remedy at law, under the allegation in the bill, that such legal remedy had been reserved to them by the terms of the agreement, there can be no doubt, upon the supposition that this remedy remained unimpaired, that the appellants could not arbitrarily abandon it, and seek the interposition of equity in a matter purely legal. The averment, therefore, by the appellants, of the continuation of their judgment, and of their right to enforce it by execution in all their original force and integrity, is wholly irreconcilable with any known head or principle of equity jurisdiction, and their bill is essentially obnoxious to objection on that account.

We are of the opinion that the decree of the Circuit Court, sustaining the demurrer to the bill of the appellants (the complainants in the Circuit Court), is correct, and ought to be, as it is, hereby affirmed, with costs.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Pennsylvania, and was argued by counsel; on consideration *whereof, it is now here [*304 ordered, adjudged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

Att'g—2 Wall., Jr., 209.
S. C.—1 Bald., 344; 7 Pet., 348.
Cited—16 Wall., 29.

JAMES N. CURRAN, *Plaintiff in Error*,

v.

THE STATE OF ARKANSAS, THE BANK OF THE STATE OF ARKANSAS. JOHN M. ROSS, Financial Receiver, AND DAVID W. CARROL, Bank Attorney.

Dissolution of corporation—State law depriving creditor of right to follow funds in hands of one not a bona fide creditor or purchaser, invalid—State sole owner of stock—funds set apart by law as capital, must remain to pay debts.

In 1836 the Legislature of Arkansas incorporated a bank with the usual banking powers of discount,

deposit, and circulation, the State being the sole stockholder.

The Bank went into operation, and issued bills in the usual form, but in November, 1839, suspended specie payments.

Afterwards, the Legislature passed several Acts of the following description:

1843, January, continuing the corporate existence of the Bank, and subjecting its affairs to the management of a financial receiver and an attorney, who were directed to cancel certain bonds of the State, held by the Bank, for money borrowed by the State, and reduce the State's capital in the Bank by an equal amount.

1843, February, directing the officers to transfer to the State a certain amount of specie, for the purpose of paying the members of the Legislature.

1845, January, requiring the officers to receive the bonds of the State which had been issued as part of the capital of the Bank in payment for debts due to the Bank.

1845, January, another act, taking away certain specie and par funds for the purpose of paying members of the Legislature, and placing other funds to the credit of the State, subject to be drawn out by appropriation.

1846, vesting in the State all titles to real estate or other property taken by the Bank in payment for debts due to it.

1849, requiring the officers to receive, in payment of debts due to the Bank, not only the bonds of the State, which had been issued to constitute the capital of the Bank, but those also which had been issued to constitute the capital of other banking corporations which were then insolvent.

Upon general principles of law, a creditor of an insolvent corporation can pursue its assets into the hands of all other persons except *bona fide* creditors or purchasers, and there is nothing in the character of the parties in the present case or in the laws transferring the property, to make it an exception to the general rule. For the Supreme Court of Arkansas has decided that the State can be sued in this case.

The bills of the Bank being payable on demand, there was a contract with the holder to pay them; and these laws, which withdrew the assets of the Bank into a different channel, impaired the obligation of this contract.

Nor does the repeal or modification of the charter of the Bank by the Legislature prevent this conclusion from being drawn. But in this case the charter of the Bank has never been repealed.

Besides the contract between the bill holder and the Bank, there was a contract between the bill holder and the State, which had placed funds in the Bank for the purpose of paying its debts, and which had no right to withdraw those funds after the right of a creditor to them had accrued.

The State had no right to pass these laws, under the circumstances, either as a creditor of the Bank or as a trustee taking possession of the real estate for the benefit of all the creditors.

The several laws examined.

The Supreme Court of the State held these laws to be valid, and consequently the jurisdiction of this court attaches under the 25th section of the Judiciary Act.

THIS case was brought up from the Supreme Court of Arkansas, by a writ of error issued under the 25th section of the Judiciary Act.

305*] *It was argued by *Messrs. Lawrence and Pike* for the plaintiff in error, and by *Mr. Sebastian*, filing a brief prepared by *Mr. Hempstead*, for the defendants in error.

The arguments of counsel upon both sides were in such an unbroken train of reasoning, that the reporter cannot compress them into a mere report; and as together, they made upwards of sixty pages of print, he cannot publish them entire. The reader who desires to examine into the case thoroughly, can consult

the opinion of the Supreme Court of Arkansas, delivered in November, 1851. In that opinion the court maintains its doctrines with great earnestness.

Mr. Justice Curtis delivered the opinion of the court:

This is a writ of error to the Supreme Court of the State of Arkansas.

The plaintiff in error filed his bill in equity in the Circuit Court of that State for the County of Pulaski, against the State of Arkansas, the State Bank of Arkansas, and the financial receiver and the attorney of the Bank; and the defendants having demurred thereto, the Circuit Court overruled the demurrers; and as the defendants elected to rest thereon, the court made a decree in favor of the complainant. The defendants appealed to the Supreme Court, where the demurrers were sustained, and the bill ordered to be dismissed. This decree the plaintiff has brought here for re-examination under the 25th section of the Judiciary Act.

As the questions to be determined arise on a demurrer to the bill, the substance of the case, therein made and confessed by the demurrer, must be stated, to exhibit the grounds on which our decision rests.

The bill shows that the Bank of the State of Arkansas was incorporated by the Legislature of that State in 1836, with the usual banking powers of discount, deposit and circulation, and that the State in fact was, and was designed by the charter to be, its sole stockholder. That the capital stock of the Bank consisted of \$1,146,000, raised by the sale of bonds of the State, together with certain other sums paid in by the State as part of the capital stock, amounting in the aggregate to the sum of \$350,753, being in the whole \$1,496,753; all which was in specie, or specie funds. That the Bank was required by its charter to have on hand at all times sufficient specie to pay its bills on demand. That the plaintiff, being the owner and bearer of bills of this Bank, amounting to upwards of \$9,000, which the Bank had refused to pay, instituted suits and recovered judgments thereon at law, upon which executions, running against the goods, chattels and lands of the Bank, have been duly returned *wholly unsatisfied. The general scope [*306 of the bill, therefore, is to obtain the aid of a court of equity to reach such assets of the Bank as ought to be appropriated to satisfy this judgment debt. The parties in whose hands it is alleged these assets are, are the State of Arkansas and two other defendants, who are alleged to have charge of certain effects of the Bank, in behalf, and under the authority of the State.

To make a case against these parties, and show that they hold property, which in equity belongs to its creditors, and ought to be appropriated to pay their debts, the bill states, that the Bank having gone into operation, and issued bills to a large amount, which were then in circulation, gave public notice, on the 7th day of November, 1839, that the payment of

NOTE.—Constitutionality of law altering charter as impairing contract. See note to *Dart. Coll. v. Woodward*, 4 Wheat., 518.

What laws are valid as impairing obligation of contracts. Vested rights, how affected by subsequent re-

peal of statute. Vested rights defined. See note to *Fletcher v. Peck*, 6 Cranch, 51.

Dissolution of corporation, and effect on debts owed by them, and on their property. See note to *Mumma v. Potomac Co.*, 8 Pet., 231.

specie was definitely and finally suspended; and thenceforward, with some comparatively trifling exceptions, has refused to redeem any of its bills.

That in January, 1843, the Bank still continuing insolvent, an Act was passed by the Legislature to liquidate and settle its affairs. That the assets of the Bank then amounted to \$1,832,120, of which the sum of \$1,000,000 was good and collectable; and that it had then on hand the sum of \$90,801 in specie. This Act expressly continued the corporate existence of the Bank; its affairs were subjected to the management of a financial receiver and an attorney, who were to apply the moneys collected by them to redeem the outstanding circulation of the Bank; but, at the same time, bonds of the State, held by the Bank, for money borrowed by the State, amounting to at least \$200,000, were required by this Act to be given up and canceled, and their amount to be credited to the Bank against a part of the capital stock put in by the State. The bill further shows, that by another Act passed at the same February Session, in 1843, the officers of the Bank were required to transfer to the State the sum of \$15,000 in specie, which was appropriated by the Act to pay the members of that Legislature. That on the 4th day of January, 1845, another Act was passed, authorizing the officers of the Bank to compromise its debts receivable, and take specific property in payment, and requiring those officers to receive in payment the bonds of the State, issued to raise capital stock for the Bank, notwithstanding the bills of the Bank might not have been taken up.

That on the 10th day of January, 1845, another Act was passed, depriving the Bank of all its specie and par funds, and appropriating the specie, first, to pay the members of that Legislature, and declaring that certain funds which had been placed in the Bank, and made by the charter to form a part of its capital stock, should be deemed to be deposited there to the credit of the State, subject to be drawn out by appropriations.

307*] That by another Act, passed on the 23d day of December, 1846, the title to all real estate and property of every kind, purchased by said Bank, or taken in payment of debts due to it, was declared to be vested in the State, and titles to property received on account of debts due to the Bank were required to be thereafter taken in the name of the State; and the bill avers, that many different parcels of land specifically mentioned and described, have been conveyed to the State, under this law, by debtors of the Bank, in satisfaction of their indebtedness.

The bill further states, that, by another Act, passed on the 9th day of January, 1849, the officers of the Bank were required to receive in payment of its debts, bonds of the State, issued to raise capital for the Real Estate Bank of Arkansas, and other banking corporations theretofore chartered by the General Assembly, and then insolvent; which last-mentioned bonds amounted to at least \$2,000,000.

The bill prays, among other things, for satisfaction of the plaintiff's judgment debt out of the assets of the Bank thus shown to have come into the custody or stand in the name, or to

have gone to the use of the State by force of the laws above mentioned; and the jurisdiction of this court, under this writ of error, is invoked, upon the ground that these laws, or some of them, impair the obligation of a contract, and that the highest court of the State has held them valid, and by reason of such decision, dismissed the complainant's bill.

It follows, that there are three questions for our consideration:

1. What would have been the rights of the complainant under the contracts shown by his bill, if uncontrolled by the particular laws of which he complains?

2. Do those laws, or either of them, impair the obligation of any contract with the complainant?

3. Does it appear, by the record, that the Supreme Court of Arkansas held these laws to be valid, and by reason thereof made a final decree against the complainant?

The first of these questions may be answered without much difficulty. The plaintiff is a creditor of an insolvent banking corporation. The assets of such a corporation are a fund for the payment of its debts. If they are held by the corporation itself, and so invested as to be subject to legal process, they may be levied on by such process. If they have been distributed among stockholders, or gone into the hands of others than *bona fide* creditors or purchasers, leaving debts of the corporation unpaid, such holders take the property charged with the trust in favor of creditors, which a court of equity will enforce, and compel the application of the property to the satisfaction of their debts.

*This has been often decided, and [**308** rests upon plain principles. In 2 Story's Eq. Jur., sec. 1252, it is said, "Perhaps, to this same head of implied trusts upon presumed intention (although it might equally well be deemed to fall under the head of implied trusts by operation of law), we may refer that class of cases where the stock and other property of private corporations is deemed a trust fund for the payment of the debts of the corporation; so that the creditors have a lien, or right of priority of payment on it, in preference to any of the stockholders of the corporation. Thus, for example: "The capital stock of an incorporated bank is deemed a trust fund for all the debts of the corporation: and no stockholder can entitle himself to any dividend or share of such capital stock until all the debts are paid, and if the capital stock should be divided, leaving any debts unpaid, every stockholder receiving his share of the capital stock, would, in equity, be held liable *pro rata* to contribute to the discharge of such debts out of the fund in his own hands." In conformity with this is the doctrine held by this court in *Mumma v. The Potomac Company*, 8 Pet., 281.

The cases of *Wood v. Dummer*, 3 Mason, 308; *Wright v. Petrie*, 1 Sm. & Marsh., 319; *Nevitt v. Bank of Port Gibson*, 6 Id., 513; *Hightower v. Thornton et al.*, 8 Ga., 493; *Nathan v. Whitlock*, 3 Edwards, C., 215, affirmed by the Chancellor (9 Paige, 152), contain elaborate examinations of this doctrine, and it has been affirmed and applied in many other cases.

So far, therefore, as the property of this Bank has become vested in the State or gone to

its use, it is so vested and used, charged with a trust in favor of this complainant, as an unpaid creditor, unless there is something in the character of the parties, or the consideration upon which, or the operation of the laws by force of which, it has been transferred, taking the case out of the principles above laid down.

And first, as to the character of the parties. By the charter of this Bank, the State of Arkansas became its sole stockholder. But the Bank was a distinct trading corporation, having a complete separate existence, enabled to enter into valid contracts binding itself alone, and having a specific capital stock, provided, and held out to the public as the means to pay its debts. The obligations of its contracts, the funds provided for their performance, and the equitable rights of its creditors were in no way affected by the fact that a sovereign state paid in its capital, and consequently became entitled to its profits. When paid in and vested in the corporation, the capital stock became chargeable at once with the trusts, and subject to the uses declared and fixed by the charter, to the same **309*** extent, and *for the same reasons, as it would have been if contributed by private persons.

That a state, by becoming interested with others in a banking corporation, or by owning all the capital stock, does not impart to that corporation any of its privileges or prerogatives, that it lays down its sovereignty, so far as respects the transactions of the corporation, and exercises no power or privilege in respect to those transactions not derived from the charter, has been repeatedly affirmed by this court, in *The Bank of the United States v. The Planters' Bank*, 9 Wheat., 904; *Bank of Kentucky v. Wistar et al.*, 3 Pet., 431; *Briscoe v. The Bank of Kentucky*, 11 Id., 324; *Darrington et al. v. The Bank of Alabama*, 13 How., 12. And our opinion is, that the fact that the capital stock of this corporation came from the State which was solely interested in the profits of the business, does not affect the complainant's right, as a creditor, to be paid out of its property; a right which, as we have seen, follows the fund into the hands of every person, save a *bona fide* creditor or purchaser, and which a court of equity is bound to enforce by its decree against any party except such a creditor or purchaser capable by law of being brought within its jurisdiction.

That the State of Arkansas is capable of being thus sued, has been decided, after a careful examination, by the Supreme Court of that State, in this suit; and as this is purely a question of local law, depending on the constitution and statutes of the State, we follow that decision, and hold, in conformity therewith, that by its own consent the State has become liable to a decree in favor of the complainant in this suit, if the complainant has valid grounds entitling him to the relief prayed.

Whether there was anything in the consideration or circumstances of the transfers of the property of the Bank to the State, or to its use, which relieved that property from the trust in favor of creditors, may be best examined under the next question, which is, do the laws, by force of which these transfers were made, impair the obligation of any contract with the complainant?

This question can be answered only by ascertaining what contracts existed, and what obligations were attached to them, and then by examining the actual operation of those laws upon those contracts and their obligations.

The plaintiff was the bearer of bills of the Bank, by each of which the Bank promised to pay him, on demand, a certain sum of money. Of course these payments were to be made out of the property of the Bank. By the laws of the State, existing when these contracts were made, their bearer had the right, by legal process, to compel their performance by the levy of an *execution on the goods, chattels, [*310 lands and tenements of the Bank, by garnishing its debtors, and by resorting to a court of equity to reach equitable assets, or property conveyed to others than creditors and *bona fide* purchasers.

Such were these contracts and their obligations; and it would seem to require no argument to prove that a law authorizing and requiring such a corporation to distribute its property among its stockholders, or transfer it to its sole stockholder, leaving its bills unredeemed, would impair the obligation of the contracts contained in those bills. The cases of *Bronson v. Kinzie et al.*, 1 How., 311; and *McCracken v. Hayward*, 2 Id., 608, which will be more particularly adverted to hereafter, leave no doubt on that point. Indeed, it has not been attempted to maintain, that such a law, operating on the property of a mere private corporation, whose charter the Legislature could not repeal, would be valid. But it is argued that this is a different case. That the Legislature has power to destroy this corporation, and thereupon its contracts are no longer in existence, and cannot be enforced against the property of the corporation, which, upon the repeal of its charter, reverts to the grantors of its lands and escheats, so far as it is personalty, to the State; and that, if it be in the power of the State thus to destroy the remedies of creditors, by repealing the charter, their rights must be considered to be entirely subject to the will of the State, and no law can impair the obligation of their contracts, because subjection to any law which may be passed belongs to the very existence of such contracts. Or, to express the same ideas in different words, that the State created and can destroy the corporation and all its contracts, and, as it can thus destroy them by repealing the charter, it can modify, obstruct and abridge the rights of creditors and the obligations of their contracts, without repealing the charter.

Neither these premises, nor the conclusion deduced from them, can be admitted.

This banking corporation, having no other stockholder than the State, it is not doubted that the State might repeal its charter; but that the effect of such a repeal would be entirely to destroy the executory contracts of the corporation, and to withdraw its property from the just claims of its creditors cannot be admitted. If such were the effect of a repeal of an Act incorporating a bank containing no express power of repeal, it might be difficult to encounter the objection that the repealing law was invalid, as conflicting with the Constitution of the United States. This argument was pressed on this court, in the case of *Mumma v. The Potomac Company*,

8 Pet., and it was met by the following explicit language:

§ 11*] "We are of opinion, that the dissolution of the Corporation, under the Acts of Virginia and Maryland, cannot in any just sense be considered, within the clause of the Constitution of the United States on this subject, an impairing of the obligation of the contracts of the Company by those States, any more than the death of a private person can be said to impair the obligation of his contracts. The obligation of those contracts survives; and the creditors may enforce their claims against any property belonging to the Corporation, which has not passed into the hands of *bona fide* purchasers, but is still held in trust for the Company, or for the stockholders thereof, at the time of its dissolution, in any mode permitted by the local laws."

Indeed, if it be once admitted that the property of an insolvent trading corporation, while under the management of its officers, is a trust fund in their hands for the benefit of creditors, it follows, that a court of equity, which never allows a trust to fail for want of a trustee, would see to the execution of that trust, although by the dissolution of the corporation, the legal title to its property had been changed. (*Mumma v. The Potomac Company*, 8 Pet., 281; *Wright v. Petrie*, 1 S. & M. Ch., 319; *Nevitt v. The Bank of Port Gibson*, 6 S. & M., 518; 1 Ed. Ch.; S. C., 9 Paige; *Reed v. Frankfort Bank*, 23 Maine, 318.) And, in this point of view, the decision of this court, in *Lennox et al. v. Roberts*, 2 Wheat., 373, is applicable.

It was a suit in equity, brought by persons to whom, at the expiration of the charter of the Bank of the United States, its effects were conveyed by deed, in trust for creditors and stockholders. Among these effects were certain promissory notes indorsed by the defendant, which the bill prayed he might be compelled to pay. The complainants had not the legal title transferred to them by indorsement upon the notes. This court held that the suit was maintainable. And this decision necessarily involves two points. First. That the expiration of the charter had not released the indorser. Second. That a court of equity would lend its aid to trustees for creditors of the Bank, to enforce payment of the notes. We do not think that the omission of the Bank to appoint a trustee would vary the substantial rights of creditors in a court of equity.

Whatever technical difficulties exist in maintaining an action at law by or against a corporation after its charter has been repealed, in the apprehension of a court of equity, there is no difficulty in a creditor following the property of the corporation into the hands of anyone not a *bona fide* creditor or purchaser, and asserting his lien thereon, and obtaining satisfaction of his just debt out of that fund specifically set apart for its payment when the debt was contracted, and charged with a trust for **§ 12*]** all *the creditors when in the hands of the corporation; which trust the repeal of the charter does not destroy. Chancellor Kent, in 2 Com., 307, n., says: "The rule of the common law has in fact become obsolete. It has never been applied to insolvent or dissolved moneyed corporations in England. The sound doctrine now is, as shown by statutes and judi-

cial decisions, that the capital and debts of banking and other moneyed corporations, constitute a trust fund and pledge for the payment of creditors and stockholders, and a court of equity will lay hold of the fund, and see that it be duly collected and applied. The case of *Hightower v. Thornton*, 8 Ga., 491, and other cases before referred to in this opinion, are in conformity with this doctrine; and, in our judgment, a law distributing the property of an insolvent trading or banking corporation among its stockholders, or giving it to strangers, or seizing it to the use of the State, would as clearly impair the obligation of its contracts as a law giving to the heirs the effects of a deceased natural person, to the exclusion of his creditors, would impair the obligation of his contracts.

But if it could be maintained that the repeal of the charter of this Corporation would be operative to destroy the obligation of its contracts, it would not follow that anything short of a repeal could have that effect. The only ground upon which such a power could be claimed is, that inasmuch as the power of repeal exists when the contract is made, and inasmuch as the necessary effect of a repeal is to put an end to the obligation of the contracts of the Corporation, all its contracts are made subject to this contingency, and with an inherent liability to be thus destroyed. We have already said, that it is not the necessary effect of a repeal of the charter to destroy the obligations of contracts; but if it were, and they were entered into subject to this liability, upon what ground could it be maintained, that merely suspending certain powers of the corporation, its existence being preserved, can be followed by any such consequence? Surely it is not the necessary effect of a prohibition to transact new business, to destroy contracts already made; and if not, how can the right and power to destroy them be considered to grow out of a power to make such a prohibition? Or how can it be fairly assumed, because the creditor knew when he received the contract of the Bank that the Legislature could at any time deprive it of power to enter into new engagements, and therefore must be taken to have assented to the exercise of that power at the discretion of the Legislature, that he must also be considered as assenting to the exercise of a totally different power, viz.: the power to destroy contracts already made? Legislative powers, over contracts lawfully existing when the contracts *are formed, affect the **§ 13** nature and enter into the obligations of those contracts. But such powers can be exerted only in the particular cases in reference to which they have been reserved; and they are inoperative in all other cases. And, until such a case arises, the obligation of such a contract can no more be impaired than if it were under no circumstances subject to the legislative control. The assumption that, because the Legislature may destroy a contract by repealing the charter of the corporation which made it, therefore such a contract may be impaired, or altered, or destroyed, in any manner the Legislature may think fit, without repealing the charter, is wholly inadmissible.

Now, the charter of this Bank has never been repealed. On the contrary, the 28th section of the Act of the 31st day of January, 1843, expressly provided, "That nothing in this Act

shall be so construed as to impair or destroy the corporate existence of the said Bank of the State of Arkansas, but the charter of the said institution is only intended to be so limited and modified as that said Bank shall collect in and pay off her debts, abstain from discounting notes, or loaning money, and liquidate and close up her business as is hereinafter provided." Subsequent laws have still further limited and modified the corporate powers, but the corporate existence has not been touched, and the Corporation is made a party to this suit, and appears on the record.

We do not consider, therefore, that the power of the State to repeal this charter enables the State to pass a law impairing the obligation of its contracts.

We have thus far considered only the contracts between the complainant and the Bank, arising out of the bills of the Bank held by him, and some of the obligations of those contracts. But this is not the only contract with the complainant. It is true that, as the State was the sole stockholder in this Bank, the charter cannot be deemed to be such a contract between the State and the Corporation as is protected by the Constitution of the United States. But it is a very different question whether that charter does not contain provisions, which, when acted upon by the State and by third persons, constitute in law a binding contract with them, the obligation of which cannot be impaired.

If a person deposit his property in the hands of an agent, he may revoke the agency and withdraw his property at his pleasure. But if he should request third persons to accept the agent's bills, informing them, at the same time, that he had placed property in the hands of that agent to meet the bills at their maturity, and upon the faith of such assurance the agent's bills are accepted, the principal cannot, by revoking the agency, acquire the right to withdraw his property from the hands of the agent.

It is no longer exclusively his. They who, on the faith of its deposit, have changed their condition, have acquired rights in it. The matter no longer rests in a mere delegation of a revocable authority to an agent, but a contract has arisen between the principal and the third persons from the representation made, and the acts done on the faith of it, and the property cannot be withdrawn without impairing the obligation of that contract.

Now, the charter of this Bank provides (sec. 1), that it shall have a capital stock of \$1,000,000 to be raised by the sale of the bonds of the State, and also (sec. 13), that certain other funds, which are specifically described, shall be deposited therein by the State, and constitute a part of the capital of the Bank, and the bill avers that the bonds of the State, amounting to one \$1,000,000, and also other bonds of the State amounting to \$146,000, authorized by a subsequent Act of the Assembly, were sold, and their proceeds, together with the other funds mentioned, were paid into the Bank to constitute its capital stock.

The Bank received this money from the State as the fund to meet its engagements with third persons, which the State, by the charter, expressly authorized it to make for the profit of the State. Having thus set apart this fund in

the hands of the Bank, and invited the public to give credit to it, under an assurance that it had been placed there for the purpose of paying the liabilities of the Bank, whenever such credit was given, a contract between the State and the creditor not to withdraw that fund to his injury, at once arose. That the charter, followed by the deposit of the capital stock, amounted to an assurance, held out to the public by the State, that anyone who should trust the Bank might rely on that capital for payment, we cannot doubt. And when a third person acted on this assurance, and parted with his property on the faith of it, the transaction had all the elements of a binding contract, and the State could not withdraw the fund, or any part of it, without impairing its obligation.

We proceed, therefore, to examine the laws complained of, to ascertain what is their operation upon the obligations of the several contracts with the State and with the Bank, which are above declared to exist. The learned counsel for the State of Arkansas has, with great ability, presented a view of these laws which requires consideration. It is this: that so far as these laws withdraw specie and funds from the Bank, and appropriate them to the uses of the State, the State acted in the character of a creditor, taking a preference over other creditors, and paying itself a debt; and [*315] that the other laws, by force of which all the real property of the Bank was vested in the State, are not to be deemed to have been passed in denial of the rights of creditors, but only the better to protect and give effect to those rights; that the trust in favor of creditors still subsists, to be worked out in such manner as the State shall deem proper.

To maintain the first proposition, it must appear that the State stood in such a relation to this Bank and its creditors at the time these laws were passed; that it was a creditor, and could provide by law for the payment of its debt in preference to other creditors; and second, that these laws do not withdraw and apply to the use of the State any greater sum than the amount of such debt.

In our judgment, the State cannot be considered to have occupied this position. It had placed its bonds in the possession of the Bank, with authority to sell them and hold their proceeds as capital. It had also paid over to the Bank certain other funds, with an express declaration, contained in the thirteenth section of the charter, that these also were to be part of its capital, and were to have credited to them their proportion of dividend of the profits of the business. All these moneys were thus set apart, in the hands of the Bank, as a fund, upon the credit of which it was to issue bills, and which was to be liable to answer the engagements of the Bank, contracted to its creditors, in the course of the business which it was authorized to transact for the profit of the State. Such is the necessary effect of the express declaration in the charter, that these funds constitute the capital of the Bank.

When this Bank became insolvent, and all its assets were insufficient to perform its engagements, it is manifest that every part of these assets stood bound by the contracts which had been made with the Bank upon the faith of the funds thus set apart by the charter; and it is

equally clear, that the Bank no longer had in its possession any capital stock belonging to the State. Whatever losses a bank sustains, are losses of the capital paid in by its stockholders; that is the only fund it has to lose. When it has become insolvent, it has lost all that fund, and has nothing belonging to its stockholders. In some sense a bank may be said to be indebted to its stockholders for the capital they have paid in. With the leave of the State, they have a right to withdraw it, after all debts are paid, and, if the State is itself the sole stockholder, it may withdraw its capital while any of it shall remain. But, from the very nature of things, it cannot withdraw capital from an insolvent bank, because it has none of their capital remaining. When insolvent, its assets belong solely to its creditors.

§16* It is unnecessary, therefore, to decide what were the rights and powers of the State, in respect to any portion of these funds, while the Bank continued solvent. When it became insolvent, when its entire property was insufficient to pay its debts, it no longer had any capital stock belonging to the State, and therefore, none could be withdrawn, without appropriating by law to the use of the State what by the charter stood pledged to creditors, and such a law impairs the obligations of the contracts of the Bank, and also the obligation of the contract between the State and the creditors, arising from the provisions of the charter devoting these funds to the payment of the debts of the Bank.

In addition to this, it must be observed that the averments of the bill, which are confessed by the demurrer, show that the whole amount of the funds mentioned in the thirteenth section of the charter, which it is claimed the State had the right to withdraw, was \$350,753; and that the amount actually withdrawn and appropriated to the use of the State, was at least \$400,000. On an investigation of the accounts, these averments might appear to be erroneous; but we are obliged to consider them to be true, as they are confessed on the record.

Our opinion is, that these laws, which withdraw from the Bank the sum of \$400,000, according to the averments in the bill, cannot be supported upon the ground that the State had the right, as a creditor of the Bank, to appropriate these funds to its own use.

Nor can we find sufficient support for the other position, that the laws divesting the Bank of its property and vesting it in the State, do not impair the obligations of the plaintiff's contracts, because they were not passed in denial, but in furtherance of the rights of creditors, and to afford them a remedy, and for the prevention of further loss.

Passing over the laws which, upon their face, not only withdrew funds from the Bank, but appropriated those funds to the use of the State, and which, therefore, cannot be supposed to be in furtherance of the rights of creditors, or intended to protect them from loss, or not to be in denial of their rights, to so much [of] the property of the Bank as was thus withdrawn, there are four Acts complained of by the bill, which require examination, with a view to see whether they can be considered as remedial only, and in that point of view con-

sistent with the obligations of the contracts of the plaintiff. The first is the Act of January 4, 1845. The seventeenth section of this Act is as follows: "That said financial receivers be required to receive, in whole or in part payment of any debt due the Bank, the bonds of the State which were sold in good faith to put said *Bank and branches in operation, [*317 notwithstanding the outstanding circulation of said Bank and its branches may not be taken up."

We cannot attribute to this provision of law any other meaning or effect than what is plainly apparent on its face. It authorizes and requires the assets of the Bank to be appropriated to pay debts of the State; and we cannot conceive how this can be reconciled with the rights of creditors to those assets, or how it can consist with the execution of a trust in their favor, or how it differs from the other laws appropriating the property of this insolvent Bank to the use and benefit of the State.

The circumstances that these bonds were sold by the State, through the agency of the Bank, to obtain funds to constitute the capital of the Bank, do not make them debts of the Bank. They were bonds under the seal of the State, signed by the governor, and countersigned by the treasurer, containing an acknowledgment that the State of Arkansas stood indebted, and a promise by the State to pay. The president and cashier of the Bank are empowered to transfer them by indorsement; but no liability, even of the conditional character which arises from the indorsement of negotiable paper by the law merchant, is attached by the charter to these indorsements, and, from the nature of the case, we do not see how any such could have been intended. We do not deem it necessary to determine, whether, under the fifteenth section of the charter, the Bank was made liable for the accruing interest on the bonds. It would seem that this section is merely directory to the general board, and was intended to provide for the payment of interest out of expected profits; but however this may be, to suppose that the charter intended the fund raised by the sale of these bonds, and which it held out to creditors as capital of the Bank, could, at any time, be appropriated to pay these bonds, leaving the creditors, who had dealt with the Bank on the faith of that capital, wholly unpaid, would be to give it a construction not supported by any provision which we have been able to discover in it, and directly in conflict with its manifest purpose and meaning. For in no fair sense can the Bank be considered to have had the proceeds of these bonds as so much capital, if it was liable, at the pleasure of the State, to be swept away at any moment to pay the debts which the State had contracted to borrow it. In such a condition of things, these proceeds would be nothing more than a deposit, payable on demand; and to call them capital, and allow the public to trust to them as such, would involve a plain contradiction.

Indeed, upon this construction of the charter, taken in connection with the alleged right to withdraw at pleasure all the other funds *deposited, the Bank had no proper [*318 capital which was bound by its contracts; and this would render it extremely difficult to

maintain the validity of the charter under tenth section of the first article of the Constitution of the United States, prohibiting the States from emitting bills of credit. It is well known that the power of the several States to create corporations, to issue bills, and transact business for the sole benefit of the State which appointed the corporate officers, and was alone interested in the Bank, has been from time to time seriously questioned. The cases of *Briscoe v. The Bank of Kentucky*, 11 Pet., 257, and *Darrington et al. v. The Bank of Alabama*, 13 How., 12, have settled this question, in reference to such banks as were involved in those cases. But the principal ground on which such bills were distinguished from bills of credit emitted by the State, was, that they do not rest on the credit of the State, but on the credit of the corporation derived from its capital stock.

But if the charter of the Bank has not provided any fund, effectually chargeable with the redemption of its bills, if what is called its capital is liable to be withdrawn at the pleasure of the State, though no means of redeeming the bills should remain, then the bills rest wholly upon the faith of the State and not upon the credit of the Corporation, founded on its property. We do not perceive, in the charter of the State Bank of Arkansas, an intention to create such a bank and emit such bills; on the contrary, we think it plainly appears to have been intended to make a bank having a real capital, on the credit of which its business was to be transacted; and this intention is necessarily in conflict with the existence of the power anywhere to appropriate the funds of the Bank, after it became insolvent, to pay debts of the State contracted to borrow the money which constituted that capital.

By the Act of December 28, 1846, the financial receivers were authorized in certain cases to pay judgment creditors in notes of non-resident debtors, provided such judgment creditors would convey to the State all lands of the Bank on which they had levied; and by another Act, passed on the same day, all conveyances of real estate purchased for, or taken in payment of, any debt due to the Bank, were required to be made to the State, and all such titles were declared to be vested in the State. The second section of this law is in the following words: "That the governor is hereby authorized to exchange any property, so taken by the said Bank, for an equal amount of the bonds of the State executed for the benefit of said institution; provided that such property shall not be exchanged with the holders of such bonds at less prices than were allowed by the Bank 319*] for the *same, and that the governor be authorized to make titles and give acquittances for the same; and this Act shall take effect and be in force from and after its passage."

If this law had contained only the first section, vesting the real property of the Bank in the State, and providing no remedy by which this complainant, as a creditor of the Bank, could reach it, we think it would have impaired the obligation of his contracts. True, it does not touch the right of action against the Bank; it only withdraws the real property from the reach of legal process, and thus affects the remedy. But it by no means follows,

because a law affects only the remedy, that it does not impair the obligation of the contract. The obligation of a contract, in the sense in which those words are used in the Constitution, is that duty of performing it, which is recognized and enforced by the laws. And if the law is so changed that the means of legally enforcing this duty are materially impaired, the obligation of the contract no longer remains the same.

This has been the doctrine of this court from a very early period. In *Green v. Biddle*, 8 Wheat., 1, Mr. Justice Washington, delivering the opinion of the court, said: "It is no answer that the Acts of Kentucky now in question are regulations of the remedy and not of the right to the lands. If these Acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they directly overturned his rights and interests." In *Bronson v. Kinzie*, 1 How., 811, Mr. Chief Justice Taney, delivering the opinion of the court, and speaking of the above rule, as laid down in *Green v. Biddle*, said: "We concur entirely in the correctness of the rule above stated. The remedy is the part of the municipal law which protects the right, and the obligation by which it enforces and maintains it. It is this protection which this clause in the Constitution was mainly intended to secure."

The difficulty of determining, in some cases, whether the change in the remedy has materially impaired the rights and interest of the creditor, must be admitted. But we do not think any such difficulty exists in this case. The decision of this court in *McCracken v. Hayward*, 2 How., 608, must be considered as settling this question. In that case the law under consideration provided that a sale should not be made of property levied on under an execution, unless it would bring two thirds of its valuation by three householders. It was held that such a law so obstructed the remedy as to impair the obligation of the contract. The law now in question certainly presents a far more serious obstruction, for it withdraws the real property of the Bank altogether from the reach of legal process, provides no substituted *remedy, and leaves the creditor, [*320 as is truly said by the Supreme Court of Arkansas, in its opinion in this case, "in a condition in which his rights live but in grace, and his remedies in entreaty only."

But not only does this law withdraw the real property from the Bank, and vest it in the State, but by the second section, the terms of which have been given, the property so withdrawn is expressly appropriated to pay the bonds of the State. An appropriation which, as has been above stated, cannot be reconciled with the preservation of the rights of creditors, whether those rights are to be protected by existing legal remedies, or in any other manner.

The same observations apply to so much of the Act of the 9th of January, 1849, as required the officers of the Bank to receive in payment of debts due to the Bank, bonds of the State issued to obtain capital to put in operation the Real Estate Bank of the State of Arkansas, which bonds are averred in the bill to have amounted

to \$2,000,000. If a law which withdrew assets of the Bank to pay bonds sold to raise its capital, impaired the obligation of the complainant's contracts, it would probably not be supposed that a law applying such assets to pay bonds of the State sold to raise capital for another bank, could be free from that objection.

It only remains to consider the third question: whether it appears by the record that the Supreme Court of Arkansas held these laws to be valid, and by reason thereof dismissed the complainant's bill.

Each of these laws is specifically referred to in the bill, and its operation upon the property of the Bank averred, and made a subject of complaint. If a private person had received assets of the Bank in the same manner they are alleged in the bill to have been received by the State, he must have been held amenable to the complainants as a creditor of the Bank, in a court of equity. We have already stated that, by the local law of Arkansas, the State stands in the same predicament as a private person, in respect to being chargeable as a trustee, unless it is exempted by force of the laws in question. It necessarily follows, therefore, that the Supreme Court of the State held these laws valid, and that by force of them the State was not subject to the principles upon which it would otherwise have been chargeable.

It is sufficient, to give this court jurisdiction under the 25th section of the Judiciary Act, that it appears by the record that the question, whether a law of a state impaired the obligation of a contract, was necessarily involved in the decision, and that such law was held to be valid, and the decision made against the plaintiff. *321*] *iff* **In error by reason of its supposed validity. (Armstrong v. The Treasurer of Athens County, 16 Pet., 281; Crowell v. Randall, 10 Pet., 392; McKenney v. Carroll, 12 Pet., 66.)*

The result is, that so much of each of the said laws of the State of Arkansas, as authorized and required the cancellation of the bonds of the State, given for money borrowed of the Bank of the State of Arkansas, or authorized and required the withdrawal of any part of the specie or other property of that Bank, and the appropriation thereof to the use of the State, or authorized and required the application of any part of the assets or property of that Bank to pay bonds issued by the State and sold to raise capital for the Bank of the State of Arkansas, or for the Real Estate Bank, of the State of Arkansas, or authorized and required real property purchased for the Bank of the State of Arkansas, or taken in payment of debts due to the Bank of the State of Arkansas, to be conveyed to and the title thereof vested in the State of Arkansas, impaired the obligation of contracts made with the complainant as the lawful holder and bearer of bills of the Bank of the State of Arkansas, and so were inoperative and invalid. And, consequently, the judgment of the Supreme Court of that State must be reversed, and the cause remanded, that it may be proceeded in as the Constitution of the United States requires.

Messrs. Justices Catron, Daniel, and Nelson, dissented.

HOWARD 15.

Mr. Justice Catron:

As this case comes up from a state court under the 25th section of the Judiciary Act, the first question presented is, whether we have jurisdiction to decide the merits; and I am of opinion, that no violation of any contract rendered, which the complainant sets up a right to recover, has occurred within the sense of the Constitution, by the laws passed by the State of Arkansas, and which laws are complained of in the bill.

On the merits, I have formed no opinion, not having authority to inquire into them, as I apprehend.

Mr. Justice Daniel:

From the decision of this court, just announced, I am constrained to declare my dissent. According to my apprehension there is no legitimate ground of jurisdiction, and of course for the interference of this court in this case, within the just intent and objects of the 10th section of the first article of the Constitution. By the Legislature of the State of Arkansas, which has been assailed, the obligation of no [*322 contract is denied. The claims of every stockholder and every note holder of the Bank of the State of Arkansas are, in reference to that corporation, fully recognized. The utmost that can be objected to the action of the State is, that in a contest amongst the creditors of a failing corporation, the State, as one of those creditors, and the largest creditor of the number, may have appropriated to herself a portion of the assets of that corporation greater than would have been warranted by perfect equity, or other equality, amongst all the creditors. But should this conclusion be conceded, the concession implies no attempt to deny or impair any obligation of the Bank to satisfy every creditor. It might raise a question of fraud or unfairness in the action of the State in reference to the other creditors of the Bank, but it carries with it no interference with the obligation or the sanctity of their contract with the corporation, whatever that might be. The mere question of fraud, in the execution or non-performance of contracts, surely the Constitution never intended to constitute as a means by which the federal authorities were to supervise the polity and Acts of the State governments. Such a claim of power in the federal government would justify the interference with, and the supervision by this court of any Act of the State Legislatures, and of every transaction of private life, and in the necessarily imperfect attempts to exercise such a power, would encumber it with a mass of business, which would disappoint and entirely prevent the performance of its legitimate duties.

ORDER.

This cause came on to be heard on the transcript of the record from the Supreme Court of Arkansas, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Supreme Court, in order that such further proceedings may be had there.

in, in conformity to the opinion of this court, as to law and justice, and the Constitution of the United States, shall appertain.

Rev'g—12 Ark., 321.

Cited—18 How., 486; 2 Wall., 21; 7 Wall., 410; 8 Wall., 553; 16 Wall., 221, 232; 17 Wall., 62; 19 Wall., 530; 1 Otto, 61; 2 Otto, 324, 687; 5 Otto, 557; 12 Otto, 530; 3 Hughes, 64; 4 Hughes, 408, 411; 11 Blatchf., 394; 13 Blatchf., 143, 144; 3 Dill., 73; 5 Dill., 83, 87, 318; 3 Biss., 424; 7 Biss., 147; 6 Bank. Reg., 171; 9 Bank. Reg., 149; 13 Bank. Reg., 230, 451; 2 Low., 99; 1 McCrary, 90, 367; 5 Sawy., 50, 417; 2 Woods, 53, 112, 637; 1 Holmes, 441.

323*] *REUBEN ANDERSON ET AL.,
Plaintiffs in Error,

v.

MICHAEL BOCK.

Louisiana Law—dissolution of contract cannot be presumed—judicial proceeding necessary.

The City of New Orleans sold a lot in the city for a certain sum of money, the payment of which was not exacted, but the interest of it, payable quarterly, remained as a ground rent upon the lots. It was further stipulated, that if two of these payments should be in arrear, the city could proceed judicially for the recovery of possession, with damages, and the vendees were to forfeit their title.

Six years afterwards, the city conveyed the same lot to another person, who transferred it to an assignee.

The title of the first vendee could not be divested without some judicial proceeding, and the dissolution of the contract could not be inferred merely from the fact that the city had made a second conveyance.

Therefore, the deed to the second vendee, and from him to his assignee, were not, of themselves, evidence to support the plea of prescription. The city, not having resumed its title in the regular mode, could not transfer either a lawful title or possession to its second vendee.

The Circuit Court having instructed the jury that, in its opinion, under the written proofs and law of the case, the plea of prescription must prevail, and the written proofs not being in the record, this court cannot test the accuracy of its conclusion.

THIS case was brought up by writ of error from the Circuit Court of the United States for the Eastern District of Louisiana.

The facts in the case are set forth in the opinion of the court.

It was submitted, on printed briefs, by **Mr. Bemis** for the plaintiff, in error, with a brief by **Messrs. Stockton and Steele**, and by **Mr. Benjamin** for the defendant in error.

Plaintiffs' Points.

I. The charge of the court was manifestly improper and illegal, as the judge stated to the jury, "it was his opinion, that under the written proofs and law of the case, the defense of prescription, set up by the defendant, must prevail."

This was not a deduction for him to draw, but it was peculiarly the province of the jury to decide on the evidence. The defense of prescription involves both matter of fact and law; of the former the jury are exclusive judges, and of the latter they are also judges, under the instruction of the court as to what the law is.

This expression of opinion by the judge, in delivering his charge, could form, legally, no part of the charge.

He does not tell the jury what the law is,

but only that, as the law stands, the proofs in the cause make out the defense of prescription.

II. The court erred in charging the jury, that the act of sale from the city to John Clay, dated 18th November, 1816, and the act of sale from Clay to defendant, dated 30th January, 1823, *were of themselves evidence of [*324 possession in the defendant and his vendor, Clay, to support the plea of prescription.

Possession is a matter *in pais*, and it cannot be established by a mere paper conveyance of the property.

III. The court erred in refusing to instruct the jury, as required by the plaintiffs, "that by the acts of sale, dated 15th October, 1810, from the City of New Orleans to Sticher and Anderson, the said city transferred to Sticher and Anderson the title and possession of the property, and that neither the title nor possession thereof can be presumed to be afterwards in the city; but, on the contrary, the city must show, by proper evidence, that the title and possession again came lawfully into its hands.

This was simply a requirement, on the part of the plaintiffs, that the court should instruct the jury that the elder title, emanating from the city to Sticher and Anderson, must prevail over the younger title from the city to Clay.

The deeds to Sticher and Anderson were made on consideration of an annual ground rent, to be paid by them for a certain number of years, and the further consideration of a stipulated price, to be paid by them after the term of the continuance of the ground rent should have expired. This term for the continuance of the ground rent had expired many years before the institution of this suit. No complaint has been made that Sticher and Anderson did not pay the considerations stipulated in the deed to them. There can, then, be no good reason why their prior title shall not prevail over the junior title of the defendant.

Defendant's Points.

The first bill of exceptions complains, that "the judge refused to charge the jury, that, by the act of sale, dated 15th October, 1810, from the City of New Orleans to Sticher and Anderson, the city transferred to them the title and possession of the property; that neither could afterwards be presumed to be in the city; but, on the contrary, the city must show, by proper evidence, that the title and possession came lawfully into its hands;" and further complains that the judge, on the contrary, charged the jury "that the act of sale from the City of New Orleans to John Clay, dated the 18th November, 1816, and the act of sale from Clay to defendant, dated the 30th January, 1823, were of themselves evidence of possession in the defendant, Bock, and his vendor, Clay, to support the plea of prescription set up by the defendant."

The second bill of exceptions complains that "the judge stated to the jury, that it was his opinion, that under the written *proofs [*325 and law of the case, the defense of prescription, set up by the defendant, must prevail."

Now, in relation to these bills of exceptions, it is to be observed that neither of them pretends on its face to set forth all the evidence offered in the cause, but only a part of the

written evidence. As regards the second bill of exceptions, therefore, it is clear that this court is without the means of determining whether the charge of the judge was correct or not; and, in the absence of such means, the presumption of law is, that the judgment of the lower court was supported by the written proofs. For aught that appears in the record, there may have been offered in evidence a written admission by the plaintiffs that the defendant had been in possession, as is alleged in the answer, for a length of time sufficient to establish prescriptive right to the property; or written contracts, receipts or other documents, proving him to have inclosed and built upon the property, or leased it to tenants, and collected rents. Without a statement showing what the written evidence was, it is impossible to say that there was error in the charge "that under the written proofs and law of the case, the defense of prescription must prevail."

In order to determine the propriety of the charge complained of in the first bill of exceptions, the issues presented by the pleadings must be taken into consideration.

The petition alleges possession by the defendant, but asserts the possession to be unlawful.

The answer admits the possession, and asserts it to have been lawful under just title for upwards of thirty years, and sets forth the deed under which the possession was acquired, to wit: the deed of 30th January, 1823.

The fact of possession being thus asserted by both parties, the only question was, whether the possession was lawful, or in good faith.

It appears, by the bill of exceptions, that the defendant showed, as the basis of his possession, the deed from Clay, of 30th January, 1823, being at a date twenty-seven years anterior to the institution of the suit.

By reference to the act of sale to defendant, it will appear, that when it was executed, "Michael Bock, being present, declared that he accepts this act of sale and conveyance, is in possession of the said property, and contented therewith." This deed was in evidence without objection, exception, or reservation.

Now, the article 2455 of the Civil Code, provides that "the law considers the tradition or delivery of immovables as always accompanying the public act which transfers the property."

326*] The judge, therefore, had before him,

1st. The admission by plaintiffs of the fact of the defendant's possession.

2d. The proof that this possession had originated in 1823, and was held by virtue of the sale made in that year, as recited in the deed itself.

3d. The legal presumption established by article 2455 of the actual delivery of the immovable sold.

4th. The absence of any allegation or pretense by plaintiffs of adverse possession in themselves or any other person than the defendant between the year 1823 and the institution of the suit.

The article 3442 of the Civil Code provides that "he who acquires an immovable in good faith and by a just title, prescribes for it in ten years, if the real owner resides in the State, and after twenty years if the owner resides out of the State."

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It is obvious, from these premises, that the sole question before the court and jury was, whether the defendant had acquired a good title by prescription, and that the court did not err in charging the jury that the defense had been established.

The prayer of the plaintiff that the judge should charge the jury in relation to the effect of the sale from the city to Sticher and Anderson, was properly refused, because wholly irrelevant. The question was not whether Sticher and Anderson had acquired a valid title in 1810, but whether the defendant had subsequently acquired a good title to the same property by prescription, and the judge properly confined his charge to the latter inquiry, the only one relevant to the issue.

The language of the charge is, that the acts of sale set up by defendants "were of themselves evidence of possession in the defendant, Bock, and his vendor, Clay, to support the plea of prescription."

The judge did not charge that these acts were conclusive or sufficient proofs, but that they were evidence of possession; and that they were evidence is fully established by the terms of the article 2455, above quoted. (See, also, articles 3405-3407, 3414, 3450.)

The point in dispute is fully settled in the jurisprudence of Louisiana.

In the case of *Ellis v. Prevost et al.*, 13 La., 280, 285, the principle is thus stated: "No physical act, in taking possession under a sale by notarial act, is necessary. The intention of the purchaser, which the law presumes, coupled with the power which the act of sale gives, vests the possession in him. The right is taken for the fact, and he is seised of the thing corporally. Article 3405 goes on to provide that when a person has once acquired [*327] corporal possession, the intention which he has of possessing suffices to preserve it in him, although he may have ceased to have the thing in actual custody."

It is therefore respectfully submitted that the plaintiffs have failed to show error as alleged, and that there is no legal ground for disturbing the verdict and judgment of the lower court.

Mr. Justice Campbell delivered the opinion of the court:

The plaintiffs commenced a petitory action, as heirs at law of Thomas Anderson, to recover a lot of land in the City of New Orleans, of which they aver he died seised, and that the defendant wrongfully detains.

The defendant denied their claim to the property, and pleaded prescription under a just and valid title, with undisputed possession for upwards of thirty years.

Upon the trial, the plaintiffs produced a conveyance of the lot by a notarial act from the City of New Orleans to Sticher and Anderson, dated in 1810, upon the consideration of \$1,580. This sum was to remain a charge upon the lot, and the interest upon it, at the rate of six per cent. *per annum*, was to be paid in quarterly installments. Upon a failure to pay two of these installments the city was authorized to proceed judicially for the recovery of possession, and for the damages arising from a deterioration of the property, and the vendees were to forfeit

their title. The other stipulations in this conveyance are immaterial to the decision of the case.

The defendant relied upon a notarial act from the City of New Orleans, dated in 1816, conveying the property in the same lot to one Clay, upon a contract of sale, and an act dated in 1823 from Clay, conveying the property to the defendant. In each of these the vendees acknowledge that possession of the lot had been delivered at the date of the deeds.

The plaintiffs requested the court to instruct the jury that the City of New Orleans, by the Notarial Act of 1810, had transferred to Sticher and Anderson the title and the possession of the property, and that neither the title nor the possession can be presumed to be afterwards in the city, but that the city should show that the title and possession came lawfully into its hands. This request was refused by the court, and the jury was instructed that the deeds from the city to Clay of 1816, and from Clay to the defendant in 1823, were of themselves evidence of possession in the defendant and his vendor to support the plea of prescription. The court further instructed the jury, that under the written proofs and law of the case, the plea of prescription must prevail. These instructions were excepted to, and are here assigned as error.

328*] *The conveyance from the city to Sticher and Anderson, of 1810, was upon a resolutive condition. The contract between the parties was not dissolved of right by the non-fulfillment of the condition, but the party complaining of the breach might have insisted upon its dissolution, with damages, or upon a specific performance. (C. C., 2041, 2042.)

The dissolution of the contract for the non-fulfillment of the conditions, could not be inferred merely from the fact of a subsequent conveyance by the City of the same property. The title of the City to the lot passed to Sticher and Anderson by the Notarial Act of 1810, and to sustain a posterior conveyance of the City, it should have been shown, either that the first contract had been revoked, or that another title had been acquired. The court erred, therefore, in refusing the instruction requested by the plaintiffs.

2. To sustain a title by prescription to immovable property, according to either of the articles of the Civil Code, referred to in the pleas, the defendant was required to show "a public, unequivocal, continuous and uninterrupted possession," "under the title of owner." "The possessor must have held the property in fact and in right as owner," "though a civil possession would suffice, if it had been preceded by the corporeal possession." (C. C., 3462, 3467, 3453; *Devall v. Choppin*, 15 La., 566.)

The court has been referred to the Civil Code (C. C., 2455) to prove that the claims of the articles of the code we have cited are fulfilled by the public acts produced by the defendants. This article is "that the law considers the tradition or delivery of immovables as always accompanying the public act which transfers the property. Every obstacle which the seller afterwards imposes, to prevent the corporeal possession of the buyer, is considered as a trespass."

This article was designed to declare the operation of a contract for the transfer of property when embodied in a public Act as between the parties to the Act. It establishes, that the transfer is complete by the use of apt words of conveyance in such an Act, without the formality of a real delivery; that the power of control and enjoyment, transferred by a grantor in such an Act, is equivalent to a manual or physical tradition. So exactly the equivalent, that an "interfering obstacle," interposed by the grantor afterwards, may be treated as a trespass—that is, a disturbance of the possession of the grantee.

This rule from the Louisiana Code, corresponding with the Code Napoleon, deviates from the rule of the Roman and feudal law, which exacted a formal delivery, to perfect the transfer of the property.

*The rule is in complete harmony with [*329 the American system of conveying, which accomplishes the cession of property, with its incidents of possession and enjoyment, without a resort to symbolical acts, or inconvenient ceremonies, by the consent of the owner, legally authenticated.

This explanation of the object of the article of the Code, will enable us to define the limits of its operation. A vendor cannot transfer a title, or a possession, which is not vested in him. He cannot, by his conveyance or admissions, affect the claims of persons whose title is adverse to his. It follows, therefore, that the recitals in these acts, that possession had been delivered, and that the vendor was satisfied therewith, are not evidence of that corporeal possession, which is the foundation of a prescriptive right in a case like the present. (*Tropl. De Vente*, secs. 36, 40; C. C., 2238, 2235; *Emmerson v. Fox*, 3 La., 183; *Ellis v. Prevost*, 19 La., 251.)

3. As a general rule the possession necessary to sustain a prescription is founded upon facts, which it is the province of a jury to ascertain. (*Ewing v. Burnet*, 11 Pet., 41; *Beverly v. Burke*, 9 Ga., 440.)

But the "written proofs," upon which the Circuit Court felt authorized to instruct the jury that the plea of prescription must prevail, are not exhibited in the record, and this court cannot, therefore, test the accuracy of its conclusion.

For the errors in the charge that we have noticed, the judgment of the Circuit Court must be reversed, and the cause remanded for further proceedings.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions for further proceedings to be had therein in conformity to the opinion of this court.

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330*] *ROSS WINANS, *Plaintiff in Error*,
v.

ADAM, EDWARD AND TALBOT DEN-
MEAD.

*Patent Covers Variation in Form attaining Same
Result—Coal Cars with Drop Bottoms—Con-
struction of Specification.*

A patent was taken out for making the body of a burden railroad car of sheet iron, the upper part being cylindrical, and the lower part in the form of a frustum of a cone, the under edge of which has a flange secured upon it, to which flange a movable bottom is attached.

The claim was this: "What I claim as my invention and desire to secure by letters patent, is, making the body of a car for the transportation of coal, &c., in the form of a frustum of a cone, substantially as herein described, whereby the force exerted by the weight of the load presses equally in all directions and does not tend to change the form thereof, so that every part resists its equal proportion, and by which also the lower part is so reduced as to pass down within the truck frame and between the axles, to lower the center of gravity of the load without diminishing the capacity of the car as described. I also claim extending the body of the car below the connecting pieces of the truck frame and the line of draught, by passing the connecting bars of the truck frame and the draught bar through the body of the car, substantially described."

This patent was not for merely changing the form of a machine, but by means of such change to introduce and employ other mechanical principles or natural powers, or a new mode of operation, and thus attain a new and useful result.

Hence, where, in a suit brought by the patentee against persons who had constructed octagonal and pyramidal cars, the District Judge ruled that the patent was good for conical bodies, but not for rectilinear bodies; this ruling was erroneous.

The structure, the mode of operation, and the result attained, were the same in both, and the specification claimed in the patent covered the rectilinear cars. With this explanation of the patent, it should have been left to the jury to decide the question of infringement as a question of fact.

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of Maryland.

It was an action brought by Ross Winans for the infringement of a patent right. The jury, under the instruction of the District Judge, the late Judge Glenn, then sitting alone, found a verdict for the defendants; and the plaintiff brought the case to this court by a writ of error.

The nature of the case is set forth in the explanatory statement prefixed to the argument of the counsel for the plaintiff in error.

It was argued by Mr. Latrobe for the plaintiff in error, and by Mr. Campbell for the defendant in error.

Statement and points of Plaintiff in Error.

On the 26th June, 1847, Ross Winans, the plaintiff in error, obtained letters patent of the United States, for a new and useful improvement in cars for transportation of coal, &c.

The occasion for the invention thus patented, and the principle of it, are well set forth in the specification, thus:

"The transportation of coal, and all other heavy articles in lumps, has been attended with great injury to the cars, requiring the bodies to be constructed with great strength, to resist the outward pressure on the sides, as well as the vertical pressure on the bottom, due, not only to the weight of the mass, but the mobility

of the lumps amongst each other, tending 'to pack,' as it is technically termed. Experience has shown, that cars on the old mode of construction cannot be made to carry a load greater than their own weight; but, by my improvement, I am enabled to make cars of greater durability than those heretofore made, which will transport double their weight of coal.

The principle of my invention, by which I am enabled to obtain this important end, consists in making the body, or a portion thereof, conical, by which the area of the bottom is reduced, and the load exerts an equal strain on all parts, and which does not tend to change the form, but to exert an equal strain in the direction of the circle; at the same time this form presents the important advantage, by the reduced size of the lower part thereof, to extend down within the truck and between the axles, thereby lowering the center of gravity of the load."

The specification then gives a detailed description of the mode of constructing the cars in question, and proceeds thus:

"What I claim as my invention, and desire to secure by letters patent, is making the body of a car for the transportation of coal, &c., in the form of a frustum of a cone, substantially as herein described, whereby the force exerted by the weight of the load presses equally in all directions, and does not tend to change the form thereof, so that every part resists its equal proportion, and by which also the lower part is so reduced as to pass down within the truck frame, and between the axles, to lower the center of gravity of the load, without diminishing the capacity of the car as described."

And the specification concludes with a claim for a portion of the construction, not important in this connection.

From the testimony it appears that cars, constructed by the plaintiff, in accordance with the specification, while they weighed but 5,750 lbs. each, carried 18,550 lbs. of coal—making the weight of the load, in proportion to the weight of the car, as 3.3 to 1—that the thickness of the sheet iron used in the construction of the bodies was but 3.32ds of an inch, and that the dimensions of the band around the top were $\frac{1}{2}$ of an inch by 2 inches; and it is further shown, in illustration of the importance of the invention, that the plaintiff had constructed a model car, which, weighing but 2 $\frac{1}{2}$ tons, carried, nevertheless, 9 $\frac{1}{2}$ tons of coal "in perfect safety and satisfactorily from Cumberland to Baltimore." The proportion of the weight of the car, in this instance, to the weight of coal carried in it, was as 1 to 4 nearly. It appears further, from the testimony generally, that the cars referred to were used in the transportation of coal from the mines near Cumberland to Baltimore.

It then appears that the defendants, "in view for a call for cars from the mining roads near Cumberland," in 1849, '50, required their draftsman, Cochrane, to get up a car that would suit their purposes; that he went to the Reading road, and "finding nothing there, returned to Baltimore, and went to the plaintiff's shops, where he saw a car nearly finished, which he examined and measured." That it first occurred to him to make a square car, but that, as this would interfere with the wheels, he made an octagonal one.

Another witness proves, that the iron used in the car, thus built by the defendants, was of the same thickness as that used by the plaintiff, to wit: 8.82ds of an inch, while the band around the top was of the same thickness, to wit: $\frac{1}{4}$ of an inch, and $1\frac{1}{4}$ inches in width.

It thus appears that a patent was granted, in 1847, to Ross Winans for a car for carrying coal, whose merits may be summed up thus: that it carried more coal in proportion to its own weight than any car previously in use, and that the load, instead of distorting it, preserved it in shape, acting as a framing.

These eminent advantages, which increased the available power of the locomotive engine, looking to revenue on coal as a freight, from 50 to 100 per cent. were to be attributed to the peculiar shape of the car body, consisting of a frustum of a cone, which permitted the use of iron, as thin as has been described, lessening, in proportion, the weight of the car, or the weight, the transportation of which by the locomotive gave no return in revenue; and it appears, that in view of obtaining the best results from his invention, the plaintiff, in 1849, '50, at the instance of the witness Pratt, perfected a model car for certain mining roads near Cumberland; that this model car was examined and measured by the defendant's draftsman, to aid him in getting up coal cars for other mining companies in 1849 and 1850; and subsequently, cars of the same weight of material in the bodies, which differed from the plaintiff's in this only, that while the latter were cylindrical and conical, the others were octagonal and pyramidal—were built by the defendants, to the number of 24.

Believing that the cars thus built by the defendants were built in palpable violation of his patent, the plaintiff brought the present suit.

It will be seen, by examining the record, that the main question before the jury was, whether the cars, so built by the defendants, were substantially the same in principle and mode of operation with the car described and claimed 333* by the plaintiff *in his specification, and experts were examined on both sides on this point.

On the part of the defendants it was contended, that the cars of the defendants were octagonal in shape, while the plaintiff's were cylindrical.

On the part of the plaintiff it was insisted, that this was immaterial, provided the octagonal car obtained the same useful results, through the operation of the same principles in its construction; and it was suggested, that if the original construction of the body in right lines saved the infringement, an hundred-sided polygon would be without the patent; and also, that in point of fact, even the conical car was oftener a polygon than a true curve, owing to the character of the material from which it was built; and that if, by accident, it came from the shops a true theoretical cone, a day or two's use made a polygon of it; and that the immediate tendency of the load of coal, when put into an octagon car, was to bulge out its size and convert it into a conical one. All of which was urged for the purpose of showing that the question was necessarily a question as to whether the change of form was colorable or substantial—a question of fact, which it belonged to the jury to determine.

It is not necessary, in this statement, and in view of the questions arising on this appeal, to go into evidence in regard to the merely colorable difference of construction in detail. All the witnesses, on both sides, proved that the advantages which Winans proposed to obtain were substantially obtained in the defendant's cars—the plaintiff's witnesses swearing to the fact directly, and the defendant's witnesses admitting it on cross-examination; and the only testimony quoted now is that of the defendant's own and leading witness.

"That the advantage of a reduced bottom of the car thus obtained, whether the car was conical or octagonal; that the strengthening of the bottom, due to the adoption of the conical form, was the same when the octagonal form was adopted or the circular; that the circular form was the best to resist the pressure, as, for instance, in a steam boiler, and an octagonal one better than the square form; that the octagonal car was not better than the conical car; that for practical purposes, one was as good as the other; that a polygon of many sides would be equivalent to a circle; that the octagon car, practically, was as good as the conical one; and that, substantially, witness saw no difference between the two."

The testimony must indeed be all one way, where the plaintiff is willing to rest his case on the defendant's own showing.

In the view of the plaintiff below, there were two questions; the first for the court, being the construction of the patent; the second *for the jury, being the substan- [*334 tial, or only colorable difference between the cars in principle and mode of operation.

The plaintiff prayed the Circuit Court (His Honor, the late Judge Glenn, sitting alone) accordingly.

In framing the prayer for the court's construction of the specification, the language of the specification was adopted in describing the object of the invention; and the court were asked to say to the jury, "that what they had to look at was not simply whether, in form and circumstances, which may be more or less immaterial, that which has been done by the defendant varied from the specification of the plaintiff's patent, but to see whether, in substance and effect, the defendants, having the same object in view as that set forth in the plaintiff's specification, had, since the date thereof, constructed cars which, substantially, on the same principle and on the same mode of operation, accomplished the same result." And to give more certainty to the prayer, the plaintiff added the instruction as prayed for by him, "that to entitle the plaintiff to a verdict, it was not necessary that the body of the defendants' cars should be conical, in the exact definition of the term, provided the jury should believe that the form adopted by the defendants accomplished the same result, substantially, with that in view of the plaintiff, and upon substantially the same principle and in the same mode of operation."

The language of the first part of the prayer, here quoted, was taken *verbatim*, nearly, from the charge of Sir N. C. Tindal to the jury in the case of *Walton v. Potter & Horsfall*, Webster's Pat. Cases, 587.

This was a case where the plaintiff's patent

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was for the substitution of sheets of India rubber for leather for the insertion of the teeth, in the manufacture of cards for carding wool; and the infringement lay in the use of cloth saturated with a solution of India rubber for the same purpose; and the court, after determining the construction of the specification, gave substantially the same instruction that the plaintiff prayed for here. It is in this case that *Ch. J. Tindal* says: "That if a man has, by dint of his own genius and discovery, after a patent has been obtained, been able to give the public, without reference to the former one, or borrowing from the former one, a new and superior mode of arriving at the same end, there can be no objection to his taking out a patent for that purpose. But he has no right whatever to take, if I may so say, a leaf out of his neighbor's book, &c."

It would be hard indeed to find a case where the court's decision, applied to the facts in this cause, more completely negated the right, set up by the defendants, to build the cars which **335** *they did build; for here, the taking of the leaf out of the book is not left to inference; but day and date are given for the act.

To the same point is the case *Huddart v. Grimshaw*, also cited in the court below. (Webster's Patent Cases, 95.)

Here a patent had been obtained for making rope, a part of the process being the passage of the strands, while being twisted, through a tube; and it appeared that they had formerly passed through a hole in a plate. If the tube and the plate were the same, substantially, the difference being colorable only, then the patent was void, otherwise it was good; and the question was left to the jury, who found for the plaintiff.

To the same point is the case of *Russell v. Conley & Dixon*, Webster's Patent Cases, 463.

This was the case of a patent for welding iron tubes, by drawing them, at a welding heat, through a conical hole. The infringement was the passing them between rollers; and the question of colorable or substantial difference was referred to the jury.

So in the case of *Morgan v. Seaward*, Webster's Patent Cases, 170, which was upon Gallaway's patent for paddle wheels of steam-vessels, and where the question of infringement having arisen, the court, Alderson, B., told the jury "that the question would be, simply, whether the defendant's machine was only colorably different; that is, whether it differed merely in the substitution of mechanical equivalents for the contrivances which were resorted to by the patentee." And after referring to points of construction, the court continues: "Therefore, the two machines were alike in principle; one man was the first inventor of the principle, and the other has adopted it; and though he may have carried it into effect by substituting one mechanical equivalent for another, still you (the jury) are to look to the substance, and not the mere form, and if it is in substance an infringement, you ought to find so."

So to in the case of *Crossley v. Beverly*, growing out of Clegg's patent for a gas meter; and referred to by Alderson, B., in the case of *Jupe v. Pratt et al.*, Webster's Patent Cases, 144, as follows: "There never was a more instructive case than that. I remember very well the argu-

ment put by the Lord Chief Baron, who led on that case, and succeeded. There never were two things to the eye more different than the plaintiff's invention, and what the defendant had done in contravention of his patent right. The plaintiff's invention was different in form; different in construction; it agreed with it only in one thing, and that was, by moving in the water. A certain point was made to open either before or after, so as to shut up another, and the *gas was made to pass through ***336** this opening; passing through it, it was made to revolve it; the scientific men, all of them, said, "the moment a practical, scientific man has got that principle in his head, he can multiply, without end, the forms in which that principle can be made to operate."

As in the case under discussion, the moment a practical, scientific man is furnished with the idea of giving to the car a shape which will, by dispensing with the framing ordinarily used, enable him to make it lighter in proportion to its load than it has ever been made before, he can multiply without end the forms in which this principle can be made to operate. He can make the car a polygon of an hundred sides, of twenty sides, or of eight sides. He can vary the angle of the cone, or pyramid, through which the coal is discharged, *ad infinitum*. He can make the opening at the bottom larger or smaller to please his fancy. He can avail himself or not of the advantage of lowering the car, in position, so as to lower the center of gravity. Still the question must always be, whether, whatever the shape he adopts, he is not availing himself of the principle first suggested by the patentee; a question which, in a court of law, is at all times a question not for the court, but the jury; after the former shall have given to the specification that construction which is to govern the latter in determining whether the infringement complained of falls, substantially, in principle and mode of operation, within the plaintiff's patent.

The authorities here cited, and which were relied on in the court below, are held to sustain the prayer of the plaintiff; that, having pronounced upon the construction of the specification, the question of infringement should be left to the jury.

The court below thought differently, however, and, rejecting the prayers of both plaintiff and defendants, instructed the jury. "That while the patent is good for what is described therein—a conical body in whole or in part, supported in any of the modes indicated for a mode of sustaining a conical body on a carriage or truck, and drawing the same, and for those principles which are due alone to conical vehicles and not to rectilinear bodies; and it being admitted that the defendant's car was entirely rectilinear, that there was no infringement of the plaintiff's patent." (See Record, pages 16, 17.)

Upon this instruction nothing was left for the jury but to render a verdict for the defendant. The court had not only settled the construction, but the infringement also.

The present appeal is from this decision of the late District Judge.

The points of the plaintiff in error are:

1. That the court below erred in the construction which it *gave to the specification, ***337** should it be held that this construction

limited the plaintiff to the strictly conical form. And upon this point the authority relied on is the patent itself.

2. That the court below erred, even supposing that its construction of the specification was correct, in excluding the inquiry whether the cars of the defendants were not substantially the same in principle and mode of operation with those of the plaintiff; admitting that these last were rectilinear in their sections and not curvilinear.

And upon this point the authorities relied on, are, *Walton v. Potter*, Webster's Patent Cases, 587; *Huddart v. Grimshaw*, *Id.*, 95; *Jupe v. Pratt*, citing *Crossley v. Beverly*, *Id.*, 144; *Morgan v. Seaward*, *Id.*, 170; *Russell v. Cowley*, *Id.*, 463; Phillips on Patents, 125-127.

(Infringement.) *Curtis on Patents*, 268, 265, 264, 5, 268; citing, *Wyeth v. Stone*, 1 Story, 272; *Odiorno v. Winkley*, 2 Gall., 51; *Gray v. James*, Pet. C. C., 894; *Boville v. Moore*, Dav. Pat. Cas., 361.

3. That the court below erred in taking the question of fact from the jury.

Upon which point the authorities already cited are relied on.

Defendant's Points.

The defendant in error submits that the court below was right in refusing the prayer on the other side and giving the instruction which it did.

1. As to the rejected prayer of the plaintiff.

This prayer asserted the essence of the invention to consist in the conical form adopted by the patentee, and rightly so asserted, but the conclusion thence drawn was a *non sequitur*. It was that any other form was a violation. Had the patent claimed the application of a principle operating through the form of a cone, and more or less through other forms, and claimed the principle or mode of operation through whatever shape permitted it, there would have been some ground for the deduction. But the claim is confined to a single form, and only through and by that form to the principles which it embodies; and if, out of many forms embodying more or less perfectly the same mode of operation, the plaintiff in error has made his choice of the best, he is confined to that choice and the rejection which it involves of all other forms less felicitous. It may be admitted, without hesitation, that the substitution of mechanical or chemical equivalents, as they are called, will not affect the rights of a patentee, but the cases in which this principle holds, are where the *modus operandi* embraces more than a single way to reach the desired end. Where the invention consists [338*] of a principle embodied in *a single form, the form is the principle and the principle the form, and there can be no violation of the principle without the use of the form. (*Davis v. Palmer*, 2 Brockenbrough, 309.)

2. As to the court's instruction.

The construction of the patent was exclusively for the judge. He construed it correctly as embracing only a curvilinear form. It necessarily followed that, as the infringements relied on consisted only in the construction of rectilinear forms, there was no evidence to go to the jury of any violation of the patent, and it was proper in him so to instruct them. (*Greenleaf v. Birth*, 9 Pet., 292.)

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Mr. Justice Curtis delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the District of Maryland. The plaintiff in error brought his action in that court for an infringement of the exclusive right to make, use, and sell "an improvement in cars for the transportation of coal," &c., granted to him by letters patent, bearing date on the 26th day of June, 1847; and the judgment of that court being for the defendants, he has brought the record here by this writ of error.

It appears, by the bill of exceptions, that the letters patent declared on were duly issued, and that their validity was not questioned; but the defendants denied that they had infringed upon the exclusive right of the plaintiff.

On such a trial, two questions arise. The first is, what is the thing patented; the second, has that thing been constructed, used or sold by the defendants.

The first is a question of law, to be determined by the court, construing the letters patent, and the description of the invention and specification of claim annexed to them. The second is a question of fact, to be submitted to a jury.

In this case it is alleged the court construed the specification of claim erroneously, and thereby withdrew from the jury questions which it was their province to decide. This renders it necessary to examine the letters patent, and the schedule annexed to them, to see whether their construction by the Circuit Court was correct.

In this, as in most patent cases, founded on alleged improvements in machines, in order to determine what is the thing patented, it is necessary to inquire,

1. What is the structure or device, described by the patentee, as embodying his invention?

2. What mode of operation is introduced and employed by this structure or device?

3. What result is attained by means of this mode of operation?

*4. Does the specification of claim [*339 cover the described mode of operation by which the result is attained?

Without going into unnecessary details, or referring to drawings, it may be stated that the structure, described by this patent, is the body of a burden railroad car, made of sheet iron, the upper part being cylindrical, and the lower part in the form of a frustum of a cone, the under edge of which has a flange secured upon it, to which flange a movable bottom is attached. This bottom is made movable, in order to discharge the load through the aperture left by removing it.

To understand the mode of operation introduced and employed by means of this form of the car body, it is only necessary to state, what appears on the face of the specification, and was testified to by experts at the trial as correct, that, by reason of the circular form of the car body, the pressure of the load outwards was equal in every direction, and thus the load supported itself in a great degree; that, by making the lower part conical, this principle of action operated throughout the car, with the exception of the small space to which the movable bottom was attached; that, being con-

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ical, the lower part of the car could be carried down below the truck, between the wheels, thus lowering the center of gravity of the load; that the pressure outwards upon all parts of the circle being equal, the tensile strength of the iron was used to a much greater degree than in a car of a square form; and finally, that this form of the lower part of the car facilitated the complete discharge of the load through the aperture, when the bottom was removed.

It thus appears, that by means of this change of form, the patentee has introduced a mode of operation not before employed in burden cars, that is to say, nearly equal pressure in all directions by the entire load, save that small part which rests on the movable bottom; the effects of which are, that the load, in a great degree, supports itself, and the tensile strength of the iron is used, while at the same time, by reason of the same form, the center of gravity of the load is depressed, and its discharge facilitated.

The practical result attained by this mode of operation is correctly described by the patentee; for the uncontradicted evidence at the trial showed that he had not exaggerated the practical advantage of his invention. The specification states:

"The transportation of coal, and all other heavy articles in lumps, has been attended with great injury to the cars, requiring the bodies to be constructed with great strength to resist the outward pressure on the sides, as well as the vertical pressure on the bottom, due not only to the weight of the mass, but the mobility of the lumps among each other tending to **340*** 'pack,' as 'it is technically termed. Experience has shown that cars, on the old mode of construction, cannot be made to carry a load greater than its own weight; but, by my improvement, I am enabled to make cars of greater durability than those heretofore made, which will transport double their own weight of coal," &c.

Having thus ascertained what is the structure described, the mode of operation it embodies, and the practical result attained, the next inquiry is, does the specification of claim cover this mode of operation, by which this result is effected.

It was upon this question the case turned at the trial in the Circuit Court.

The testimony showed that the defendants had made cars similar to the plaintiff's, except that the form was octagonal instead of circular. There was evidence tending to prove that, considered in reference to the practical uses of such a car, the octagonal car was substantially the same as the circular. Amongst other witnesses on this point was James Millholland, who was called by the defendants. He testified:

"That the advantage of a reduced bottom of the car was obtained, whether the car was conical or octagonal; that the strengthening of the bottom, due to the adoption of a conical form, was the same when the octagonal form was adopted, or the circular. That the circular form was the best to resist the pressure, as, for instance, in a steam boiler, and an octagonal one better than the square form; that the octagonal car was not better than the conical car; that, for practical purposes, one was as good as the other; that a polygon of many sides

would be equivalent to a circle; that the octagonal car, practically, was as good as the conical ones; and that, substantially, the witness saw no difference between the two."

The District Judge, who presided at the trial, ruled—

That while the patent is good for what [is] described therein, a conical body, in whole or in part, supported in any of the modes indicated for a mode of sustaining a conical body on a carriage or truck, and drawing the same, and to those principles which were due alone to conical vehicles, and not to rectilinear bodies, and it being admitted that the defendants' car was entirely rectilinear, that there was no infringement of the plaintiff's patent.

The substance of this ruling was, that the claim was limited to the particular geometrical form mentioned in the specification; and as the defendants had not made cars in that particular form, there could be no infringement, even if the cars made by the defendants attained the same result by employing, what was in fact, the same mode of operation as that described by the patentee. We think this ruling was erroneous.

*Under our law a patent cannot be [**341** granted merely for a change of form. The Act of February 21, 1793, sec. 2, so declared in express terms; and though this declaratory law was not re-enacted in the Patent Act of 1836, it is a principle which necessarily makes part of every system of law granting patents for new inventions. Merely to change the form of a machine is the work of a constructor, not of an inventor; such a change cannot be deemed an invention. Nor does the plaintiff's patent rest upon such a change. To change the form of an existing machine, and by means of such change to introduce and employ other mechanical principles or natural powers, or, as it is termed, a new mode of operation, and thus attain a new and useful result, is the subject of a patent. Such is the basis on which the plaintiff's patent rests.

Its substance is a new mode of operation, by means of which a new result is obtained. It is this new mode of operation which gives it the character of an invention, and entitles the inventor to a patent; and this new mode of operation is, in view of the patent law, the thing entitled to protection. The patentee may, and should, so frame his specification of claim as to cover this new mode of operation which he has invented; and the only question in this case is, whether he has done so; or whether he has restricted his claim to one particular geometrical form.

There being evidence in the case tending to show that other forms do in fact embody the plaintiff's mode of operation, and, by means of it, produce the same new and useful result, the question is, whether the patentee has limited his claim to one out of the several forms which thus embody his invention.

Now, while it is undoubtedly true that the patentee may so restrict his claim as to cover less than what he invented, or may limit it to one particular form of machine, excluding all other forms, though they also embody his invention, yet such an interpretation should not be put upon his claim if it can fairly be construed otherwise, and this for two reasons:

1. Because the reasonable presumption is, that, having a just right to cover and protect his whole invention, he intended to do so. (*Haworth v. Hardcastle*, Web. P. C., 484.)

2. Because specifications are to be construed liberally, in accordance with the design of the Constitution and the patent laws of the United States, to promote the progress of the useful arts, and allow inventors to retain to their own use, not anything which is matter of common right, but what they themselves have created. (*Grant v. Raymond*, 8 Pet., 218; *Ames v. Howard*, 1 Sumn., 482, 485; *Blanchard v. Sprague*, 3 Id., 535, 539; *Daroll v. Brown*, 1 Wood. & 342*] M., 53, 57; *Parker v. Haworth*, *4 McLean, 372; *Le Roy v. Tatham*, 14 How., 181, and opinion of Parke, Baron, there quoted; *Neilson v. Harford*, Web. P. C., 341; *Russell v. Cowley*, Id., 470; *Burden v. Winslow*, decided at the present term, 15 How.)

The claim of the plaintiff is in the following words:

"What I claim as my invention, and desire to secure by letters patent, is making the body of a car for the transportation of coal, &c., in the form of a frustum of a cone, substantially as herein described, whereby the force exerted by the weight of the load presses equally in all directions, and does not tend to change the form thereof, so that every part resists its equal proportion, and by which, also, the lower part is so reduced as to pass down within the truck frame and between the axles, to lower the center of gravity of the load without diminishing the capacity of the car as described.

"I also claim extending the body of the car below the connecting pieces of the truck frame and the line of draught, by passing the connecting bars of the truck frame, and the draught bar, through the body of the car, substantially as described."

It is generally true, when a patentee describes a machine, and then claims it as described, that he is understood to intend to claim, and does by law actually cover, not only the precise forms he has described, but all other forms which embody his invention; it being a familiar rule, that to copy the principle or mode of operation described, is an infringement, although such copy should be totally unlike the original in form or proportions.

Why should not this rule be applied to this case?

It is not sufficient to distinguish this case to say, that here the invention consists in a change of form, and the patentee has claimed one form only.

Patentable improvements in machinery are almost always made by changing some one or more forms of one or more parts, and thereby introducing some mechanical principle or mode of action not previously existing in the machine, and so securing a new or improved result. And, in the numerous cases in which it has been held, that to copy the patentee's mode of operation was an infringement, the infringer had got forms and proportions not described, and not in terms claimed. If it were not so, no question of infringement could arise. If the machine complained of were a copy, in form, of the machine described in the specification, of course it would be at once seen to be an infringement. It could be nothing else. It is

only ingenious diversities of form and proportion, presenting the appearance of something unlike the thing patented, which give rise to questions; and the property of inventors would be valueless, if it *were enough for the [*343 defendant to say, your improvement consisted in a change of form; you describe and claim but one form; I have not taken that, and so have not infringed.

The answer is, my improvement did not consist in a change of form, but in the new employment of principles or powers in a new mode of operation embodied in a form by means of which a new or better result is produced; it was this which constituted my invention; this you have copied, changing only the form; and that answer is justly applicable to this patent.

Undoubtedly there may be cases in which the letters patent do include only the particular from described and claimed. *Davis v. Palmer*, 2 Brock., 309, seems to have been one of those cases. But they are in entire accordance with what is above stated.

The reason why such a patent covers only one geometrical form, is not that the patentee has described and claimed that form only; it is because that form only is capable of embodying his invention; and consequently, if the form is not copied, the invention is not used.

Where form and substance are inseparable, it is enough to look at the form only. Where they are separable; where the whole substance of the invention may be copied in a different form, it is the duty of courts and juries to look through the form for the substance of the invention—for that which entitled the inventor to his patent, and which the patent was designed to secure; where that is found, there is an infringement; and it is not a defense, that it is embodied in a form not described, and in terms claimed by the patentee.

Patentees sometimes add to their claims an express declaration, to the effect that the claim extends to the thing patented, however its form or proportions may be varied. But this is unnecessary. The law so interprets the claim without the addition of these words. The exclusive right to the thing patented is not secured, if the public are at liberty to make substantial copies of it, varying its form or proportions. And therefore, the patentee, having described his invention, and shown its principles, and claimed it in that form which most perfectly embodies it, is, in contemplation of law, deemed to claim every form in which his invention may be copied, unless he manifests an intention to disclaim some of those forms.

Indeed, it is difficult to perceive how any other rule could be applied, practicably, to cases like this. How is a question of the infringement of this patent to be tried? It may safely be assumed, that neither the patentee nor any other constructor has made, or will make, a car exactly circular. In practice, deviations from a true circle will always occur. How near to a *circle, then, must a car [*344 be, in order to infringe? May it be slightly elliptical, or otherwise depart from a true circle, and if so, how far?

In our judgment, the only answer that can be given to these questions is, that it must be so near to a true circle as substantially to em-

body the patentee's mode of operation, and thereby attain the same kind of result as was reached by his invention. It is not necessary that the defendant's cars should employ the plaintiff's invention to as good advantage as he employed it, or that the result should be precisely the same in degree. It must be the same in kind, and effected by the employment of his mode of operation in substance. Whether, in point of fact, the defendant's cars did copy the plaintiff's invention, in the sense above explained, is a question for the jury, and the court below erred in not leaving that question to them upon the evidence in the case, which tended to prove the affirmative.

The judgment of the court below must be reversed.

Mr. Chief Justice Taney, Messrs. Justices Catron, Daniel, and Campbell, dissented.

Mr. Justice Campbell:

I dissent from the opinion of the court in this case.

The plaintiff claims to have designed and constructed a car for the transportation of coal on railroads which shall carry the heaviest load in proportion to its own weight.

His design consists in the adoption of the "conical form" "for the body of the car," "whereby the weight of the load presses equally in all directions;" does not "tend to change the form of the car;" permits it "to extend down within the truck," lowering "the center of gravity of the load," and by its reduced size at the bottom adding to its strength and durability. He claims as his invention, and it is the whole of the change which he has made in the manufacture of cars, "the making of the body of the car in the form of the frustum of a cone."

It is agreed that a circle contains a greater area than any figure of the same perimeter; that the conical form is best suited to resist pressure from within, and that the reduced size at the bottom of the car is favorable to its strength. The introduction of the cars of the plaintiff, upon the railroad, for the transportation of coal, was attended by a great increase of the loads in proportion to the weight of the car. The merits of the design are frankly conceded. Nevertheless, it is notorious, that there does exist a very great variety of vessels in common domestic use, "of a conical form," or, "of the form of the frustum of a cone," for the reception and transportation of articles of **345***] prime "necessity and constant demand, such as water, coal, food, clothing, &c. It is also true that the properties of the circle, and of circular forms alluded to in the patent of the plaintiff, are understood, and appreciated, and have been applied in every department of mechanic art. One cannot doubt that a requisition from the transportation companies for cars of a diminished weight, and an increased capacity, upon the machinists and engineers connected with the business, would have been answered promptly by a suggestion of a change in the form of the car. The merit of the plaintiff seems to consist in the perfection of his design, and his clear statement of the scientific principle it contains.

There arises in my mind a strong if not in-

superable objection to the admission of the claim, in the patent for "the conical form," "or the form of the frustum of a cone," as an invention. Or that any machinist or engineer can appropriate by patent a form whose properties are universally understood, and which is in very common use, in consequence of those properties, for purposes strictly analogous. The authority of adjudged cases seems to me strongly opposed to the claim. (*Hotchkiss v. Greenwood*, 11 How., 249; *Losh v. Hague*, Web. Pat. Cas., 207; *Winans v. Providence Railroad Company*, 2 Story, 412; 2 *Id.*, 190; 2 Car. & Kir., 1022; 3 W. H. & Gord., 427.)

Conceding, however, that the invention was patentable, and this seems to have been conceded in the Circuit Court, the inquiry is, what is the extent of the claim? The plaintiff professes to have made an improvement in the form of a vehicle, which has been a long time in use, and exists in a variety of forms. He professes to have discovered the precise form most fitted for the objects in view. He describes this form, as the matter of his invention, and the principle he develops applies to no other form. For this he claims his patent. We are authorized to conclude, that his precise and definite specification and claim were designed to ascertain exactly the limits of his invention. (*Davis v. Palmer*, 2 Brock., 298.)

The car of the defendants is of an octagonal form, with an octagonal pyramidal base. There was no contradiction, in the evidence given at the trial, in reference to its description, nor as to the substantial effects of its use and operation. In the size, thickness of the metal employed in its construction, weight, and substantial and profitable results, the one car does not materially vary from the other. The difference consists in the form, and in that, it is visible and palpable.

The Circuit Court, acting upon these facts, of which there was no dispute, instructed the jury that an infringement of the plaintiff's patent had not taken place. I do not find the question *before the court a compound [**346** question of law and fact. The facts were all ascertained, and upon no construction of those facts was the plaintiff, in my opinion, entitled to a judgment.

In theory, the plaintiff's car is superior to all others. His car displays the qualities which his specification distinguishes. The equal pressure of the load in all directions; the tendency to preserve the form, notwithstanding the pressure of the load; the absence of the cross strain; the lowering of the center of the gravity of the load—are advantages which it possesses in a superior degree to that of the defendants'. Yet the experts say that there is no appreciable difference in the substantial results afforded by the two.

The cause for this must be looked for in a source extrinsic to the mere form of the vehicles. Nor is it difficult to detect the cause for this indentity in the results in such a source.

The coarse, heavy, cumbrous operations of coal transportation do not admit of the manufacture of cars upon nice mathematical formulas, nor can the loads be adjusted with much reference to exactness. There is a liability to violent percussions and extraordinary strains, which must be provided for by an excess in the

weight and thickness of the material used. Then, unless the difference in the weight of the load is great, there will be no correspondent difference in the receipts of the transportation companies.

The patentee, not exaggerating the theoretical superiority of the form of his car, overlooked those facts which reduced its practical value to the level of cars of a form widely variant from his own. The object of this suit is to repair that defect of observation. It is, that this court shall extend, by construction, the scope of operation of his patent, to embrace every form which in practice will yield a result substantially equal or approximate to his own.

In the instruction asked for by the plaintiff, "form and circumstances" are treated as more or less immaterial, but the verdict is claimed if the defendants have constructed cars "which, substantially on the same principle and in the same mode of operation, accomplish the same result."

The principle stated in the patent applies only to circular forms.

The modes of operation in coal transportation have experienced no change from the skill of the plaintiff, except by the change from the rectilinear figure to the circular.

The defendant adheres to the rectilinear form. The result accomplished by the use of the two cars is the same—a more economical transportation of coal. This result it is that the **347*** plaintiff desires to appropriate, but this cannot be permitted. (Curtis on Patents, secs. 4, 26, 27, 86, 87, 88; 2 Story, 408, 411.)

In the case of *Aiken v. Bemis*, 3 Wood. & M., 349, the learned judge said: "When a patentee chooses to cover with his patent the material of which a part of his machine is composed, he entirely endangers his right to prosecute when a different and inferior material is employed, and one which he himself, after repeated experiment, had rejected."

The plaintiff confines his claim to the use of the conical form, and excludes from his specification any allusion to any other. He must have done so advisedly. He might have been unwilling to expose the validity of his patent, by the assertion of a right to any other. Can he abandon the ground of his patent, and ask now for the exclusive use of all cars which, by experiment, shall be found to yield the advantages which he anticipated for conical cars only?

The claim of to-day is, that an octagonal car is an infringement of this patent. Will this be the limit to that claim? Who can tell the bounds within which the mechanical industry of the country may freely exert itself? What restraints does this patent impose in this branch of mechanic art?

To escape the incessant and intense competition which exists in every department of industry, it is not strange that persons should seek the cover of the Patent Act, for any happy effort of contrivance or construction; nor that patents should be very frequently employed to obstruct invention, and to deter from legitimate operations of skill and ingenuity. This danger was foreseen, and provided for, in the Patent Act. The patentee is obliged, by law, to describe his invention, in such full, clear and

exact terms, that from the description, the invention may be constructed and used. Its principle and modes of operation must be explained; and the invention shall particularly "specify and point" out what he claims as his invention. Fullness, clearness, exactness, preciseness, and particularity, in the description of the invention, its principle and of the matter claimed to be invented, will alone fulfill the demands of Congress or the wants of the country. Nothing, in the administration of this law, will be more mischievous, more productive of oppressive and costly litigation, of exorbitant and unjust pretensions and vexatious demands, more injurious to labor, than a relaxation of these wise and salutary requisitions of the Act of Congress. In my judgment, the principles of legal interpretation, as well as the public interest, require that this language of this statute shall have its full significance and import.

In this case the language of the patent is full, clear and exact. The claim is particular and specific.

*Neither the specification nor the **[348]** claim, in my opinion, embraces the workmanship of the defendants. I therefore respectfully dissent from the judgment of the court, which implies the contrary.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Maryland, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to award a *venire facias de novo*.

Cited—1 Otto, 183; 5 Otto, 569; 6 Otto, 230; 3 Hughes, 294; 2 Bond, 65; 2 Cush., 349; 3 Blatchf., 183; 15 Blatchf., 426; 1 Holmes, 116.

CLINTON WALWORTH, Plaintiff in Error,

v.

JAMES KNEELAND, AND HANNAH, HIS WIFE, AND FRANCES CORNELIUS FOSTER, AND WILLIAM FOSTER, Infants, by their next Friend, JAMES KNEELAND.

Refusal of State Court to allow defense, that contract sued on was made in fraud of Act of Congress, will not give this court jurisdiction.

Where a case was decided in a State Court against a party, who was ordered to convey certain land, and he brought the case up to this court upon the ground that the contract for the conveyance of the land was contrary to the laws of the United States, this is not enough to give jurisdiction to this court under the 25th section of the Judiciary Act.

The State Court decided against him upon the ground that the opposite party was innocent of all design to contravene the laws of the United States.

But even if the State Court had enforced a con-

NOTE.—When court will decree conveyance of land situated beyond its territorial jurisdiction. Specific performance. See note to *Oakey v. Bennett*, 11 How., 83.

tract, which was fraudulent and void, the losing party has no right which he can enforce in this court, which cannot therefore take jurisdiction over the case.

THIS case was brought up from the Supreme Court of the State of Wisconsin, by a writ of error issued under the 25th section of the Judiciary Act.

The case is stated in the opinion of the court.

It was submitted on a printed brief by *Mr. Smith* on behalf of the plaintiff in error, and argued by *Mr. Baxter* for the defendants in error.

The counsel for the plaintiff in error made the following points:

1st. The contract in which this suit originated was made in violation of the Act of Congress approved March 3d, 1807, entitled "An Act to prevent settlements being made on lands ceded to the United States, until authorized by law. (2 U. S. Stat., 445.)

349*] *The first section prohibits the occupation and cultivation of the public lands, under the penalty of forfeiture of all the right and claim of the occupant.

The fourth section provides for the removal of such occupants and their punishment by fine and imprisonment.

At the time all the contracts connected with the land in question, to which Walworth was a party, were made, there was no pre-emption law of the United States in force. Every occupant of the public lands was a trespasser and occupied in violation of the Act of 3d of March, 1807, unless he had permission pursuant to the provisions of the second section of that Act.

2d. The bond of Walworth to Arnold, and the contract in which it originated, were made in violation of the 4th section of the Act of Congress of the 31st of March, 1830. (U. S. Stat., Vol. VIII., p. 278.)

3d. These agreements respecting this land between Frisbee and Walworth, Frisbee and Arnold, and Walworth and Arnold, all originated in, and were part of, a combination to hinder and prevent, at first, any other person than Frisbee, and after his sale, any other than Walworth, from purchasing the land at the public sales of the United States. There was a double combination. Walworth, Arnold and Frisbee, combined together, and they also combined with and became a part of the general organization of the settlers upon the public lands in the Milwaukee land district, to prevent anyone, excepting the actual claimant under the rules of such organization, from purchasing such lands at the public sales.

4th. Frisbee testifies that whether the title was obtained by pre-emption or under the claim laws, the title to the land, according to the original contract, was to come to him; that is, he was to purchase direct from the United States, and convey one half to Walworth; and he (Walworth) for that one half was to furnish money to pay for the whole, in addition to the \$100 he paid Frisbee at the time of making the original contract. In other words, he was to give something more than the price for which the land should be purchased of the United States.

This contract was clearly within both the spirit and the letter of the Act of 31st March, HOWARD 15.

1830, which declares all such contracts absolutely void.

5th. The contract between Walworth and Arnold, if ever valid, was annulled or rendered impossible to be performed by the Act of Congress, passed 18th day of June, 1838, entitled "An Act to grant a quantity of land to the Territory of Wisconsin for the purpose of aiding to open a canal to connect the waters of Lake Michigan with those of Rock River.

The counsel for the defendant in error moved to dismiss the case for want of juris. [*350 diction, and on that motion and on the argument of the case, relied on the following points:

I. Foster, the plaintiff in the court below, purchased from Arnold the land in question, and took the assignment of the title bond executed by Walworth, without any knowledge of, or participation in, the illegality (if any existed) between Frisbee and Walworth. He expended his money in the purchase and improvement of the land, without any design to violate or encourage the violation of law.

He therefore contends that Walworth cannot set up the defense of illegality against him.

1. Because they are not *in pari delicto*.

2. Because he was able to establish his case as stated in his bill, and claim specific performance of the contract, without relying on the illegal contract alleged by Walworth to exist between Frisbee and Walworth.

On this point the defendant in error will rely on the following cases: *Falkney v. Reynolds*, 4 Burr., 2070; S. C., 1 W. Bl., 638; *Petrie v. Hannay*, 8 T. R., 418; *Simpson v. Bloss*, 7 Taunt., 246; *Firaz v. Nicholls*, 2 M., G. & S., 501-552; Eng. Com. Law. 601; *Bunn v. Winthrop*, 1 Johns. C., 337; *Ellis v. Nimmo*, Lloyd & Goold, 333; 10 Cond. Eng. C., 533; *Lewis v. Davison*, 4 Mees. & Wels., 654.)

II. This court has no jurisdiction, because the decision of the Supreme Court of Wisconsin does not question the validity of any of the statutes referred to in the assignment of errors, nor has the plaintiff in error set up any right, title, privilege, or exemption under said statutes or any of them.

III. The Supreme Court of Wisconsin has not misconstrued the Acts of Congress named in the assignment of errors.

On these points the defendant in error will refer to the Acts of Congress and authorities mentioned below:

The Judiciary Act, 1 Stat. at Large, 85, L. & B.'s edition. An Act to prevent Settlements, etc., 2 *Id.*, 445. An Act for the relief, etc., 4 *Id.*, 391, 392. An Act to grant, etc., 5 Stat. at Large, 245. An Act regulating grants, etc., south of Tennessee, 2 *Id.*, pp. 229, 230, secs. 2, 3, 1803. An Act supplementary, etc., 2 *Id.*, ch. 43, sec. 5, 1805. An Act to authorize the State of Tennessee, etc., 1806, ch. 31, sec. 2, condition, and 2d proviso, 2 *Id.*, 383. An Act regulating grants of land in Michigan, 1807, ch. 34, sec. 2, p. 438, Vol. II. An Act supplemental, etc., 1808, ch. 10, sec. 1, p. 455, Vol. II. 1808, ch. 40, sec. 6, p. 480, an Act concerning sales. 1808, ch. 67, sec. 3, p. 503, an Act supplemental, etc. Act of 1811, ch. 48, sec. 4, 1st proviso, Vol. II., p. 664, preference given to occupants. 1813, ch. 20, sec. 1, p. 797, preference, in sales in Illinois territory, given to settlers. 1814, ch. 61, sec. 4, p. 126,

351*] Vol. III., pre-emption *to settlers in Illinois prior to February 5, 1813. 1815, ch. 63, sec. 3, p. 218. Vol. III. 1816, ch. 101, sec. 1, p. 307. Vol. III. 1816, ch. 163, secs. 1, 2, and pp. 330, 381. 1820, ch. 96, p. 573. 1826, ch. 28, Vol. IV., p. 154, pre-emption to settlers in Alabama, Mississippi, and Florida. 1830, ch. 208, Vol. IV., p. 420. 1834, ch. 54, Vol. IV., p. 678. 1838, ch. 119, Vol. V., p. 251. *Piatt v. Oliver et al.*, 2 McLean, 278; *Oliver v. Piatt*, 3 How., 410, 411.

Mr. Chief Justice Taney delivered the opinion of the court:

This case is brought before us by a writ of error directed to the Supreme Court of the State of Wisconsin.

A bill in equity was filed in the Milwaukee District Court of that State by Gustavus A. Foster, against Walworth, the plaintiff in error, to obtain the specific performance of a contract for the conveyance of a certain quarter section of land described in the bill. The contract under which the complainant claims is set out in the bill; and, as he alleges, was made by Walworth with a certain Jonathan E. Arnold; that the land in question had at that time been surveyed by the government, but not offered for sale; and that Arnold, in pursuance of and in execution of the agreement with Walworth, entered upon and took possession of it, and afterwards assigned his interest to the complainant, who took possession and still held the possession when his bill was filed; that Walworth had become the purchaser, pursuant to his agreement with Arnold; and obtained a legal title from the United States; and was bound, under that agreement and the assignment of Arnold above mentioned, to convey the land to the complainant.

Foster died pending the suit, and the defendants in error are his legal representatives.

Walworth, in his answer, alleges that the original contract in relation to this land, was between him and a man by the name of Frisbee; that Frisbee transferred his interest to Arnold, who agreed to take his place, and fulfill his part of the agreement; and that the contract with Arnold was made upon that condition. He admits that Arnold conveyed his interest to Foster. He also gives in much detail the several contracts; the understanding of the respective parties at the time, as he alleges it to have been; their acts afterwards; the object of the agreement, and the circumstances under which he afterwards became the purchaser of the land claimed. And he denies that there was any valuable consideration moving from Frisbee or Arnold to him to support the contract; and if there was, he denies the construction given by the complainant to the agreement; and denies, also, that his subsequent purchase from the government was made under it. He alleges that neither Frisbee nor Arnold performed their part of the contract; and, moreover, that the contract was void, because its object and purpose was to prevent competition for public lands, when offered at auction by the government, and therefore against the policy of the law.

Testimony was taken on both sides; and at the final hearing, the court, by its decree, directed Walworth to convey to the defendants

in error the one half of the quarter section in question. Walworth appealed to the Supreme Court of the State, where the decree was affirmed. And this writ of error is brought to revise that decree.

Upon looking into the proceedings in the state court, we should be at a loss to understand how this court could be supposed to have jurisdiction upon this writ of error, over any of the questions decided in the state court, if the printed argument in behalf of the plaintiffs in error had not pointed to the one on which he relies. For we do not see that Walworth set up any right or title under an Act of Congress; or that any of the contingencies took place at the trial which gave jurisdiction to this court under the twenty-fifth section of the Act of 1789.

But it appears that he claims the right to remove the case to this court upon the following ground: he alleges in his answer, that at the time of his contract with Frisbee, and also with Arnold, there was no Act of Congress which authorized them to settle on this land, or gave any right of pre-emption to those who had settled on them; that they were trespassers, and had illegally combined with a large body of men of like character, who had settled upon the public lands in that district, to prevent them from selling for more than one dollar and twenty-five cents the acre, and to secure to each other at that price the land they had respectively selected. And he further states, that these settlers had adopted rules and established a land office in which their respective claims were to be entered: and had agreed, that if the government refused to grant the right of pre-emption at the price above named, and directed them to be sold at public auction, the settlers would, by force and terror—or, as he terms it, “by club or Lynch law”—prevent anyone from bidding against the settler for the land he had entered at their land office; and would, by such means, enable him to buy it at the lowest government price, that is, at one dollar and twenty-five cents an acre. And that under the agreement between Frisbee and himself, Frisbee was to hold possession, and have his claim entered at the settlers’ land office; and if Congress should give the right of pre-emption at the lowest government price, he and Frisbee or Arnold were to share in the profits, Walworth to furnish the money to pay for it. And if no right of pre-emption was given, Walworth was permitted to buy, under the “settlers’ regulations, at that price, [*353] and the profits in that case also to be shared between the parties. And that these contracts were in violation of the Acts of Congress, in relation to the sales of public lands, and contrary to public policy, and, therefore, void. Such is the substance of his defense on this part of the case, so far as we can gather it from his answer (which is by no means clear in its statements), and from the evidence he offered to support it, and the printed argument filed in his behalf.

It is due to the state court to say, that in its decree, it declares that such a contract would be void; and it decreed in favor of the complainants upon the ground that it was not proved, by legal testimony, that either Frisbee or Arnold had undertaken to associate themselves with the illegal combination of settlers.

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or to use any other unlawful means, to enable Walworth to buy the land in question at a reduced price.

But if it had been otherwise, and the state court had committed so gross an error as to say that a contract, forbidden by an Act of Congress, or against its policy, was not fraudulent and void; and that it might be enforced in a court of justice, it would not follow that this writ of error could be maintained. In order to bring himself within the twenty-fifth section of the Act of 1789, he must show that he claimed some right, some interest, which the law recognizes and protects, and which was denied to him in the state court. But this Act of Congress certainly gives him no right to protection from the consequences of a contract made in violation of law. Such a contract, it is true, would not be enforced against him in a court of justice; not on account of his own rights or merits, but from the want of merits and good conscience in the party asking the aid of the court. But to support this writ of error, he must claim a right which, if well founded, he would be able to assert in a court of justice, upon its own merits, and by its own strength. No such right is claimed in the answer of the plaintiff in error. And indeed it would be a novelty in legislation and in public policy if Congress had taken so much pains to provide for the protection of persons who had combined with others to perpetrate a fraud on the United States, and found themselves in the end the sufferers by the speculation; or who, by the error of a state court, had been compelled to share its gains with their associates in the fraud. The right or interest claimed in the state court must be of a very different character, to entitle him to the protection of the Act of 1789. It has already been so decided in this court in the case of *Udell et al. v. Davidson*, 7 How., 769.

Neither can the writ of error be supported [354*] on the ground that *Walworth was unable to purchase, at \$1.25 per acre, another portion of the land mentioned in the contracts, in consequence of its subsequent cession by the United States to the Territory of Wisconsin. Whether that cession, and the enhanced price at which it was held, absolved him from the obligation of performing any part of the contract, depended altogether upon its construction. The rights of the parties did not depend on the Act of Congress making the cession, but upon the contract into which they had entered. And the construction of that agreement, and the rights and obligations of the parties under it, were questions exclusively for the state court; and over its decree in this respect this court has no control.

The writ of error must be dismissed for want of jurisdiction.

ORDER.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Wisconsin, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that this cause be, and the same is hereby dismissed for the want of jurisdiction.

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FARISH CARTER, *Plaintiff in Error*,

v.

ARCHIBALD T. BENNETT.

Jurisdiction—transfer of cause from Territorial to State Court in Florida on admission—question of jurisdiction of State Court not raised below not considered on appeal.

A person was sued in the Territorial Court of Florida.

After the admission of Florida as a State, the case was transferred to a State Court.

The defendant appeared, and pleaded the general issue.

The verdict was given against him.

He then moved in arrest of judgment, upon the ground that the case ought to have been transferred to the District Court of the United States, instead of a State Court.

The motion was overruled, and judgment entered up against him.

Upon an appeal to the Supreme Court of Florida, this judgment was affirmed.

This court has no jurisdiction under the 25th section of the Judiciary Act, to review that decision.

What the State Court decided, was the motion in arrest of judgment, where the record only is examined, and no new evidence admitted. There was nothing in the pleadings to show that the defendant was a citizen of Georgia, and no defect of jurisdiction was apparent.

The defendant might have pleaded in abatement that he was a citizen of Georgia, but not having done so, it was too late to introduce the matter upon a motion in arrest of judgment.

*As it does not appear, therefore, that the [*355] Supreme Court of the State must have decided adversely to the party now claiming the interposition of this court, and decided so upon the construction of an Act of Congress, the writ of error must be dismissed for want of jurisdiction.

THIS case was brought up from the Supreme Court of the State of Florida by writ of error issued under the 25th section of the Judiciary Act.

The case is set forth in the opinion of the court.

Mr. Davis made a motion to dismiss it, for want of jurisdiction, which motion was resisted by Mr. Johnson.

Mr. Chief Justice Taney delivered the opinion of the court:

This case comes before us upon a writ of error directed to the Supreme Court of the State of Florida; and a motion has been made to dismiss it for want of jurisdiction.

The suit was brought by Bennett, the defendant in error, against Carter, the plaintiff in error, in December, 1842, while Florida was yet a Territory, and was continued from term to term, until she was admitted into the Union as a State. The action was trover for certain property. The declaration was in the usual form, and the defendant pleaded the general issue of not guilty. After Florida became a State, and the Territorial Court, in which the suit was pending, ceased to exist, the papers were transmitted by the clerk to the Circuit Court of the State for the same county.

The plaintiff and defendant both appeared in the Circuit Court, and the case was continued until December, 1848, when the parties proceeded to trial—and the jury found for the defendant in error, and assessed his damages at \$19,999.66.

Several exceptions were taken to the rulings of the court on the trial, which it is not neces-

sary to mention, because they relate to the laws of the State, over which this court can exercise no jurisdiction upon this writ of error. After the verdict was rendered against him, the plaintiff in error moved for a new trial. But the motion was overruled by the court. He thereupon offered to prove that he was a citizen of Georgia at the time the suit was instituted in the Territorial Court, and had continued to be so, and still was a citizen of that State. And this fact being admitted by the opposite party, he moved in arrest of judgment, and that the case be dismissed from the court, with an order to the clerk to transfer the papers to the District Court of the United States for the Northern District of Florida, or hold the papers and proceedings subject to any order of transfer or demand from the said court.

356*] This motion was refused, and judgment entered on the verdict. Whereupon he appealed to the Supreme Court of the State; and the judgment of the Circuit Court being there affirmed, he has brought the case before this court by writ of error.

In support of this writ the plaintiff in error contends, that as he was a citizen of Georgia at the time the suit was brought in the Territorial Court, and also when the Act of Congress of February 22d, 1847, was passed, the suit was, by operation of that law, transferred to the District Court of the United States for the Northern District of Florida, and that the Circuit Court of the State had no right to take possession of the papers in the case, nor any authority to try and decide it; and that, by moving in arrest of judgment upon this ground, he had claimed a right under a law of the United States; and that as the decision was against the right claimed, he is entitled to a writ of error under the 25th section of the Act of 1789.

Upon this motion to dismiss the writ of error, the construction of the Act of Congress of 1847 is not before us. In this stage of the case we are not called on to decide whether this Act of Congress did or did not, *proprio vigore*, transfer the case to the District Court of the United States. The only question presented by the motion is, whether, upon the record before us, we have a right to reverse the judgment of the State Court. And in order to give this court jurisdiction over the judgment of the State Court, it must appear by the record that the right now claimed by the plaintiff in error, to remove the case to the District Court of the United States, was so drawn in question in the State Court, that it must have been decided in the judgment it has given.

Now, there is nothing in the pleadings to show that Carter was a citizen of Georgia. It is not so stated in the declaration or plea. And when the papers were transmitted to the State Court, he appeared there and defended himself upon the plea of the general issue, which he had put in, in the Territorial Court. This plea admitted the jurisdiction of the court; and the case was tried and the verdict rendered upon these pleadings. And upon a motion in arrest of judgment the court cannot look beyond the record; and the judgment cannot be arrested, unless there is some error in law or defect of jurisdiction apparent in the proceedings. And here there was no error or defect of jurisdiction

apparent on the record, even if the construction of the Act of 1847, contended for by the plaintiff in error, is the true one. Both parties, by their pleadings, admitted the jurisdiction of the court; and there was no averment, in any part of them, that Carter was a citizen of Georgia. And after a verdict is rendered, the judgment cannot be arrested by the introduction of new evidence on a new fact. It may, in a proper case, lay the foundation of a motion for a new trial, but not in arrest of judgment.

It is evident, therefore, that the State Court, in proceeding to give judgment on the verdict, could not legally have decided upon the validity of the plaintiff's objection to its jurisdiction. They could not hear evidence, in that stage of the case, to prove that Carter was a citizen of Georgia, nor judicially notice it when admitted by the opposite party. And we are bound to presume that they proceeded to judgment on this ground, and did not consider the right claimed by the plaintiff in error as properly before them.

In an action in a circuit court of the United States, where the jurisdiction depends upon the citizenship of the parties, it has always been held, that where the plaintiff avers in his declaration that he and the defendant are citizens of different states, if the defendant means to deny the fact and the jurisdiction, he must plead it in abatement; and if he omits to plead it in abatement, and pleads in bar to the action, he cannot avail himself of the objection at the trial. Still less could he be permitted to do so upon a motion in arrest of judgment. And the same principles which this court sanction in such cases in the courts of the United States, upon questions of jurisdiction depending upon personal privilege, we are bound to apply to the proceedings in the State Court.

Undoubtedly it was in the power of the plaintiff in error, when he appeared to the suit in the Circuit Court of the State, to have pleaded to the jurisdiction, upon the ground that he was a citizen of Georgia. Whether such a plea could have been maintained or not, it is not necessary for us to say. But it would have brought before the court the construction of the Act of 1847, and it must have been judicially decided. And if the decision had been against the right he claimed under it, this court would have had jurisdiction to hear and determine that question. But upon the record, as it comes before us, it does not appear that this question was ever presented to the State Court in a manner that would enable it judicially to notice or decide it.

And the writ of error must therefore be dismissed for want of jurisdiction.

ORDER.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Florida, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that this cause be, and the same is hereby dismissed, for the want of jurisdiction.

358*] *ROBERT FORSYTH, Appellant,

v.

**JOHN REYNOLDS, JOSIAH E. MCCLURE,
AND JOHN MCDUGALL.**

Grant under Treaty between U. S. and Great Britain of 1794, did not disqualify from taking donation under Acts of 1820 and 1823.

By two Acts, passed in 1820 and 1823, Congress granted a lot in the Village of Peoria, in the State of Illinois, to each settler who "had not heretofore received a confirmation of claim or donation of any tract of land or village lot from the United States."

Lands granted to settlers in Michigan, prior to the surrender of the western posts by the British government, and which grants were made out to carry out Jay's Treaty in 1794, were not donations so as to exclude a settler in Peoria from the benefit of the two Acts of Congress above mentioned.

THIS was an appeal from the Circuit Court of the District of Illinois, sitting as a court of equity.

The case was this:

On the 4th day of June, 1850, John Reynolds, Josiah E. McClure, and John McDougall, appellees in the court, filed their bill in the Circuit Court of the United States for the District of Illinois, against Robert Forsyth, appellant in this court.

The bill sets forth that the complainants claim title to a tract of land situated in the Village of Peoria, State of Illinois, and particularly described in said bill, their claim of title commencing with a patent from the United States to one John L. Bogardus, on a pre-emption established by him at the Land Office, in Quincy, Illinois; said patent bearing date January 5, 1838; a copy of which, and also of all the intermediate conveyances from Bogardus to said complainants, are filed with said bill as exhibits.

The bill also avers that said complainants have been for several years in possession of said land, and made valuable improvements thereon, amounting to over \$3,000.

The bill further sets forth that in the year 1848, Robert Forsyth commenced an action of ejectment in the said Circuit Court of the United States against one James Kelsey and Joshua P. Hotchkiss, then occupants of said premises, for recovery of a portion of said premises, to which the said Forsyth claimed title under French claim number seven, in said Village of Peoria, which claim covered the larger portion of the premises above referred to; the said Forsyth claiming by virtue of an Act of Congress, approved May 15th, 1820, entitled "An Act for the relief of the inhabitants of the Village of Peoria, in the State of Illinois," and also by virtue of another Act of Congress, approved March 3, 1823, entitled "An Act to confirm certain claims to lots in the Village of Peoria, in the State of Illinois," in pursuance of which Acts a patent issued on the 16th December, 1845, to the legal representatives of one Thomas Forsyth, and to their heirs, a copy of which patent is filed as an exhibit with said bill.

The bill further alleges that said Robert **359*] Forsyth**, derived all his title to said French claim by inheritance from the said Thomas Forsyth, the said Robert being one of the sons of the said Thomas, and by purchase from the other heirs of the said Thomas.

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The bill further charges that the Act of Congress of March 3, 1823, before referred to, excluded the right or claim of any settler in the Village of Peoria, who had, before the date of the said Act, received a confirmation of claims or a donation of any tract of land or village lot from the United States, and that the grant made by said Act was only to such settler, provided he had not received any prior grant, confirmation or donation.

The bill further charges, that by a regulation of the General Land Office, the appellant, Forsyth, in August, 1845, filed an affidavit with the Receiver of the Land Office, at Edwardsville, to the effect that Thomas Forsyth had not received a prior confirmation or donation, and that said Thomas Forsyth was an inhabitant or settler on lot seven, within the meaning of the Act.

The bill further charges that the claim of the said Robert Forsyth, made before the Register of the Land Office at Edwardsville, Illinois, on the 7th September, 1820, and the evidence in support of said claim, show that the same was made by said Forsyth in his own right, and not as the legal representative of any other person.

The bill further charges that the said Thomas Forsyth had, prior to the passage of the Act of the 3d March, 1823, received from the United States donations and confirmations of two claims in the Territory of Michigan, under an Act of Congress entitled "An Act regulating grants of land in the Territory of Michigan," approved March 3, 1807, and that patents for said claims were duly issued to the said Thomas Forsyth, in the year 1811, certified copies of which patents are filed as exhibits with said bill.

The bill, after propounding certain interrogatories, concludes with a prayer for a perpetual injunction against the said Robert Forsyth, restraining him from prosecuting his said action of ejectment.

The patent, after the usual grant to Bogardus, concludes with the following proviso: "subject, however, to the rights of any and all persons claiming under the Act of Congress of 3d March, 1823, entitled 'An Act to confirm certain claims to lots in the Village of Peoria, in the State of Illinois.'"

The patent recites Thomas Forsyth as claiming "under John Baptist Maillet, and in right of his own occupancy and cultivation," and also recites that it appears from the certificate of the register that "John Baptist Maillet was the inhabitant or settler within the purview of said Act of Congress of 1823," and that it has appeared to the satisfaction of the reg- ***360** ister and receiver that the said inhabitant or settler did not, prior to said Act of 1823, receive a confirmation of claims or donation of any tract of land or village lot from the United States, and that the legal representatives of said Thomas Forsyth, under said Maillet, in virtue of the confirmatory Act aforesaid, are entitled to a patent.

On the 31st August, 1850, Forsyth filed his answer, admitting the possession of the premises by complainants, as stated by them, and that the value of the improvements was \$3,000, as stated by complainants, that the action of ejectment was brought, as stated in the

bill, and that the complainants claimed title under the Bogardus patent.

The answer further sets forth that respondent claims title to the premises, by settlement and occupation, of John Baptist Maillet, previous to the year 1790, and from that time to 1801, and a sale of such possession and occupancy to John M. Coursell, and from him to Thomas Forsyth, and Forsyth's occupancy, under such purchases, from 1802 to 1812; also, by the Act of Congress of May 15th, 1820, above referred to; also, by the report of Edward Coles, Register of the Land Office at Edwardsville, Illinois, in pursuance of said Acts of Congress, said report, properly authenticated, being filed with the answer; also, by the Act of Congress of March 3, 1823; also, by the survey of the Village of Peoria, and of said premises, by the surveyor of public lands in Illinois and Missouri, plats of which are filed with said answer, marked "B" and "C"; also, by the patent to Thomas Forsyth, exhibited with said bill, and by devise from said Thomas to Mary, the sister of respondent, and by death of said Mary without issue, whereupon the premises descended to respondent and his brother, and by deed, to respondent from his brother, for his interest, duly certified copies of the will of Thomas Forsyth, and of the deed from respondent's brother to him being filed as exhibits with the answer, and the heirship of respondent and his brother fully appearing in the proof.

The answer further states that respondent can produce no deeds from Maillet to Coursell, and from Coursell to Thomas Forsyth, and that it was the custom among the French inhabitants, prior to 1812, to transfer the occupancy of real estate by verbal contract and delivery of possession merely.

The answer further states that respondent knows nothing of the donations and confirmations mentioned in said bill as having been made to said Thomas Forsyth, in Michigan, and never heard of such, except from said bill, or a short time before it was filed.

The answer further sets up that said Bogardus never occupied said premises in his own right, but as tenant to one Jacques Mette, and that the said Mette had on the 4th day of 361*] March, *1847, received a patent from the United States for that portion of the premises occupied by said Bogardus, and therefore said Bogardus having never occupied said land in his own right, but only as tenant to said Mette, the said pre-emption claim of Bogardus, and the patent issued thereon to him, were void; of all which the answer avers, the complainant had notice.

The answer further sets up that even if it should appear in proof that the Thomas Forsyth, referred to in said bill, and respondent's father were the same person, and that said Thomas Forsyth did receive the confirmations in Michigan, described in said bill, nevertheless, said confirmations would not prevent the said Thomas Forsyth from holding said premises in Peoria, under a proper construction of the Act of 8d March, 1823.

Exhibits were filed with the answer and proof taken, showing the defendant's title under Thomas Forsyth.

On the 7th June, 1850, the complainants filed

an amendment to their bill, setting forth that the John Baptist Maillet mentioned in the patent to the legal representatives of Thomas Forsyth, died about the year 1801, and that neither the said Maillet or his legal representatives, nor any other person, except the said Thomas Forsyth, ever presented any claim to said lot seven before the officers of the Land Office at Edwardsville, under the provisions of the Acts of Congress before referred to.

On the 26th December, 1850, the respondents filed an answer to the amendment, admitting the death of said Maillet, as therein stated, but insisting that Thomas Forsyth was the legal representative of said Maillet, and authorized to claim said premises before the land officers at Edwardsville, under the Act of Congress.

Much proof was taken, by the complainants in the case, to show the identity of the Thomas Forsyth who received the confirmations in Michigan, with the Thomas Forsyth to whose legal representatives the Peoria lot was patented, and who was the father of Robert Forsyth, the defendant.

The defendants took the depositions of Lisette Mette, Antoine Smith, Joseph Aubuchon, Sarah Bouche, and others, by whom it was clearly proven that about sixty years ago John Baptist Maillet occupied the premises at Peoria; that he sold to Coursell; that Coursell sold to Thomas Forsyth, who continued to occupy the lot; that these sales were made in the ordinary mode of selling real estate among the French at Peoria at that time, by verbal sale and delivery of possession.

The said Lisette Mette also proved that the said Robert Forsyth, defendant, was the son of said Thomas Forsyth; that she was present at his birth, which took place on the lot in controversy.

*It is also proven that Thomas For- [362
syth died in 1833, leaving three children, to wit: Thomas, Mary, and appellant, and that Mary died without issue, leaving Thomas and appellant her sole heirs. There is no controversy on this point.

The case was heard before the District Judge, holding the Circuit Court at the December Term, 1852, who decreed a perpetual injunction against the defendant Robert Forsyth, enjoining him from prosecuting said action of ejectment, the decree being on the ground that the confirmation in Michigan to Thomas Forsyth rendered invalid the Peoria patent to his legal representatives, under the Act of March 3, 1823.

From this decree Forsyth appealed to this court.

The cause was argued by *Mr. Williams* for the appellants. Briefs were also filed upon that side by *Messrs. Lincoln and Gamble*. *Mr. Chase* argued the case for the appellee: and a brief was also filed by *Mr. Purple*.

The following is the notice of the main point in the case, taken from one of the briefs on the part of the appellant:

The objection made to the patent to Forsyth's representatives is, that Forsyth in his life obtained two confirmations for lands in Michigan Territory.

If the Act of 1823 designed to exclude from

the grant all settlers who had previously received confirmations or donations of lands or lots, in any part of the territory of the United States, such design was strangely singular. If it excludes all who had received confirmations, it excludes them without reference to the character of the title confirmed or the consideration for the confirmation. It would place on the same footing, those who, under treaties made by the United States with foreign nations, had obtained confirmations of titles which the United States were bound to confirm; and those who had received from the United States lots or lands as mere gratuities. It should not receive a construction that would make it operate so absurdly, unless such construction is unavoidable. No similar act, with such a restriction upon its operation, can be found among the Acts of Congress. It is apparent, from the history of the Michigan titles of Thomas Forsyth, which are employed in this case to defeat the title to this lot in Peoria, that, if they can have the effect given to them by the Circuit Court, then a confirmation of a Spanish grant in any part of Louisiana, made by the United States under the clear obligation of the Louisiana Treaty, would equally defeat a title to a lot in Peoria claimed under the Act of 1823.

The titles in the Michigan land, held by **363**] Thomas Forsyth, *were held under the section of the Act of March 3d, 1807 (2 United States Stat., 438), and they were founded upon possession and improvement of the property prior to July 1st, 1776. The tracts are situated at Gross Point, in the Detroit District. Now, the part of Michigan Territory in which this land was situated, had been occupied by the British authorities up to June or July, 1796, and the possession and improvement of the land which were to be the basis of the title under the Act of 1807, were under British sanction. How, then, did such occupancy of property, undoubtedly within the territorial limits of the United States, become the foundation of a grant by our government? The Treaty of 1794, which provided for the evacuation of all places within our territory occupied by the British troops, required, in its second section, that traders and settlers should be protected in the enjoyment of their property, and should be free to settle the same or retain it for their own benefit. This obligation, assumed by the Treaty, was recognized and discharged by the Act of 1807, as far as that Act extended, and the titles thus acquired were not mere gratuities, but had for their consideration all stipulations in the Treaty which our government regarded as beneficial to itself. In respect to their consideration, these titles stand upon the same footing as any others which have been acknowledged and confirmed by our government, under any of the treaties by which we have acquired territory, and by which we become bound to acknowledge and perfect the titles initiated under the former government.

When an individual has acquired a title from our government under the obligation of a treaty with a foreign nation, and therefore for a consideration which that foreign nation has given, we would not expect our own government to make the title, so acquired, a ground for excluding that citizen from any benefit conferred

upon a class of citizens in a distant part of the country, upon altogether different considerations, when he belongs to the class intended to be benefited, and has himself given the consideration for the benefit. It would appear to be an unnatural supposition that such was ever the design of our government.

The language of the Act of 1823, which excludes from the benefit of the grant those who have obtained previous confirmations or donations, does not require such construction as would exclude a person claiming property in Michigan under the Act of 1807. A title to property in Michigan under that Act is not a donation, for it rests upon the considerations that moved two sovereign powers to the conclusion of a Treaty. The term "confirmation" is applied in different Acts of Congress to titles of different origin. In the second section of the Act, 3d March, 1807, in relation to land titles in Louisiana, it is used with *reference [**364** to titles where there is no other foundation for the claim than possession. (2 United States Stat., 440.) In the first section of the Act 13th June, 1812 (2 United States Stat., 748), it is applied in like manner to rights, titles, and claims, resting only upon possession. There are very many acts in which the term is used for the purpose of perfecting claims, when, according to law, the person in possession of the property had no title to it, or right to the possession, and therefore, in such case, the confirmation is a mere gratuity.

The counsel for the appellees thus briefly noticed the point in question:

The claims confirmed to Forsyth, at Gross Point, under the Act of the 3d March, 1807, are of the same class and character as the one which he now seeks to enforce in Peoria. Settlement and occupation were necessary to establish the validity of both. No other claim, equitable or legal, is advanced in favor of either. In the one case, the right depends upon a settlement prior to the 1st day of January, 1813; in the other, upon a settlement, and continued occupancy, from before the 1st day of July, 1796, to the passage of the Act of 3d March, 1807. In neither case, at the time of the passage of the Acts, had the settlers or occupants any title to the lands, derived from any source which the government of the United States were legally or morally bound to respect. Both were gratuities—mere boons; not at all allied to those cases where grants, concessions, or donations have been made by the officers of foreign governments, under the authority of such governments, previous to the time of the acquisition of the territory in which they were located by the United States.

It is apparent that the object and design of the reservation in the Act of 1823, was to prevent anyone from becoming the recipient of the bounty of the government, in lands or lots, more than once; and it is not confined in its operation to any special location, or particular class of cases.

Mr. Justice Catron delivered the opinion of the court:

The bill seeks to set aside a patent to the legal representatives of Thomas Forsyth, because he had obtained from the United States two other donations of land situate in Michigan.

previous to his donation of the village lot in Peoria; and it is alleged that for this reason his donation certificate and patent were fraudulent, as against the complainants, and should not be set up to their prejudice; and so the court below held.

Waiving, for the present, all consideration of the fact that Forsyth claimed the village lot as assignee of Maillet, who had not obtained any previous "confirmations or donations;" **365***] and *second; that the patent to Bogardus was made subject to the rights of all persons claiming lots in Peoria, under the Act of 1823; and placing the case on the ground that the Circuit Court did, and then, how does the claim to relief stand?

It was assumed by the court below, that Forsyth had received, as a donation, the two tracts of land in Michigan, within the meaning of the Act of 1823. That the Act contemplated a donation we think is true.

A donation is a gift and gratuity, and not a grant of land founded on a consideration, as where the government is bound to make it by treaty stipulation conferring mutual benefits. Thomas Forsyth and his family were Canadian settlers and British subjects, residing on our side of the line, established by the Treaty of Peace of 1783; they professed allegiance to Great Britain, as all that population did at the date of Jay's Treaty, in 1794, and up to July, 1796.

By the sixth article of the Treaty of 1783, it was provided that no one should suffer by reason that they took part with Great Britain in the war, "in person or property."

As Great Britain held possession of the country in Michigan, regardless of the Treaty of 1783, a principal object of Jay's Treaty was to obtain actual possession, and to do this it was necessary to secure the removal of the British troops, and an evacuation of the military posts of that power from our side of the line.

The second article expressly provided for these objects, and at the same time, and as matter of justice, it was declared, that all settlers and traders, within the precincts or jurisdiction of said posts shall continue to enjoy, unmolested, all their property of every kind, and shall be protected therein by the American government; that they may sell their lands and houses, or retain the property thereof at discretion; and that those who continue in the country for one year, after the date of the Treaty, shall be considered as having elected to become citizens of the United States.

The 9th article is reciprocal and general, and further provides that British subjects holding lands in the United States shall continue to hold them, according to the nature and tenure of their respective estates and titles therein, and that they may sell or devise the same as if they were natives.

As, from 1783 to 1794, no title could be made by Great Britain to lands on our side of the line, within the jurisdiction of the posts, it was for mere settlers, to a great extent, that the 2d article of the Treaty provided: persons residing there usually having no other evidence of title than possession, improvements, and actual residence on the land.

To execute in good faith this part of the **366***] Treaty, Congress provided, *by the Act of March 3, 1807 (sec. 2), that to every per-

son or persons in possession at that date of any tract of land, in his own right, in Michigan Territory, which tract of land was settled, occupied, and improved by him or them prior to the 1st day of July, 1796, or by some other person under whom he or they hold or claimed the right of occupancy or possession thereof, and which occupancy or possession had been continued to the time of passing that Act, then the said tract or parcel of land thus possessed, occupied, and improved, should be granted, and such occupant should be confirmed in the title to the same as an estate of inheritance in fee simple.

The Act of 1807 pointed out the mode by which those seeking title under it should proceed. Forsyth's two claims were brought strictly within the terms of the Act; he got certificates from the commissioners to that effect, and in 1811 obtained his patents.

The larger tract of 600 acres he claimed by a deed of conveyance from his father, William Forsyth; and the other tract for 336 arpents he held, as one of his father's heirs, by a deed of partition. Both tracts front on lake St. Clair, and were within the jurisdiction of the British posts.

We suppose it is free from controversy, that these two tracts of land were the property of Thomas Forsyth, in 1807, by virtue of the Treaty of 1794, and just as plainly property as lands held by a concession in Louisiana, under the Spanish government, by force of the Treaty of 1803.

In neither case could a donation be assumed to have been made. As Forsyth obtained no donation in Michigan, he was not within the prohibition prescribed by the Act of 1823 to settlers in the Village of Peoria, and therefore, the decree below must be reversed, and the bill dismissed, but without prejudice to either party, in prosecuting and defending the suit at law, sought to be enjoined by the bill, in regard to matters not hereby decided.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Illinois, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to dismiss the bill of complaint without prejudice to either party, in prosecuting and defending the suit at law, sought to be enjoined by the bill, in regard to matters not hereby decided.

***THE EXECUTORS OF JOHN Mc. [367
DONOGH, Deceased, ET AL.,**

v.

**MARY MURDOCH ET AL., Heirs of JOHN
McDONOGH, Deceased.**

Construction of will devising property to municipal corporations of Baltimore and New Orleans—impossible conditions, and those contrary to law, are as though not written—legacy is free from an invalid charge thereon.

HOWARD 15.

McDonogh, a citizen of Louisiana, made a will, in which, after bequeathing certain legacies not involved in the present controversy, he gave, willed and bequeathed all the rest, residue and remainder of his property to the corporations of the cities of New Orleans and Baltimore forever, one half to each, for the education of the poor in those cities.

The estate was to be converted into real property, and managed by six agents, three to be appointed by each city.

No alienation of this general estate was ever to take place, under penalty of forfeiture, when the States of Maryland and Louisiana were to become his residuary devisees for the purpose of educating the poor of those States.

Although there is a complexity in the plan by which the testator proposed to effect his purpose, yet his intention is clear to make the cities his legatees; and his directions about the agency are merely subsidiary to the general objects of his will, and whether legal and practicable, or otherwise, can exert no influence over the question of its validity.

The City of New Orleans, being a corporation established by law, has a right to receive a legacy for the purpose of exercising the powers which have been granted to it, and amongst these powers and duties is that of establishing public schools for gratuitous education.

The civil and English law upon this point compared.

The dispositions of the property in this will are not "substitutions, or *adeli commissa*," which are forbidden by the Louisiana Code.

The meaning of those terms explained and defined.

The testator was authorized to define the use and destination of his legacy.

The conditions annexed to this legacy, the prohibition to alienate or to divide the estate, or to separate in its management the interest of the cities, or their care and control, or to deviate from the testator's scheme, do not invalidate the bequest, because the Louisiana Code provides that "in all dispositions *inter vivos* and *mortis causa*, impossible conditions, those which are contrary to the laws or to morals are reputed not written."

The difference between the civil and common law, upon this point, examined.

The City of Baltimore is entitled and empowered to receive this legacy under the laws of Maryland; and the laws of Louisiana do not forbid it. The article in the Code of the latter State, which says that "Donations may be made in favor of a stranger, when the laws of his country do not prohibit similar dispositions in favor of a citizen of this State," does not most probably apply to the citizens or corporations of the States of the Union. Moreover, the laws of Maryland do not prohibit similar dispositions in favor of a citizen of Louisiana.

The destination of the legacy to public uses in the City of Baltimore, does not affect the valid operation of the bequest in Louisiana.

The cities of New Orleans and Baltimore, having the annuities charged upon their legacies, would be benefited by the invalidity of these legacies. Upon the question of their validity, this court expresses no opinion. But the parties to this suit, viz.: the heirs at law, could not claim them.

In case of the failure of the devise to the cities, the limitation over to the states of Maryland and Louisiana would have been operative.

THIS was an appeal from the Circuit Court of the United States for the Eastern District of Louisiana, sitting as a court of equity.

The bill was filed by the appellees, as the heirs at law of John McDonogh, to set aside his will.

The will itself is too long to be inserted in this report of the case; it would, of itself, occupy more than thirty printed pages. The reporter adopts the following statement of it, **[368*]** made out by *the following French jurists, whose opinion was requested upon the whole case, viz.: Coin-Deislis, Advocate, late

of the Council of the order of Advocates of Paris; Delangle, late Bastonier of the Order of Advocates of Paris; Giraud, LL.D., a member of the National Institute; Duranton, Père, Advocate, Professor in the Law Faculty of Paris; Marcadé, Advocate, late Advocate in the Court of Cassation.

Statement of the facts of the case.

John McDonogh, a native of Baltimore, an inhabitant of McDonoghville, State of Louisiana, made his olographic will at McDonoghville aforesaid, on the 29th of December, 1838, according to the forms prescribed by the local law.

No question is raised about the form of the instrument; nor could it be otherwise. The Civil Code of Louisiana gives every man the right of making an olographic will. Such a will, in Louisiana, as in France, is one written by the testator himself; and in order to be valid, it must be entirely written, dated, and signed by the testator's own hand. (Art. 1581.) This kind of will is subject to no other form, and may be made anywhere, even out of the State. (Same art.) These are the same rules as those contained in arts. 970 and 999 of the French Civil Code.

John McDonogh died in October, 1850. His will was proved in due form of law.

This will has been printed at New Orleans, at full length, with the testator's instructions appended, under the title of "The last Will and Testament of John McDonogh, late of McDonoghville, State of Louisiana, also his Memoranda of Instructions to his Executors, &c." We do not mean to give it here *in extenso*, deeming a synopsis of it quite sufficient for our purpose.

The testator, after having called on the holy name of God, commences, by declaring that he was never married, and that he has no heirs living, either in the ascending or the descending line. So that, according to the laws of the State, his power of willing away his property was unlimited. (Civil Code of Louisiana, 1483.)

He orders that, immediately after his death, an inventory shall be made of his property, by a notary public, assisted by two or more persons, whom his executors shall appoint; the same to be done on oath.

First comes a devise to the children of his sister Jane, the widow of Mr. Hamet, of Baltimore, of land which he purchased on the 29th of February, 1819, of one John Payne, in Baltimore County. This lot, containing ten acres, more or less, together with the improvements, goes to his nephews aforesaid, a life estate in the same being, however, reserved to their mother.

*He also bequeaths to his said sister, **[*369]** widow Hamet, \$6,000, recommending to her so to place the capital as to make the interest support her in her old age.

He then bequeaths their freedom to certain slaves, fixes a fifteen years' term of service to be performed by certain others on his plantations, and orders the remainder of his black people to be sent to Liberia by the American Colonization Society.

And now, in language expressive of piety towards God, and charity towards mankind, the testator (after having made these deductions for

NOTE.—Devise to corporation; power to take by devise and bequest; subsequent incorporation as to such power. See note to Baptist Ass'n v. Hart, 4 Wheat., 1.

his sister, Mrs. Hamet, for the children of his sister, and for the freedom of a certain number of slaves) goes on to lay down what may be called emphatically his will.

He gives, wills and bequeaths, all the rest, residue, and remainder of his estate, real and personal, present and future, as well that which is now his, as that which may be acquired by him hereafter, at any time previous to his death, and of which he may die possessed, of whatsoever nature it may be, and wheresoever situate, unto the Mayor, Aldermen and Inhabitants of New Orleans, his adopted city, and the Mayor, Aldermen and Inhabitants of Baltimore, his native city, and their successors forever, in equal portions of one half to each of said cities of New Orleans and Baltimore.

He wills, at the same time, that the entire mass of property thus bequeathed and devised, shall remain charged with several annuities or sums of money, to be paid by the devisees of his general estate, out of the rents of said estate.

He adds, that the legacies to the two cities are for certain purposes of public utility, and especially for the establishment and support of free schools in said cities and their respective suburbs (including the town of McDonogh, as a suburb of New Orleans), wherein the poor, and the poor only, of both sexes, of all classes and castes of color, shall have admittance, free of expense, for the purpose of being instructed in the knowledge of the Lord, and in reading, writing, arithmetic, history, geography and singing, &c., &c.

This is the principal object of the testator's bounty, as appear by the words which usher in the general devise: "And for the more general diffusion of knowledge, and consequent well-being of mankind, convinced as I am that I can make no disposition of these worldly goods which the Most High has been pleased so bountifully to place under my stewardship, that will be so pleasing to him, as that by which the poor will be instructed in wisdom, and led into the path of virtue and happiness, I give," &c.

For the execution of his will, and with the unequivocal intent of increasing his real estate, 370* after his death, the testator appoints *executors, to whom he gives the seisin of all his personal estate, corporeal and incorporeal, and clothes them with the most extensive powers, without the interference of judicial or extra-judicial authority.

As relates to his real estate, such as it will be found to be at his death, which estate he has just devised to the cities of New Orleans and Baltimore, he expressly forbids the Mayor, Aldermen and Inhabitants of each of the cities, and their successors, ever to alienate or sell any part thereof; but the cities shall let the lots improved with houses, to good tenants, by the month or year; they shall let the unimproved lots in New Orleans, its suburbs, town of McDonogh, or elsewhere, for a term not to exceed twenty-five years at any one time, the rent payable monthly or quarterly, and to revert back, at the end of said time, with all the improvements thereon, free of cost, to the lessors; and as to the lands, wherever situate, in the different parishes of the State, the cities shall lease them in small tracts, for a term not to exceed

one to ten years, revertible back with their improvements, to be re-leased for a shorter time and at higher rates.

As concerns his personal estate (which, as we have seen in the general bequest above, also belongs to the cities of New Orleans and Baltimore), the testator instructs his testamentary executors to invest his personal estate of all kinds, as well as the amount of all debts owing to him, as fast as they are received, together with the interest and increase, in real estate of a particular description, to wit: lots of ground, improved and unimproved, lying in the City or suburbs of New Orleans, and to hand over said real estate, with the title deeds, to the commissioners and agents of his general estate, so that, by said means, the whole of his estate, real and personal, shall become a permanent fund on interest, as it were (viz.: a fund in real estate affording rents); no part of which fund shall ever be touched, divided, sold or alienated, but shall forever remain together as one estate, termed in his will "the general estate," and be managed as hereinafter directed. The net amount of the revenues collected annually shall be divided equally, half and half, between the two cities of New Orleans and Baltimore, by the commissioners and agents of the general estate, after paying the several annuities and sums of money hereinafter provided for, and applied forever to the purposes for which it is intended.

The testator, dividing into eight equal portions the revenues of his estate, thus made up of the immovables left at his decease, and of those which shall be acquired by his executors, with the aid of his personality and the interest accruing on his *credits, gives and be- [371] queaths the first eighth part of the net yearly revenue of the whole, during forty years, to the American Colonization Society for colonizing the free people of color of the United States; but the society shall not receive or demand, in any one year, a larger sum than \$25,000.

He gives and bequeaths the second eighth part of the net yearly revenue of the whole to the Mayor, Aldermen and Inhabitants of the City of New Orleans, until said eighth part of the net yearly revenue of rents shall amount to the full and entire sum of \$600,000: and that for the express and sole purpose of establishing an asylum for the poor of both sexes, and of all ages and castes of color.

He gives and bequeaths the third eighth part of the net yearly revenue of the whole to the Society for the Relief of Destitute Orphan Boys of New Orleans, for the express and sole purpose of its being invested in real estate, until the annuity shall amount to the full sum of \$400,000, exclusive of the interest which may have accrued on it.

He gives and bequeaths the fourth eighth part of the net yearly revenue of the entire estate to the Mayor, Aldermen and Inhabitants of the City of Baltimore, for the express and sole purpose of establishing a School Farm, on an extensive scale, for the destitute male children of Baltimore, of every town and village of Maryland, and of the great maritime cities of the United States until the said eighth part shall amount to the sum of \$3,000,000.

There now remains the revenue of one half or four eighths of the revenue of what the testator styles his general estate. The two cities

of New Orleans and Baltimore being the principal legatees, it is obvious that they are entitled to the four eighths not bequeathed by a particular title; consequently, it is laid down that until such time as these four annuities, bequeathed under a particular title, shall have been paid off and expire, the cities of New Orleans and Baltimore shall receive, for the establishment and support of said free schools, one half only of the net yearly revenue of rents of the general estate, and no more.

Moreover, the total amount to be received by each of the legatees of one eighth of the revenue, until the respective sums of \$25,000, \$600,000, \$400,000, or \$3,000,000 are realized, shows that one of the annuities is to determine before the others are paid off. The testator, therefore, orders that, as soon as any one of the annuities shall be filled and paid off, the proportions of the net yearly revenue of rents of the general estate, which were payable under the extinct annuity, shall go and be payable to the annuity bequeathed to the City of Baltimore [*372] more for "the establishment of a School Farm; so that the \$3,000,000 may be made up in as short a space of time as possible. It will not be till the full and entire discharge of the annuities, that the two cities will divide between them the net yearly revenue of rents of the general estate.

We will now turn our attention to the means and devices adopted by the testator to improve the condition of his particular legatees.

He forbids the alienation of the real estate which he leaves at his death to the two cities; and points out how the houses shall be let for short terms, the unimproved lots let for twenty-five years, at most, so as to be revertible, together with all improvements, to the mass of his estate; and the lands leased out, so as to bring in returns more and more ample.

He also orders his testamentary executors to invest his personality in houses and building lots in New Orleans and its suburbs.

He has not ordered anything of the kind for the \$25,000 of the Colonization Society (first eighth). The sum is a small one and can be paid off in a short time.

But as respects the Society for the Relief of Destitute Orphans (third eighth), he gives this third eighth part of the revenues to be first deposited in one or more of the banks in New Orleans, which allow interest on deposits; and then always with the approbation of the Mayor, Aldermen and Inhabitants of New Orleans, who shall become parties to the deeds, the said society shall invest the money, as good purchases offer, in houses and lots lying in New Orleans and its suburbs, so that such real estate, once acquired, shall be inalienable and shall forever be retained and held by it, and remain its property, in order that the revenue of the said real estate may be sufficient for the support of the institution.

With respect to the particular legacy bequeathed to the City of New Orleans, for the purpose of establishing an Asylum for the Poor (second eighth), he orders that annually or semi-annually the amount of the fractions of eighths be invested, as the commissioners receive it, in bank stocks or other good securities on landed estate, on interest, so that the capital of \$3,000,000 may be thereby augmented up

to the time when the last of the annuity shall be received from the general estate; that after this period (or even earlier, if a favorable opportunity occur), one third of the whole (not more) be invested in the purchase of landed estate, in the erection of buildings, and the furnishing of necessary articles; and the remainder, or two thirds at least, invested in the purchase of such houses and building lots, in New Orleans and its suburbs, as will probably *greatly augment in value; which real [*373] estate, when purchased, shall never be alienated, but a permanent revenue derived therefrom for the support of the institution.

Again, as regards the particular legacy bequeathed to the City of Baltimore for a School Farm (fourth eighth), which legacy is to reach the amount of \$3,000,000, to be taken out of the eighth charged therewith, and out of the other three eighths as soon as the other three legacies are finally paid off, the fund must be increased as it is received, by investing the moneys in bank stocks, or other good securities on landed estate, on interest; and this capital, with its increase, shall be invested, for one sixth part at the utmost, in the purchase of such land, animals and agricultural implements as the institution shall need; and the other five sixths invested in the purchase of houses and building lots situated in the City, suburbs, and vicinage of Baltimore, or of tracts of land in its immediate neighborhood, viz.: such lots or lands (to be all purchased under fee simple titles) as will probably greatly augment in value. And in this instance, too, the real estate, when purchased, is never to be sold or alienated, but is to remain forever the property of the institution, to the end that a permanent revenue may be derived therefrom.

We will now examine the measures taken by the testator to prevent the cities from giving the moneys a different destination from that prescribed by the testator.

Not content with appointing testamentary executors, McDonogh, wishing to debar the city corporations from the handling of moneys, has ordered that there be commissioners of his estate, having a principal and central office in the City of New Orleans, where all the muniments and papers relating to his affairs may be kept, as well for the Asylum for the Poor, for the investment of the moneys due to the Orphan Relief Society, for the School Farm of Baltimore, as for the management of the general estate, or fund for the education of the poor. These commissioners are to have the sole management of the general estate, the leasing and renting of its lands and houses, the cultivating of its estates, the collecting of its rents, the paying of the annuities bequeathed as above, and are to do all acts necessary to its full and perfect management.

These commissioners cannot be members of the City Councils; but they shall be appointed by the City Councils of New Orleans, as regards the Asylum for the Poor; by the Mayor and City Councils, as respects the School Farm at Baltimore, with the style of Directors; by the respective City Councils of New Orleans and Baltimore, as to the management of the fund for the education of the poor.

*New appointments shall be made annually, on a day fixed by the will. [*374]

The City Councils shall have a supervision over their operations; and to them the commissioners are liable for the performance of all their duties, and must annually render an account of their administration.

Besides these commissioners, each city shall have agents on the spot to represent its commissioners; and these agents shall also be appointed by the Mayors and City Councils.

And after the payment of the annuities, the respective commissioners, or the agents representing them, shall receive one moiety of the net revenue of the year, to be disposed of conformably to the will.

As for the purchases to be made, before the full payment of the annuities by the Commissioners of the Asylum for the Poor, they must be approved by the Mayor and City Councils of New Orleans. The same rule is laid down for the purchases to be made by the Directors of the School Farm. They must be approved by the Mayor and City Council of Baltimore.

The testator recommends to the Commissioners of the Asylum for the Poor to apply to the Legislature of the State of Louisiana for an Act of Incorporation, subject always, however, to the conditions provided for in the will. He has also recommended, in the same language and under the same conditions, to the Directors of the Farm School, to apply, for the same purpose, to the Legislature of the State of Maryland. He recurs to the same idea, using the same phraseology; and with the intent, no doubt, that his general estate should become a juridical person, he also recommends to the commissioners to sue out an act of incorporation for said general estate, always subject to the conditions laid down in the will.

We omit a variety of minute regulations concerning the publication of the annual accounts, the building and locality of school houses and residences for teachers, the school organization, the immense lands for the Poor Asylum, together with the high flown disquisitions in which the testator indulges. All this matter appears to be foreign to the controversy. The whole may be reduced to these few words: "The cities are the devisees; but the administration of the property devised shall be carried on forever by commissioners appointed by the cities, and accountable to them; and it shall be the duty of said commissioners to hand over the moneys to the new public institutions which the testator orders to be created."

The testator goes on to say: "No compromise shall ever take place between the Mayor, **375*** Aldermen and Inhabitants of Baltimore, and those of New Orleans, or their successors, in relation to their respective rights to my general estate."

"Neither party shall receive from the other, by agreement, a certain sum of money annually, or otherwise, for its respective proportions. Neither party shall sell its respective rights, under this will, the general estate, to the other or to others; but said general estate shall forever remain, and be managed, as I have pointed out, ordered and directed.

"And should the Mayor and Aldermen of New Orleans, and the Mayor and Aldermen of Baltimore, combine together, and knowingly and willfully violate any of the conditions

hereinbefore and hereinafter directed, for the management of the general estate, and the application of the revenue arising therefrom, then I give and bequeath the rest, residue, remainder and accumulations of my said general estate (subject always, however, to the payment of the aforementioned annuities), to the States of Louisiana and Maryland, in equal proportions, to each of said States, of half and half, for the purpose of educating the poor of said States, under such a general system of education as their respective Legislatures shall establish by law (always understood and provided, however, that the real estate thus destined by me for said purpose of education, shall never be sold or alienated, but shall be kept, and managed as they, the said Legislatures of said States, shall establish by law, as a fund yielding rents forever; the rents only of which general estate shall be taken and expended for said purpose of educating the poor of said respective States, and for no other). And it is furthermore my wish and desire, and I hereby will, that in case there should be a lapse of both the legacies to the cities of New Orleans and Baltimore, or either of them, wholly or in part, by refusal to accept, or any other cause or means whatsoever, then, both or either of said legacies, wholly or partially lapsed, shall inure, as far as it relates to New Orleans, to the State of Louisiana, and as far as it relates to Baltimore, to the State of Maryland, that the Legislatures of those States, respectively, may carry out my intentions, as set forth in this my will, as far and in the manner which will appear to them most proper."

In October, 1852, the Judge of the District Court, sitting as a circuit judge, passed the following decree, viz:

That all that part of the olographic will of John McDonogh, beginning at the second paragraph with the words "It is my will and I direct my executors (hereinafter named), immediately after my death, to correspond," &c., on the second page, numbered as the sixth page of the printed copy of the will on file, and ending with the words "or otherways, and held and owned by said corporations," on the 33d page of the said printed copy of said *will, being all and every portion of ***376** said will relative to the City of New Orleans, the City of Baltimore, the State of Louisiana, and the State of Maryland, the "general estate," the Colonization Society, a projected asylum in New Orleans, the Society for the relief of Destitute Orphan Boys, a projected school farm in Maryland, free public schools in New Orleans and Baltimore, and the appointment of various boards of commissioners, agents, directors, &c., and for the investment and accumulation of the estate, be, and all said provisions are, declared illegal, null, and of no force and effect whatever; and that as to all the estate of said deceased, except such as is disposed of in the first paragraph of said will, the deceased died intestate, and his estate fell, by his death, to his heirs at law. That complainants are heirs at law of the deceased John McDonogh, in the following proportions, to wit: Maria Louisa Ord, wife of Pacificus Ord: Laura J. Welsh, Thomas Welsh, Frank E. Welsh, and William P. Welsh, minors, represented by their guardian, William F. Murdoch,

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are heirs of twelve seventieths ($\frac{12}{70}$); one half of said portion being for the said Maria Louisa, and the other half being equally divided between said minors. Anne Cole, Mary Murdoch, wife of William F. Murdoch; Eliza Hayne, wife of George Hayne; George F. Cole, Louisa Sheffey, wife of Hugh W. Sheffey, and the children of Margaret Cole, the deceased wife of George P. Jenkins, namely: George Jenkins, Mary McDonogh Jenkins, and Conway M. Jenkins, minors, represented by their father George T. Jenkins, are heirs of twelve seventieths of the estate. The said Anne, Mary, Eliza, George F., and Louisa, each to take one sixth part of said portion, and the remaining one sixth part thereof to be equally divided between said minors. Sarah Day, wife of Nicholas Day, is heir of twelve seventieths of the estate. Jane Beaver, wife of William Beaver; Sarah Beaver, wife of Jacob Beaver; Robert H. Hammett, Jessie Hammett, Anne Maria Snook, wife of Peter Snook; Eliza Anderson, wife of Joseph C. Anderson, and the children of Margaret Hammett, deceased (said children not being parties), are heirs of twelve seventieths of the estate; the said Jane, Sarah, Robert, Jessie, Anne, and Eliza, to take each a seventh part of said portion, and the remaining seventh to be reserved for the children of said Margaret, when they shall make themselves parties, and on due proof. Rosalba P. Lynch, wife of Andrew H. Lynch, is heir of twelve seventieths of the estate; the remaining ten seventieths to be reserved for the heirs of the half blood, when they shall make themselves parties, and on due proof. That the said complainants recover of the defendants' executors of the will of the deceased all and singular the property, **377*** real and personal, *corporeal and incorporeal, composing the estate of the deceased, and especially all and singular the property of the deceased, in the several parishes of the State of Louisiana, mentioned or comprised in the inventory of the succession, prepared by Thomas Layton and Adolph Mazureau, notaries public, a copy of which is in evidence; and that said complainants have execution, and be put in possession of the same in conformity with law and the rules of court. That reference be made to the master in chancery for an account of the administration of the said executors, from the death of the deceased to the execution of this decree; and that said executors account to the said master in the premises; and that said master report to the court; and so much of the said bill as demands said account and the recovery of any moneys in the hands of said executors, is retained for further decree. That any other person or persons, not now parties to the proceedings, claiming title to the estate of the deceased, or any part thereof, be allowed to present their claims respectively before this court, to make due proofs thereof and to become parties to the proceedings for the due establishment and adjudication thereof. That the costs of the complainants and of the executors, be paid out of the succession of said deceased, and the costs of the other parties defendant by themselves respectively.

Decree rendered 7th October, 1852.

Signed 26th October, 1853.

[SEAL.] THEO. H. McCALLEN,
United States Judge.

From this decree, the executors appealed to this court.

It was argued by *Messrs. Brent, May, and Hunt*, for the appellants, and by *Messrs. Benjamin and Johnson* for the appellees. There were also briefs filed, being adopted by the counsel in this cause, prepared by the French jurists above spoken of, by Mr. Pierce and Mr. Grailhe, which were used before the Supreme Court of Louisiana, in a case wherein that State contended that the legacies had become elapsed, and consequently inured in part to the benefit of that State.

From all this mass of materials, the reporter can only extract notices of some of the most important points which were discussed.

The counsel for the appellants arranged their arguments under the following heads:

First. That the validity of these legacies and annuities depends exclusively on the local laws of Louisiana.

Second. That the exposition of those laws, written or unwritten, by the courts of Louisiana, form part of the local *law, and [**378** as such will be followed and respected by the federal courts, and this, whether expressed by a series of decisions or a single one, pronounced, by the state court, "*post litem motam*," or even after the decision of this cause in the United States Circuit Court.

Third. That by the laws of Louisiana, legacies for the benefit of the poor, or for education, or establishments of public utility, are legacies to pious uses, and as such are pre-eminently favored and protected by law, so much so, that they shall not be suffered, in any event, to fall, unless found liable to be annulled, as "*substitutions or fidei commissa*."

Fourth. That the universal legatees (the cities) have legal capacity to take the legacies bequeathed to them.

Fifth. That legacies like these are, in no respect, subject to the prohibitions against substitutions and *fidei commissum*.

Sixth. That whatever conditions are found in the annuities or legacies, of an illegal or impossible character, are to be considered as erased from the will, by operation and judgment of law, and no illegal or impossible clause, which is not a condition to the legacies, can prove prejudicial.

Seventh. That even the lapse or annulment of the annuities, from any cause, they being distinct from the universal legacies, so far from affecting their validity, would benefit them, by inuring, entirely and exclusively, to their increase and benefit.

Eighth. That the two cities are invested with a sufficient legal title as universal legatees, which is not impeached, either by any subsequent provisions, repugnant to the nature of the ownership instituted in them, or by any illegal or impossible conditions annexed by the testator to his legacies, because the title bequeathed can well stand without, and discharged from the conditions thus imposed, wherever they may be illegal or impossible.

Ninth. That this very will of McDonogh has been finally and authoritatively adjudicated by the Supreme Court of Louisiana, to be valid under the laws of that State; and such being the judgment of the highest state tribunal, it is conclusive upon this court, upon all

questions involving the laws of Louisiana, and can only be revised, or its authority denied, on the ground that it is, in some respects, in conflict with the Constitution or laws of the United States.

Fifth point. Legacies like these are, in no respect, subject to the prohibitions against substitutions and *fidei commissa*.

Both substitutions and *fidei commissa* are prohibited by the Civil Code, art. 1507.

The legacies to the cities cannot be brought within the category of either of the four classes of substitutions known to the civil or Spanish Law. (Johnson's Civil Law of Spain, 132.)

379*] *The vulgar substitution would apply to the substituted legacies over to the States. (Johnson's Civil Law, 132.)

And the States, therefore, could not take, in the face of the prohibition of art. 1507, but for the express saving contained in art. 1508, which declares, that "the disposition by which a third person is called to take the gift, the inheritance, or the legacy, in case the donee, the heir or the legatee, does not take it, shall not be considered a substitution, and shall be valid."

Nor is there anything of the "substitution, *fidei commissaria*," which is made by giving it in trust to some one appointed heir, to hold the inheritance for a given time, that he may deliver it afterwards to another." (Johnson's Civil Law, 126; *Beaulieu v. Ternoir*, 5 Annual, p. 480; see, also, the case decided by the Court of Cassation in France, cited in the appendix to this brief.)

There is, therefore, nothing of a prohibited substitution in this will, and especially none in respect to the title of the cities.

Fidei commissa are equally prohibited by art. 1507, but there is this difference, that a prohibited substitution annuls the first legacy, in respect to which there is a substituted legatee, while in the case of a *fidei commissum*, the first legacy is not avoided if the trust, or *fidei commissum*, be to a third party for the benefit of the second, or substituted legatee, and distinct from the first legacy. (5 Annual, 480, 481; *DuPessis v. Kennedy*, 6 L. R., 247.)

Therefore, to avoid the title of the cities on this ground, there must be either a bequest, in trust for them, or to them in trust for a third party.

Let us examine the decisions on this question.

In the case of *Franklin's will*, Chief Justice Eustis declared, that "the prohibition certainly embraced the substitutions, and the *fidei commissum* of the Roman, the French and the Spanish laws. (See page 21 of his opinion.)

And in the same case, he considers *fidei commissum* synonymous with trust, under the English law. And this court has decided the prohibition to extend only to express trusts. (*Gaines v. Chew*, 2 How., 650.)

Now, to constitute a case of strict trust, under the English law, or of *fidei commissum*, under the civil law, the trust must not be for the benefit or use of the trustee.

If a legacy is to A, in trust for his own use, it would not be a trust, either under the English or civil law.

Legacies to corporations, or funds in their possession for public purposes, will be enforced

in equity as charitable funds. (2 Spence's Eq., 34; see *Attorney General v. Heelis*, 2 Sim. & St., 76; *Attorney General v. Carlisle*, 2 Sim., 427; *Attorney General v. Brown*, 1 Swanst., 297.)

*It is true that, in the parlance of [*380 the English chancellors, a devise to a corporation for the benefit of its poor, or for any charitable purpose connected with the purposes of the corporation, is loosely termed a trust, which chancery will enforce; but though such a dedication to charitable uses be fiduciary in its nature, yet we confidently submit, that a legacy to a corporation for the benefit of its poor, or any establishment of public utility, is not that sort of express trust to which the prohibition in the Code of Louisiana has reference. If an individual is the trustee for a third person, or for the poor, it might be safely admitted, that in both cases it was a *fidei commissum*, because he was a stranger to the beneficiaries, but not so when corporations are the legatees, and the legacies, in the words of this court in *Vidal v. Girard*, 2 How., 189, are for purposes "germane to the objects of the incorporation," and "relate to matters which will promote and aid and perfect those objects."

One of the illustrations is furnished in the same opinion of this court in 2 How., 189, where it supposes the case of a devise to Philadelphia "to supply its inhabitants with good and wholesome water."

That might, in some sense, be called a trust, but, "relating to matters which promote, aid, and perfect the objects of incorporation," it could not be considered that sort of trust in which the beneficiary is foreign to the trustee, and therefore prohibited.

But it seems to us that this very question has been conclusively settled by the Supreme Court of Louisiana, in the case of *De Pontalba v. New Orleans*, 3 Annual, 662, decided in 1848. (See *D. R. Richard v. Milne*, 17 La., 320.)

In that case the testator bequeathed a hospital to the city for the use of lepers, and the city having afterwards, when there were no lepers, converted it into a cemetery, the court held "that the city had a legal title to the property as against the heir at law, though the purpose of the legacy had failed." Now, that was undoubtedly a legacy in trust for the benefit of a particular class of the community of New Orleans, and would have been termed by English chancellors a trust, still it was held by the Supreme Court of Louisiana, to be a valid title in the city, notwithstanding the prohibition against "*fidei commissa*," which is not even noticed.

This decision, made under Spanish laws re-enacted, is the very Civil Code which is now relied on to destroy legacies to the same city for the support and education of its poor, has, therefore, in our humble judgment, conclusively and clearly exempted from the prohibition of article 1507 all legacies to a city for the benefit of its poor, or any work of public utility, or any purpose "germane to the objects of incorporation."

*If these legacies for the "establish- [*381 ment of free schools in Baltimore and New Orleans" be stamped with the character of the prohibited "*fidei commissa*," then you must, under the same article of the Code, annul every legacy

in trust for any legitimate purpose of the corporation, or for establishments of utility and benefit, and to accomplish that end you must not only declare that legacies to corporations for their own benefit are trusts in the meaning of the law, and as such within the prohibition, but you must reserve and strike down the well-settled construction by her courts of the Civil Code of Louisiana. A doubt would escape the prohibition. (*Cole v. Cole*, 7 Martin, N. S., 418.)

We will here beg leave to incorporate into this argument so much of the opinion of *Chief Justice Eustis*, pronounced on this will of McDonogh, as relates to this question, and which seems to us unanswerable:

"That, without a positive prohibition, municipal corporations in Louisiana should be incapacitated from receiving legacies for the public purposes of health, education and charity, seems to me repugnant to all sound ideas of policy and to the reason of the law.

"What legacies could they be expected to receive except for some public or humane object? Who would give a city a legacy, to be absorbed by its debts or appropriated to common expenses? Certainly, so far as the conscience of the public is concerned, a legacy of money to a city without any designation would be held to have been given for some object of charity or beneficence.

"I think there are articles in the Code which exclude the conclusion as to the incapacity of the City of New Orleans to take legacies of this kind.

"The article 1536 provides that donations for the benefit of a hospital of the poor of a community, or of establishments of public utility, shall be accepted by the administrators of such communities or establishments.

"Provision is made by this article to give effect to donations for the poor made by living persons, *inter vivos*, because in donations of this kind the donor is not bound, and the donation is without effect until the act of donation is signed and accepted by a party competent to receive the donation. The article relates to the form of the Act and provides for its acceptance and the completion of the donation, and is not its legality presupposed? Is it not predicated upon the legality of this mode of property for pious uses? Such appears to me to be the obvious intent of the article.

"There is not the slightest ground for any distinctions as to the legality of the holding or **382** ownership by donation *inter vivos* and *mortis causa*—that is, that the property could be acquired by one donation and not by the other.

"Nor does the law make any distinction between a legacy to the poor of a city, and a legacy to a city for the poor. For in both cases it is a legacy to pious uses, and the city is the recipient. (*Domat*, lib. 4, tit. 2; Sec. 2, sec. 13; *Id.*, sec. 6, sec. 1, *et seq.*)

"The article 1548 provides that when the donation is made to minors, to persons under interdiction, or to public establishments, the registry shall be made at the instance of curators, tutors or administrators.

"The article 607 provides that the usufruct granted to corporations, congregations and other companies which are deemed perpetual,

lasts only thirty years. If these corporations, congregations and companies are suppressed, abolished, or terminate in any other manner, the usufruct ceases and becomes united with the ownership.

"The legislation concerning the powers of the City of New Orleans, I think, is in the same sense.

"Doubts having existed as to the power of the City to hold property out of its limits, the corporation was declared 'capable of holding or possessing real estate without its limits, and of acquiring, retaining and possessing, by donation or legacy, any property, real or personal, whether situate within or without the limits of the city.' (Act of 1830, p. 50; Digest of Stat., 144, sec. 150.)

"I have no doubt of the legality of the testamentary disposition under consideration.

"I think it would follow, as a necessary consequence from the definition, origin, and nature of legacies to pious uses, that if those in favor of the cities are of that sort, those in favor of the States, in the contingency provided, are of the same character. The difference is, that in the former the mode of administration is regulated by the will, in the latter it is left to the wisdom and discretion of the legislative power.

"The administration of property devoted to pious uses by a legacy, through the instrumentality of overseers, commissioners, or a *quasi* corporation, makes no difference as to the title; both in fact are legacies to pious uses, and not unlike the Girard legacy maintained by this court in 2d Annual Reports, 898." (*Girard's Heirs v. New Orleans*.)

This opinion was concurred in by *Mr. Justice Dunbar*.

Ninth Point.—The conclusiveness and binding effect of the judicial decisions of the State Courts of Louisiana upon the construction and exposition of the Civil Code and the Unwritten Laws of that State.

In elucidating the above proposition, our remarks will necessarily *be confined [**383** exclusively, almost, to a consideration of the decisions of the Supreme Court of the United States.

This case depends on the construction to be given to the laws of Louisiana, composed of a written code, and of so much of the Roman, Spanish, and French laws, as are judicially recognized as of authority in that State.

The Supreme Court of Louisiana, in the case of *The State of Louisiana against The Executors of McDonogh*, has given a construction to this very will, founded on the local law, which, in effect, defeats the claim of the heirs at law.

But before that judgment was pronounced, the Circuit Court of the United States for the District of Louisiana, in a cause instituted in that court by the heirs at law against the executors, decreed in favor of the heirs.

That decree is now before the Supreme Court of the United States on appeal, and the important inquiry is, whether the decision of the Supreme Court of Louisiana is not conclusive upon all the questions in the case, depending on the construction of either the written or unwritten law of that State.

In cases depending on the laws of a particular State, the Supreme Court of the United States

has uniformly adopted the construction which the supreme judicial tribunal of the State has given to those laws. And the reason on which this rule is founded, is stated by *Chief Justice Marshall* to be, that "the judicial department of every government is the appropriate organ for construing the legislative acts of that government." (10 Wheaton, 159.)

The cases in which the Supreme Court has conformed to the decisions of state courts, are very numerous. The following list of references may save the trouble of search, though it does not comprise the whole: 5 Cranch, 22; *Id.*, 221; *Id.*, 255; 6 *Id.*, 165; 9 *Id.*, 87; 2 Wheat., 816; 5 *Id.*, 270; 6 *Id.*, 119; 7 *Id.*, 361; 10 *Id.*, 152; 11 *Id.*, 361; 12 *Id.*, 153; 2 Pet., 492; *Id.*, 89; 4 *Id.*, 124; 6 *Id.*, 291; 15 *Id.*, 449; 5 How., 184; 6 *Id.*, 1; 7 *Id.*, 198, 219; *Id.*, 812, 818; 10 *Id.*, 401; 13 *Id.*, 271; 14 *Id.*, 485, 504.

In *St. John v. Chew*, 12 Wheat., 153, it is said: "This court adopts the local law of real property, as ascertained by the decisions of the state courts, whether those decisions are grounded on the construction of the statutes, or from a part of the unwritten law of the State."

In *Elmendorf v. Taylor*, 10 Wheat., 165, the court say: "We must consider the construction as settled finally by the courts of the State; and this court ought to adopt the same rule, should we even doubt its correctness."

Nees v. Scott, 13 How., 271, decided that this 384*] court, on "appeal from the Circuit Court," would not be governed by the decision of the Supreme Court of the State, upon any question dependent upon general chancery principles; but the court clearly intimate that it would be otherwise if the case had depended upon "the legislation of Georgia, or the local laws or customs of that State."

In *Nesmith v. Sheldon*, 7 How., 812, in which the court, in an equity cause, held a single decision of the Supreme Court of Michigan on the same question to be conclusive, that question depending on the construction of the constitution and local laws of the State.

The court will not demand a series of state decisions, but will hold itself bound by a single decision of the highest State tribunal.

In *The Bank of Hamilton v. Dudley*, 2 Pet., 492, there was but a single decision, and that by a divided court, and yet it was regarded as conclusive.

In *Gardner v. Collins*, 2 Pet., 89, the court say: "If this question had been settled by any judicial decision in the State where the land lies, we should, upon the uniform principles adopted by this court, recognize that decision as part of the local law."

In *The United States v. Morrison*, 4 Pet., 124, and *Green v. Neal*, 6 Pet., 291, a single decision of the highest state court was held sufficient.

Again, in *The Bank of Hamilton v. Dudley*, 2 Pet., 492, after the case had been argued in the Supreme Court, the court hearing that the same question was depending before the highest judicial tribunal of the State (Ohio), held the case under advisement till the next term, to receive the opinion, and after it had been given, conformed to it. (See, also, 7 How., 812, 818.)

Again, the decision of a circuit judge, though made prior in time to the decision of a state court, upon the same question, does not affect

the conclusiveness of the latter. Thus, in *The United States v. Morrison*, 4 Pet., 124, the Circuit Court of the United States for Virginia (*Chief Justice Marshall* presiding), made a decision upon the construction of a state statute, in regard to which different opinions had been entertained; subsequently to which, the same question was decided the other way by the Court of Appeals of Virginia. And though this state decision had not been reported, but was quoted in manuscript, when the case came before the Supreme Court of the United States, *Chief Justice Marshall*, delivering the opinion, reversed his own judgment in the Circuit Court.

The rule was afterwards conformed to in a still stronger case. The Supreme Court had twice decided the same question, as to the true *construction of the Statutes of Limita-[*385 tions of Tennessee, upon the authority of two decided cases in the Supreme Court of that State, in 1815. But in 1832, in the case of *Green v. Neal*, 6 Pet., 291, it appearing that these decisions were made under such circumstances that they were never considered, in the State of Tennessee, as fully settling the construction of the statutes; and that in 1825 the Court of Appeals, by a single decision, had ruled the point differently, the Supreme Court overruled its two former decisions, and adopted that of the state court, as the last and authoritative.

In the case of *Groves v. Slaughter*, 15 Pet., 449, the court did not depart from this established rule. The state decision relied on, as settling the construction of a provision in the constitution of Mississippi, was the decision of a divided court—was extrajudicial, and contrary to the legislative construction of the provision, and we will add especially, that it was made after the date of the contract in controversy in that case, and impaired the obligation of the contract. In *Groves v. Slaughter*, the note in suit was dated December 20th, 1836 (15 Pet., 449), and the State decision relied on to invalidate the note, was that of *Glidewell, &c.*, v. *Hits and Fitzpatrick*, not then reported (see 15 Pet., 497); but since reported in 5 How. Miss., 110, by which report, it appears that the State decision was not made until December, 1840, four years after the date of the contract which it sought to impair. It was therefore considered by the Supreme Court as an open, unsettled question, and so decided.

The same question, on the same clause of the constitution of Mississippi, afterwards, in 1847, came again before the Supreme Court, in *Rowan v. Runnels*, 5 How., 184. In the intermediate time, however, after the decision in *Groves v. Slaughter*, the question of construction had been decided by the highest tribunal of the State, differently from the decision of the Supreme Court. Both *Groves v. Slaughter*, and *Rowan v. Runnels*, were cases arising upon contracts, indetical as to subject matter; and the court felt an insurmountable difficulty in following a state decision, made subsequently to the date of the contract between citizens of different states, and annulling it retroactively; which contract, on full consideration, the Supreme Court of the United States had pronounced valid, and they therefore adhered to their first decision, *Mr. Justice Daniel* dissenting, however, even in the case of a contract.

See, also, to same effect, *Sims v. Hundley*, 6 How., 1.

The whole amount of these decisions is, that in cases arising upon contract, where the Supreme Court, in the absence of any state decision settling the construction of a provision in **386*** the *State constitution, in reference to the validity of the contract, had decided in favor of its validity, they would not reverse that decision, on the ground of an adjudication of the question contrariwise, by a state court, if that adjudication was made subsequently, not only to the first decision by the federal court, but subsequently to the very contract in issue, between parties who were, by the Federal Constitution, entitled to an adjudication on that contract, by the federal courts.

If it had been a case involving questions of title to real property, or the construction of local laws, irrespective of contract, the court would, no doubt, have been governed by *Green v. Neal*, 6 Pet., 291, and have overruled its former decision in *Groves v. Slaughter*. (See *Nesmith v. Sheldon*, 7 How., 813.)

To say nothing, however, of the distinction taken by the court in this case of *Rowan v. Runnels*, it is very clear that the decision is altogether inapplicable to the case of the heirs at law and the executors of McDonogh.

In this case, the question depends on a will of real and personal property, as to which there has been no decision of the Supreme Court; and in wills this court adopts the local law bearing on the case. (7 How., 818, 814, 504; *Patterson v. Gaines*, How.; *Vidal v. Girard*, 2 How., 128; *Wheeler v. Smith*, 9, How. 55.)

The validity of the will is to be determined by a true construction of the written and unwritten law of Louisiana; and the tribunal of the last resort in that State has decided in favor of its validity. "Undoubtedly," said the Chief Justice, in *Rowan v. Runnels*, "this court will always feel itself bound to respect the decisions of the state courts; and from the time they are made, will regard them as conclusive, in all cases, upon the construction of their own constitution and laws. But we ought not to give them a retroactive effect, and allow them to render invalid contracts entered into with citizens of other states, which, in the judgment of this court, were wrongfully made.

These decisions, therefore, of the Supreme Court of the United States, denying the binding effect of subsequent state decisions, so as to retroact on antecedent contracts, are fully warranted by the spirit, if not the letter, of that clause in the Federal Constitution which prohibit the States from passing "any law impairing the obligation of contracts."

For, if the sovereignty of the States is not competent to legislate away the obligation of contracts lawfully entered into at the time, it should equally follow that the state courts cannot construe away the obligation of antecedent contracts, which the Constitution meant to protect from every department of the state governments, and to place under the protecting ægis of the federal judiciary.

387*] But when we come to consider the effect of a decision by the state tribunals upon their local laws involving any matter not impairing the obligation of a contract, the case is one of a very different character. It must, in

that case, result from principle, and the authoritative decisions of this court, that if the validity of a Louisiana will is to be tested by the laws of that State, the exposition of those laws, by her highest judicial tribunal, must be equally regarded as part of the local law of the State, and as such, binding on the federal courts, whether it be established by a single decision, or by a series of decisions, and whether it involve title to real estate or personality.

Baltimore and Susquehanna Railroad Company v. Nesbit, 10 How., 401, recognizes the principle that this court can in no case revise or annual retrospective state legislation, unless it violates some clause of the Federal Constitution, or is in conflict with the laws of the United States.

Has this court any greater jurisdiction over the State judiciary, in expounding their own laws, than it would have over the Legislature which makes them?

But it may be objected that the true reason why this court did not regard as conclusive a subsequent state decision in the cases of *Groves v. Slaughter* and *Rowan v. Runnels*, and *Sims v. Hundley*, is not that they were cases of contracts, but, because such subsequent decisions would deprive citizens of other states of the practical enjoyment of the privilege of suing in the federal courts on titles already vested in them, and to sustain this position, a paragraph will be cited from the opinion of the Chief Justice in *Rowan v. Runnels*, 5 How., 189.

But we respectfully submit that the state courts cannot be deprived of their legitimate function, of expounding authoritatively and conclusively the meaning of their own state laws, merely because, at the time of such exposition, there were parties *in esse* who had a right to sue, or who had sued in the federal courts upon titles already vested in them by virtue of the state laws.

It would be monstrous if the federal courts, obtaining jurisdiction "*ratione personarum*" alone, were to exercise that jurisdiction for the single purpose of prostrating and annulling all expositions of the state laws by the state courts, which had been made after the right had attached to sue in the federal courts.

It is not to be presumed that the state tribunal has so decided from a motive to oppress or prejudice the plaintiffs in the federal courts; and in the absence of such a presumption, the federal courts are as much bound in a case where their jurisdiction is acquired alone by the character of the parties, to respect the local *law, as expounded by local tribunals, [**388** "*pendente lite*," or "*post litem motam*," as if it had been declared before the right attached to sue in the federal courts. We submit, with deference, that it is not a principle of "comity" only which gives force to the local decisions; but it is because state decisions, whenever made upon state laws, form part of those laws, and as such, are the governing rule of the United States courts in every case dependent on state laws, except in the solitary instance of state decisions retroacting on antecedent contracts, and this principle appears to have been adopted by this court, on full and deliberate consideration, in the case of *Green v. Neal*, 6 Pet., 298.

The counsel for the appellees made the following points:

I. The first point to be settled is the true meaning of the will. This depends altogether on the signification of the language used by the testator, and on no peculiarity of local law. The rules of interpretation laid down by the Civil Code of Louisiana (Acts of 1705 *et seq.*), correspond with those which guide judges in the courts of common law. All aim, alike, at discerning the intentions of the testator; and as McDonogh has used the English language in expressing those intentions, a reference to local jurisprudence is entirely useless, and this court has accordingly held, that it does not follow the construction of a state court on a will or deed, as it does on the construction of a statute. (*Lane v. Vick*, 3 How., 464, 476; *Russell v. Southard*, 12 Id., 189.)

We maintain the will of the testator to be a scheme devised by him for perpetuating his succession, under the name of his "general estate"; that the title to his property was intended by him to remain in his succession; that, under the cover of a bequest to the cities and states, he intended to shield his property from alienation; that the cities and states were not intended, under any circumstances, to be his beneficiaries; and that, if any title whatever, under the terms of the will, was bequeathed to the cities or states, it was a mere legal title as trustees, unaccompanied by any beneficial interest.

In support of this position, we rely on the plain language of the instrument itself. It is true that the testator says that he "gives, wills and bequeathes all the rest, residue and remainder of his estate to the two cities"; but this clause begins by stating, that he makes the bequests "for the more general diffusion of knowledge," &c., and closes by stating that the bequest is "to and for the several interests and purposes hereinafter mentioned, declared, and set forth concerning the same," which purposes he immediately proceeds to specify.

389*] *By the analysis of the will, as already set forth, it will be seen that, after this introductory clause containing the devise, he provides,

1st. That his whole property, real and personal, "is to be converted into one mass, entitled his "general estate."

2d. That the seisin and possession of this "general estate" is to be vested in commissioners and agents, with perpetual succession, and the meaning of the word "seisin" is abundantly shown by the Civil Code, 934-936, 1600, 1602, 1609, 1617, 1652, 1658; 2 Bl. Com., 811, marginal paging; *Fowler et al. v. Boyd*, 15 L. R., 562.

3d. That these commissioners are to obtain an act incorporating the "general estate."

4th. That they are to have the sole and exclusive management and control of the "general estate."

5th. That "no part of said general estate, or revenues from rents arising from said general estate, shall go into the hands of the corporations of said cities, but that they, the said corporations, shall forever have a supervision over it."

6th. The testator further provides (p. 25) that "copies of the accounts of the general estate fund

shall be delivered to the city councils of the City of New Orleans, who shall visit the books, examine and audit the accounts, and keep up and support a general supervision over the general estate, its accounts, funds, management and real estate, as also over the free schools," &c.

7th. After providing for the establishment of free schools to educate the poor, the testator says (p. 30), "for this purpose, and this only, my desire being that one dollar shall never be expended to any other purpose, I destine the whole of my general estate."

In view of these provisions, so clearly and emphatically detailed, it is impossible to discover any of the elements which constitute title or ownership of property in the cities. The mind is at a loss to conceive what interest in an estate can appertain to parties who are never to have it in possession, never to receive one dollar of its revenues, never to alienate it and never, even, to manage, administer or control it. It is evident that all that is bequeathed to the cities is the power of appointing the officers of this imaginary entity, this corporation that the testator intended to create, under the name of his "general estate," coupled with functions which are precisely those attributed by law to the visitors of corporations (see 1 Black., 401); and it is worthy of remark, that with this visitatorial agency Baltimore has nothing to do, beyond receiving annually certified copies of "the accounts of the general estate, and [*390 "publishing them in two of the newspapers of the city." (Record, p. 25.)

If there could be a doubt, under the terms of the will itself, that the testator's intention was to vest the title to his property, not in the cities, but in the general estate, that doubt would vanish on the simple perusal of his own commentary on his will, as contained in the memoranda before referred to. In them he styles the general estate "an institution of vast importance to the State and the world" (p. 35). He speaks of the property as "belonging to the general estate" (p. 36). He prays the city councils of New Orleans to exempt from taxation "the real estate belonging to said general estate" (p. 36). He declares at pp. 40 and 41, that he has selected land for investment, that "it may yield an annual revenue for the purposes to which it is destined forever;" and expresses the hope that "its rents will amount to some millions of dollars annually," and that it will become in time "a huge mountain of wealth." At p. 43, he speaks of two thousand lots "belonging to this estate, and which will be and remain the property of this estate at my death;" and finally, at p. 55, he concludes that "the great object I have in view, as may plainly be seen, is the gradual augmentation in value of the real estate which will belong to, and be owned by, the general estate for centuries to come."

II. If, however, it should be held that the words of devise to the cities vest a title in them, and that these words cannot be controlled nor explained away by the subsequent declarations of the testator, nor by the limitations which he himself has placed on their meaning, the appellees maintain that the title so vested is the legal estate alone, unconnected with the beneficial interest; that the cities are mere trustees; and

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that the beneficiaries of the trust are the asylums, societies, school farm, and free school provided for by the will.

The will contains, not what the civil law terms legacies to pious uses; not what the common law terms a legacy to a devisee, subject to a purpose; but it contains dispositions termed in the civil law, *fidei commissa*, and in the common law, a devise for a purpose to a devisee, or a trust; and wills, precisely such in character as that before the court, have been the subject of interpretation under both systems of jurisprudence. (1 Jarman on Wills, Perkins, 457, top 2d ed., 503 of 1st ed., and authorities in notes; Lewin on Trusts, 24 Law Library, 87 top paging; *Vidal et al. v. Girard's Executors*, 2 How., 127; *Briggs v. Penny*, 8 Eng. Law & Eq., 234, 235; *Heirs of Henderson v. Rost*, 5 Annual, 458; Succession Isaac Franklin, decided in Louisiana, June 22, 1852, printed in pamphlet; *De Pontalba v. City of New Orleans*, 39 1*] 3 Annual, *680; *Corporation of Gloucester v. Osborn*, 1 H. of Lords, 285; 3 Hare, 186.)

It is true that the will, in no part of it, uses the word "trust"; but it is too familiar a principle to need authority, that the use of this word is not essential to the constitution of a trust. Girard uses this word; and his devise to the City of Philadelphia was admitted by all to be a trust, nor would the fact have been controverted even if no such word had been found in the will. The civil law is identical with the common law on this point. (Adams' Eq., 189 to 192, Am. ed., and cases cited in the note; *Briggs v. Penny*, 8 English Law & Eq., 231-235; 2 Story's Eq. Juris., sec. 964, 965, 1068, 1074; 1 Jarman on Wills, 384.)

But, independently of these considerations, the whole of the ancient civil law doctrine of destination to pious uses has been repealed by an Act of the Legislature of Louisiana, of March 25, 1828, and the Civil Code contains the rules governing the case. (See Acts Assembly of Louisiana, 1828; Civil Code, art. 3531; *Handy v. Parkinson*, 10 L. R., 92; *Reynolds v. Swain*, 13 L. R., 198.)

III. The will of John McDonogh is null, because it violates the prohibition of the law of Louisiana against substitutions and *fidei commissa*. (Civil Code, art. 15, arts. 1507 et seq.)

The devise of property, with the prohibition against its alienation, when made with a view to a purpose, has been held to be a *fidei commissum* by all authors who have written on the civil law. A direction not to alienate, where the motive is the benefit of the legatee himself, is a mere *nudum præceptum*; as where a legacy is left of an estate to Titus, who is prohibited from disposing of it, in order that his improvidence may never deprive him of the means of subsistence. But a prohibition against alienating, in order that, in ten years, or at the death of Titus, the estate may become the property of Caius, or may be devoted to any purpose not personal to Titus, contains the very essence of the technical *fidei commissum* and substitution. (C. C., 1507; Ricard, *Traité des Substitutions*, Vol. II., p. 828; Merlin, Vol. XXXII., Verbo. Bis., p. 152; Pothier, *Substitutions*, No. 584, Vol. VI., p. 517, ed. of 1777, in Cong. Library; Toullier, Vol. VI., No. 488; 2 Strahan's Domat, 8861; Hermosilla, Gloss., 5, part 5, tit. 5, law 44; 2 Gregorio Lopez, 781.)

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The *fidei commissum* of the civil law is not, as we concede, identical with the trust of the common law. The former, under the simple jurisprudence of the Romans, was a direction to the legatee to convey the property itself, or a part of it, in full ownership to the intended beneficiary; whereas the latter is a refinement, by which the perfect ownership is decomposed into its constituent elements of legal [*392 title and beneficial interest, which are vested in different persons. But the term "*fidei commissum*" is constantly translated into the word "trust" by writers of authority under both systems, and it has been held in Louisiana, in a series of adjudicated cases, that the trust of the English law is embraced in the prohibition of the *fidei commissum* under the 1507th article of the Code. For definition of the *fidei commissum*, see 2 Strahan's Domat, 3823; 3 Marcade, 375; 8 Duranton, 56; 32 Merlin Rep., Verbo Substitution; 5 Toullier, 18; 5 Zachariæ, 240; 14 Pothier's Pand., 186; Dig., lib. 36, tit. 1; Partidas, VI., tit. 5, l. 1, 14; Antonio Gomez, *Varia Resolutiones*, Vol. I., cap. 5; 2 Burge, Conflict of Laws, 100; *Gaines v. Chew*, 2 How., 650; *Clague v. Clague*, 13 L. R., 1; *Tournoir v. Tournoir*, 12 L. R., 19.) And the proposition that wills containing the technical *fidei commissum* of the Roman law, or the trust of the English law, are utterly null and void in Louisiana; and that the latter estate is one unknown to its law, and abhorrent to its people and their institutions, is abundantly established by the following decisions: *Tournoir v. Tournoir*, 12 L. R., 19; *Clague v. Clague*, 13 L. R., 1; *Liautaude v. Baptiste*, 3 Rob., 453; *Harper v. Stanbrough*, 2 Annual, 381; *Tyrell et al. v. Allen*, 7 Annual; *Ducloslange v. Ross*, 3 Annual, 432; *Beaulieu v. Ternoir*, 5 Annual, 480; *Heirs of Henderson v. Rost*, 5 Annual, 458; *Macarty v. Tyo*, 6 Annual; *Franklin* case above cited; C. C., 487, et seq.)

The principle that parties are not at liberty to invest new tenures of property and to impress such tenures on their lands, is one not peculiar to Louisiana, but is a part of the public policy of every country. (*Kipper v. Bailey*, 8 Eng. Ch., 120.)

And the decisions of the French courts, as well as the opinions of French jurists on the subject of *fidei commissum* and substitutions, are of no weight or value in Louisiana, by reason of the difference of the legislation of the two countries on the subject. (*Rowlett v. Shepherd*, 4 La., 86; *Ducloslange v. Ross*, 3 Annual 432.)

IV. There is nothing in the law of Louisiana making any exception to this general rule. The article 1536 of the Civil Code, cannot, without violent misconstruction, be applied in any manner to this subject matter. The Code contains a title called Title 2 of Donations *inter vivos* and *mortis causa*. It is divided into seven chapters, of which the first four are applicable to both classes of donations, and the prohibition in article 1507 against *fidei commissum* is in the chapter 4 entitled "Of dispositions reprobated by law in donations *inter vivos* and *mortis causa*." After exhausting, in these four chapters, such provisions as are applicable to both classes of donations, the Code proceeds, in chap [*393 ter 5, to treat separately of donations *inter vivos*, and in chapter 6 of donations *mortis causa*.

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placing in each of these chapters the special rules appropriated to its particular subject matter.

Now, chapter five embraces articles 1510 to 1562, and consequently includes the article 1536. Chapter five is divided into three sections, of which the second treats of the form of donations *inter vivos*. In prescribing this form the Code requires an authentic act to be passed before a notary, a delivery by the donor, and (in article 1527) an acceptance in precise terms by the donee. It then proceeds to provide for this acceptance by incapable parties. Article 1532 provides for a married woman; her acceptance must be with consent of her husband. Article 1533 provides that the acceptance for a minor may be by his tutor; 1534, that of an insane person by his curator; 1535, that of a deaf and dumb person by himself or attorney or curator; 1536, "donations made for the benefit of an hospital of the poor of a community, or of establishments of public utility, shall be accepted by the administrators of such communities or establishments."

It is too plain for argument, on examination of the context of the Code, that this article 1536 has not the remotest bearing on the article 1507, and has not any reference whatever to the same subject matter. So far from there being any exception in the Code authorizing corporations to become trustees, there is a positive prohibition pointed directly at corporations. (See La. Code, article 432.)

But there is another conclusive reason why the law can contain no exception in favor of the cities. The prohibition of trust estates in Louisiana is not alone a legal, it is also a constitutional prohibition. (Constitution of 1812, art. 4, sec. 11; Constitution of 1845, article 120; Opinion of *Chief Justice* Eustis, in the *Franklin* case.)

To construe article 1536 as conferring a power on cities to take estates in trust, is to violate the principle that when a capacity is granted by law to a corporation, the clause conferring it is to be construed subordinately to the general law, and not as giving powers beyond those conferred on individuals. (*McCartee v. Orphan Asylum*, 9 Cow., 487, 507; *Jackson v. Hartwell*, 8 Johns., 425.)

This clause, if it confers the power supposed, must be subjected to the most rigid construction, and can never be made to comprehend such a trust as McDonogh has devised. In New York, from motives of public policy similar to those prevailing in Louisiana, the creation of trusts has been greatly restricted by statute. (2 Rev. Stat., p. 186.)

394*] "The strictness with which this policy is enforced by her courts, and the rigor with which trusts contravening its spirit are annulled, may be seen in the cases of *Jarvis v. Babcock*, 5 Barb., 139; *McSorley v. Wilson*, 4 Sandf. Ch., 523.

V. The will of John McDonogh violates the law of Louisiana in separating the usufruct from the naked property of his estate forever. The nature of these two titles is explained in articles 479, 486 and 525 *et seq.* The law authorizes the separation of the usufruct from the ownership for one life only. (Civil Code, 601, 1509.)

But where the usufructuary is a corporation

which is deemed perpetual, the right is expressly limited to thirty years. (C. C., 607.)

It is true that where a gift of perpetual usufruct is made, it is frequently construed into a gift of the property itself, on the ground that giving to a person the perpetual enjoyment of property is only a mode of expressing the gift of the title or ownership. (See *Arnauld v. Delachaise*, 4 Annual, 119; 2 Prudhon, 6-9.)

But this is a mere rule of construction, subject to be controlled by the testator's expression of a contrary intention. The language of the will, as already set forth, expresses so clearly the intention of the testator not to give the property itself, but to place the title forever in abeyance, and to preserve the property as "his general estate," that comment on it is unnecessary.

The language used by the present *Chief Justice* of Louisiana, with reference to the will of Henderson, is equally applicable to that now under discussion: "There is not a word in the will that takes the ownership out of his succession; but that, if carried into effect, it takes it out of commerce, is indisputable." He expressly orders, "it is to remain forever as a part of my succession." The executors might lease, but they could not sell. (*Henderson v. Root*, 5 Annual, 453.)

VI. The will of McDonogh is in direct violation of the law of Louisiana, which prohibits perpetuities, and the placing of property out of commerce. (*Marthurin v. Lévaudais*, 5 Martins, N. S., 802; *Cole v. Cole*, 7 Martins, N. S., 416; *Arnauld v. Tarbe*, 4 La., 502; *Heirs of Henderson v. Root*, 5 Annual, 453; *Franklin* case above cited.)

And so strong is the determination of the Legislature to prevent property from being withdrawn from commerce, that it has expressly abrogated the former civil law, and the special article of the Code of 1808, which prohibited the alienation of things holy, sacred and religious. (Code of 1808, pp. 95 and 96; 1 Strahan's Domat, secs. 129, 1435; Civil Code, 447.) The will also violates the provision of the law which prohibits the testator from ordering "that property shall never be di- [*395 vided. (C. C., arts. 1223, 1228.)

And, although under the terms of the law, such a prohibition is considered as not made, yet where the property is not given in ownership to the devisee, and the prohibition is inserted, with a view to carry out an entire scheme, created by the will, and which must fail if the prohibition be not in force, then to allow the partition of the property between the devisees for their own use, becomes not an interpretation of the will, but a perversion of the whole design of the testator, and the making of a new will for him. (*Henderson v. Root*, above cited; see, also, *Hawley v. James*, 16 Wend., 144, 180.)

This consideration also disposes of the question raised specially in behalf of the Orphan Asylum. The annuity is inseparably connected with the trust, and must fall with it; there is no possibility of upholding it when the trust on which it depends is overthrown. It is to be paid from rents and profits which will never accrue. (*Coster v. Lortillard*, 14 Wend., 265; same case, 5 Paige, Ch., 172; *Hawley v. James*, 16 Wend., 180.)

VII. The beneficiary legatees of McDonogh, the asylum, the school farm, the free schools, are not in existence, nor is even the board of commissioners of his general estate, as a legal corporation, capable of holding property in succession.

They are intended by the testator to be corporations with perpetual succession, he has so declared in his will, and he has attempted to organize them as what he calls "institutions."

The power of creating corporations is a sovereign power, which no individual can usurp. In Louisiana the Legislature itself could not incorporate the institutions provided for by this will. (Constitution of 1845, arts. 123, 124.)

These articles prohibit the creation of any corporations by special charter, except political and municipal corporations, and provide that no corporation thereafter to be created, "shall ever endure for a longer period than twenty-five years."

The Legislature, by Act of 30th April, 1847, in obedience to these articles, passed a general law for the organization of such corporations as McDonogh desires to establish by his will, restricting their possession of property to a value of \$300,000. (Digest La. Stat., p. 181.)

The whole scheme of McDonogh's will is in direct violation of the policy of Louisiana, as established by the constitution and this law, and is null and void for this reason.

Before the adoption of these articles of the Constitution, when the Legislature granted special Acts of Incorporation to religious and charitable societies, its policy was equally 396*] marked *by restricting their possession of property and right to receive donations within narrow limits, and confining their duration to a term of years. (Bullard and Curry's Digest, p. 843, Nos. 214, 221, p. 353, No. 241, p. 354, No. 248; *First Congregational Church v. Henderson*, 4 Rob., 215, where it appears that the church was prohibited from receiving from any single person by donation or legacy more than \$1,000.)

It has long ago been held by this court, that a legacy to an association, not incorporated, could not be taken by it as a society, nor by the individuals who composed the association at the death of the testator. (*Baptist Association v. Hart*, 4 Wheat., 1.) And the law of England on this point is well settled. (Grant on Corporations, 115, 572.)

The statute law of Louisiana is in conformity with these principles, and requires, for the validity of a legacy, two conditions: 1st. The existence of the legatee at the death of the testator. 2d. The capacity of the legatee to receive at the time, if the legacy be absolute; or if conditional, the capacity at the time of the fulfillment of the condition. (Civil Code, 1459, 1460, 1469.)

These provisions of the civil law are established with great clearness by the highest authorities. (5 Toullier, 99, Nos. 91, 92; Pothier *Donations Testamentaires*, p. 361; Pothier, *Obligations*, Nos. 203, 208, 222; 2 Strahan's *Domat*, 3518, 3088; 8 *Marcade*, 480; 5 *Zacharia*, 23; 8 *Duranton*, No. 221; *Coin Delisle*, 96, No. 4.)

And although the French Code, which forms the basis of that of Louisiana, admits of ex-

ception, in cases of marriage contracts, to the rule requiring the existence of the donee at the date of the gift, the Louisiana Code expressly forbids this exception, and repeats the prohibition. (Code Napoleon, 906, 725; Civil Code, 947, 948, 1727.)

It is true that in one case in Louisiana the court held a legacy valid to corporations not in existence. (*Milne's Heirs v. Milne's Executors*, 17 La., 46.)

But that case stands alone in the reports, and on the very face of the decision is self-contradictory. It is not the law of the land.

But even admitting its correctness, it was decided on the express ground that the corporations had been created by Act of the Legislature, immediately after the decease of the testator, and where this action of the Legislature has been refused, it has since been held that the devise must fail. (*Heirs of Henderson v. Rost*, 5 Annual, 458, opinion of Preston, J.)

Now, in the case before the court, not only has the Legislature of Louisiana no constitutional power to create the corporations in question, *but both the States of Louisiana [*397 and Maryland have declared their disapproval of the scheme of the will and denounced it as null and void, and contrary to public policy. (Record, pp. 67, 129; Act of Legislature of Louisiana, 12th March, 1852, p. 132; Resolution at Legislature of Louisiana, 12th March, 1852, p. 136.)

The corporations contemplated by McDonough are therefore not only without present existence, but without any probability of future existence, and the property conveyed to them must of necessity fall to the heirs at law.

A case infinitely stronger in favor of the validity of a devise, was decided by the Supreme Court of the Hanseatic cities in favor of the heirs at law. It was the case of a legacy to the City of Frankfort, of a sum of money destined to the establishment of a museum of painting, for the direction and administration of which a society was to be created according to law, and as soon as it was incorporated, the society was to become the owner of the legacy, on condition of applying it to the use prescribed by the testator.

The decision of the court was, that the city could not keep the legacy without violating the intention of the testator; and that the society could not take it, because it had no legal existence at the date of the testator's death. The legacy was therefore annulled in favor of the legal heirs. (Roshirt, *Ueber den Stadelaschen Erbfolge*, 1828; *Muhlenbruck, Beurtheilung des Stadelaschen Beerbungsfalles*.)

And if the dispositions of McDonogh's will be indeed as we maintain in favor of corporations not yet in existence, and therefore incapable of taking, the Code of Louisiana provides that they shall be null, notwithstanding the interposition of the names of the cities, which is a mere device of the testator to shield them from the law.

"Every disposition in favor of a person incapable of receiving shall be null, whether disguised under the form of an onerous contract or made under the name of a person interposed." (C. C., 1478.)

VIII. The schools which the testator requires to be established in Louisiana are in con-

travention of the policy of the State, as established by its constitution and laws.

The will requires that the benefit of the schools shall be confined to the poor, as a class. The constitution and laws of Louisiana require that free schools shall be established and kept under the supervision of public officers, where all white children alike, the rich and poor, may be educated by the same teachers, and on terms of equality.

Free schools confined to the poor alone give **398*** rise to distinction *of classes in the community, are anti-republican in tendency, and conflict with the policy of the State. (Constitution of La., arts. 133, 134; Acts of Legislature of La., 1841, Digest, p. 239; Acts of Legislature of La., 1847, Digest Laws of La., 228 *et seq.*)

And free schools in which poor white and colored children are to be received indiscriminately, and placed on an equality, would be intolerable in states where slavery is recognized as a legal institution.

IX. If it be held that the City of New Orleans can take the trust estate bequeathed to it, the executors must be ordered to account to complainants for the half which is devised to the City of Baltimore.

The trust in favor of that city is to be there executed under the laws of Maryland. By that law the trust in question is void. It cannot be there executed, because the object is not definite.

"Whenever the word 'poor' or 'poorest' has been used as a term of description in a devise or bequest, it has been held to be insufficient for uncertainty." (*Dashiell v. The Attorney-General*, Harr. & Johns., 399.)

The devise to the school farm in McDonogh's will is "for the express and sole purpose of establishing a school farm on an extensive scale for the destitute and the poorest of the poor male children, &c." (Record, p. 18.) And "for rescuing from vice and ignominy millions upon millions of the destitute youth, &c." (Page 22.)

The general devise is "for the establishment and support of free schools wherein the poor, and the poor only, of both sexes, of all classes and castes of color, shall have admittance, free of expense." (Page 14.) Schools for "the poorer classes, for whom these institutions are alone intended" (Page 27), "where every poor child and youth, of every color, may receive a common English education." (Page 29.)

Such trusts are incapable of execution, according to the concurrent decisions of the highest courts of Maryland. (*Trippe v. Frazier*, 4 Harr. & Johns., 446; *Dashiell v. Attorney-General*, 5 *Id.*, 398; *Dashiell v. Attorney-General*, 6 *Id.*, 1; *Tolson v. Tolson*, 10 Gill & Johns., 159; *Meade et al. v. Beale & Latmer, Executors of Ford*, decided by Chief Justice Taney, in U. S. C. C., November Term, 1850.)

These decisions are in strict pursuance of those of the English courts, in cases quite as strongly appealing to good feeling as any of those termed charitable. (Ram on Legal Judgment, ch. 19, sec. 2, in 9th vol. Law Library, and cases there cited.)

And this court has more than once determined **399*** "that the *common law of each state must be ascertained by its general policy, the usages sanctioned by its courts, and its statutes; and there is no object of judicial ac-

tion which requires the exercise of this discrimination more than the administration of charities." (*Wheeler v. Smith*, 9 How., 78; *Baptist Association v. Hart*, 4 Wheat., 27; *Inglis v. Sailors' Snug Harbor*, 3 Pet., 112; *Vidal v. Girard's Executors*, 2 How., 129.)

And if the trust is incapable of execution in Maryland, though valid in Louisiana, the property falls to the legal heirs. (*Hawley v. James*, 7 Paige, Ch., 218; S. C., 5 Paige, Ch., 323, 441; S. C., 16 Wend., 61.)

So in England it has been held that where a trust was created in personal property abroad, to be invested in lands in England, contrary to the policy of her mortmain laws, the devise is void. (*Attorney-General v. Mills*, 8 Russell, 328.)

The right of Baltimore to accept such a trust is a question of personal capacity, to be governed by the law of the domicile, according to principles of law universally admitted. (*Story's Conflict*, secs. 51, 65, 446.)

X. The residuary devises to the states of Louisiana and Maryland are the same in their nature and character as those to the cities of New Orleans and Baltimore. They are trusts "That the Legislatures of those States, respectively, may carry my intentions, as expressed in this my last will and testament, into effect, as far and in the manner which will appear to them most proper" (p. 29); and this trust is followed by the reiteration of his purpose in the strongest terms he could discover: "For this purpose, and this only, my desire being that one dollar shall never be expended to any other purpose, I destine the whole of my general estate, to form a fund in real estate, which shall never be alienated, but be held and remain forever sacred to it alone."

The qualification in the devise to the states merely gives a discretionary power as to the mode of execution of the purpose; it enables them to dispense with such of the machinery of administration of the trust as they might find cumbersome or ill adapted to the object in view, but it is subordinate to the chief illegal conditions of the scheme, and does not admit of its fractional observance. It gives a latitude as to the administration and machinery of the purposes subject to the proviso that these purposes are to be observed, viz.: 1st, the education of the poor of the two cities in preference to all others; and 2d, that this be done by the revenues of a fund formed of inalienable real estate. (*Morris v. Bishop of Durham*, 9 Ves., 399; *Briggs v. Penny*, 8 Eng. Law and Eq., 234, 235; *Morris v. Bishop of Durham*, 10 Ves., 521; *Story's Eq. Juris.*, secs. 979, a. b.; *Wheeler v. Smith*, 9 How., 55; *Adams' Eq.*, 184, Am. ed.)

Mr. Justice Campbell* delivered the [400** opinion of the court:

The appellees are the heirs at law of John McDonogh, a native of the State of Maryland, who died at McDonogh, near New Orleans, in the State of Louisiana, in 1850, leaving there a very large succession. In 1839, the decedent executed, at New Orleans, an olographic will for the disposal of the estate he might have at his death. This will is in a legal form, and has been admitted to probate in the District Court of New Orleans. It contains two par-



ticular legacies which are not contested, and a single legacy under a universal title. In this bequest the testator declares, "that for the more general diffusion of knowledge, and consequent well-being of mankind," and "being convinced that he could make no disposition of those goods which the Most High had placed under his stewardship, as by means of which the poor will be instructed in wisdom and led into the path of holiness," "he gives, wills and bequeaths all the rest, residue and remainder of his estate, real and personal, present and future, as well that which was then his as that which he might acquire at any time before his death, and of which he might die possessed (subject to certain annuities), to the corporations of the cities of New Orleans and Baltimore forever, one half to each," "to and for the several intents and purposes thereafter declared." The testator directs his executors to convert his personal estate into real property, whereby "the whole of his estate will become a permanent fund in real estate, affording rents, no part of which shall ever be touched, divided, sold or alienated, but shall forever remain together as one estate, and be managed" as he shall order.

For the management of this estate, thus declared to be inalienable, he directs the two cities each to select, annually, three agents, whose duty it should be to receive seisin and possession of the estate from his executors, immediately after his death. They are "to lease or rent the lots," "cultivate the plantations," "collect the rents," "pay the annuities," "invest the moneys," and, "in fine, do all acts necessary to its full and perfect management, according to the will;" the will of the testator being "that no part of the general estate, or revenue from rents arising from said general estate, shall go into the hands of the corporate authorities of the said cities, but that the said authorities should have forever the supervision of it."

The testator designed the joint management of the agents of the cities, and the joint supervision of their authorities over the estate, to be perpetual. He forbids the cities to vary, by agreement, or by any compromise, the relations he has established between them in regard to it. They must make no sale of their interests; no traffic with their powers of control; no sur-
401* render, *for money or other consideration, of their supervisory care. But should they combine to violate his scheme of management or appropriation, their rights are declared forfeited, and "the general estate" is limited over to the States of Louisiana and Maryland, "for the purpose of educating the poor of those States," "under such a general system of education as their Legislatures should appoint." He further provides, that should there be "a lapse of the legacies from the failure of the legatees to accept, or any other cause or means whatsoever," the shares should inure for the benefit of the State or States in which the cities are situate; "that the Legislatures of those States respectively may carry his intentions, as expressed and set forth in the will, into effect, as far and in the manner which will appear to them most proper."

The testator having provided for the perpetuity of the McDonogh estate, and the des-

tination of its revenues, proceeds to develop a minute and detailed scheme for its management, improvement, and the expenditure of its income. He appropriates one eighth part of its annual revenue for forty years, for colonizing the free people of color, to the American Colonization Society, the sum not to exceed \$25,000 per annum; one eighth part for the erection, in New Orleans, of an asylum for the poor of all ages, castes and colors; one eighth part to an incorporated society for the relief of orphan boys in New Orleans; and one eighth part for the establishment of a school farm in Maryland. The money appropriated to the asylum, school farm, and orphan boys, he requires to be invested as capital in real estate, and the rents only to be subject to the uses of the donees. The capital of the asylum and school farm is to be entirely collected before any appropriation takes place for their use; and for the one the capital is to be \$3,000,000, and for the other \$600,000. The remaining four eighths of the income of the general estate, for the present, and the whole, after the objects above mentioned are fulfilled, are destined "for the education of the poor, without the cost of a cent to them, in the cities of New Orleans and Baltimore, and their respective suburbs, in such a manner that every poor child and youth, of every color, in those places, may receive a common English education—based, however, be it particularly understood, on a moral and religious one;" the whole of the general estate "to form a fund in real estate which shall never be sold or alienated, but be held and remain forever sacred."

To carry his purposes into effect, he directs the selection of boards of managers for the different establishments, and suggests that acts of incorporation may become necessary to facilitate their operations.

*The appellees claim that, as to the [**402** property embraced in this bequest to the cities, that John McDonogh died intestate.

Their argument is, that although he makes in the commencement of his will a formal gift to the cities; although the cities are designated as his legatees in several clauses of the will, in precise terms; although the property is described as property "willed and bequeathed to the cities," that the testator has sedulously contrived to withdraw from them the seisin and possession of the whole estate, and has committed them to an uncertain and fluctuating board, for the selection of which he has provided; that the dominion and use of this property, in so far as he has permitted either, has been confided to this board of managers, but that this board is held servilely to a code of regulations he has dictated, the aim of which is to hold the "McDonogh estate" together in perpetuity; that by these restrictive regulations the donations to the cities have become nugatory and unavailing.

This conclusion was adopted by the Circuit Court, whose decree is under reversal, and has been sustained in the argument at the bar of this court with great power and ability.

We may remark of the will of the testator, that it indicates his imagination to have become greatly disturbed by a long and earnest contemplation of plans which he says "had actuated and filled his soul from early boyhood

with a desire to acquire a fortune, and which then occupied his whole soul, desires and affections." In the effort to accomplish these cherished hopes he has overstepped the limits which the laws have imposed upon the powers of ownership, overlooked the practical difficulties which surround the execution of complex arrangements for the administration of property, greatly exaggerated the value of his estate; and unfolded plans far beyond its resources to effect; and has forgotten that false calculations, mismanagement, or unfaithfulness might occur to postpone or prevent their attainment. Holding and declaring a firm faith in the interposition of Providence to render his enterprise successful, he apparently abandons himself, without apprehension or misgiving, to the contemplation of the "McDonogh estate," as existing through all time, without any waste or alienation, but improving and enlarging, "extending the blessings of education to the poor through every city, town and hamlet" of the State where he was born, and the State in which he had lived and was to die; "rescuing from ignorance and idleness, vice and ignominy, millions upon millions of the destitute youth of the cities," and "serving to bind communities and States in the bonds of brotherly love and affection forever."

The exaggeration which is apparent in the [403*] scheme he projects, *and the ideas he expresses concerning it, afford the ground of the argument for the appellees. It is, however, unfair to look to the parts of the will which relate to the disorders which reign in society, or to his aspirations to furnish a relief for these "during all time," or to the prophetic visions awakened by the exalted and exciting ideas which dictated the conditions of the will, for the rule of its interpretation. We must look to the conveyances he has made in the instrument, the objects they are fitted to accomplish, and the agencies, if any, to be employed, and endeavor to frame these into a consistent and harmonious plan, accordant with his leading and controlling intentions. In reference to his controlling purpose there can be no mistake. He says, "that the first, principal, and chief object" in his view is "the education of the poor" of the two cities. With equal emphasis and precision he has disclaimed the desire of building the fortunes of his natural relations. He says, "that even to his children, if he had them (as he had not), and a fortune to leave behind him, he would, besides a virtuous education, to effect which nothing should be spared, bequeath to each but a very small amount, merely to excite them to habits of industry and frugality, and no more."

His ruling purpose had no connection with the poor of any one generation. His desire was to establish a foundation to exist for all time—a perpetuity.

He knew that to attain this purpose a succession of persons, animated with a corresponding aim, must be obtained, and that the legal capacities of voluntary associations, even if he could hope to find such to enter into his plans, were wholly unfitted for his design; nor did he hope to effectually combine such persons by any power or prayer of his own. Hence, he selected as his devisees bodies corporate, endowed with the faculties of acquiring and hold-

ing property, having determinate ends and abiding agencies to be employed in accomplishing them. These were all requisite for the full attainment of the purposes he has declared.

He excludes, it is true, the municipal authorities from the particular management of the estate, or the application of its revenues.

But, the municipal officers are not his legatees. They are themselves but agents clothed with a temporary authority; nor do the officers perform their executive duties, except by the interposition of agents subordinate to their control and subject to their supervision. Had the testator confined himself to an unconditional donation of the general estate to the cities, for the use of public schools, it would scarcely have fallen under the personal management of the corporate authorities. They would probably *have appointed boards or agencies, [*404 to whom powers, more or less general, would have been confided, and over whose conduct their supervision would have been more or less particular and exact. The knowledge of this probably induced the testator to describe the board which his experience and observation had marked as the most efficient and responsible. He defines their number, the manner of their appointment, the form of their accounts, the modes of their business, and urgently exacts that the great, and to his eyes sacred, interests of his charity should not be blended with the vulgar and debauching concerns of daily corporate management. These directions must be regarded as subsidiary to the general objects of his will, and whether legal and practicable or otherwise, can exert no influence over the question of its validity. Nor do we esteem the facts, that he has given his estate a name, regards it as a distinct entity, and couples with it language denoting perpetuity, important as evidence that the cities are not his legatees. A gift to a municipal corporation tends to create a perpetuity. Property thus held ceases to be the subject of donation, or of devise, of transfer by bankruptcy, or in the order of succession. The property of such a corporation is rarely the subject of sale, and practically it is out of commerce. McDonogh supposed that he could prohibit any alienation or division. We do not perceive, therefore, why he should have sought an incorporation of the general estate; nor do we understand that this forms a prominent portion of his scheme.

The will, through every part, discloses that the cities are the particular objects of his interest and the poor of the cities of his providence and bounty. His will designates the cities, by their corporate name, as his legatees, in definite and legal language. His plan of administration is to be executed through agents, selected by their corporate authorities, and to the end of conveying to the poor of the cities, perpetually, the fruits of his property. We should violate authoritative rules of legal interpretation, were we to disinherit the cities under these circumstances, and to substitute for them "an ideal being" called the "general estate," having no legal capacity, nor juridical character, and whose recognition, therefore, could have no result but to overturn the will of the testator. (C. C., 1706; 1 Spence, Eq. J., 529, 530; 5 Ann., 557.)

Having thus determined that the legacy is to the cities by a universal title, and having extracted from the will the leading and controlling intention of the testator, the next inquiry is, whether a legacy given for such objects is valid.

The Roman jurisprudence, upon which that of Louisiana is founded, seems originally to have **405***] denied to cities a capacity to "inherit, or even to take by donation or legacy. They were treated as composed of uncertain persons, who could not perform the acts of volition and personality involved in the acceptance of a succession. The disability was removed by the Emperor of Adrian in regard to donations and legacies, and soon legacies *ad ornatum civitatis* and *ad honorem civitatis* became frequent. Legacies for the relief of the poor, aged and helpless, and for the education of children, were ranked of the latter class. This capacity was enlarged by the Christian emperors, and after the time of Justinian there was no impediment. Donations for charitable uses were then favored; and this favorable legislation was diffused over Europe by the canon law, so that it became the common law of Christendom. When the power of the clergy began to arouse the jealousy of the temporal authority, and it became a policy to check their influence and wealth—they being, for the most part, the managers of property thus appropriated—limitations, upon the capacity of donors to make such gifts, were first imposed. These commenced in England in the time of Henry III.; but the learned authors of the history of the corporations of that realm affirm that cities were not included in them—"perhaps upon the ground that the grants were for the public good;" and although "the same effect was produced by the grant in perpetuity to the inhabitants," "the same practical inconvenience did not arise for it, nor was it at the time considered a mortmain." (Mereweth. & Steph. Hist. Corp., 489, 702.)

A century later, there was a direct inhibition upon grants to cities, boroughs, and others, which have a perpetual commonalty, and others "which have offices perpetual," and, therefore, "be as perpetual as people of religion." The English statutes of mortmain forfeit to the King or superior lord the estates granted, which right is to be exerted by entry; a license, therefore, from the King severs the forfeiture. The legal history of the Continent on this subject does not materially vary from that of England. The same alternations of favor, encouragement, jealousy, restraint, and prohibition are discernible. The Code Napoleon, maintaining the spirit of the ordinances of the monarchy, in 1781, 1749, 1762, provides "that donations, during life or by will, for the benefit of hospitals of the poor of a commune, or of establishments of public utility, shall not take effect, except so far as they shall be authorized by an ordinance of the government."

The learned Savigny, writing for Germany, says: "If modern legislation, for reasons of policy or political economy, have restrained conveyances in mortmain, that those restrictions formed no part of the common law." **406***] The laws of Spain "contain no material change to the Roman and ecclesiastical laws upon this subject. The Reports of the

Supreme Court of Louisiana (in which State these laws were long in force) attest their favor to such donations. (*De Pontalba v. New Orleans*, 3 Ann., 660.)

This legislation of Europe was directed to check the wealth and influence of juridical persons who had existed for centuries there, some of whom had outlived the necessities which had led to their organization and endowment. Political reasons entered largely into the motives for this legislation—reasons which never have extended their influence to this continent, and consequently, it has not been introduced into our systems of jurisprudence. (2 Kent's Com., 282, 288; *Whicker v. Hume*, 14 Beav., 509.)

The precise result of the legislation is, that corporations there, with the capacity of acquiring property, must derive their capacity from the sovereign authority, and the practice is, to limit that general capacity within narrow limits, or to subject each acquisition to the revision of the sovereign. We have examined the legislation of the European states, so as better to appreciate that of Louisiana. No corporation can exist in Louisiana, have a public character, appear in courts of justice, exercise rights as a political body, except by legislative authority; and each may be dissolved, when deemed necessary or convenient to the public interest. Corporations created by law are permitted to possess an estate, receive donations and legacies, make valid obligations and contracts, and manage their own business. (Civil Code, tit. 10, ch. 1, 2, 3, art. 418, *et. seq.*)

The privileges which thus belong to corporations legally existing, have been granted to the inhabitants of New Orleans in various legislative Acts. The authorities of the city have, besides, received powers of government extending to all subjects affecting their order, tranquillity and improvement. It is agreed, that these powers are limited to the objects for which they are granted, and cannot be employed for ends foreign to the corporation. (1 Paige, 214; 15 N. H., 817; 4 S. & S. C., 156; 3 Ann., 294.)

But there can be no question as to the degree of appreciation in which the subject of education is held in Louisiana. The constitution of the State imposes upon the Legislature the duty of providing public schools for gratuitous education; and various acts attest the zeal of that department in performing that public duty. Among these, there is one which authorizes and requires the corporate authorities of the City of New Orleans to establish them in that city, and to enact ordinances for their organization, government and discipline; they are likewise "charged with the instruction, [**407**] education and reformation of juvenile delinquents and vagrants. These acts are from a sovereign authority, and endue the city with the powers of acquiring, retaining, and disposing of property, without limitation as to value, and assign to it, as one of its municipal functions, the charge of popular education. No parliamentary grant or royal license in Great Britain—no government ordinance in France—could remove more effectually a disability, if one existed, or create a capacity, if one were wanting, to the corporations of those countries. (Rev. Stat. La., 41, 111, 116, 117, 144, 289; 2 Rob., 244, 491.)

We shall now examine the devise to the cities, in connection with the various conditions annexed to it. The appellees insist it is a disposition reprobated by law, for that it contains "substitutions and *fidei commissæ*," which are prohibited by article 1507 of the Code, and which annul the donation in which they are found.

We shall not inquire whether the prohibition extends to donations in favor of corporations, and for objects of public utility, though this seems to have been a question in France. (*Le feb. des Don. Picarues*, 31, 33.)

We shall limit the inquiry to the nature of the prohibited estates, to determine whether they exist in this legacy. The terms are of Roman origin, and were applied to modes of donation by will, common during its empire, and from thence were transferred to the derivative systems of law in use upon the continent of Europe. The substitute was a person appointed by the testator to take the inheritance, in case of the incapacity or refusal of the instituted heir. A *pater familias* was authorized to make the will of his son during his nonage, or lunacy, or other incapacity to perform the act; and in the case of his death, under such circumstances, the appointee took the succession. This was a mode of substitution.

The *fidei commissum* originated in a prayer, petition, or request, of a testator upon his instituted heir, to deliver the inheritance, or some portion of it, to a designated person. Every testament being originally a law of succession, proposed by the testator, and consented to by the Roman people, the language of legislation, that is, of mandate and authority, was essential to its validity. Precatory words were insufficient to raise an obligation upon the heir, or to vest property in the donee. This was afterwards changed, and words of request then imposed a charge upon the heir, to maintain the faith in which the testator had confided. Afterwards, the distinctions between words of mandate and of request became obsolete, and both were considered with reference to their significance of 408*] the intentions of the testator. The notion of a *fidei commissum* thus became limited, implying no more than an estate in possession, encumbered with the charge to surrender it to another. This might be pure and simple—that is, the duty to surrender might be immediate, or it might be on a condition, or after the expiration of a term even extending to the life of the *gravatus*. The substitute originally came in the place of another; the idea was modified to include those who came after another under certain circumstances.

The conjunction of the *fidei commissum* with the substitution would then become a natural mode of settlement of property. The instituted heir might be charged to hold and enjoy the succession for his life, and at his death that it should go to another (his heir), and that heir might in turn become a *gravatus*, for the benefit of another successor, and so from generation to generation.

Such a substitution might be properly called a "substitution *fidei commissaire*," or an "oblique substitution." This mode of limiting estates from degree to degree, and generation to generation, was much employed on the continent of Europe, and served to accumulate

wealth in a few families at the expense of the interests of the community. The vices of the system were freely exposed by the political writers of the last century, and a general antipathy awakened against it. Substitutions having this object were prohibited during the revolution in France, and that prohibition was continued in the Code Napoleon, whose authors have exposed with masterly ability the evils which accompanied them. (*Motifs et Dis.*, 875.)

This prohibition was transferred to the Code of Louisiana, with the addition of the *fidei commissæ*. These terms imply a disposition of property through a succession of donees. The substitution of the article 1507 of the Code being an estate for life, to be followed by a continuing estate in another by the appointment of the testator.

The *fidei commissæ* of the Louisiana Code are estates of a similar nature, implying a limitation over from one to another. They are the *fidei commissæ* of the Spanish and French laws, in so far as those estates are not tolerated by other articles of the Code. We shall not attempt to define them from an examination of the Code and the reports of the Supreme Court of that State. It is not necessary for the decision of this case. We are unable to perceive anything in the Code to justify the supposition that the English system of trusts, whether in its limited signification as applied in conveyancing, or in its broad and comprehensive import, as applied by the courts of chancery, were within the purview of the authors of this Code in framing this prohibition. The terms [*409 "substitution" and *fidei commissæ* are words foreign to the English law. They are applied to no legal relation which exists in it, and describe nothing which forms a part of it. The technical words, of "charged to preserve and to render," in article 1507, which embrace so much to a continental lawyer, only provoke inquiries in the mind of one accustomed to the language of the common law. The allusion to the "Trebellianic portion" is to a right of which there has never been a counterpart in the English system. The whole article refers exclusively to things of a continental origin. The estates known as *fidei commissæ* and substitutions, in so far as regards the order of persons and the duration of their interest, may be created by devise in an English will. This can be done without the interposition of trustees or with them. That is legal, estates or equitable estates can be limited to embody those conditions of the *fidei commissæ* and substitution; but the separation of the same estate into parts, legal and equitable, with separate courts in which their respective qualities may be represented, is not of continental origin. We may say of this as Sir William Grant says of another doctrine of equity, "that in its causes, its objects, its provisions, its qualifications and its exceptions, it is a law wholly English." We find nothing of the *fidei commissæ* or substitution in the legacy to the cities. The mischiefs resulting from conveyances in mortmain, and which led to restraints upon them, also existed in the substitutions of the French law, and led to their suppression. The remedies for the mischief, in consequence of the difference of the persons, were essentially variant. In the case of natural

persons, the abrogation of the capacity to limit property from successor to successor, and generation to generation, removed the evil of perpetuities. But no statute against estates tail, or of remainder, or reversion, operate upon a corporation. The mischief results from the duration of the corporation and the tenacity with which, from its nature, it holds to property. The fee simple estate to a corporation is that which most effectually promotes the creation of a perpetuity. The remedy in Europe in this case was to restrict the number of corporations, and to reserve an oversight of their acquisitions to the sovereign authority. This precaution was taken, as we have seen, also in Louisiana. If she has granted to her metropolis an unrestricted license to acquire and to hold property, we must conclude there were sufficient motives to justify the act.

Our next inquiry will be, whether the testator is authorized to define the use and destination of his legacy. We have seen that donations to the cities of the Roman empire followed immediately upon the *senatus consultum* which 410*] allowed them to take, and that the destination of such donations to public uses was declared. Domat says, "One can bequeath or devise to a city or other corporation whatsoever, ecclesiastical or lay, and appropriate the gift to some lawful and honorable purpose, or for public works, for feeding the poor, or for other objects of piety or benevolence." (Domat, *Lois Civiles*, b. 4, tit. 2, sec. 2.)

The City of New Orleans holds its public squares, hospitals, levees, cemeteries and libraries by such dedications. This court says (*New Orleans v. United States*, 10 Pet., 662), "That property may be dedicated to public use, is a well-established principle of the common law. It is founded in public convenience, and has been sanctioned by the experience of ages. Indeed, without such a principle, it would be difficult, if not impracticable, for society, in a state of advanced civilization, to enjoy those advantages which belong to its condition, and which are essential to its accommodation."

The Supreme Court of Louisiana, in a number of cases, have applied the principle contained in these citations with confidence. (*De Pontalba v. New Orleans*, 8 Ann., 662; *Will of Mary*, 2 Rob., 440; *Duke of Rich. v. Mylne*, 17 La., 312; *Maryland and Louisiana v. Roselius*, MS.)

The Code of Louisiana provides that donations made for the benefit of an hospital, of the poor of the community, or of establishments of public utility, shall be accepted by the administrators of such establishments. (C. C., 1536.) It may be very true this article relates merely to the formal manner by which donations, *inter vivos*, for such objects may be perfected; but it will be observed that the requirement of the French Code of a government license for the gift is dispensed with in the frame of this article, and a strong implication arises from its terms in favor of the validity of such gifts. An acceptance of such donations in a will is unnecessary. Nor do we see any ground for inferring a prohibition of donations by will, which are lawful, *inter vivos* in the absence of any prohibitive article in the Code. We are of the opinion, therefore, that the testator might declare the uses to which he destined

his legacy to the cities; and the destination, being for purposes within the range of the powers and duties of its public authorities, is valid.

We shall now examine the question, whether the conditions annexed to this legacy, the prohibition to alienate or to divide the estate, or to separate in its management the interest of the cities, or their care and control, or to deviate from the testator's scheme, invalidate the bequest.

The appellees contend that the performance of these conditions is impossible; they are contrary to public policy; introduce tenures at variance with the laws; and would result in mischief to the State. That the conditions are of the essence of the gift, and the will would not conform to the dispositions of the testator, if they should be erased or disregarded. They insist that the appellees take by virtue of the law, but the devisees claim under a will. That, if they cannot exhibit a clear and valid devise of the property, the legal right of the heir should not be defeated. That this court cannot, under the guise of judicial construction, sanction an instrument from which the main prescriptions of the testator are obliterated.

The argument on this point against the cities possesses great logical force. It is admitted that illegal or immoral conditions will vitiate a contract (C. C., 2026); but the Code provides that, "in all dispositions *inter vivos* and *mortis causa*, impossible conditions, those which are contrary to the laws or to morals, are reputed, not written." The authorities cited establish that, under the word "conditions," the various modes of appropriation, use and destination attached to this legacy are included. Merlin says, "Conditions take different names according to their object; they are called in turn charges, destinations, motives, designations, terms. But although the conditions, charges, destinations, &c., &c., ought to be distinguished, nevertheless the word "condition" often serves to express them all." (Merlin's Cond., sec. 2.)

The signification of this article of the Code becomes then an important inquiry. It is found in the Digest of Justinian, and from thence passed into the codes of France and Spain. (Touill., 5, No. 255; 1 Escrich. Dig. leg., 565.) It was copied from the Code Napoleon into the Code of Louisiana. Savigny furnishes us with the history of the law as found in the Pandects. One of the schools into which the Roman jurisconsults was divided (Proculeians) placed the construction of contracts and testaments, containing illegal or impossible conditions, on the same principle, and insisted that the whole disposition in each should be vitiated by them; another (Sabinians) changed the rule with reference to the instrument, and while contracts were vitiated by the illegal or immoral conditions, in wills the conditions only were pronounced nugatory. Justinian adopted the opinion of the latter, which seems to have been preferred in practice before; and his adoption has been regarded as a legislative sanction of their rule in favor of testaments. Great authorities in France oppose this doctrine, and in Prussia it exists, but in a modified form, while it has been wholly rejected in Austria. (5 Touill., No. 247; Savig. Rom. Law, secs. 122-124.)

The common law rule depends upon the fact,

whether the performance of the illegal, immoral, or impossible condition is prescribed as precedent or subsequent to the vesting of the estate of the devise. In the former case, no estate exists till *the condition is performed and no right can be claimed through an illegal or immoral act. In the latter case, the estate remains, because it cannot be defeated as a consequence of the fulfillment of an illegal or immoral condition. This, however, applies only to devises of real estate; for the ecclesiastical and chancery courts, in regard to bequest of personalty, follow the rule of the civil law, as above expressed. (1 *Rop. Leg.*, 754, 755; 7 *Beav.*, 437; 1 *Eden*, 140; 2 *Spence, Eq. J.*, 229.)

The conditions in the case before us, which impose restraints upon alienation and partition, and exact a particular management through agents of a specified description, are conditions subsequent, and would not, by the rule of the common law, divest the estate, if pronounced to be illegal or immoral. (3 *Pet. S. C.*, 377; 1 *Sim. R. N. S.*, 464; 7 *E. L. & Eq.*, 179; 2 *J. C. Scott, C. B. R.*, 883; 2 *Zabriskie*, 117; 10 *Ala.*, 702.)

These conditions belong, too, to the class that are reprobated as repugnant to the legal rights which the law attaches to ownership. The common law pronounces such conditions void, in consequence of that repugnancy, and the civil law treats them as recommendations and counsel, not designed to control the will of the donee. (1 *Rop. Leg.*, 785; 4 *Kent's Com.*, 180; *Touill.*, 5, No. 51; *Id.* No. 405; *Dalloz. Dic.*, tit. Cond., 96; 10 *E. L. & E.*, 23.)

Our opinion upon the article of the Code we have cited is, that it does not prescribe a rule of interpretation, to aid the understanding of the courts in finding the intention of the testator, but that it is a peremptory enactment of the legislative authority, applicable to the subject matter in all cases, without reference to any declared or presumed intentions of the author of a particular donation. The Code treats such conditions in contracts as the wrong of both the parties, and annuls the act. In the case of the testament, while it refuses to allow the condition, it saves to the innocent legatee the disposition in his favor. It may be that this is done on the presumption that, independent of the condition, the legatee is the favorite of the testator, or from a consideration of the legatee alone. (*Savigny Rom. Law*, sec. 122, *et seq.*)

We have thus far treated the cities as occupying an equal position, and have considered the case with reference to the City of New Orleans alone.

The City of Baltimore is legally incorporated, and endowed with the powers usually granted to populous and improving cities. The General Assembly of Maryland, in 1825, authorized the city to establish public schools, and to collect taxes for their support; and in 1843 it was empowered to receive in trust, and to control for the purposes of the trusts, any property *413*] which *might be bestowed upon it, by gift or will, for any of its general corporate purposes, or in and of the indigent and poor, or for the general purposes of education, or for charitable purposes of any description whatsoever, within its limits. The legal capacity of the city, therefore, corresponds with that of the

City of New Orleans. Do the laws of Louisiana make a discrimination?

The Code declares, "that all persons may dispose of or receive by donations, *inter vivos* or *mortis causa*, except such as the law declares expressly incapable." (*C. C.*, 1456.) There is no distinction between corporations and natural persons in the power to receive by donation, nor do we find any discrimination between domestic and foreign corporations, except, perhaps, in a single article. "Donations may be made in favor of a stranger, when the laws of his country do not prohibit similar dispositions in favor of a citizen of this State. (*C. C.*, 1477.)

We greatly doubt whether this article applies to all the citizens or corporations of the States of the Union. The constitutional relations between the citizens of the different States are those of equality, in reference to the subject of this article. This court, in the case of *The Bank of Augusta v. Earle*, 13 *Pet.*, 520, said, "that by the law of comity among nations, a corporation created by one sovereignty is permitted to make contracts in another, and to sue in its courts; and that the same law of comity prevails among the several sovereignties of the Union." This comity is presumed from the silent acquiescence of the state. Whenever a state sufficiently indicates that contracts which derive validity from its comity are repugnant to its policy, or are considered as injurious to its interests, the presumption in favor of its adoption can no longer be made.

These principles were applied to a purchase of lands by the corporation of one state in another. (*Runyon v. Coster*, 14 *Pet.*, 122.)

The principles of these cases have been adopted in Louisiana. (4 *Rob. La.*, 517; 17 *La.*, 46, 312.)

We know of no departure from these principles in Maryland, and do not doubt that the corporations of Louisiana would take in the same manner as those of Maryland in that State.

The question remains to be considered, whether the destination of the legacy to public uses in the City of Baltimore affects the valid operation of the bequest. All the property of a corporation like Baltimore is held for public uses, and when the capacity is conferred or acknowledged to it to hold property, its destination to a public use is necessarily implied. Nor can we perceive why a designation of the particular use, if within the general objects of the corporation, can affect the result; nor is there *anything in the nature of the [*414] uses declared in this will which can withdraw from the legacy a legal protection.

Neither do we concede that the uses, being in a degree foreign to the State of Louisiana, impair the effect of the will. It is well settled that, where property is conveyed to a use which would be protected, if to be executed at home, in the absence of a prohibition, the conveyance would be valid if the execution were ordered to take place abroad. This question was considered by *Mr. Justice Story*, in the opinion prepared by him for the case of *The Baptist Association v. Smith*, published in 3 *Pet.*, 486, 500.

He says, "there is no statute of Virginia making such bequests void; and, therefore, if against her policy, it can only be because it

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would be against the general policy, of all States governed by the common law." He concludes: "there is no solid objection to the bequest, founded upon the objects being foreign to the State of Virginia." In the late case of *Whicker v. Hume*, 14 Beav., 509, on appeal (16 Jur., 391), a bequest to trustees, to be appropriated in their absolute and uncontrolled discretion, for the benefit and advancement and propagation of learning in every part of the world, as far as circumstances will permit," was pronounced valid. We find nothing in the Code of Louisiana indicating a spirit less comprehensive or catholic; we shall not, therefore, infer the existence of a restriction where none has been declared. We are of the opinion, that the uses for which the testator has devised his estate to the City of Baltimore, are approved alike in the legislation of Louisiana and Maryland, and that the execution of them may be enforced in their courts.

We have considered the legacy without a reference to the annuities which the testator has charged upon it. It is only necessary for us to determine a single question in regard to them. Are the heirs at law interested in the question of their legality?

The Civil Code (C. C., 1697) declares "that legatees under a universal title, and legatees under a particular title, benefit by the failure of those particular legacies which they are bound to discharge.

It will be seen that all the annuitants, having a distinct character from the cities, have a claim upon them for their annual allowance. Should these annuities be invalid this charge would be removed, and the cities relieved. Such was the decision of the Supreme Court of Louisiana (*Prevost v. Martel*, 10 Rob., 513) and such the conclusion of the Court of Cassation in *Hanaire v. Tandon*, the report of whose judgment is appended to one of the briefs of the appellants.

415*) "The annuities created to establish an Asylum for the Poor and a School Farm—and of the validity of which grave doubts exist—are charges upon the legacy of the cities. If the directions of the testator cannot be legally complied with, the charge will be remitted without defeating the legacy. (Sav. Roman Law, secs. 120, 129.)

We shall not express any decided opinion in reference to either of the annuities, but leave the question of their validity to be settled by the persons interested, or by the tribunals to whose jurisdiction they appropriately belong.

We have considered it to be our duty to examine the several questions which arise upon the record, so that the important interests involved in them may be relieved from further embarrassment and controversy. In our opinion, the failure of the devise to the cities would not have benefited the appellees; for that the limitation over to the States of Maryland and Louisiana would have been operative in that event.

We close our opinion with expressing our acknowledgements for the aid we have received from the able arguments at the bar, and the profound discussions in the Supreme Court of Louisiana, with whose judgments we have concurred.

The decrees of the Circuit Court for the Eastern District of Louisiana is reversed, and the cause remanded to that court, with directions to dismiss the bill of the plaintiffs with costs.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to that court to dismiss the bill of the complainants, with costs in that court.

Cited—17 Wall., 334; 24 How., 505; 3 Woods, 11, 458, 459, 477.

ANDREW WYLIE, JR., Administrator of
SAMUEL BALDWIN, Appellant,
v.

RICHARD S. COXE.

Jurisdiction of equity—Agreement to allow attorney per cent. for collecting foreign claim creates lien on fund to that extent.

Where a contract was made with an attorney for the prosecution of a claim against Mexico for a stipulated proportion of the amount recovered, and services were rendered, "the death of the [*416] owner of the claim did not dissolve the contract" but the compensation remained a lien upon the money when recovered.

A court of equity can exercise jurisdiction over the case if a more adequate remedy can be thus obtained than in a court of law.

The want of jurisdiction should have been alleged in the court below, either by plea or answer, if the defendant intended to avail himself of it. If it is too late to urge it in an appellate court, unless it appears on the face of the proceedings.

THIS was an appeal from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington.

It was a bill filed by *Mr. Cox*, under the circumstances stated in the opinion of the court.

The Circuit Court passed the following decree:

In Equity.—This cause having been set down for hearing, by consent upon the bill, answer, general replication, and the testimony filed in the case, and having been argued by counsel, and having been fully and materially considered by the court, it is thereupon, on the twenty-eighth day of April, in the year of our Lord one thousand eight hundred and fifty-two, ordered, adjudged and decreed, that the averments in said bill contained are fully established and sustained, and that complainant is justly and truly entitled to the relief which he prays; and inasmuch as it is thus shown and established that said respondent, as administrator of Samuel Baldwin, did obtain an award as averred, for the sum of \$75,000, which said sum it is admitted that he has received from the government of the United States, and that he holds the same free and clear of all debts due by said intestate; and it being fully shown and estab-

lished that, by and under the contract made in the lifetime of said Samuel Baldwin between the said Samuel and said complainant; said complainant is justly and equitably entitled to have and receive out of said fund, so in the hands of said defendant, as administrator as aforesaid, at the rate of five per centum on the said sum of \$75,000.

Whereupon, it is now further ordered, adjudged and decreed, that said defendant, as administrator as aforesaid, do forthwith pay over to said complainant the sum of \$3,750.

And whereas it further appears, and it is admitted, that said award became and was payable to said defendant, as administrator as aforesaid, on the sixteenth day of May, eighteen hundred and fifty-one, it is further ordered, decreed and adjudged, that said defendant, as administrator as aforesaid, do further pay to said complainant interest on said sum of \$3,750, [417*] to be calculated and estimated *from said 16th May, 1851, until paid, together with the costs of this suit.

From this decree, Wylie, the administrator, appealed to this court.

Afterwards he filed a petition to the Circuit Court to set aside the decree for reasons which it is unnecessary to state; but the court overruled the motion, from which judgment also Wylie prayed an appeal to this court. This is mentioned in order that the case in 14 How., 1, may be understood.

The case as it now stood before this court, was argued by *Mr. Wylie* for the appellant, and *Mr. Badger* for the appellee.

Mr. Wylie made the following points:

First Point. The death of Samuel Baldwin in December, 1847, put an end to the agency of both John Baldwin and Richard S. Coxe, as to this claim. (*Hunt v. Roumanier*, 8 Wheat., 174; *Campbell v. Kincaid*, 3 Monroe, 586; *Newbaker v. Alricks*, 5 Watts, 183.)

Second Point. There is no contract even alleged as between complainant and respondent, much less a contract fixing the compensation of the former at five per cent. on the amount recovered. On the contrary, any such contract, agreement or understanding, is positively denied by the answer, nor was there the slightest proof thereof on the part of the complainant. And yet the court below decreed the payment of the five per cent. as though such a contract had been proved.

Third Point. There was no evidence on the part of complainant to show that he had rendered any valuable service in the case, which in equity and good faith required compensation; and if such service had been rendered at the request of the administrator, there being no special contract shown, the decree of the court below was erroneous. The *quantum meruit* should have been established in another tribunal.

Mr. Justice McLean delivered the opinion of the court:

This is an appeal in chancery, from the Circuit Court for the District of Columbia.

The complainant, Richard S. Coxe, filed his bill, stating that about the year eighteen hundred and forty-two or three, a certain Samuel Baldwin, a citizen of the United States, residing in Mexico, had a claim against the Mexican

Republic for personal outrages and losses of property through the officers of that government. Many similar claims were brought to the notice of the government of the United States, to enlist its efforts for an indemnity from the Mexican Republic; that the complainant was *employed by Dr. John Baldwin, the [418 brother of Samuel, to prosecute his claim, and various documents and papers connected with the same, were placed in his hands, showing the origin and merits of the claim; that he brought it to the notice of the government for several years, urging an indemnity. Much time and labor were expended in this service, in written communications and otherwise to different Secretaries of State. War against Mexico was declared, which suspended his efforts, until a peace was concluded in 1848, which provided for the settlement of those claims. An Act of Congress was passed, and a board of commissioners authorized to examine and decide such claims. The board being organized, the papers in relation to Baldwin's claim were laid before it. That up to April, 1849, no other person acted as agent or attorney for the claim but the complainant. He did everything that was done in bringing the case before our government for an indemnity. Samuel Baldwin died, and letters of administration by the advice of the complainant, were granted to Andrew Wylie, the defendant. The claim was allowed by the commissioners, amounting to the sum of \$75,000, and the complainant believes that to his measures and arguments this allowance may be principally attributed.

It was understood that a commission of five per cent. should be allowed on the sum awarded for the services of the complainant. That the defendant has refused to pay the compensation stated, &c.

The defendant admits that he was called upon by John Baldwin and complainant, and at their instance he took out letters of administration on the estate of Samuel Baldwin. The complainant was not employed by defendant—but supposing he had been engaged as counsel by the widow, a memorial was prepared to be presented to the board, setting forth the claim by the defendant, and submitted to the complainant, which he approved, and it was used before the board. Other documents being furnished, another memorial was presented by the defendant.

Mr. Goix, the agent of the widow, came on from Mexico, bringing with him the will of Samuel Baldwin, which bequeathed to his wife and children his property and appointed her executrix. Goix, being the agent of the widow, dismissed the complainant as the attorney in the case, after which he was not consulted by the defendant; and any services rendered by the complainant subsequently, were voluntary. The defendant, however, admits, that on one or two occasions, the complainant “happened to be present with the board of commissioners, while the claim was under consideration, and rendered essential service in removing objections *which might have proved very [419 injurious, if not fatal to it, if they had not been removed.”

John Baldwin, a brother of Samuel, being sworn, states that he received various documents from his brother in relation to this claim.

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with instructions to take measures for the recovery of it. He placed the papers in the hands of the complainant, and agreed with him to prosecute the claims on the same conditions as a claim he had prosecuted for witness. The papers were translated, and with a memorial, were filed in the Department of State. His brother died, and at the instance of complainant the defendant was appointed administrator, for whose services witness agreed to pay five per cent., but witness did not intend to supersede the complainant, and thinks he is entitled to his fee.

In answer to an interrogatory, the witness says, the complainant was to receive a contingent fee of five per centum out of the fund awarded, whether money or scrip; if nothing was received, he was entitled to nothing for his services.

It is contended by the defendant, that the complainant having been dismissed by the agent of the widow, who was the executrix of her husband, and not being employed by the defendant, he has no right to the compensation claimed. That John Baldwin acted as the agent of his brother, in making the contract with the complainant, is proved. The defendant seems to suppose that, as on the death of Samuel Baldwin, the agency of his brother ceased, the contract which had been made by him was no longer in force. The relation of administrator enabled the defendant to control the case and dispense with the further services of the complainant; but he had no power to annul the contract if made *bona fide*, by the complainant, and the business had been faithfully prosecuted by him.

It appears the complainant, on being employed in the case, had the papers translated, and filed, with a memorial, in the Department of State; and that for several years, with much labor, he did all in his power to procure the action of the federal government in its behalf. A claim of indemnity from Mexico, through the remonstrances of our government, was the only step which, at that time, could be taken. A war intervened, and on the restoration of peace, provision was made for the examination and decision of such claims, and also for their payment.

The complainant gave advice as to the necessary evidence to be procured in Mexico, for the establishment of the claim, and was consulted respecting the memorial to the commissioners; and while they had the claim under examination, it is admitted that the complainant, by his explanations and arguments, removed difficulties and objections which, unexplained, [420*] would in *all probability have prevented the allowance of the claim. We think the contract is proved, also the services rendered under it, by the complainant, and that he is entitled to the compensation claimed.

It is objected that equity can exercise no jurisdiction in the case, as adequate relief may be obtained at law.

There may be a legal remedy, and yet if a more complete remedy can be had in chancery, it is a sufficient ground for jurisdiction. The 8th section of the Act to carry out the Mexican Treaty, authorizes a bill to be filed, where an individual other than the one to whom the money was awarded claims it, to contest the

right, and to enjoin the payment of the money. This applies only to cases where different individuals claim the fund, but the reason of such a proceeding may, to some extent, apply to other cases. And it applies to the case before us, if the money still remain in the treasury. The bill, however, does not seem to have been drawn with reference to the Act.

The evidence proves that the complainant was to receive a contingent fee of five per centum out of the fund awarded, whether money or scrip. This being the contract, it constituted a lien upon the fund, whether it should be money or scrip. The fund was looked to and not the personal responsibility of the owner of the claim. A bill filed under the Act would have authorized an injunction for the amount claimed by complainant. Such a procedure would be within the Act. But under the contract the lien on the fund in the hands of the administrator is a sufficient ground for an equity jurisdiction. The payment of the fund to the executrix in Mexico would place it, probably, beyond the reach of the complainant.

The want of jurisdiction, if relied on by the defendants, should have been alleged by plea or answer. It is too late to raise such an objection on the hearing in the appellate court, unless the want of jurisdiction is apparent on the face of the bill.

We affirm the decree with costs.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs and interest until paid, at the same rate per annum that similar decrees bear in the courts of the District of Columbia.

Cited—8 Wall., 214; 1 Otto, 254; 3 Otto, 556; 1 Hughes, 172; 1 Holmes, 270, 322.

*HAMILTON MURRAY, use, &c.. [*421
Plaintiff,

v.

JOHN A. GIBSON.

Mississippi Statute limiting suits or foreign judgments—extent of

A Statute of Mississippi, passed in 1846, declares that no record of any judgment recovered in a foreign court against a citizen of that State, shall be received as evidence after the expiration of three years from the time of the rendition of such judgment, without the limits of the State.

This Statute has no application to judgments rendered before its passage. Hence, where it was pleaded as a defense in a suit brought upon a judgment recovered in Louisiana, in 1844, the plea was bad and a demurrer to it sustained.

THIS case came up from the Circuit Court of the United States for the Southern District of Mississippi, upon a certificate of division in opinion between the judges thereof.

The case is fully stated in the opinion of the court.

It was argued by *Mr. May* for the plaintiff, who made the following points:

First. That the federal courts will be governed by the State Law of Limitations in the forum where the suit was instituted, that is, by the law of Mississippi in this case. (See *Green v. Neal*, 6 Pet., 291; *Harpending v. The Dutch Church*, 16 Pet., 455; *Porterfield v. Clark*, 2 How., 76.)

Second. That in construing the Statutes of Limitations of Mississippi, this court will conform to, and adopt the exposition thereof made by the Supreme Court of Mississippi, and in the event of contradictory or inconsistent decisions by that court, the last decision will be preferred and followed, even though it may be opposed to a former decision of this court. (*Elmendorf v. Taylor*, 10 Wheat., 152; *Bank of Hamilton v. Dudley*, 2 Pet., 492; *United States v. Morrison*, 4 Pet., 124; *Green v. Neal*, 6 Pet., 291.)

Third. That the plea is defective under the Act of Limitations of Mississippi, passed March 5th, 1846. (See Hutch. Code, 833.)

Because that Statute is inapplicable to an action on a judgment rendered, as this was anterior to its passage, and it was so adjudged by the Supreme Court of Mississippi. (See *Boyd, &c., v. Barrenger, &c.*, 1 Cushman's Miss., 269.)

Fourth. That said plea is equally defective under the 14th sec. Act of Mississippi of 1844. (See the Act in Hutch. Code, 832.)

Because the plea does not aver that two years or more had expired from the passage of said last Act, before the institution of this suit, as the said Act requires, and as the Supreme Court of Mississippi also ruled it should have done, in the same case of *Boyd, &c., v. Barrenger*, 1 Cush., 269.)

422*] *Mr. Justice Daniel* delivered the opinion of the court:

The question adjourned for our consideration on this record, cannot be more clearly or succinctly disclosed than it has been by the certified statement of the pleadings upon which the judges of the Circuit Court were divided in opinion. That statement is in the following words:

May Term, 1851.

"This day came on this cause for trial before *Judges Peter V. Daniel* and *Samuel J. Gholson*, presiding.

The declaration is an action of debt, brought on the 16th May, 1850, and founded on a judgment rendered on the 29th day of November, 1844, in the District Court of the Parish of Madison, in the 9th Judicial District of the State of Louisiana, against the defendant, and in favor of the plaintiff. To this action the defendant pleaded a number of pleas, of which the 7th plea is in the words and figures following: 'And for further plea in this behalf said defendant says, that the said defendant was, at the time of the commencement of the suit in the District Court of the Parish of Madison, in the State of Louisiana, and also at the time of the rendition of the judgment in the plaintiff's declaration mentioned, and ever since has been, and now is, a citizen of the State of Mississippi,

residing in the County of Hinds, and that more than three years expired, and were complete and ended, from and after the time of the rendition of such judgment, without the limits of this State, to wit: in the parish of Madison, in the State of Louisiana, before the institution of this suit, and this he is ready to verify; wherefore, &c.' *JOHNSON, MAYS & CLIFFTON, For Defendant.*"

"To said plea the plaintiff filed a general demurrer.

Among other matters to be tried, the question occurred before the court whether the demurrer of the plaintiff to the defendant's plea above copied ought to be sustained. And after argument by counsel, the opinions of the two Judges aforesaid are opposed and disagree upon the question aforesaid; one of said Judges being of opinion that said plea is a good and sufficient bar to the plaintiff's action, and that said demurrer should be overruled; and the other of said Judges being of opinion that said plea is not a good or sufficient bar to the plaintiff's action, and that said demurrer should be sustained.

And thereupon, at the request of the counsel for both parties to said suit, the point aforesaid upon which said disagreement happens is hereby stated under the direction of the Judges aforesaid, and is by them, upon the request of said counsel, signed and sealed, and [*423 ordered to be enrolled and made part of the record in said cause.

And the court orders and directs that said point be duly certified, under the seal of said court, to the Supreme Court of the United States of America, at the next session of said Supreme Court hereafter to be held.

P. V. DANIEL, [SEAL]
S. J. GHOLSON. [SEAL.]"

Upon an examination of the defendant's seventh plea and of the law to which it has reference, it is obvious that the purpose of the defendant was to interpose, as a bar to a recovery upon the judgment rendered by the court in Louisiana, the provision of the Statute of Mississippi, enacted on the 5th of March, 1846, and to be found in Hutchison's Digest of the Statutes of that State of 1848, art. 8, p. 833. The language of the provision is as follows: "No record of any judgment, recovered in any court of record without the limits of this State, against any person who was, at the time of the commencement of the suit on which the judgment is founded, or at the time of the rendition of such judgment, a citizen of this State, shall be received in any court of this State as evidence to charge such citizen with liability, after the expiration of three years from the time of the rendition of such judgment without the limits of this State."

As a general rule for the interpretation of statutes, it may be laid down, that they never should be allowed a retroactive operation where this is not required by express command or by necessary and unavoidable implication. Without such command or implication they speak and operate upon the future only. Especially should this rule of interpretation prevail, where the effect and operation of a law are designed, apart from the intrinsic merits of the rights of parties, to restrict the assertion of those rights. The peculiar language of the provision of the

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Mississippi Statute, if taken in its literal acceptation, would not only evince the force and propriety of the rule above mentioned, but might suggest a serious doubt as to the compatibility of that provision with the principles of common right, or with the mandate of the Federal Constitution; for by the literal terms of that Statute, the rights of the citizen of a different state seem to be made dependent, not upon his diligence in the institution or prosecution of his suit, but upon an event over which he can have no control, viz.: the trial of the action brought upon the previous judgment. From these difficulties, which would seem to flow from the letter of the Statute, the Court of Errors and Appeals for the State of Mississippi have relieved that law by the interpretation they have placed upon 424*1 it. *Thus, in the case of *Boyd v. Barringer*, reported in the 23d volume of *Miss. Reps.*, by Cushman, page 270, they have declared that the Statute of the 5th of March, 1846, has no application to judgments rendered before its passage; and in the 24th volume of *Miss. Reps.*, page 377, in the case of *Garrett v. Beaumont*, they have affirmed the same position. In a decision, pronounced on the 2d Monday of December, 1853, in *Moore v. Lobbin*, a manuscript copy of which has been certified and submitted by consent of counsel, the same court have expounded that provision of the Statute of 1846 which declares "that no record of any judgment recovered in any court of record without the limits of the State, against any person who, at the commencement of the suit on which the judgment was recovered, or at the time of the rendition of said judgment, was a citizen of the State of Mississippi, should be received in any court of that State as evidence to charge such citizen with liability after the expiration of three years from the time of the rendition of such judgment without the limits of the State."

In expounding this provision the court say, "the phraseology of this Statute renders it not free from difficulty of construction. It is an amendment of the general Statute of Limitations, and the Legislature must have had in view that general principle governing all statutes limiting actions, that the periods prescribed have reference to the commencement of the action. We cannot suppose that the Legislature intended to do more than to debar a party of any right to maintain an action commenced on such judgment after the lapse of the time mentioned, or that any reference was had to the time of trial of a suit which might be commenced long before the expiration of the time limited. Such a construction would involve the most unjust and unreasonable consequences." The court, after more extended views of the subject, arrives at the following conclusion: "We are therefore led to sanction such a construction of the Statute as is most consistent with reason and justice, and not in conflict with the Constitution of the United States; and we are accordingly of opinion that this is a Statute of Limitations, affecting the commencement of the suit; and that if an action on such judgment be instituted before the expiration of three years from the date of its rendition, a transcript of the record of it is admissible in evidence on the trial, though more than three years have elapsed at the time it is offered in evidence."

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Such is the construction placed by the highest court of Mississippi upon the Statute of 1846, which the seventh plea of the defendant sought to interpose as a bar to the action against him.

According to that construction, the Statute of 1846 could operate no such bar, because the judgment in Louisiana, on which *the [425 action was founded, was recovered on the 29th of November, 1844, more than a year previously to the passing of the Statute in question; and by the same interpretation, the right of the plaintiff to count upon and to adduce in evidence, in support of his action, the record of that judgment, was in nowise affected by the period of the trial, but that the law had reference exclusively to the interval of time between the first judgment and the institution of the action founded thereon.

It is the practice of this court to adopt the interpretation given by the highest tribunals of the several States to their respective acts of legislation where such interpretation does not conflict with the paramount authority of the Constitution or laws of the United States binding upon their own courts, or with the fundamental principles of justice and common right. Perceiving in the case before us no conflict whatsoever between such authority and the decisions of the Supreme Court of Mississippi herein referred to, but, on the contrary, an entire coincidence between them, we approve and adopt those decisions; and, in conformity therewith, we order it to be certified to the Circuit Court that the 7th plea of the defendant pleaded in this case is not sufficient to bar the action of the plaintiff, and that the demurrer of the plaintiff to that plea ought to be sustained.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and on the question or point on which the judges of the said Circuit Court were opposed in opinion, and which was certified to this court for its opinion, agreeably to the Acts of Congress in such case made and provided, and was argued by counsel; on consideration whereof, it is the opinion of this court, that the plea pleaded by the defendant is not a good or sufficient bar to the plaintiff's action, and that the demurrer of the plaintiffs should be sustained. Whereupon it is now here ordered and adjudged by this court, that it be so certified to the said Circuit Court.

Cited—17 Wall., 600; 1 Flippin, 621; 1 Biss, 186, 187; 6 Biss., 82; 4 Sawy., 227; 4 Cliff., 607.

*JOHN DEN, *ex dem.* ARCHIBALD [*426
RUSSELL, *Plaintiff in Error*,

v.

THE ASSOCIATION OF THE JERSEY
COMPANY.

Soil under river in New Jersey.

NOTE.—*Right of U. S. and states to shore lands and accretions against piers.* See note to *Doe v. Beebe*, 13 How., 25.

The soil under the public navigable waters of East New Jersey belongs to the State and not to the proprietors. This court so decided in the case of *Martin v. Waddell*, 16 Pet. 367; and the principle covers a case where land has been reclaimed from the water under an Act of the Legislature.

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of New Jersey.

The action of ejectment was brought to recover a tract of land at Paulus Hook, now Jersey City, on the Jersey shore, formerly under the tide waters of the Hudson River, and below low water mark. The *locus in quo* has been reclaimed from the water by artificial means, and was in the possession of the Jersey Associates, and occupied by them as building lots.

Upon the trial in the Circuit Court it was ruled that the plaintiff had failed to make out a title, and the jury found for the defendants.

The plaintiff excepted to the opinion of the court and the cause came up on a writ of error.

It was argued by *Messrs. Rutherford and Van Santvoord* for the plaintiff in error, and by *Messrs. Zabriskie and Scudder* for the defendants.

The title of the plaintiff in error was derived from the proprietors of East New Jersey, who claimed under a grant from Charles II. to his brother James, Duke of York, in 1664.

The proprietors living in 1776 having espoused the cause of the Americans, in the struggle of the Revolution, their property was not confiscated; and they are still recognized by the State of New Jersey as an existing body, for many purposes. They own a considerable quantity of unappropriated land, which is exempt from taxation.

The argument of the case in this court covered a great deal of ground upon both sides; but as the decision of the court turned upon a single point, viz.: that the main feature of the case had been adjudicated upon in *Martin v. Waddell*, 16 Pet., 367, it is not deemed necessary to do more than state the argument made by counsel to show the difference between the two cases.

Mr. Van Santvoord, one of the counsel for the plaintiff in error, thus noticed the point: [427*] "We are to show, therefore, that the propriety in the soil under the navigable waters of New Jersey, passed to the Duke of York and his grantees, and that it passed not as one of the regalia of the crown, or as a concomitant of government, but as an absolute proprietary interest, subject, it is true, to every lawful public use; but not the less on that account a hereditament, and the subject of lawful ownership and of the right of full and unqualified possession when that public use shall have ceased.

In examining the question it will be necessary, first, to remove an obstacle which is encountered at the very threshold of the discussion. It is contended, and the circuit judge so charged the jury, that the matter is already *res adjudicata*, and that the decision in *Martin et al. v. Waddell* involves the very point in controversy. If this be so, the discussion, of course, is at an end. For though a decision like that of *Arnold v. Mundy*, 1 Halst., 1, in a state court is not conclusive, yet an adjudication by this court of the very subject matter of the controversy is; and we are not at liberty to question it, or permitted to look beyond the rule and the decision in the particular case for the reason upon which such decision is founded.

We contend, then, that the question presented by the present case was not necessarily involved, and certainly not passed upon, in *Martin v. Waddell*, nor was it in *Arnold v. Mundy*. Our claim is perfectly consistent with the actual decisions in both cases, and is even fortified by those decisions. I shall therefore briefly consider what was really decided in *Martin v. Waddell*, and point out the distinction between that and the present case. And,

First. This is an ejectment for lands reclaimed from the bed of a navigable river, and in the actual possession of the defendant as building lots. *Martin v. Waddell* was an ejectment for lands still under water, in the constructive possession of the defendant as a fishery.

Ejectment is a possessory action, and the suit is brought to recover the possession, in the one case of the fishery, or the use of the land, in the other case of the land itself.

Second. In *Martin v. Waddell*, the only possession of which the *locus in quo* (being then under water) was susceptible, was in its capacity of a public easement, or highway for navigation, or for fishery, and their correspondent uses. The only possession withheld by the defendant, and claimed by the plaintiff, was the use of the *locus in quo* as a fishery. The decision in that case was, that the plaintiff was not entitled to such possession, because he had not an exclusive right to such use or possession; but the question of the ultimate fee in the soil, or *jus proprietatis*, was not involved.

*This position may be illustrated by [*428] supposing the possession claimed by the plaintiff, and withheld by the defendant, to have been the exclusive use of the soil and waters for navigation. The defendant being in possession by his boats, rafts, &c., the plaintiff seeks to oust him by an ejectment; and must fail, for the same reason that he failed in *Martin v. Waddell*, because navigation being a *jus publicum*, the defendant had a right, in common with every other citizen, to be there. But no one will pretend that such a decision would carry with it the more important one, in respect to the fee of the soil. So in *Martin v. Waddell*, the franchise of fishery is elevated into a *jus publicum*, and placed upon the same footing with navigation. The plaintiff, by an ejectment, can no more be put in exclusive possession of it, than he could of an exclusive right of navigation in a public river, because it is not susceptible of ownership.

Third. It makes no difference that the action was technically brought for the land under water. The sole and only controversy was in respect to the claim set up by the plaintiff's lessor of an exclusive right of fishing, and nothing else was passed upon in the case. Ejectment cannot be brought for a fishery *eo nomine*; but if a fishery be claimed, the action must be brought for the land covered with water. (Thom Co. Litt., p. 200.)

Thus, also, ejectment will not lie for a water-course but the ground over which the water

passes, being deliverable in execution, upon which an entry can be effected, may be recovered in this action. (*Challoner v. Thomas*, Yelv., 143; see, also, *Jackson v. Bush*, 9 Johns., 298; *Jackson v. May*, 16 Johns., 184.)

It was formerly held that a franchise of fishery, being an incorporeal hereditament, and not susceptible of delivery, could not be recovered in ejectment (Cro. Jac., 144, Cro. Car., 492); and it is now only upon the assumption that a fishery is a tenement, and may be delivered in possession, that an ejectment will lie to recover it. (Saund. Pl. & Ev., 981.)

Fourth. These distinctions were taken and strongly urged in *Martin v. Waddell* by the counsel who argued the case against the plaintiffs. He says:

"The plaintiff, to recover, must maintain two positions:

1. That he has a possessory title to the premises in question, the soil of this navigable river. And,

2. That there was not a common right of fishery in the people at large in the premises in question."

He must maintain both positions. A mere title to the soil would not enable him to recover. It must be a possessory title, and that, too, to the exclusion of every other right of possession, including the common right of the [429*] people at large to use the "*locus in quo*" as a fishery. Accordingly, in another part of his argument, the counsel remarks: "A question has arisen whether the King of England can grant the soil of the sea and its arms, so as to destroy or prejudice public rights. Not considering this question at all material to the main argument, I have purposely left it out." The question, therefore, of the title to the soil was not presented by counsel, or passed upon by the court.

Fifth. That it was the use of the water as a fishery, and not the title to the land, that was in question, is manifest also from the opinion of the court. "It appears," says the Chief Justice, "that the principal matter in dispute is the right to the oyster fishery in the public rivers and bays of East New Jersey." Justice Thompson, in his dissenting opinion, attempts, indeed, to show that it was the use of the land, and not of the water as a fishery, that was in controversy, making a distinction between fishing for floating fish, and dredging for oysters, but this view was not concurred in. "Should it be admitted," he says, "that the right to fish for floating fish was included in this public right, it would not decide the present question," that is, the propriety in the soil. The whole argument goes to show, as was stated by the counsel for the State, that the question presented was not as to the power of the king "to grant the soil, so as to give an individual the right to take it after its character had been changed by alluvion, wharfing out, &c.," but the power of the king "to grant it, so as to vest in an individual the soil, and divested of all common use before the change takes place." If, therefore, the right to fish for both shell fish and floating fish be such "common use," as was held in that case, the present question remains still untouched.

Sixth. The actual decision in the case of *Martin v. Waddell*, as I have endeavored to show, HOWARD 15.

establishes nothing more than this, namely: that the particular right or claim in controversy—the possession of an oyster fishery—could not be recovered in an action of ejectment, because an oyster fishery, like every other fishery in navigable waters, was a part of the *jure regalia*—a royalty—a necessary attribute of government; and, as such, did not pass under the grant as private property, but became disconnected from the proprietary interest, and passed out of the crown with the surrender of government to Queen Anne. If there be anything else in the opinion delivered in that case, it is not conclusive or binding as authority. But we contend that there is nothing in that opinion which goes further than this; for though it does not, in express terms, discriminate between the "dominion and propriety in the navigable waters, and in the soils under them," but connects them together, yet the whole scope of the argument seems to show that it was the "franchise of fishery alone which Chief [430] Justice Taney held had passed "as a part of the prerogative rights annexed to the political powers conferred on the duke;" and that the question of the ultimate fee, or propriety in the soil, subject to the public use, was not considered as influencing the decision.

And lastly. When it is said, in the opinion of the court, that the navigable waters and the soils under them passed as a royalty incident to the forms of government, "to be held in the same manner and for the same purposes that the navigable waters of England, and the soils under them are held by the crown," the whole question as to what is properly the domain of the crown, which is alienable as a private interest to a subject, and what is the common property which is inalienable, save as a trust necessarily incident to government, is left open except so far as that it is undoubtedly decided by the case in question, that the waters of a public river in respect to their use, including the public right of fishery in all its branches, is a part of this common property and is inalienable. This was precisely the point taken and the decision made in *Arnold v. Mundy*, 1 Halst., 1.

We maintain, then, that the soil under navigable waters, disconnected from its public use, is part of the domain of the crown. And this leads at once to the main point in controversy.

The *locus in quo*, a portion of the bed of the Hudson River, passed to the Duke of York and his assigns, not as a royalty annexed to the political powers conferred upon the duke by the patent, but as an absolute propriety in the soil, subject to the public uses of navigation, &c., and also, subject to the public right of fishery, and everything necessarily incident to such right. This might, and perhaps would include the right of anchorage, the right to erect wharves, docks, &c., and every other use of the soil necessary to facilitate commerce and render the navigable water serviceable as an easement or public highway; as well as the right to make every proper use of the soil for the purposes of fishery, not inconsistent with the regulations of the sovereign power, in this case the State, in respect thereto. If this proposition can be successfully maintained, the proprietary title is established, and the right of the plaintiff to recover must be admitted.

This is the main, and indeed it may be said the only question presented by this case; and I propose to discuss it with a specific reference to the decision in *Martin v. Waddell*; yielding as I do to that decision an unqualified assent.

Let us set out with the undeniable proposition conceded in the case of *Martin v. Waddell*, and as expressed in the prevailing opinion of the court, that the "right of the King to make this grant with all its prerogatives and powers of government," cannot, at this day, be questioned." That is, the entire grant—the proprietary interest, and the powers of government, together with the royalties necessarily incident and annexed to the powers of government. They all passed to the duke and his heirs and assigns in the same manner as they were held by the King himself, and of course the twenty-four proprietors so held them. Nothing, either of property or dominion in New Jersey remained in the King.

The important question then arises, and the question which must be decisive of this case, how, and in what capacity, under the Constitution and laws of England, were lands under navigable waters either in public rivers or arms of the sea, held by the king, and what was his power over them? Were they held as a proprietary and alienable interest, the subject of an exclusive possession as the proper domain of the king when the public servitude had ceased? Or were they held by the king in the capacity of trustee merely for the public, and, like the franchise of fishery, &c., inalienable by grant or otherwise from the king to a subject to be held as private property?

Chief Justice Taney very properly and truly remarks, in *Martin v. Waddell*, that, "in deciding a question like this, the laws and institutions of England, the history of the times, the object of the charter, the contemporaneous construction given to it, and the usage under it, for the century and more which has elapsed—are all entitled to consideration and weight."

Pursuing precisely this course, let us examine the question in the same way, namely:

1st. By the laws and institutions of England.

2d. By the history of the times.

3d. By the objects of the charter, the contemporaneous construction given to it and the usages under it, &c., &c., &c.

The counsel for defendants in error thus stated the point:

Sixth Point. That the Supreme Court of New Jersey and the Supreme Court of the United States, have both expressly decided that the Board of East Jersey Proprietors, the grantors in this case, under whom Russell claims title, had no right or title to, and could not grant the soil under tide waters bounded by the shores of New Jersey. The plaintiff's title, or proprietary title, in this case, is precisely the same as in *Arnold v. Mundy* and in *Martin v. Waddell's Lessee*. In this case the position of the defendants is stronger, as they are riparian owners, and have wharfed out from their own lands, under the express authority of the Act of the Legislature incorporating them. (*Arnold v. Mundy*, 1 Halst., 1; *Martin et al. v. Waddell's Lessee*, 16 Pet., 369.)

432*] **Mr. Chief Justice Taney* delivered the opinion of the court:

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This is an action of ejectment brought by the plaintiff in error against the defendants in the Circuit Court for the District of New Jersey, to recover a parcel of land situate in Jersey City. The land in question has been reclaimed from the water, by the defendants, under the authority of the Legislature; and is now in their possession, and occupied by them as building lots.

The plaintiff claims the premises under sundry mesne conveyances from the Proprietors of East New Jersey, and the title of the proprietors is the point in question. And they claim that, by virtue of the various grants by which they became proprietors of East New Jersey, the fee of the soil under the navigable waters of that part of the State was conveyed to them, as private property subject to the public use; and as that use has ceased in the premises in question, they are entitled to their exclusive possession.

It is not necessary to state particularly the charters and grants under which they claim. They are all set out in the special verdict in the case of *Martin v. Waddell*, reported in 16 Pet., 367. The title claimed on behalf of the proprietors in that case was the same with the title upon which the plaintiff now relies. And upon very full argument and consideration in the case referred to, the court were of opinion that the soil under the public navigable waters of East New Jersey belonged to the State and not to the proprietors; and upon that ground gave judgment for the defendant. The decision in that case must govern this.

The counsel for the plaintiff, however, endeavor to distinguish the case before us from the former one, upon the ground that nothing but the right of fishery was decided in *Martin v. Waddell*; and not the right to the soil. But they would seem to have overlooked the circumstance that it was an action of ejectment for the land covered with water. It was not an action for disturbing the plaintiff in a right of fishery; but an action to recover possession of the soil itself. And in giving judgment for the defendant the court necessarily decided upon the title to the soil.

It is true, the defendant claimed nothing more than the exclusive right of planting and growing oysters on the soil for which the ejectment was brought. The special verdict found that he was in possession under a law of New Jersey, which gave him the exclusive privilege of planting and growing oysters on the premises in question, upon the payment of a certain rent to the State. The principal question therefore in dispute between the parties in that suit, and indeed the only one of any value, was the oyster fishery. But the right to the fishery depended on the right to the soil upon which the oysters were planted and grown; and if the [*433 plaintiff could have shown that the proprietors, under whom he claimed, were legally entitled to it, the judgment of the court must have been in his favor.

Nor do we see anything in the opinion delivered on that occasion, in relation to the rights of fishery, further than they contributed to illustrate the character and objects of the charter to the Duke of York; and to show that the soil, under public and navigable waters, was granted to him, not as private property, to

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be parceled out and sold for his own personal emolument, but as a part of the *jura regalia* with which he was clothed, and as such was surrendered by the proprietors to the English crown, when they relinquished the powers of government, and consequently belonged to the State of New Jersey when it became an independent sovereignty.

There being nothing in the title now claimed for the proprietors to distinguish this case from that of *Martin v. Waddell*, it is not necessary to examine the other and further grounds of defense taken by the defendants.

The judgment of the Circuit Court must be affirmed with costs.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of New Jersey, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

Cited—18 How., 74; 23 Wall., 68.

ARTHUR MORGAN FOLEY, *Plaintiff in Error*,

v.

SAMUEL T. HARRISON, *Defendant*, AND
LOUIS LESASSIER, *Intervenor*.

Land patents conflict between U. S. and state—power to decide, who has—conclusiveness.

In 1841 Congress passed an Act (5 Stat. at Large, 455) declaring that there shall be granted to each State, &c. (Louisiana being one), five hundred thousand acres of land.

This Act did not convey the fee to any lands whatever, but left the land system of the United States in full operation as to regulation of titles so as to prevent conflicting entries.

Hence, where a plaintiff claimed under a patent from the State of Louisiana, and entries only in the United States office; and the defendant claimed under patents from the United States, the title of the latter is the better in a petitory action.

The defendant has also the superior equity, because his entries were prior in time to those of the plaintiff, and the decision of the board, consisting of the Secretary of the Treasury, the Attorney-General, and the Commissioners of the Land Office, to whom the matter had been referred by an Act of Congress, was in favor of the defendant.

434*] THIS case was brought up from the Supreme Court of the State of Louisiana, by a writ of error issued under the 25th section of the Judiciary Act.

It was a petitory action, commenced by Foley in the Fifth District Court of New Orleans, claiming lots No. 1 and 2 of section No. 3, the west half of section No. 10, and the northwest quarter of section No. 15, in township eleven, range thirteen east, containing in all 855½ acres.

By the Act of 4th September, 1841, section 8 (5 Statutes at Large, 455), Congress granted to several of the States, of which Louisiana was one, five hundred thousand acres of land each, for purposes of internal improvement; "the selections in all of said States to be made within their limits respectively, in such a manner as the Legislatures thereof shall direct; and located in parcels conformably to sectional divisions and subdivisions of not less than three

hundred and twenty acres in any one location, on any public land except such as is or may be reserved from sale by any law of Congress or proclamation of the President of the United States, which said locations may be made at any time after the lands of the United States, in said States respectively, shall have been surveyed according to existing laws."

In 1844, the Legislature of Louisiana, in pursuance of the power with which it was invested by the above-cited Act of Congress of directing the manner the selections of land thus granted should be made, passed an Act establishing an office for the sale of the unlocated lands granted to the State, with a register, and the State Treasurer as the receiver thereof. (Session Acts of 1844, p. 61.)

By the 7th section of that Act, it was made the duty of the register and treasurer "to issue warrants for the lands donated by Congress, and not as yet located, provided they shall not be issued for less than eighty nor more than six hundred and forty acres, which warrants shall be sold in the same manner as the lands located, provided they shall not be sold for less than \$3.00 per acre; and it shall be the duty of the governor to issue patents for all the lands that have been sold, and for the lands located by warrants, when contemplated to be sold by that Act, whenever he shall be satisfied that the same have been properly located."

Under the provisions of the above-recited Act of Congress, granting the land, and the above provisions of the State Legislature, directing the manner in which the selections should be made, Foley purchased two warrants from the state officers, and, on the 7th January, 1846, located them in the Land Office of the United States, at New Orleans, upon the lands now in controversy.

*The defendants claimed title under [*435 five patents, issued from the General Land Office on the 1st September, 1847. These patents purported to be issued under an Act of Congress of August 8, 1846, and were founded on certain floats, which were claimed under the second section of the Pre-emption Act of 1830 (4 Stat. at Large, 421), which was revived for two years by the Act of 19 June, 1834 (4 Stat. at Large, 678).

In order to show more clearly the respective titles of the plaintiff and defendants, the reporter has arranged them in chronological order.

Plaintiff's Title.	Defendant's Title.
1830, 1834, { Acts of Congress.	Acts granting pre-emption rights—settlements included within the Houmas claim—floats issued—a large part of the claim having been decided to be public land by Commissioner Graham, in 1829, upon which settlements were made. Barrett and Bell located these floats upon the land now in dispute.
1836. _____	Commissioner of the General Land Office directed the Register and Receiver at New Orleans to withhold from sale all the lands within the claimed limits of the Houmas grant. May 17. Sale by Barrett to Bell.

1841. Congress passed an Act (5 Stat. at Large, 456) declaring that there shall be granted to each State, &c. (Louisiana being one), 500,000 acres of land.

1844. Louisiana passed an Act authorizing the March 25 State Register to issue warrants for the above land.

1845. Dec. 24. The Commissioner of the General Land Office wrote that the canceled entries left the land public, and it could be entered by the State, Foley accordingly made his location. Harrison filed a caveat in the State Land Office.

1846. January 7. Foley made his location at the Register's Office of the United States, upon the lands now in controversy. March 9. Commissioner wrote to the Register and Receiver at New Orleans, suspending entries, either by state selection or otherwise. April 20. Foley took out two patents from the Governor of Louisiana.

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Feb. 5. Foley brought suit against Harrison in the Fifth District Court of New Orleans (state court).

1847.

The Houmas claim confirmed in its whole extent by the Secretary of the Treasury. Entries made of locations from floats arising within it ordered to be canceled. Patents were ordered to be issued for the whole of the Houmas claim. May 8. Sale by Widow Bell to Harrison.

*August 3. Congress passed an Act providing for the adjustment of all suspended pre-emption land claims. The Commissioner of the Land Land Office, the Attorney-General, and Secretary of the Treasury were to decide.

June 28. The Secretary of the Treasury decided that he would approve the locations made under the floating claim, held by the actual settlers and improved by them, in preference to the state locations, made subsequently, and covering these improvements.

July 9. The Commissioner,

August 2. The Acting Secretary of the Treasury.

August 27. The Attorney-General; all sanctioned this decision.

Sept. 1. Five patents issued from the United States to Harrison.

January 7. Foley located two warrants upon the property in dispute, and entered them at the Land Office of the United States at New Orleans.

The District Court decided that Foley should recover the lot No. 1, of section 8, township eleven, range thirteen east, containing 211.77 acres, and that the plea of prescription pleaded by defendant be sustained as to lot No. 2, of section 8, township eleven, range 18 east, and the west half of section 10 of the same township and range.

The Supreme Court of Louisiana reversed this decree, and ordered judgment for the defendant for the land in controversy.

Foley sued out a writ of error under the 25th section of the Judiciary Act, and brought the case up to this court.

It was argued by *Mr. Lawrence* for the plaintiff in error, and by *Mr. Benjamin* for the defendant in error.

Mr. Lawrence: The 1st section of the Act of 1880 gave to any settler on public land, &c., the right of pre-emption to the quarter section settled on. The 2d section provided that where two or more persons were settled on the same quarter section, the first two settlers should each take one half of said quarter section, if by a north and south or east and west line it could be so divided as to include the settlement and improvement of each in a half quarter section; and in such case the said settlers shall be entitled to a pre-emption of eighty acres of land elsewhere *in the same district. This [*437] latter privilege was called a "floating right," or "float."

Now, without being so hypercritical as to contend that this section only intended to confer a floating right when the quarter section could be divided in half by a north and south or east and west line, so as to include in separate parts the improvements of each settler, it is very clearly the intention of Congress not to confer the right of pre-emption to eighty acres "elsewhere," unless the parties had under the same Act the right of a pre-emption to the quarter section settled on. If the latter were not public land, were reserved land, were not the subject of a pre-emption right, then no settlement on such land could give a floating privilege elsewhere. And so it has been universally held in the Land Department. In fact, the 4th section of the Act expressly declares, "nor shall the right of pre-emption contemplated by this Act extend to any land which is reserved from sale by Act of Congress or by order of the President, or which may have been appropriated for any purpose whatever." (19 La., 390; 3 Laws Ins. and Op., 682.)

Now, it is especially to be observed that the settlement, out of which these floats are supposed to arise, was within the claimed limits of the Houmas grant. This is not disputed.

By agreement of parties the report of the Secretary of the Treasury on the Houmas claim is made evidence in this cause.

I do not intend to trouble the court with any argument as to the validity or invalidity of the Houmas claim in its whole extent, or in any part of its extent. It has been a matter of contro-

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vey in the Treasury Department from the time of the acquisition of Louisiana to this day. All that is necessary to be known in this cause is, that its limits were claimed to be from the Mississippi to the *Amité*, and so the claim was filed. (See Report of Secretary of Treasury, pp. 96, 97.)

The 6th section of the Act of 3d March, 1811, which authorizes the sale of the public lands in the Territory of Louisiana, has the following proviso: "That, till after the decision of Congress thereon, no tract of land shall be offered for sale the claim to which has been in due time and according to law presented to the Register of the Land Office, and filed in his office for the purpose of being investigated by the commissioners appointed for ascertaining the rights of persons claiming lands in the Territory of Orleans." (2 Stat., 665.)

If, then, this claim has not been acted on by the decision of Congress, neither a pre-emption right to land settled on within it, nor a floating right to a pre-emption elsewhere by virtue of any settlement within it, could be acquired.

Several different views have been taken of **438*** the Houmas claim. By some it has been supposed to be a complete grant, needing no confirmation from this government. By others it has been supposed to have been confirmed to its full extent by the decisions of the commissioners under the Acts of 2d March, 1805 (2 Statutes, 324), and 21st April, 1806 (2 Statutes, 391), and by the confirmation certificates issued by the commissioners. By others it has been held that the commissioners had no power under those Acts to issue final certificates, and could only submit the claims presented to them for the decision of Congress. Again, it has been supposed that this claim was confirmed by the Act of 12th and 18th April, 1814 (3 Statutes, 131-139).

Now, it is immaterial to the particular question involved in this case, viz.: whether the lands within the Houmas claim were reserved lands, which of these conflicting views is correct, or whether any of them are correct. For if Congress, by these Acts, has not made its decision on the Houmas claim, then by the Act of 1811 it is still reserved from sale. If it was a complete grant from the Mississippi to the *Amité*, it was not within the operation of the Pre-emption Act of 1830; it was not public land. If, as Mr. Graham supposed, the validity of the grant was affirmed by the commissioners under the Acts of 1805 and 1806, but that the extent of its limits required judicial determination, it was still claimed before the boards of commissioners, and filed with the recorder of land titles, as a grant from the Mississippi to the *Amité*, and unless it has been acted on by Congress, is still reserved from sale, under the Act of 1811. If the commissioners, under the Acts of 1805 and 1806, had power to decide this claim finally, then they did decide in favor of the claim, and issued their certificates of confirmation, and it was no longer public land. If the effect of the Act of 1814 was to confirm the certificates issued by the commissioners under the Acts of 1805 and 1806, as Mr. Secretary Bibb decided (and under his decision patents have been issued for the whole Houmas claim), then the Act of 1814 was the decision of Congress contemplated in

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the Act of 1811, and the claim, to its full extent, was private property, and not public land. And if, as Mr. Attorney-General Clifford holds, the Act of 1814 was only intended to cover cases in which certificates of confirmation had been properly issued, under the Acts of 1805 and 1806, and these certificates had not been properly issued, then the Houmas claim is still undecided, and, of course, the land within it is still reserved.

It is obvious, then, that under any of these conflicting views, the land within the limits of the Houmas claim was not subject to the operation of the pre-emption laws, and that the settlements thereon conferred no rights either to the lands themselves or to floats. The entries which were permitted, therefore, were absolutely void; and so Attorney-General [**439** Legaré decided. (*Brown's Lessee v. Clements*, 3 How., 664, 665; *Wilcox v. Jackson*, 13 Pet., 498; *Stoddard v. Chambers*, 2 How., 318.)

The entries permitted by the location of these floats, were accordingly canceled in 1844. And it was after this cancellation of those entries that our locations were made by virtue of the State warrants.

The court below seemed to be of opinion that these entries were authorized by Commissioner Graham, in a letter to the Surveyor-General, of February 17, 1829. (2 Laws Ins. and Op., 898.)

In this letter Mr. Graham supposes that the board of commissioners had only decided on the validity of the grant, leaving the extent to be determined by the courts. And he supposes that a survey running back $1\frac{1}{2}$ leagues in depth, would leave sufficient space for the determination of the courts. But he does not, by a single word, authorize (if he could) the register and receiver to permit entries of any kind. The letter was not addressed to them. Indeed, the land was not at that date subject to sale, public or private. There was no pre-emption law in force at the time. But if there had been, and if it had contained instructions to permit entries beyond the league and a half, it would have been in direct contravention of the Act of 1811. These entries were permitted by the register and receiver, not only without any instructions from the General Land Office, but in violation of the Act of 1811, and were therefore void.

Now, we do not rely upon any particular virtue in the mere act of cancellation, except so far as it was an official declaration of the invalidity of the floats. We do not mean to contend that the General Land Office can take away any real right of a certificate holder, by canceling the certificate; and yet we do not doubt that the commissioner may cancel a void certificate of entry. The cancellation does not make the entry void, but the nullity of the entry is the reason for the cancellation. The party is not deprived of any right by the cancellation, because, the entry being void, the party had acquired no right by the entry.

But whether these entries were canceled properly or improperly, or if they had not been canceled at all, it is enough for our purpose that they were void. They formed no obstacle to the sale of the land to anyone else, or to a location of the land by anyone else.

This is the uniform and clear doctrine of this

court, as well as of the Supreme Court of Louisiana itself. (*Wilcox v. Jackson*, 13 Pet., 498; *Bullance v. Forsyth*, 13 How., 18; *Campbell v. Doe*, 13 How., 245; 19 La., 334, 510; 8 Rob., 293.)

440*] *We have thus far considered the right of the plaintiff in error, upon his certificates of location alone, and without reference to the state patents.

According to the cases above cited from the Louisiana Reports, such certificates were sufficient ground for a petitory action.

The case of *Surgett v. Lapice et al.*, 8 How., 48, in this court, sustains the same ground.

2. Let us now inquire whether those patents, under the Act of Congress of 1841, do not pass the fee in the lands selected, without any further patents from the United States.

The court below seem to suppose that nothing but a patent can pass the fee from the United States, and they cite cases to sustain that view. If that court had examined those cases a little more carefully, it would have been seen that this court expressly mentions legislative grants as cases in which no patent issues. (*Wilcox v. Jackson*, 13 Pet., 498.)

The Act of 1841 enacts that there shall be granted to each of the States named 500,000 acres of land; and provides that the selection should be made in the manner directed by the State Legislatures. It does not itself provide for the issuing of patents by the General Land Office. The Legislature of Louisiana directed the manner in which her selections should be made, and also that the governor should issue patents. As soon, then, as the locations of the State warrants were made in the United States Land Office, upon public land which had been surveyed, and which was not reserved, then by force of the Act of Congress of 1841, and the Act of the State Legislature in pursuance of it, the fee in these particular lands passed from the United States.

It has been shown, then, that at the time when Foley's locations were made on the lands in controversy, they were public lands, and that the defendant's location of floats thereon was void, and had been canceled by the Land Office, because the settlements out of which those floats had arisen were within the Houmas claim.

Let us now see by what authority the patents were subsequently issued to the defendant upon these floats.

They were issued under the supposed authority of the Act of 3d August, 1846 (9 Stat., 51), upon the mistaken idea that the state selections required the approval of the Treasury Department before any right could be acquired under them.

It is to be observed that the state selections were not approved by the General Land Office merely because of a contemplated law (which, as will be seen hereafter, never passed), to confirm the entries by floats arising out of the Houmas claim. No other reason is assigned for their **441*]** non-approval. The very letter which submits them for the action of the Secretary, states that the selections were made on land liable to selection, and that the register and receiver had been so instructed. And the Secretary of the Treasury, in making his decision, offers no objection to the propriety of the State selections. He merely "proposes" to approve

the locations by the floats, rather than the locations by the state warrants, under the idea that the respective rights of the parties rested in his discretion alone.

Now, there is not one word in the Act of 1841 requiring the State selections to be approved by the Treasury Department. The selections were to be made in the manner to be directed by the State Legislatures. It is true the selections could only be made of surveyed, unserved public land, and in certain parcels. But that is just as true of all the pre-emption laws. And yet this court has uniformly held that a pre-emption acquires a right by his settlement under the law, although the Land Department disapproves of the entry. (*Lytle v. Arkansas*, 9 How., 314; *Cunningham v. Ashley et al.*, 14 How., 377; *Surgett v. Lapice*, 8 How., 48.)

There are laws which expressly require the approval of the Secretary of the Treasury, but this is not one of those. The Land Department has a very proper regulation of its own, both in regard to state selections and claims to pre-emption, under which its officers examine whether the particular case conforms to the law under which the claim is made. But it is not understood there as adding anything to the right of the claimant by its approval, or taking away anything from it by its disapproval. If the law gives the right, the person has it, whether the office approves or disapproves.

But if any approval were necessary to confirm the plaintiff's right, such approval was had, as to two of the tracts in controversy.

3. It is submitted on the part of the plaintiff in error, that the Act of 3d August, 1846, was not applicable to the case of the defendants in error. That Act applied to "suspended" entries, not to void and canceled entries. The term "suspended entries" is one well known to the Land Office, and is always used to designate entries of land under the authority of law, but which are not patented, because of some informalities attending them. They are, consequently, held in suspense in the General Land Office, until those informalities are cured. But in the case of void entries they are canceled, and the receiver is ordered to refund the money paid on them.

It is true that a law was recommended to Congress confirming entries by floats arising out of the Houmas claim. But that recommendation was not carried into effect; and the reason why it was not carried into effect **442** fact was, that almost every one of them was found to be fraudulent. But even that law only proposed to confirm entries where no private right had in the mean time been acquired. And it also was intended to exclude all cases in which fraud appeared.

But the law did not pass, and for good reasons; and the attempt is now made to bring these void, canceled and probably fraudulent entries within a general law applicable to all the states, providing merely for the issuing of patents in suspended cases.

4. But even if the defendant's entries were within the meaning of the Act of 1846, the rights of the plaintiff are expressly saved. The proviso to the first section enacts that the adjudications "shall only operate to divest the United States of the title to the land embraced

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by such entries, without prejudice to the rights of conflicting claimants."

Without this proviso there can be little doubt that any previously acquired right would be good against the confirmation authorized by this Act. But with the proviso, such rights cannot be overlooked. (*Mills v. Stoddard*, 8 How., 365; *Stoddard v. Chambers*, 2 How., 284; *Ballance v. Forsyth*, 13 How., 18.)

5. As to the plea of prescription:

Under the Constitution of the United States, and the Acts admitting new states into the Union, no state can interfere with the primary disposal of the public lands. Prescription cannot run until the legal title is out of the United States. Were it otherwise, effect could be given to state laws which would invalidate the titles emanating from the United States, and deprive the federal government virtually of the power of disposal which the Constitution secures. The legal title did not pass to the plaintiff until the location was made on the lands in controversy in 1846. This suit was commenced in 1847.

By an agreement, found on page 75 of the record, it will be seen that all questions as to improvements, rents, profits, are reserved.

It is confidently submitted:

1. That the floats of the defendant were originally void, because they arose from a settlement on reserved land.

2. That the location of those void floats on the tracts in controversy gave no title whatever to those tracts.

3. That those tracts were in 1846 (and were so decided to be by the Land Department) public, unreserved, surveyed lands, and consequently within the operation of the Act of 4th September, 1841.

4. That the locations of the plaintiff were made in the manner directed by the Legislature of Louisiana.

443*] *5. That those locations, so made, gave to the plaintiff a valid right to the tracts located, by force of the Act of 1841, without any approval of the Land Department.

6. That if such approval had been necessary, it was had in the letter of the commissioner, on page 14 of the record.

7. That no subsequent law of Congress could defeat such right.

8. That the Act of 3d August, 1846, expressly reserved such right, and that for these reasons the plaintiff in error is entitled to recover.

Mr. Benjamin, for the defendant in error, made the following points:

1. The title set up by plaintiff is not, under the evidence adduced, either a legal or equitable title to the land in controversy.

The 8th section of the Act of Congress of the 4th September, 1841 (5 Statutes at Large, 455), granting 500,000 acres of land to the State of Louisiana, does not set apart any particular land, and separate it from the public domain. It only authorizes the State to make locations of land to that extent; and the location, when made by the State, does not *ipso facto* separate from the public domain the land so located. Nothing in the Act deprives the officers who are charged with the duty of executing the land laws, of their control over the locations, in order to see that they conform to the law; that they are lands which have been previously surveyed;

that they are vacant; that they have not been reserved, &c., &c. It is only upon the approval of such locations that the final severance from the public domain of the lands so located takes effect.

Such is the practice and settled construction of the law in the General Land Office.

The location by the State, of the land in controversy, was not approved.

The patents issued by the State of Louisiana can have no effect upon the title; they only operate as a conveyance of the right of the State. Now, these patents are dated 20th April, 1846. But on the 9th March, 1846, the Commissioner of the General Land Office had instructed the land officers in New Orleans not to permit the location of the lands in controversy, and had reserved action on locations already made, until Congress should determine the course to be pursued.

It also appears, from the testimony of Robert J. Ker, the Register of the State Land Office, that the plaintiff was aware that the land which he sought to locate under the State warrant, was claimed by others; that the warrant for the entry of the land in controversy was refused to him, and only floating warrants accorded; *and that under these floating [*444] warrants he entered the very lands which the State register had refused to him.

The foregoing recital of facts shows a total absence of any title whatever. The United States have issued a patent certificate to defendant, and having refused to issue a patent to the plaintiff, or to approve of his location, the case comes completely within the principles established in *Wilcox v. Jackson*, 13 Pet., 498; *Bragg v. Broderick*, 13 Pet., 436.

II. The question of title between the parties has already been settled by the judgment of a special tribunal, authorized by Congress to take cognizance of the controversy, and to decide it conclusively between the parties.

By the first section of the Act of Congress of 3d August, 1846 (9 Statutes at Large, 51), the Commissioner of the General Land Office was "authorized and empowered to determine, upon principles of equity and justice, as recognized in courts of equity and in accordance with general equitable rules and regulations, to be settled by the Secretary of the Treasury, the Attorney-General and commissioner, conjointly, consistently with such principles, all cases of suspended entries now existing in said Land Office, and to adjudge in what cases patents shall issue upon the same." The second section of the laws speaks of "the power and jurisdiction" given to the commissioner, and of his "adjudications;" and the fourth section directs patents to issue to those persons in whose favor decisions have been rendered.

By reference to the record, page 57, it will be seen that the tribunal, thus authorized by Congress, made an adjudication in favor of the defendant in error, which was approved by the acting Secretary of the Treasury, p. 59, and by the Attorney-General, p. 59, and was in conformity with the rules and regulations established under the Act, and the principle previously proposed by the Secretary.

The Act of Congress grants no appeal from the decision of the commissioner, and the proposition is too clear for argument that the power

of Congress to dispose of the public lands is complete and unlimited. If, therefore, the case was within the jurisdiction conferred by the Act, the question is *res judicata*.

The Act confers the power to decide "all cases of suspended entries now existing in said Land Office." Was the case of defendant a suspended entry? A conclusive answer to this inquiry is found in the letter of the Commissioner of the General Land Office, dated 9th of March, 1846, in which he expressly says that these entries, as well as the state selections, are "suspended to await the action of Congress."

But it is contended that the original entries, under which the patents were issued to defendants, were utterly void, as being in violation of the proviso of the 6th and 10th sections of the Act of Congress of 3d March, 1811 (2 Stat. at Large, 662). The answer to this objection is found in the fact that the confirmation of the Houmas grant by the Act of the 12th April, 1814 (3 Stat. at Large, 121), satisfied the object of this proviso.

But, independently of this consideration, it is sufficient to say that the question whether the entries were or were not void, is one of the very questions which, by the terms of the Act of Congress, were submitted to the decision of the special tribunal created by that Act. Its language declares that the commissioner is to decide "all cases of suspended entries," and necessarily confers on him the power to decide whether the entry was void or voidable, or valid. This is the precise jurisdiction conferred on him, and the jurisdiction is without appeal. The argument of the plaintiff calls on this court to reverse the decision of the commissioner who pronounced that the entry was not void, but was a sufficient basis for a patent, which is equivalent to calling on the court to exercise an appellate jurisdiction over his judgment on the merits of the entry. The commissioner can in no sense be said to have assumed a jurisdiction over a subject not confided to him by the Act. There is no exception made by the law giver—all suspended entries are to be determined. The only legitimate subject of inquiry is, whether the defendant's entry was a suspended one; as soon as this is ascertained in the affirmative, the jurisdiction attaches, and the allegation by the plaintiff that the entry was void is simply an assertion that the commissioner erred in deciding it not to be void.

That the decision of the tribunal, created by the Act of Congress to decide on this suspended entry, is conclusive, is established by the jurisprudence of this court. (*Wilcox v. Jackson*, 18 Pet., 498; *Elliott et al. v. Peirce et al.*, 1 Pet., 328.)

Mr. Justice McLean delivered the opinion of the court:

This is a writ of error to the Supreme Court of the State of Louisiana.

A petitory action by petition was commenced in the Fifth District Court of New Orleans, on the 5th February, 1847, by the plaintiff in error, claiming a tract of land of which the defendant had possession. The plaintiff claims under two patents from the State of Louisiana, issued under the law of that State of the 25th of March, 1844, and alleges title in the State, under the Act of Congress of 4th September, 1841.

On the day the action was commenced, the defendant filed his answer claiming the same land under a purchase made by Robert Bell and Thomas Barrett from the United States, the 16th of May, 1836, and by mesne conveyances transmitted to the defendant. He pleads a [*446] prescription of a peaceable possession of more than ten years—that large and valuable improvements have been made on the premises, &c.

On the trial in the District Court of New Orleans, the plaintiff gave in evidence, patents from the State of Louisiana, for eight hundred and fifty-five acres and nine hundredths of an acre, the land in controversy, by virtue of the Act of Congress of the 4th of September, 1841. The certificates of entries of the land were also in evidence.

The defendant produced in evidence five patents from the United States, dated 1st of September, 1847, and a sale of the premises by Thomas Barrett to Robert Bell by authentic act on 17th May, 1836, and a series of mesne conveyances, terminating in a sale and conveyance by the widow R. Bell, to the defendant, on the 9th of May, 1844.

A jury not being demanded under the Louisiana law, the court gave judgment that the plaintiff recover of the defendant lot No. 1 of section 3, township 11, range 13 east, containing 211 acres. The plea of prescription was sustained as to the residue of the tract. From this judgment the defendant appealed to the Supreme Court of the State.

The Supreme Court reversed the judgment of the District Court, and entered judgment in favor of the defendant for the land in controversy.

The plaintiff, on the ground that he claimed title under an Act of Congress, and relied on the construction of another Act, to nullify the title of the defendant, and as the decision of the Supreme Court was against the right asserted by him, procured the allowance of a writ of error under the 25th section of the Judiciary Act.

The 8th section of the Act of 4th September, 1841, declares, "that there shall be granted to each State specified in the first section of the Act, of which Louisiana is one, five hundred thousand acres of land for purposes of internal improvement," provided such State had not received land for that purpose. And it is provided that "the selections in all of the said States shall be made within their limits respectively, in such manner as the Legislature shall direct; located in parcels conformably to sectional divisions and subdivisions, of not less than three hundred and twenty acres in any one location, on any public land except such as is or may be reserved from sale, &c.;" no locations to be made until the land shall be surveyed by the United States.

In 1844 the Legislature of Louisiana passed an Act establishing an office for the sale of the unlocated lands granted to the State, with a Register and State Treasurer as receiver.

The 7th section of the Act makes it the duty of the Register "and Treasurer, to issue [*447] warrants for the lands donated by Congress and not as yet located, provided they shall not be issued for less than eighty nor more than six hundred and forty acres, which warrants shall

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be sold in the same manner as the lands located, provided they shall not be sold for less than \$3 per acre; and it shall be the duty of the governor to issue patents for all the lands that have been sold, and for the lands located by warrants, when contemplated to be sold by that Act, whenever he shall be satisfied that the same must have been properly located."

Under the Act of Congress and the State law, the plaintiff purchased, it is alleged, two warrants from the State officers, and on the 7th of January, 1848, entered them in the Land Office of the United States, at New Orleans, upon the lands in controversy. And it is contended that these locations, independently of the patent issued by the State, being made on public land not reserved from sale by any law of Congress or proclamation of the President, which had been surveyed, and were entered in parcels conformably to the Act of Congress, gave the plaintiff a right to the lands in controversy under the Act of 1841, unless the defendant had, at that time, an equitable or legal title to them.

The Act of 1841 authorized the State to enter the lands, where surveys had been executed and the lands were open to entry, under the Acts of Congress. The State of Louisiana acted within its powers, in issuing warrants, and establishing Land Offices, as means of disposing of the lands. But it had not the power to convey the fee, as it had not been parted with by the general government. The words of the Act of 1841, are "that there shall be granted to each State," not that there is hereby granted. The words import, that a grant shall be made in future. (*Lesieur et al. v. Price*, 12 Pet., 75.)

It could not have been the intention of the government to relinquish the exercise of power over the public lands that might be located by the State. The same system was to be observed in the entry of lands by the State as by individuals, except the payment of the money; and this was necessary to give effect to the Act, and to prevent conflicting entries.

The defendant claims under five patents from the United States, dated the 1st of September, 1847, which was some months after this suit was commenced. These patents were issued under the Act of 3d of August, 1846. That Act provides, "that the commissioner of the General Land Office be, and he is hereby authorized and empowered, to determine, upon principles of equity and justice, as recognized in courts of equity, and in accordance with general equitable rules and regulations, to be settled by the Secretary of the Treasury, the Attorney-General and commissioner, conjointly, consistently with such principles, all cases of suspended entries, now existing in said Land Offices, and to adjudge in what cases patents shall issue upon the same." This power is limited to two years; and the exercise of it shall only operate to divest the title of the United States, but shall not prejudice conflicting claimants.

By the above Act the commissioner was required to arrange his decisions in two classes, and the 4th section requires patents to be issued in cases in the first class.

On the 9th of July 1847, the commissioner reported to the Secretary of the Treasury "ten entries by pre-emption, made at the Land Office of New Orleans, which were heretofore suspended, at the General Land Office." He says,

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"they have been adjudicated by me and placed in the first class, under the Act of the 3d August, 1846. It is stated that the first seven, of the ten cases reported, are entries by floats, arising from settlements within the Houmas claim, and would have been embraced with similar cases in abstract No. 13; but that the land, in whole or in part, has been selected by the State under the Act of 4th of September, 1841, since the floats were decided to be illegal under the Act of 1834." This report is agreed to by the acting Secretary of the Treasury and the Attorney-General.

As this decision was made by a special tribunal, with full powers to examine and decide; and as there is no provision for an appeal to any other jurisdiction, the decision is final within the law.

Under the Pre-emption Act of 1830, revived and continued for two years by the Act of 1834, pre-emption rights were granted to settlers on the public lands, not exceeding to each settler one hundred and sixty acres. And where two settlers are found on the same quarter section, each being entitled to a pre-emption for one hundred and sixty acres, the quarter which they occupied was divided between them, and each received a certificate for eighty acres in addition, giving a pre-emption right elsewhere on the public lands, which certificates were called floats. A number of these certificates were purchased by Thomas Barrett and Robert Bell, and by virtue of which they located the land in dispute. The settlements on which these certificates were issued were made on the Houmas claim, and as doubts existed whether the land embraced by this claim would be properly called public lands, under the pre-emption laws, the entries were suspended. And these were the entries included in the above report of the Commissioner of the General Land Office, and sanctioned by the Secretary of the Treasury and the Attorney-General.

"The patents issued by the State to [449] the plaintiff were dated the 20th of April, 1846. And it seems that on the 9th of the preceding month, the Commissioner of the General Land Office wrote to the Register and Recorder of New Orleans: "As Congress has taken the subject of the floating pre-emption entries arising from pre-emption settlements within the limits of the Houmas private claim into consideration, and is about to confirm them in the hands of *bona fide* assignees, I deem it proper, in order to prevent future inconvenience, to direct that all the land embraced by such entries, except as to those where the purchase money has been refunded and the claim abandoned, be hereby considered as excused from disposition in any way, either by state selection or otherwise. The state selections already made will be suspended to await the action of Congress."

"If the contemplated law confirms all entries in the hands of *bona fide* assignees, it will, in all probability, defeat all locations made by state selections. In the mean time, it is necessary that all appropriations of the lands covered by such entries be suspended."

It is true that on the 24th December, 1845, the commissioner wrote to the same Land Office, "that, after the cancellation of pre-emption claims, if the land is not otherwise interfered with or reserved, it is considered as

public land liable to be located by the State." And it seems that the tracts for which the plaintiff obtained patents, were designated in the letter of the commissioner as coming within the category.

This decision or opinion of the commissioner did not affect the rights of the defendant, as appears from subsequent proceedings of the same office. As soon as the defendant was apprised of the above letter, he filed a *caveat* in the State Land Office, and on the 9th of March, 1846, the commissioner, in his letter, as above stated, suspended the plaintiff's entries. And on the 25th of June, 1847, the Secretary of the Treasury, on a representation made by the Commissioner of the Land Office, "approved the locations made under the floating claims, held by the actual settlers who had improved the land, in preference to state locations. And this decision was sustained in the proceeding under the Act of the 3d of August, 1846, by the report of the commissioner, sanctioned by the Secretary of the Treasury and the Attorney-General, as above stated.

The Houmas claim, as filed before the Commissioners on Land Titles, extended from the Mississippi River to the *Amité*, embracing a large extent of country. It was confirmed by the commissioners, and also by an Act of Congress passed in 1814. This confirmation, however, was construed to be limited, and not *ex-450*] tending "to the boundaries claimed. The survey authorized by the Treasury Department extended only one and a half leagues back from the river; and the Register and Receiver were instructed to treat the residue of the claim as public lands. This induced a great many persons to settle on the claim up to the year 1836. In that year, by order of the Land Office, the Register and Receiver were directed to withhold from sale the lands within the claim. This suspension was continued, and the patent certificates which had been issued to purchasers were declared to have been issued without authority.

Afterwards, in 1844, this claim, to its whole extent, was recognized as valid by the Secretary of the Treasury: in consequence of which, entries made within the grant were canceled, and the purchase money returned. This action of the Land Office has been referred to, for the purpose of understanding the nature of the pre-emption rights acquired by settlers upon the Houmas claim, and the floats which were issued, as above explained, under the law. These floats were issued under the authority of the government, and, when presented by *bona fide* purchasers, could not be disregarded. This was the origin of the right set up by the defendant. It has been sanctioned by the Land Office, by the Secretary of the Treasury and the Attorney-General, under the Act of 1846, and a patent has been granted. Under the claim of the defendant, possession of the land has been held many years, and the improvements on it have made it of great value.

The plaintiff's title originated by his obtaining a float, as it was called, from the State Land Office, at \$3 an acre, in virtue of which he located the land in controversy, on 7th January, 1846, with the Register of the Land Office of the United States. The plaintiff, through John Laidlaw, made an application to have the land

specified in the float or warrant, but the Register of the State declined to specify any lands in the warrant. He refused for some time to issue a patent on the location, as he had "misgivings" as to whether it would be right for him to do so; but eventually he issued it on the order of the governor, to test the validity of the title.

As the patent from the State did not convey the legal title to the plaintiff, he must rely only on his entry, and that, in a petitory action, cannot stand against the patent of the defendant. But, if the case were before us on the equities of the parties, the result would be the same. The entries of the land claimed by the defendant were prior in time to those of the plaintiff, and of paramount equity. The entries of both claims were suspended by the order of the government, and the decision of the Secretary, and especially the decision of the Commissioner, *the Secretary of the Treasury, and the [451] Attorney-General, under the Act of 1846, was final, and related back to the original entries of the land. The circumstances under which the plaintiff located his warrants on a very valuable sugar plantation, of which the defendant had long been in possession, do not strongly recommend his equity.

We affirm the judgment of the Supreme Court of Louisiana, with costs.

ORDER.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Louisiana, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court in this cause be, and the same is hereby affirmed, with costs.

*Att'g—5 La. Ann., 75.
Cited—18 How., 284; 9 Wall., 798; 1 Otto, 233; 3 Blatchf., 516; 2 Cliff., 375.*

ERASTUS CORNING, JOHN F. WIN-
LOW, AND JAMES HORNER, *Appel-*
lants,

THE TROY IRON AND NAIL FACTORY.

Appeal, when it does not lie.

Where the respondent in a chancery suit in the Circuit Court took two grounds of defense, and the judge, in giving his reasons for a decree dismissing the bill, upon one of the two grounds, expressed his opinion that the respondent had not established the other ground, he cannot appeal from this as a part of the decree.

The decree was in the respondent's favor, dismissing the bill with costs, and no appeal lies from an opinion expressed by the judge upon the facts of the case, not affecting the decree.

Moreover, the decree complained of has already been argued before this court upon the appeal of the other party, and both grounds of defense decided to be insufficient, and the decree reversed. There is, therefore, no such decree as that appealed from.

Besides, the court below has not acted upon the mandate and entered a final decree; therefore there is no final decree to appeal from.

THIS was an appeal from the Circuit Court of the United States for the Northern District of New York, sitting as a court of equity.

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It was a branch of the case of *Troy Iron and Nail Factory v. Corning et al.*, reported in 14 How., 193. The decree of the Circuit Court, now appealed from, is given at page 194. The bill was originally filed by the Troy Iron and Nail Factory against Corning *et al.*, and the Circuit Court dismissed the bill, but this court reversed that decree. By reference to page 194, 14 Howard, it will be seen that the Circuit Court, in its decree, used the following language, viz.: "And it appearing to the said court that the said Henry Burden 452*) was the first and original inventor *of the improvement on the spike machine in the bill of complaint mentioned, and for which a patent was issued," &c., &c.

Corning *et al.* being defendants in that suit, and succeeding in having the bill dismissed, did not appeal from the decree; but when the appeal was decided against them by this court, as reported in 14 Howard, they entered an appeal from that part of the decree which was as follows:

"And that so much or such parts of said decree as declares, orders, adjudges and decrees as follows, to wit: 'And it appearing to the said court that the said Henry Burden was the first and original inventor of the improvement on the spike machine in the bill of complaint mentioned, and for which a patent was issued to the said Henry Burden, bearing date the 2d September, 1840, as in said bill of complaint set forth; and that said complainants have full and perfect title to the said patent for said improvements, by assignment from the said Henry Burden, as is stated and set forth in the said bill of complaint,' may be reversed, and that the appellants may be restored to all things which they have lost by reason thereof."

This was the appeal now pending, which Mr. Stevens moved to dismiss, filing the following motion:

Supreme Court of the United States.—The Troy Iron & Nail Factory, Appellees, v. Erastus Corning, John F. Winslow, and James Horner, Appellants.

IN EQUITY.

State of New York, Northern District, City and County of Albany, ss.

Samuel Stevens, of Albany, being duly sworn, says that he is of counsel and solicitor for the Troy Iron and Nail Factory, appellees in this court, and one of the solicitors and counsel in the Circuit Court of the United States for the Northern District of New York for the complainant.

That upon the hearing of the said cause in the Circuit Court of the United States for the Northern District of New York, upon pleadings and proofs, a decree therein was pronounced by the said court, which was duly entered by the clerk of the said court on the fourth (4th) day of September, 1850, which is in the words and figures following:

At a special term of the Circuit Court of the United States for the Northern District of New York, in equity, held at the City of Utica in said District, on the fourth day of September, one thousand eight hundred and fifty.

Present, the Honorable Samuel Nelson, Justice.

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**The Troy Iron and Nail Factory v. [453 Erastus Corning, John F. Winslow, and James Horner.*

IN EQUITY.

This cause having been heretofore brought to a hearing upon the pleadings and proofs, and counsel for the respective parties having been heard, and due deliberation thereupon had, and it appearing to the said court that the said Henry Burden was the first and original inventor of the improvement on the spike machine in the bill of complaint mentioned, and for which a patent was issued to the said Henry Burden, bearing date the 2d September, 1840, as in said bill of complaint set forth, and that the said complainants have a full and perfect title to the said patents for said improvements by assignment from the said Henry Burden, as is stated and set forth in the said bill of complaint.

But it also further appearing to the court, on the pleadings and proofs, that the instrument in writing bearing date the 14th October, 1845, stated and set forth in the said bill of complaint, and also in the answer of the said defendants thereto, entered into upon a settlement and compromise of certain conflicting claims between the said parties, and among others of mutual conflicting claims to the improvements in the spike machine, in said bill mentioned, and when said instrument was executed by the said Henry Burden of the one part, and the said defendants of the other, the said Henry Burden at the time being the patentee and legal owner of the said improvements, and fully authorized to settle and adjust the said conflicting claims, did, in legal effect and by just construction, impart and authorize and convey a right to the defendants to use the said improvements in the manufacture of the hook headed spike, without limitation as to the number of machines so by them to be used, or as to the place or district in which to be used.

Therefore it is ordered, adjudged and decreed, that the said bill of complaint be, and the same is hereby dismissed, with costs to be taxed, and that the defendants have execution therefor.

That on the 22d day of October, 1850, the said complainant appealed from the said decree to this court, which appeal was duly allowed by Mr. Justice Nelson, one of the justices of said court, and that afterwards, to wit: in the December Term of this court, 1852, the said cause upon the said appeal and upon the record returned to this court by the said clerk of the said Circuit Court of the United States for said Northern District, came on to be heard and was argued, whereupon this court pronounced a decree in the words and figures following, to wit:

**United States of America, ss. [454*

The President of the United States of America to the Honorable the Judges of the Circuit Court of the United States for the Northern District of New York;

Greeting: Whereas lately in the Circuit Court of the United States for the Northern District of New York, before you or some of you, in a cause between the Troy Iron and Nail Factory, complainants, and Erastus Corning, John F. Winslow and James Horner,

defendants, in chancery, the decree of the said Circuit Court was in the following words, to wit:

Therefore, it is ordered, adjudged and decreed, that the said bill of complaint be, and the same is hereby dismissed, with costs to be taxed, and that the defendants have execution therefor, as by the inspection of the transcript of the record of the said Circuit Court, which was brought into the Supreme Court of the United States by virtue of an appeal, agreeably to the Act of Congress in such case made and provided, fully and at large appear.

And whereas in the present term of December, in the year of our Lord one thousand eight hundred and fifty-two, the said cause came on to be heard before the said Supreme Court on the said transcript of the record, and was argued by counsel; on consideration whereof, is it now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court in the cause be, and the same is hereby reversed, with costs; and that the said complainants recover against the said defendants, \$360.42 for their costs herein expended, and have execution therefor.

And it is further ordered that this cause be, and the same is hereby remanded to the said Circuit Court, with instructions to enjoin the defendants perpetually from using the improved machinery with the bending lever for making hook and brad-headed spike, patented to Henry Burden, the 2d September, 1840, and assigned to the complainants, as set forth in complainants' bill, and to enter a decree in favor of the complainants for the use and profits thereof, upon an account to be stated by a master under the direction of the said Circuit Court, as is prayed for by the complainants, and for such further proceedings to be had therein, in conformity to the opinion of this court, as to law and justice may appertain. January 18.

You therefore are hereby commanded that such execution and further proceedings be had in said cause, in conformity to the opinion and decree of this court, as according to right and justice and laws of the United States ought to be had, the said appeal notwithstanding.

Witness, the Honorable ROGER B. TANEY, 455*] Chief Justice of *said Supreme Court, the first Monday of December in the year of our Lord one thousand eight hundred and fifty-two. [L. s.]

And deponent further says that afterwards, and on the 28th day of June, 1853, the said decree of this court was, by the said Circuit Court for said Northern District of New York, made the decree of said Circuit Court, which last-mentioned decree is in the words and figures following, to wit:

At a term of the Circuit Court of the United States for the Northern District of New York, held at the court house in the village of Canandaigua, on the 28th day of June, 1853.

Present: The Honorable Samuel Nelson, Nathan K. Hall, Judges.

The Troy Iron and Nail Factory v. Erastus Corning, James Horner, and John H. Winslow.

IN EQUITY.

The above named, the Troy Iron and Nail

Factory, the complainants in the above-entitled suit, having duly appealed to the Supreme Court of the United States from that part of the decree made in this suit which dismissed the bill of complaint herein with cost to be taxed, and the said Supreme Court of the United States having duly heard the said appeal at the December Term, 1852, upon the transcript of the record, and having reversed the said decree of the Circuit Court of the United States for the Northern District of New York, with costs, and having ordered, adjudged and decreed that the said complainants recover against the said defendants \$360.42 for their cost in said Supreme Court, and that they have execution therefor: the said Supreme Court having remanded the said cause to the said Circuit Court with instructions to enjoin the defendants perpetually from using the improved machinery with the bending lever for making hook or brad-headed spikes, patented to Henry Burden the 2d September, 1840, and assigned or transferred to the complainants, as set forth in the complainants' bill, and to enter a decree in favor of the complainants for the use and profits thereof, upon an account to be stated by a master under the direction of the said Circuit Court, as is prayed for by the said complainants in their bill of complaint, and for such further proceedings to be had thereon, in conformity to the opinion and decree of the said Supreme Court, as to law and justice may appertain, which order, decree and instructions appear to this court by the mandate of the said Supreme Court:

Now, therefore, on filing the said mandate, and in pursuance *thereof, and after *456 hearing *Mr. Stevens* for the said complainants, and *Messrs. Seymour and Seward* for the defendants, it is ordered, adjudged and decreed, and this court by virtue of the power and authority therein vested and in obedience to the said mandate, doth order, adjudge and decree, that the instrument in writing, bearing date the 14th day of October, 1845, stated and set forth in the pleadings in this cause, executed by the said Henry Burden and the said defendants, did not, in legal effect or otherwise, or by just construction, license, impart, authorize or convey a right to the said defendants to use the said improvements in the manufacture of the hook-headed spikes, by the machinery mentioned in the said bill of complaint, or any rights secured to the said Henry Burden by the said letters patent, and assigned or transferred to the said complainants, as aforesaid.

And it is further adjudged and decreed, that the said defendants have infringed and violated the said patent, so granted to the said Henry Burden, as aforesaid, by making and vending the said hook-headed spikes by the said machinery patented to the said Burden, on 2d September, as aforesaid.

And it is further adjudged and decreed, that the said defendants do account to the said complainants for the damages or use and profits, in consequence of the said infringements by the said defendants.

And it is further adjudged and decreed, that an account of the damages, or use and profits, be taken and stated by Marcus T. Reynolds, Esq., counselor at law, as master of this court, *pro hac vice*, and that the defendants attend be-

HOWARD J.

fore the said master, from time to time, under the direction of the said master, and that the said complainants may examine the said defendants under oath as to the several matters pending on the said reference, and that the said defendants produce before the said master, upon oath, all such deeds, books, papers and writings, as the said master shall direct, in their custody or under their control, relating to said matters, which shall be pending before said master.

And it is further ordered and decreed, that a perpetual injunction issue out of and under the seal of this court, against the said defendants, commanding them, their attorneys, agents and workmen, to desist and refrain from making, using or vending any machine containing the new and useful improvement for which letters patent were granted to the said Henry Burden on the 2d day of September, 1840, and from in any manner infringing or violating any of the rights or privileges granted or secured by said patent.

And it is further ordered, that the said complainants recover *of the said defendants the damages or use and profits which shall be reported by the said master, and that upon the confirmation of his report or decree, be entered against the defendants therefor, and also for the costs of the complainants in this suit in this court, and that the said complainants have execution therefor, and for the costs in the said Supreme Court.

And it is further ordered and decreed, that such other proceedings be had herein, in conformity to the opinion of the said Supreme Court, as to law and justice may appertain, and that the parties and master may apply, upon due notice, to this court, upon the foot of this decree, for such other and further orders, instructions and directions, as may be necessary.

(A copy.)

A. A. BOYCE, Clerk.

And deponent further says, that on the 5th day of October, 1853, the solicitor for the defendants served upon Henry Burden, the President of the said complainants, a petition of appeal and a citation thereon, in the words and figures following:

To the Supreme Court of the United States of America.

The petition of Erastus Corning, John F. Winslow, and James Horner, respectfully represents, that a decree was lately made in the Circuit Court of the United States for the Northern District of New York, in equity, bearing date the 4th day of September, 1850, in a certain cause pending in said court, wherein the Troy Iron and Nail Factory were complainants, and your petitioners were defendants; certain parts of which decree, as herein-after specified, are, as your petitioners are advised, erroneous, and ought to be reversed.

And your petitioners further show, that the matters in dispute in said cause, exclusive of costs, exceed the sum of \$2,000. Whereupon your petitioners pray that the said decree, together with the pleadings, depositions, and all other proceedings in said cause, may be sent to the said Supreme Court of the United States

and filed therein on the first Monday of December next, and that so much or such parts of said decree as declares, orders, adjudges and decrees as follows, to wit: "And it appearing to the said court that the said Henry Burden was the first and original inventor of the improvement on the spike machine in the bill of complaint mentioned, and for which a patent was issued to the said Henry Burden, bearing date the 2d September, 1840, as in said bill of complaint set forth, and that the said complainants have a full and perfect title to the said patent for said improvements, by assignment from the said Henry Burden, as is stated and set forth in the *said bill of complaint, may be re-versed, and that the appellants may be restored to all things which they have lost by reason thereof."

DANIEL L. SKYMOUR,
Solicitor for Appellants.

Dated Troy, Sept. 8, 1853

By the Honorable Samuel Nelson, one of the Judges of the Circuit Court of the United States for the Northern District of New York.

Whereas, Erastus Corning, John F. Winslow, and James Horner, lately filed in the Circuit Court of the United States for the Northern District of New York, a petition of appeal directed to the Supreme Court of the United States of America, stating that a decree was lately made in the Circuit Court of the United States for the Northern District of New York in Equity, bearing date the 4th day of September, 1850, in a certain cause therein pending, wherein the Troy Iron and Nail Factory were complainants, and Erastus Corning, John F. Winslow, and James Horner, were defendants, certain parts of which said decree are alleged to be erroneous and ought to be reversed, and further, stating that the matters in dispute in said cause, exclusive of costs, exceeded in value the sum of \$2,000;

And whereas the said Erastus Corning, John F. Winslow, and James Horner, by their said petition prayed that the said decree, together with the pleadings, depositions, and all other proceedings in said cause may be sent to the said Supreme Court of the United States, and filed therein on the first Monday of December next, and that the said parts of said decree may be reversed, and the said appellants restored to all things which they have lost by reason thereof;

You are, therefore, hereby cited to appear before the said Supreme Court of the United States at the City of Washington, on the first Monday of December next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, in the Circuit Court of the United States for the Northern District of New York, the 23d day of September, 1853.

S. NELSON.

And deponent further says, that he has been informed and believes that the record and proceedings in said appeal have been duly filed with the clerk of this court.

SAMUEL STEVENS.

Sworn before me this 16th day of November, 1853.
LEONARD KIP,
Master and Examiner in the Circuit Court of the Northern District of New York.

459*] **Supreme Court of the United States. The Troy Iron and Nail Factory v. Erastus Corning et al.*

IN EQUITY.

SIR—Be pleased to take notice that upon the pleadings, papers, and proceedings in this cause in the Circuit Court of the United States for the Northern District of New York, and upon the record, and proceedings returned to this court by the clerk of said Circuit Court on the appeal by the complainant to this court, and upon the affidavit hereto annexed, and copy of which is herewith served upon you, this honorable court will be moved at the next term thereof to be held at the Capitol, at the City of Washington, District of Columbia, on the first Monday of December next, at the opening of the court on that day, or as soon thereafter as counsel can be heard, for a rule or order dismissing the appeal of the defendants to this court or of such other and further rule or order as may be agreeable to equity.

Albany, November 9th, 1853.

SAMUEL STEVENS,
Solicitor for Complainants.

To D. L. SEYMOUR, Defendants' Attorney.

Upon this motion to dismiss the appeal, the cause was taken up.

It was argued by *Messrs. Stevens and Johnson* for the motion, and *Messrs. Seymour and Seward* against it.

Mr. Stevens, in support of the motion to dismiss, made the following points:

The only ordering part of the decree—the only judgment pronounced by the court below—was a decree dismissing the complainants' bill, with costs; from that decree the complainants duly appealed to this court, which decree was reversed, and a decree ordered according to the prayer of the bill, which was duly entered in the Circuit Court, before the defendants made the present appeal.

Preceding the ordering part of the decree, certain recitals were made by the Circuit Court, showing the reasons or grounds upon which that court pronounced the ordering part of the decree.

It is from the recitals preceding the decree in this cause, and not from the decree, that this appeal has been made.

The complainants, the respondents to this appeal, now move to quash or dismiss it upon the following grounds:

460*] **First.* This court has appellate jurisdiction only upon appeals from final judgments or decrees of the Circuit Court. (1 United States Statutes at Large, p. 84, sec. 22.)

The ordering part of a decree is the only final decree or judgment of the court.

The preliminary recitals preceding the ordering part of the decree, is no part of the decree or judgment of the court.

Such recitals are simply the reasons or grounds of the decree.

Those reasons or grounds of the decree cannot be appealed from. A party might as well claim to appeal from the opinion of the court, as from a synopsis of the opinion which constitutes the recitals upon which the ordering part of the decree is based.

The only decree in this case was a decree dis-

missing the complainants' bill, with costs. (Seaton's Forms of Decrees, pp. 8, 9.)

From the whole of that decree the complainant appealed, the whole of which decree was reversed by this court at its last term, and the Circuit Court was ordered by the mandate of this court to enter a decree in said cause, according to the prayer of complainant's bill, and such decree was entered by the said Circuit Court, at the June Term thereof, 1853, in compliance with said mandate of this court.

The defendants cannot have that decree of this court reviewed or altered by an attempt to appeal from the reasons upon which the Circuit Court pronounced its decree.

Second. But if the recitals preceding the ordering part of the decree of the Circuit Court could be appealed from, the defendants should have brought a cross appeal, which would be heard by this court with, and at the same time of, the original appeal, and one decree only would be pronounced by the appellate court. (1 Barbour's Ch. Prac., 397; Uguart's Prac. in House of Lords on Appeals and Writs of Error, pp. 37-40; Palmer's Prac. in House of Lords on Appeals and Writs of Error, p. 33; *Howley v. James*, 16 Wend., 85-274; *Mopes v. Coffin*, 5 Paige, 296.)

A party cannot have a decree of the Circuit Court reviewed by this court two, three or more times, by appealing from different parts of the decree at different times. Every ground which he might have urged on the hearing of the first appeal, will be deemed to have been made by him, or if not made, to have been abandoned. (*The Santa Maria*, 10 Wheat., 443, 444; *Ex-parte Sibbald*, 12 Pet., 488.)

This attempt at an appeal by the defendants from the reasons of the decree, is analogous to an application to this court for a rehearing upon the original appeal, which is never granted after the cause has been remitted to the Circuit Court. (*McArthur v. Browder*, 4 Wheat., 488.)

Third.* The decree of the Circuit [*461** Court entered in this cause on the 4th September, 1850, was reversed by this court at its December Term, 1852, and the proceedings were remitted to the Circuit Court, and that court, at its June Term, 1853, entered a new decree, in pursuance of, and in compliance with, the mandate of this court. Therefore, on the 5th of October, 1853, the date of defendants' present appeal, there was no such decree of the Circuit Court as that entered by said court of the 4th of September, 1850, from parts of which the defendants claim to appeal.

Fourth. The only decree existing in the Circuit Court in this cause, since its June Term, 1853, is an interlocutory, and not a final decree, and cannot be appealed from. (*Kane v. Whittick*, 8 Wend., 219; 9 Pet., 1; 15 *Id.*, 287.)

Appeals from the Circuit Court to this court can only be from final decrees or judgments. (United States Statutes at Large, p. 84, sec. 122.) *Mr. Seymour* and *Mr. Seward* opposed the motion to dismiss the appeal, upon the following grounds:

1. The decree of the Circuit Court, made on 4th September, 1850, disposed of the whole cause on the merits, and was therefore a final decree, and an appeal may be taken from it. (See Act of Congress, March 3, 1803.) By this

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Act, an appeal to the Supreme Court is given "from all final judgments or decrees rendered, or to be rendered, in any Circuit Court." (See, also, Act 24th February, 1789; *The San Pedro*, 2 Wheat., 132; see Act of 1819, 3 United States Statutes at Large, p. 481, chap. 19; see Patent Act of 1836, sec. 17, 5 United States Stat. at Large, p. 124; Laws United States Courts, 117, 118, 119.) This last Act enlarges the right of appeal in patent cases. It gives the court a discretion to allow the appeal in cases other than those already provided for by law. The appeals authorized by this are only allowed from a final decree in United States courts. (*Patterson v. Gaines et al.*, 6 How., 585.)

A decree dismissing a bill is a final decree. (2 Daniel's Chancery Pleading and Practice, Perkins' ed., pp. 1199, 1200; *McCollum v. Eager*, 2 How., 64.)

The decree, therefore, of the Circuit Court, in this cause, may be appealed from, under the Acts of Congress aforesaid.

II. This decree consists of three parts: the introductory part; the part declaring the rights of the parties, as this does of the complainants; and another part ordering or directing a thing or things to be done. (See 2 Daniel's Chancery Pleading and Practice, Perkins' ed., pp. 1210-1214, as to the forms of decrees.) The rules of this court do not allow of recital. (See 462*) rule *85; so, too, Stats. 3 and 4 William IV., cited in 2 Daniel's Pr., 1212; Seaton's Decrees, 159.) It declares the right of complainants to the patent right, and the right of the defendants to use the patented machinery, under the agreement of October 14, 1845.

This decree proceeds and adjudges and determines two important matters of defense which had been distinctly set up in the pleadings, and upon which much testimony had been given, to wit:

First. "That the said Henry Burden was the first and original inventor of the improvement on the spike machine in the bill of complaint mentioned, and for which a patent was issued to the said Henry Burden, bearing date the 2d day of September, 1840, as is in said bill of complaint set forth."

Second. "That the said complainants have a full and perfect title to the said patents for said improvements, by assignment from the said Henry Burden, as is stated and set forth in the said bill of complaint."

These portions of the decree are final decisions on the merits of the case, giving to the complainants the full and complete title to the machinery; a vital point, which if decided for the defendants decides the whole case for them; no matter what may the decision as to the agreement of October 14, 1845.

An appeal will lie from the decision of the Court, upon either or both of these contested points. (3 Daniel's Ch. Pr., 1606.)

III. Even if the adjudication contained in the decree of the originality of the invention in question, and of the complainants' title to the patent, need not have been inserted in the decree, yet they were inserted by the Circuit Court, upon the special motion of the complainants, and against the opposition of the defendants, who should therefore not be prejudiced by it. See affidavits read on this motion by the defendants.

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IV. The appeal by the complainants brought up only the questions decided to their prejudice. (*Buckingham v. McLean*, 18 How., 150, 151.)

The equity practice of the Supreme Court of the United States is regulated by the laws of the United States, the rules of the court, and in the absence of any provision in them applicable to a given case, by the practice of the English High Court of Chancery. (Rule 90. Supreme Court; *The State of Rhode Island v. The State of Massachusetts*, 14 Pet., 210; *Bein v. Heath*, 12 How., 168; *Dorsey v. Packwood*, 12 How., 126.)

By the practice, both of the American and the English Courts of Chancery, this is a proper case for a cross appeal to be brought by defendants. (1 Turner & Venable's Chancery Practice, 733, edit. 1835; 2 Smith's Chancery Practice, p. 31, edit. 1837; *3 Daniel's Ch. Prac. [*463] tice, 1685, 1688, 1606; *Blackburn v. Jepson*, 2 Ves. & B., 359; *Hawley v. James*, 16 Wend., 61, 85; *Mapes v. Coffin*, 5 Paige, 296; *Cloues v. Dickinson*, 8 Cow., 330.)

V. The present is the proper time to bring it.

1. The decree of the Circuit Court being final, the laws of March 3, 1803, and of 1819 and 1836, give an unrestricted and unqualified right of appeal to either party for five years.

2. Because an appeal now taken from the latter decree would bring up for review only the proceedings subsequent to the mandate. (*The Santa Maria*, 10 Wheat., 31; *Ex-parte Sibbald*, 12 Pet., 488.)

There is no rule of the Supreme Court adopting the rules of the House of Lords.

VI. The decision of this court, on the appeal of the complainants, affects only the part of the decree complained of by them, to wit: the construction of the agreement of October 14, 1845; and while the declaratory parts of the decree of the Circuit Court, in favor of the complainants, remain unreversed, the right to sustain their bill for a perpetual injunction, and to recover damages, followed as a consequence, from the construction given by this court to the agreement of October, 1845.

VII. The defendants are entitled to an appeal at some time within five years from the decision of the Circuit Court against them, on the validity of the patent in question. Now, if the complainants' position is true, that nothing is appealed from but the order directing the bill to be dismissed, these defendants have not now, and never have had, an opportunity to appeal at all; because that decree was in their favor, and a party cannot appeal from a decree in his own favor.

It is a mere subtlety to say that because the decree, deciding the validity of the patent and the title of the complainants in their favor ordered no relief; but on the contrary, for a different reason, directed their bill to be dismissed, that, therefore, the decision of the validity of the patent and the title of the complainants is mere recital, and not a substantial part of the decree, and proper subject of an appeal. The test is this: are the validity of the patent and the title of the complainants now open to dispute by the defendants in the Circuit Court? Certainly they are not. But, according to the complainants, those points are not open to appeal; so that a decision on a vital

point against the defendants is not the subject of an appeal at all.

Again. If what the complainants allege is correct, that there is no decree now remaining in the court below but the decree which is entered on the mandate; and also, that, on appeal *from that decree so entered on the mandate, the party aggrieved can review only the proceedings subsequent to that decree, then it results that the defendants can have no appeal at all from a decree in which the material issue upon the invention is found against them by the court below.

Again. In answer to this, it is said, that on the appeal brought by the complainants upon the issue as to a license found against them, the defendants were at liberty to fall back, and contest the issue of the invention found against them: but, in reply, we say that by the rules of the courts of equity, as well as by statute, it is optional to the defendants whether they will so fall back, and contest the issue found against them on the hearing of the appeal of the complainants, or whether they will bring their own distinct appeal.

VIII. The respondents' motion should be denied.

Mr. Justice Grier delivered the opinion of the court:

The Troy Iron and Nail Factory filed their bill in the court below, claiming to be assignees of a patent granted to Henry Burden for a "new and useful improvement in machinery for manufacturing wrought nails or spikes." The bill charges, that the appellants, Corning & Company, have infringed their patent, and prays for an injunction and an account of profits, &c. The answer of the respondents below took defense on two grounds—first, that Burden was not the first and original inventor of the machine patented; and second, that the respondents used their machine under a license from the patentee. The court below sustained the defense on the latter ground, and entered the following decree: "Therefore, it is ordered, adjudged and decreed, that the said bill of complaint is hereby dismissed, with costs to be taxed, and that the defendant have execution therefor."

The case is now before us on a motion to dismiss the appeal. Looking at the case as exhibited to us by the record, it appears to be an appeal by respondents from a decree dismissing the complainant's bill with costs. It often happens that a court may decree in favor of a complainant, but not to the extent prayed for in his bill, and he may have just cause of appeal on that account. But the prayer of the respondent's answer is, that "he be hence dismissed, with his reasonable costs and charges, on this behalf most wrongfully sustained." And having such a decree on the present case, he cannot have a more favorable one.

It is true that the petition for the appeal in this case prays only, "that so much of such parts of said decree, as declares, orders, adjudges and decrees as follows, to wit: "And it *appearing to the said court that the said Henry Burden was the first inventor of the improvement, &c., may be reversed, and that the appellants may be restored to all things which they have lost by reason thereof."

But the matter complained of forms no part of the decree of the court below.

It shows only that the judge, in reciting the inducement or reasons for entering a decree in favor of the respondents below, was of opinion that they were entitled to such decree, because they had succeeded in establishing one only of the two defenses alleged in their answer. It is the opinion of the court, on a question of fact involved in the case, but not affecting the decree. If the decree be correct, the party in whose favor it is given has no right to complain; yet his appeal prays that it "may be reversed, and the appellants restored to all things which they have lost by reason thereof;" and the record shows they have lost nothing.

If the decree be reversed, according to the prayer of the appellants, the court must necessarily enter a decree for the complainants below. This would, probably, not meet the views of the appellants. They have put themselves in the anomalous position either of asking for the affirmance of the decree from which they have appealed, or of requesting this court to reverse a decree in their favor, and send back the record to the court below, with directions to enter the very same decree, but to assign other reasons for it. The court were not bound to give any reasons for their decree. The law gives the party aggrieved an appeal from a final decree of an inferior court. But it does not give the party who is not aggrieved an appeal from a decree in his favor, because the judge has given no reasons, or recited insufficient ones for a judgment admitted by the appellant to be correct.

There is a part of the history of this case which does not appear on the record; but being known to the court, and assumed by counsel on both sides to make part of the case, it will be necessary to notice the case under that aspect.

The decree in favor of the appellants, which is now appealed from, has already been before this court on an appeal by the complainant below. The parties were then fully heard, the decree of the Circuit Court reversed, and the case remanded for further proceedings. It is reported in 14 How., 194. It appears, therefore, that there is no such decree as that which is now complained of. The decree of the Circuit Court has been entirely annulled, reversed, and set aside by this court. Before that was done, the appellants had a full hearing on every point of defense set up in their answer. The court below had decided *that the defend *ant had a good defense under his plea of license, but not under the plea that Burden was not the first inventor of the patented machine. This court has decided, that the appellant's defense was insufficient on both pleas. The language of the court is (14 How., 208), "That the defendants have failed to prove that Burden was not such first inventor; and in our opinion the evidence given by them on that point rather serves to establish the originality of the invention than to impair it. The appellants stand upon the patent, as the first which was granted for the bending lever; and they may well do so, until other evidence than that in this record shall be given to disprove its originality."

It is plain, therefore, that under the guise of an appeal from the decree of the Circuit Court,

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this is an appeal, in fact, from the decision of this court. For there is no other decree existing in the case except the decree of this court. There must be an end of litigation sometime. To allow a second appeal to a court of last resort, on the same questions which were open to dispute on the first, would lead to endless litigation. It is said by this court, in *Martin v. Hunter*, 1 Wheat., 355, "A final judgment of the court is conclusive upon the rights which it decides, and no statute has provided any process by which this court can revise its judgment." (See, also, *Sibbald v. United States*, 12 Pet., 488.) It follows, therefore, that when a complainant has a decree in his favor, but not to the extent prayed for in his bill, and the respondent, appeals: if the complainant desires a more favorable decree, he must enter a cross appeal, that when the decree comes before the appellate court, he may be heard. For, when the decree is either affirmed or reversed by the appellate court, it becomes the decree of that court, and cannot be the subject of another appeal. But, in this case, where the decree of the court below dismissed the bill, no appeal by the respondent was necessary. He had a full opportunity to urge every defense set up in his answer. The printed arguments show that the defense, for want of originality in the patent, was relied upon as a ground for affirming the decree of the court below, and as we have already shown, was distinctly passed upon and overruled by this court.

A second appeal lies only when the court below, in carrying out the mandate of this court, is alleged to have committed an error. But on an appeal from the mandate, it is well settled, that nothing is before the court but the proceedings subsequent to the mandate. Whatever was formerly before the court, and was disposed of by its decree, is considered as finally disposed of. (See *Himely v. Rose*, 5 Cranch, 813; *Canter v. The Ocean Insurance Company*, 1 Pet., 511; *The Santa Maria*, 10 Wheat., 431; *Rice v. Wheatly*, 9 Dana, 272.)

*Moreover, as it is admitted that the court below have not yet acted upon the mandate of this court, and entered a final decree in pursuance thereof, there is no final decree, from which only an appeal can be taken. (See *The Palmyra*, 10 Wheat., 502; *Chace v. Vasquez*, 11 Id., 429.)

There are, therefore, three conclusive reasons for dismissing the present appeal:

1. The appellants have already been heard in this court on a former appeal.
2. There is no such decree as that from which the appeal purports to be taken.
3. There is no final decree in the case, from which an appeal can be taken.

The appeal is therefore dismissed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Northern District of New York, and was argued by counsel; on consideration whereof, it is now ordered, adjudged and decreed by this court, that this cause be, and the same is hereby dismissed, with costs.

S. C.—14 How., 194.

Cited—20 How., 481; 17 Wall., 284; 4 Otto, 499.

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THE UNITED STATES, *Plaintiffs*,

v.

JAMES L. DAWSON AND JOHN R. BAYLOR.

Trial of indictment pending in Circuit Court in Arkansas not affected by Act giving State Court right to try same offenses—sixth amendment to Constitution.

In June, 1844, Congress passed an Act by virtue of which the Circuit Court of the United States for the District of Arkansas was vested with power to try offenses committed within the Indian country.

In July, 1844, it was alleged that a murder was committed in that country.

In April, 1845, an indictment was found by a grand jury, in the Circuit Court of the United States for the District of Arkansas, against a person charged with committing the murder.

In March, 1851, Congress passed an Act erecting nine of the Western counties and the Indian country into a new judicial district, directing the judge to hold two terms there, and giving him jurisdiction of all causes, civil or criminal, except appeals and writs of error, which are cognizable before a circuit court of the United States.

The residue of the State remained a judicial district to be styled the Eastern District of Arkansas.

This Act of Congress did not take away the power and jurisdiction of the Circuit Court of the United States for the Eastern District to try the indictment pending.

THIS case came up from the Circuit Court of the United States for the Eastern District of Arkansas, upon a certificate of division in opinion between the judges thereof.

*The two following questions were [*468 certified, viz.:

1st. Did the Act of Congress, entitled "An Act to divide the district of Arkansas into two judicial districts," approved the third day of March, in the year of our Lord one thousand eight hundred and fifty-one, whereby the Western District of Arkansas was created and defined, take away the power and jurisdiction of the Circuit Court of the United States for the Eastern District of Arkansas, so that it cannot proceed to hear, try and determine a prosecution for murder, pending against the prisoner, James L. Dawson, a white man and not an Indian, upon an indictment found, presented and returned into the Circuit Court of the United States for the District of Arkansas, by the grand jury impaneled for that district, upon the sixteenth day of April, in the year of our Lord one thousand eight hundred and forty-five, against James L. Dawson, a white man, for the felonious killing of Seaborn Hill, another white man and not an Indian, on the 8th day of July, A. D. 1844, in that country belonging to the Creek nation of Indians, west of Arkansas, and which formed a part of the Indian country annexed to the judicial district of of Arkansas by the Act of Congress approved the 17th day of June, A. D. 1844, entitled "An Act supplementary to the Act entitled 'An Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers, passed thirtieth June, one thousand eight hundred and thirty-four,'" in which cause, so pending, no trial has as yet been had?

2d. Can the District Court of the United States for the Western District of Arkansas take jurisdiction of the case aforesaid, upon the indictment aforesaid, so found in the year

1845, in said Circuit Court for the District of Arkansas?

Although the name of Dawson only was mentioned in the question certified, yet the record showed that Baylor was indicted at the same as aiding and abetting in the murder.

A motion was made in the Circuit Court to quash the indictment upon the ground that this honorable court has no jurisdiction or power to hear, try or determine this case and prosecution, and that all its jurisdiction and power in that behalf ceased and was extinguished on the 3d of March, 1851, when that part of the Indian country, in which the offense is charged to have been committed, was severed from this district, and made part of a new district, under the jurisdiction of the District Court of the United States for the Western District of Arkansas.

It was upon this motion that the judges differed in opinion and certified the two questions, above stated, to this court.

The motion to dismiss the case was argued by Messrs. **Lawrence and Pike** for Dawson, and by **Mr. Cushing** (Attorney-General) for the United States.

469*] *Mr. Pike*, in his brief, made the following argumentative statement of pre-existing laws upon the subject:

This is an indictment against James L. Dawson for a murder alleged to have been committed at the Creek agency, in the Creek country, west of Arkansas, on the 8th day of July, A. D. 1844. The bill was found by the grand jury for the Arkansas district, at the April Term, 1845, of the Circuit Court of the United States for the District of Arkansas.

At the April Term, 1853, present *Mr. Justice Daniel*, and the Honorable Daniel Ringo, District Judge, a motion was made to quash the indictment for want of jurisdiction, on which motion the Judges dividing in opinion, the prisoner was admitted to bail in an amount which he has been wholly unable to give; and upon a certificate of division of opinion the case has come into this court.

By the Act of March 3d, 1817 (3 Stat. at Large, 383), jurisdiction and power of trial, in case where offenses were committed in any town, district or territory belonging to any nation or tribe of Indians, were given to the courts of the United States "in each territory and district of the United States in which any offender against this Act shall be first apprehended or brought for trial."

The Constitution, art. III., sec. 2, No. 3, had provided that "the trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crime shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed."

The States and people not thinking this a sufficient guaranty for a fair and impartial trial, Art. VI. of the amendments to the Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."

The Intercourse Act of 30th June, 1834

(4 Stat. at Large, 733), by the 24th section, after making divers provisions, defining the limits of the "Indian country," and imposing penalties for sundry offenses, provides "that, for the sole purpose of carrying this Act into effect," certain Indian country, bounded east by Arkansas and Missouri, west by Mexico, north by the Osage country, and south by Red River, "shall be, and hereby is annexed to the Territory of Arkansas;" and by section 25 it was provided "that so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States shall be in force in the Indian [*470 country; provided the same shall not extend to crimes committed by one Indian against the person and property of another Indian." Power to apprehend offenders in the Indian country, and take them into "the judicial district having jurisdiction," was given by sec. 26.

Under this Act the Superior Court of the Arkansas Territory took and exercised jurisdiction as to offenses committed in the Indian territory so annexed to Arkansas.

But, by Act of June 15th, 1836 (5 Stat. at Large, 50, 51), Arkansas was admitted as a State; and sec. 4 provided "that the said State shall be one judicial district, and be called the Arkansas District, and a district court shall be held therein, to consist of one judge, who shall reside in the said district, and be called a district judge." It was provided that he should hold semi-annual sessions at Little Rock, and that he should "in all things have and exercise the same jurisdiction and powers which were by law given to the judge of the Kentucky district, under an Act entitled An Act to establish the judicial courts of the United States."

That was the Act of September 24th, 1789 (1 Stat. at Large, 73). That Act gave to the District Court of Kentucky the jurisdiction of a Circuit Court, except on appeals and writs of error, in addition to the ordinary District Court jurisdiction. Sec. 10 and sec. 29, provided that in cases punishable with death, the trial should be had in the county where the offense was committed; or where that could not be done without great inconvenience, twelve petit jurors at least should be summoned from thence.

There was, in the Act of 1836, no express repeal of so much of the Act of 1834 as applied to Arkansas; but the Legislature, by expressly limiting and defining the bounds of the Arkansas district, and making it to be composed of the State, cut away the Indian country, and severed its connection with Arkansas. It was therefore held by the District Court of Arkansas that it formed no part of the district, and that the court had no jurisdiction to try and determine cases upon indictments found in the Superior Territorial Court, for offenses committed in the Indian country prior to the 15th June, 1836; and all prisoners so indicted were discharged.

To remedy this, by Act of March 1, 1837 (5 Stat. at Large, 147), it was provided, that the District Court of Arkansas should have "the same jurisdiction and power in all respects whatever that was given to the several district courts" by the Intercourse Act of March 30, 1802, "or by any subsequent Acts of Congress, concerning crimes, offenses, or misdemeanors,

which may be committed against the laws of the United States in any town, settlement, **471*** or territory, belonging to any Indian tribe in amity with the United States, of which any other district court of the United States may have jurisdiction."

Section 15 of this Act of 1802, like the Act of 1834, gave the jurisdiction of offenses committed against its provisions to the Territorial, Circuit, and other Courts of the United States, in each district in which the offenders should be apprehended, or into which, agreeably to the provisions of the Act, they should be brought for trial. By sec. 19, persons apprehended in the Indian country were to be taken into one of the three adjoining States or districts for trial. If apprehended in any district, they were, by sec. 17, to be tried there.

By Act of March 3, 1837 (5 Stat. at Large, 176), the districts of Alabama, Mississippi, and Arkansas, and the Eastern District of Louisiana, were erected into the ninth circuit; and provision being made for holding a circuit court at Little Rock, it was further, by the third section, provided, that so much of any Act or Acts of Congress as vested in sundry district courts, including that of Arkansas, "the power and jurisdiction of Circuit Courts" should be, and was thereby repealed, and like jurisdiction was given to the Circuit Court of Arkansas as to other circuit courts, and to the District Court of Arkansas as to other District Courts.

Under these Acts it was held by the Circuit Court for the District of Arkansas, in 1842, I think—present, *Mr. Justice Daniel* and the Honorable Benjamin Johnson, District Judge—that the Court had no jurisdiction as to offenses committed in the Indian country.

By Act of August 23, 1842 (5 Stat. at Large, 517), concurrent jurisdiction with the Circuit Court was given to the District Courts in prosecutions for offenses not capital.

And by Act of June 17, 1844 (a few days before the day on which the offense in this case is charged in the indictment to have been committed), (5 Stat. at Large, 680), the courts of the United States in and for the District of Arkansas were vested with the same power and jurisdiction, to hear, try, determine and punish, all crimes committed within the Indian country designated in the 24th section of the Intercourse Act of June 30, 1834, and therein and thereby annexed to the Territory of Arkansas, as were vested in the courts of the United States for that Territory before it became a State; and the Act went on to declare: "That for the sole purpose of carrying this Act into effect, all that Indian territory heretofore annexed by the said 24th section of the Act aforesaid to the Territory of Arkansas, be, and the same hereby is annexed to the State of Arkansas."

Under this Act the Circuit Court assumed **472*** jurisdiction of "offenses committed in the Indian country; and among other indictments, this was found.

But on the 3d of March, 1851, a new Act passed (9 Stat. at Large, 594), by which it was enacted, Sec. 1. That from and after the passage of this Act, the counties of Benton, Washington, Crawford, Scott, Polk, Franklin, Johnson, Madison, and Carroll, and all that part of the Indian country lying within the present judicial district of Arkansas, shall constitute a

new judicial district, to be styled 'The Western District of Arkansas;' and the residue of said State shall be and remain a judicial district, to be styled 'The Eastern District of Arkansas.'"

By sec. 2 of this singularly worded Act, "the Judge of the District Court of Arkansas" is directed to hold two terms "of said Court" in each year, at Van Buren, in Crawford County, and special and adjourned sessions when needed.

By sec. 3 it is provided, that "the District Court of the United States for the Western District of Arkansas, hereby established," shall have, besides District Court jurisdiction, "within the limits of its respective district," circuit court jurisdiction, except in cases of appeals and writs of error, and proceed like a Circuit Court with right of appeal to the Supreme Court.

By sec. 4 a marshal and district attorney "for said Western District of Arkansas," were provided for, and the District Judge was empowered to appoint a clerk "of said Court hereby established."

Since the passage of this Act, and the establishment of the District Court for the Western District of Arkansas, that Court has taken jurisdiction of indictments found there for capital offenses committed in the Indian country prior to the passage of the Act, and has tried, convicted and sentenced the parties, and had them executed.

And at the same time a Circuit Court for the Eastern District of Arkansas has been opened and held, succeeding to the business of the Circuit Court for the District of Arkansas, and the cases pending there when the Act passed had been proceeded in as still in the same court. Persons have been tried for offenses committed in the Indian country, and upon indictments found in the Circuit Court for the District of Arkansas, prior to the passage of the Act of 1851: and one, convicted of manslaughter, is still imprisoned under the sentence. But in the case of *Dawson*, the question of jurisdiction was formally raised, and comes up here for consideration.

At common law, in criminal cases, the venue was local, and matter of substance affecting the jurisdiction and power of the grand jury, who were to find the indictment or make the presentment, as well as of the court who were to try the cause and carry into effect the law. (1 Chitty, Cr. Law, 177, 190.)

***[473]** (After examining the English authorities upon this point, the counsel proceeded to the American.)

One of the grounds of complaint, set forth in the Declaration of Independence against the English King, was "for transporting us beyond seas to be tried for pretended offenses."

After the Constitution was framed, it did not seem to the states and people that the rights of the citizen were sufficiently guarded by the provision which gave Congress, where an offense was not committed within any state, the power to direct, as well after as before the offense was committed, at what place the trial should be had. The objections to this were obvious. In every case where an offense was committed beyond the limits of a state, as on the high seas or in a territory, Congress might virtually decide the case against the accused by directing that he should be tried in a remote or

unfriendly district. If the offense were a political one, especially, this was a power dangerous and odious in the extreme. The sixth article of the amendments wisely took away this whole power, and provided that the trial of all criminal prosecutions should be by an impartial jury of the state and district wherein the crime should have been committed, and required that such district should have been previously ascertained by law. It is obvious that the phrase means, previously to the commission of the offense, because, if Congress could create or ascertain the district after its commission, that was continuing their power to direct the trial to be had at whatever place they might think most apt and fit for the particular case.

It will occur to everyone, that it would be intolerable if a power existed by which, if a man committed an offense in Oregon or Florida, Congress might, in order to strike him down with perfect certainty, attach the particular place where he committed the offense to the District of Maine, so as to carry him to Portland for trial; retaining, of course, the power to sever again from the district the country so attached, so soon as the political or other offender should be immolated, and the ends of public or party vengeance attained.

And it will also occur, that it would be equally dangerous to concede to Congress a power, when an offense has been committed, to sever the particular place at which it was committed from the district of which it then formed a part, and so, disabling the court to send beyond its district for jurors, utterly deprive the accused of the right to a jury of the vicinage.

It was not intended by the amendment to leave the rights of the accused to be settled by the caprice or hostility of Congress, and by laws enacted on the spur of the moment, to 474*] suit the *particular occasion, reach the particular case, and strike the particular individual.

The amendment is therefore peremptory. No man can be tried, under any circumstances, elsewhere than in the state or district where he committed the offense. Nor can new districts be created, *ad libitum*, after the offense is committed, to carry the trial to whatever remote point Congress may please, for reasons of prejudice, ill will or favoritism, in order to acquit or convict, as inward feeling or outward pressure may dictate, giving to the particular party, at the option of Congress, friendly or unfriendly juries and judges, and allowing or taking from him a jury of his vicinage. Such a power, in a free country, would be intolerable. Congress could acquit or condemn at its pleasure. The district within which the crime was committed must have been previously ascertained by law. Thus, and thus only, will a possibility of special legislation for the particular case be avoided, and this power of attainer in disguise taken away.

There have never been but two districts in which it could be said that the offense in this case was committed. The Eastern District of Arkansas is limited to certain specified counties of the State; and it is not the district within which the offense was committed. It was committed in the former District of Arkansas, and in what now forms a part of the Western Dis-

trict of Arkansas. If Dawson is now tried in the Eastern District, certainly he is not tried in the district within which he committed the offense.

The notion upon which the claim to jurisdiction appears to rest is, that the Circuit Court for the Eastern District is either the same court as the former Circuit Court for Arkansas, or its successor; but so is the District Court for the Western District its successor; for the judge of the District Court of Arkansas is to hold two terms of said court at Van Buren.

This idea does not even sound the question, to see how deep it is. To create a Circuit or District Court, and confer upon it all power to punish crimes within the power of Congress to bestow, would be wholly unavailing, until the territory was defined within whose limits its jurisdiction should operate. No jurisdiction whatever could be exercised until a district was established and defined. The continued existence of the court avails nothing, if its jurisdiction is compressed into narrower territorial limits. Its power shrinks within these limits at once. If the particular place in which the offense was committed is, after the commission of the offense, severed from the district, or left outside of the jurisdiction by the process of compression, and the offence is still tried in the court whose jurisdiction is so *nar- [475 rowed, the offense, we may admit, would be tried in the same court as if it had been tried there before the excision of territory; but the fact still remains, that it will not be tried in the district, previously ascertained by law, in which the offense was committed.

It is said that it is the district in which the offense was committed. That is not so, because it is a new and different district altogether; the district in which the offense was committed no longer exists, but two new districts exist in lieu of it. It might as well be said that if you sever a man in the middle, he still exists. Suppose, however, that the Act had merely taken off from the Arkansas District the Indian country, and left the former district to stand with its old name, still the Arkansas District, as it was before—*totus totus atque rotundus*—still, although the Arkansas District, it would not be the district in which the offense was committed. If you cut off a man's hand, the man remains, identical and one, as before; because the man, the individual, the *me*, is something different and distinct from each of his members. You may even imagine that a particular faculty or part of the soul could be cut away, and yet the residue would continue the identical individual which existed before.

But if you cut a tract of land or country in two, you may call one half by the name previously borne by the whole, and for some purposes it may be the same tract of country; but for others it is not so. Take from Arkansas a county, or half a dozen counties, and in many senses the residue would be the same Arkansas that existed before. Suits in her favor would not abate, nor her contracts be annulled, because the sovereignty or municipal corporation which constitutes the State does not lose its individuality by parting with a portion of its territory.

But the word "district" does not mean a

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corporation, or a being, but a mere tract and extent of country; and when it is divided, one half of it is no more the same district that existed before than the other is. A half is not the whole; nor can two halves continue to be each the previous whole.

This may be made more plain, and the fallacy of the notion more striking, by reflecting that it operates both ways; and if the district remains the same when part of its territory is cut away, so it would if a vast extent of new territory was added. Suppose Congress had chosen to annex the Indian country to the District of Columbia, the argument would be thus: the crime was committed at the Creek agency; that is now made part of the District of Columbia by annexation. The District of Columbia is a corporation, one and identical, the same now as before; consequently, it is the 476*] District of Columbia in which the offense was committed. On the other hand, it could be said the offense was committed in the District of Arkansas; the place where it was committed no longer forms part of that District; but the fact still remains, that the crime was committed in the District of Arkansas.

All the reason of the thing would be in favor of the District of Columbia; because the *locus* of the offense now forming part of that district, the accused might have a jury of the vicinage; while, if tried in the maimed district of Arkansas, he could not.

The truth is, that the continued existence and identity of the metaphysical *ens*, called district, territory, state, or of that other called the court, has nothing to do with the question. If it has, the right guaranteed amounts to nothing. The trial is to be in the district where the offense was committed, in order that the party may have, if not the reality, at least the possibility or fiction of a right to a jury of the vicinage. A constitutional provision, without a reason for it, would be a monster. The right is one that continues to the trial; it is, indeed, a right of the trial. The right is, that the identical place, and fixed solid ground, or unstable water, where the offense was committed, shall then be within the district in which the party is to be tried. If there is any district in which this person could now be tried, it is the Western District of Arkansas. The only way to avoid the difficulty would have been, as the cases we have cited show, for Congress to have declared the old district to continue, with its original territorial extent, for all the purposes of this and similar cases.

The courts of the United States have no jurisdiction, as to crimes, except such as is expressly conferred by statute. In such cases, they have no implied powers, nor any derived from the common law. (*Hudson v. Goodwin*, 7 Cranch, 82; *United States v. Worrall*, 2 Dall., 384; *United States v. Coolidge*, 1 Wheat., 415; 1 Kent, 337-339; *United States v. Bevans*, 3 Wheat., 336.)

And it is equally indispensable that the law should put the place where the crime occurs within the jurisdiction of the court which is to try the case. (*United States v. McGill*, 4 Dall., 426; *United States v. Bevans*, 3 Wheat., 336; *Ex-parte Bollman and Swartwout*, 4 Cranch, 75, 131; *United States v. Willberger*, 5 Wheat., 76.)

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It is a well settled principle, that where a statute creating an offense is repealed, and no provision is made for carrying forward prosecutions commenced under it, all such prosecutions are absolutely ended with the repeal of the law.

Such was decided to be the effect of the Act repealing the *Bankrupt Act of 1803, [*477 in *United States v. Passmore*, 4 Dall., 372.

And the same decision was made in *Miller's* case, 1 W. Bl., 451. No proceedings are pursuable under a repealed statute, which commenced before the repeal.

These decisions, and others to which we shall refer, do not proceed upon any peculiar principle especially applying to penalties imposed by repealed Acts, or to the destruction of the criminal character of acts done before the repeal, but upon a broad general principle of universal application.

And that principle is simply that stated by Lord Tenterden, in *Surtees v. Ellison*, 9 Barn. & Cress., 752, where he said: "It has been long established that, when an Act of Parliament is repealed, it must be considered, except as to transactions passed and closed, as if it had never existed. That is the general rule; and we must not destroy that by indulging in conjectures as to the intention of the Legislature. We are therefore to look at the Statute 6 Geo. IV., ch. 16, as if it were the first that had ever been passed on the subject of bankruptcy." His Lordship felt the pressure of the consequences of the decision, but the law was too well settled to be disregarded; and he added: "It is certainly very unfortunate, that a statute of so much importance should have been framed with so little attention to the consequences of some of its provisions. It is said that the last will of a party is to be favorably construed, because the testator is *inops consilii*. That we cannot say of the Legislature; but we may say that it is '*magnas inter opes inops*.'" (See, also, *Dwarris on Statutes*, 673, 676.)

The counsel then proceeded to examine other analogous principles, which there is not room to insert.

Mr. Cushing (Attorney-General) insisted that the Act of 3d March, 1851, has not taken away the jurisdiction of the Circuit Court to hear and determine the said indictment then found and pending.

The said Act of 3d March, 1851, did not create a new Circuit Court. It created a new District Court, having the ordinary powers of the District Court of the United States within the territory assigned to it, with an anomalous increase of jurisdiction; but it left the then existing Circuit Court unrepealed, in being and activity.

The general powers of the then existing Circuit Court remained unimpaired as to cases begun and pending; its future jurisdiction was limited to cases originating within a smaller territorial district. The territory within which the Circuit Court then existing should exercise its powers over new suits *and prose- [*478 cutions thereafter to be instituted, was lessened: but the powers which belonged to it as a circuit court, and as common to all the other Circuit Courts of the United States were not diminished.

The general rule is, that where the jurisdic-

tion of a court over the subject matter has once vested, it is not divested by a subsequent change of circumstance. (*United States v. Myers*, 2 Brock., 516; *Morgan v. Morgan*, 2 Wheat., 290; *Molan v. Torrance*, 9 Wheat., 537; *Clarke v. Matthewson*, 12 Pet., 165.)

Thus, where the complainants, being citizens of a state other than Kentucky, sued citizens of the State of Kentucky in the Circuit Court of the United States for the Kentucky District, and pending the suit one of the complainants voluntarily removed to, and became a citizen of, the State of Kentucky, the Supreme Court of the United States decided unanimously "that the jurisdiction of the court having once vested, was not divested by the change of residence of either of the parties." (*Morgan's Heirs v. Morgan*, 2 Wheat., 293, 297.)

There are no words in the Act of 1851 to give it a retrospective effect, to make it retroact upon pending suits and prosecutions, rightfully commenced in the pre-existing and continuing Circuit Court. To give, by implication, a retrospective effect to the newly created District Court, whereby to divest a pre-existing and continuing superior Circuit Court of its cognizance over suits, actions and prosecutions rightfully begun therein, and undetermined, would violate the rules of just construction and right reasoning.

Heretofore when a Circuit Court has been established within a district wherein only a District Court had been established with the powers of a District Court and of a Circuit Court, in order to divest the District Court of its cognizance of cases pending, which belonged to the proper cognizance and jurisdiction of a Circuit Court, and transfer them into the newly created Circuit Court, or when new courts have been established, whether Circuit Courts or District Courts, and it was intended by the Congress of the United States to transfer cases pending in the old or pre-existing courts into the newly created courts, there to be heard, tried and determined, it has been deemed necessary and proper to employ express and positive enactments to effect such purposes, and they have been used invariably to that end.

Thus in the Act of Congress of 13th February, 1801 (2 Stat. at Large, 89), two sections, viz.: secs. 20 and 24, were introduced as specially applicable. This Act was repealed by 8th March, 1802 (2 Stat. at Large, 132), and the preceding judicial system re-instated, and sections 4 and 5 introduced to provide for the case. 479*] *The Act of 24th February, 1807 (2 Stat. at Large, 420), established Circuit Courts and abridged the jurisdiction of the District Courts in the District of Kentucky, Tennessee, and Ohio, and sec. 3 provided for the transfer of cases.

The Act of April 20th, 1818 (3 Stat. at Large, 462), divided Pennsylvania into two districts, and sections 4 and 6 provided for the transfer of cases.

The Act of March 10th, 1824 (4 Stat. at Large, 9), divided Alabama into two districts, and sec. 5 made the necessary provisions.

The Act of 3d March, 1837 (5 Stat. at Large, 176), erected twelve new Circuit Courts. The third and fourth sections provided for this case.

In these six statutes, last quoted, we have examples of two classes, relative to the divisions

of districts and the establishment of courts therein: one class containing enactments for transferring cases, begun and pending in one District Court, to another District Court, established in a part of the territory formerly composing one district; the second class containing express provisions to take away the jurisdiction of District Courts, acting as Circuit Courts, over cases, civil and criminal, begun and pending in such inferior District Courts, and to transfer the cognizance thereof to the superior Circuit Courts newly established in the same districts.

If positive enactments were necessary and proper to divest the jurisdiction of inferior District Courts over causes, actions and pleas rightfully begun and pending therein, and to transfer the cognizance thereof to superior Circuit Courts newly established in the same districts, *a fortiori*, express and positive enactment would be necessary to divest the jurisdiction of a Superior Court over cases rightfully begun and pending therein, and to transfer the cognizance thereof, from such existing continuing Superior Court, to an inferior District Court newly established within the same territory which composed the district when the proceeding was instituted in the Circuit Court.

We have examples of legislation by Congress by which new judicial districts have been formed out of the old, with total silence as to the cognizance of actions or prosecutions pending in the old, viz.:

The Act of April 9th, 1814 (3 Stat. at Large, 120), and the Act of February 21st, 1823 (3 Stat. at Large, 726). In these Acts, cases were left to be heard, tried and determined under the general rule that when once the jurisdiction of a court has rightfully attached by action, writ or prosecution, instituted, it is not divested by change of circumstances, by mere implication, or otherwise than by express enactment.

*The two Acts of May 26th, 1824 [*480 (4 Stat. at Large, 50, and May 26th, 1824, 14 Stat. at Large, 48), took away certain counties and attached them to another district, and no special provision was thought necessary respecting cases then pending.

Furthermore, we have examples of the legislation of the Congress of the United States in dividing one judicial district, in the States of North Carolina, into three judicial districts; thereafter, in consolidating the three into one, and afterwards in dividing that one into three judicial districts, viz.:

The Act of the 9th June, 1794 (1 Stat. at Large, 396); the Act of 3d March, 1797 (1 Stat. at Large, 518); the Act of 29th April, 1802 (2 Stat. at Large, 156). In these Acts there are provisions that there shall be no failure of justice by abatement or discontinuance of the process or lapse of jurisdiction.

The Act of 3d April 1794 (1 Stat. at Large, 352), transfers jurisdiction from one court to another and provides for the trial of cases.

The various Acts of Congress for dividing judicial districts, and for taking off territories or counties from one judicial district and adding them to another, and for consolidation of judicial districts into one, and again for dividing that one into several, and for creating new courts by abolishing some pre-existing, and

substituting others in their stead, when compared each with the others, evince beyond doubt, that the Legislature, in framing those statutes, understood and acted upon the following principles and rules of law, viz.:

1st. That to abolish the jurisdiction of one existing and continuing court over any of the subjects originally committed to its cognizance, and to transfer such jurisdiction to another court, it was necessary and proper to use words aptly and clearly expressive of such intent.

2d. That when the jurisdiction of a court had once rightfully vested over a cause begun and pending, it was not divested by change of circumstance, but continued with the court, until plainly taken away by the Legislature, or until the court itself was abolished.

By these rules the Acts of the Legislature are to be construed. Otherwise the most unexpected, inconvenient, nay, calamitous consequences would result, with miserable confusion of all justice.

If taking off territory from one judicial district and adding to another *ipso facto* abrogates the jurisdiction of the courts (district and circuit) holden for such diminished district, over cases then pending and originated in such territory so taken from one judicial district and added to another, then the people of Virginia, of New York, and of Pennsylvania, would have been thrown into a strange predicament. **481*** The statutes before cited for dividing the judicial districts in Virginia, New York and Pennsylvania, respectively, and afterwards for diminishing the one and enlarging the other in each State, made no special provision for, but were silent as to, cases then pending. The courts wherein they were pending, supposing their jurisdiction to have continued, went on to hear and determine them. But if the doctrine now contended for by the counsel for Dawson is to prevail, the said courts had no jurisdiction; their decisions are absolutely void, confer no right, bar no right, and all concerned in executing them were trespassers; for such are the consequences of decisions and sentences of courts not having jurisdiction. (*Elliot v. Peirson*, 1 Pet., 340; *Wise v. Withers*, 3 Cranch, 337; *Rose v. Hymely*, 4 Cranch, 269.)

A question arose upon the before-mentioned Act of 1824, May 26th, taking away certain counties from the Eastern District of Pennsylvania and adding them to the western district, in an action of ejectment pending in the Circuit Court for the District of Pennsylvania, for land lying in Union County, one of the counties so taken from the eastern and added to the western district. The question was made at the first sitting of the Circuit Court for the District of Pennsylvania after the passage of the Act of 1824, whether the said ejectment so instituted and pending at the passage of that Act should be retained in the Circuit Court, or be sent to the Western District Court, acting as a Circuit Court. Upon argument, Mr. Associate Justice Washington and Judge Peters decided that the case should be retained; the said Act had not transferred it to the western district. (*Lessee of Rhodes and Snyder v. Selin*, 4 Wash. C. C., 725.)

To combat this decision, the counsel for the accused cites the cases of *Picquet v. Swan*, 5

Mason, 35, and *Toland v. Sprague*, 12 Pet., 300. The case of *Picquet v. Swan* is cited to prove "that title to real estate, by the general principles of law, can be litigated only in the state where the land lies, and where the process may go to find and reach the land and enforce the title of the party." This extract, quoted by the counsel for the accused, is connected with the next preceding and the next succeeding sentence, to actions, in their nature, "purely local;" and immediately afterwards Judge Story explains himself further, by saying, "collateral suits for other purposes, binding the conscience, or controlling the acts of the party personally, may be brought and decided elsewhere." (5 Mason, 42.) The case did not involve the question of a rightful jurisdiction vested, and sought to be divested by matter subsequent. It was a case brought in the federal court, and District of Massachusetts, by an alien, against a citizen of the United States, then out of the United States, but late of the City of Boston, by color of the "state law and a [*482] process called the trustee process, or foreign attachment, and returned by the marshal that he had attached the real estate of the defendant in the District of Massachusetts, summoned the supposed trustees and agent of the defendant, Swan, but that "the said Swan has not been an inhabitant or resident of this district (Massachusetts) for three years last past." Such a suit, Judge Story decided, could not be so commenced in the federal court contrary to the federal law, although allowed by the law of the State of Massachusetts.

In *Penn v. Lord Baltimore*, in the High Court of the Chancery of England, respecting the title to land in Maryland, Lord Hardwick decided that it was no objection to the decree for settling the right between the parties, that the land was in Maryland, and not itself to be reached by the process of that court. (*Penn v. Lord Baltimore*, 1 Ves., 454, 455.)

By the 6th section of the Act of 3d March, 1797 (1 Statutes at Large, by L. & B., p. 515, chap. 20), writs of execution, upon any judgment obtained for the use of the United States in one state, may run and be executed in any other state, or in any of the territories of the United States. Subpoenas for witnesses may run from one district to any other, by Act of March 2, 1793 (Statutes at Large, by L. & B., p. 335, chap. 22, sec. 6). And executions "upon judgments or decrees obtained in any of the District or Circuit Courts of the United States, in any one state, which shall have been, or may hereafter be, divided into two judicial districts, may run and be executed in any part of such state." (Act of 20th May, 1826, 4 Statutes at Large, by L. & B., p. 184, chap. 123.) So that the question of jurisdiction was not involved in the case of *Picquet v. Swan*; but only the sufficiency of the process by foreign attachment against the absentee, not served personally with the process, to entitle the plaintiff to judgment by default.

The case of *Toland v. Sprague*, 12 Pet., 300, cited by the counsel of the accused, was not a case of jurisdiction once rightfully vested and sought to be divested by matter subsequent; but a question whether, according to the Acts of Congress, a citizen of Pennsylvania could commence a suit in the Circuit Court of the

United States for the Eastern District of Pennsylvania, by process of attachment of property within the State (as authorized by a law of the State), belonging to the absentee, who was a citizen of the State of Massachusetts. The defendant appeared and pleaded to issue, having moved to quash the process. The court below rendered judgment in chief for the plaintiff for his demand. This court decided that the process of attachment had issued improperly; but as the defendant had appeared and pleaded to issue, this court said:

483*] "Now, if the case were one of a want of jurisdiction in the court, it would not, according to the well-established principles, be competent for the parties by any act of theirs to give it. But that is not the case. The court had jurisdiction over the parties, and the matter in dispute; the objection was, that the party defendant not being an inhabitant of Pennsylvania, nor found therein, personal process could reach him; and that the process of attachment could only be issued properly against a party under circumstances which subjected him to process *in personam*. Now, this was a personal privilege or exemption which it was competent for the party to waive, . . . and that appearing and pleading will prove that waiver." (12 Pet., 330, 331.) And thereupon the judgment was affirmed.

These cases do not shake the opinion in the case of *Rhodes v. Selin*, 4 Wash. C. C., 725. The principle on which it stands, that a jurisdiction once rightfully vested is not divested by after circumstances, but only by express transfer to some other tribunal, or by express repeal, is sustained by the case of *Morgan's Heirs v. Morgan*, 2 Wheat., 297; *Tyrell v. Rountree*, 7 Pet., 467, 468.

The conclusion in the case of *Rhodes v. Selin*, and which is here maintained, is not a novelty or anomaly, as seems to be assumed in behalf of the defendant; it is but a single instance of a general doctrine of statute construction, which is this:

If part of a defined territory, having functions or duties political, judicial, municipal or other; be separated from it, either by annexation to another, or by being converted into a new political, judicial, municipal or other entity, then the remaining part of the territory, or the former public body, retains all its property, powers, rights and privileges, and remains subject to all its obligations and duties, unless some express provisions to the contrary be made by the Act authorizing the separation.

The counsel for the accused relies upon the Constitution of the United States as amended, for an argument against the jurisdiction of the Circuit Court of Arkansas.

The Constitution, in art. 3, sec. 2, provides: "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed."

This provision authorized the Act of Congress, which prescribed that the trial of the crime charged in the indictment as committed in the Indian country, out of the limits of any

state, should be had in the Circuit Court of Arkansas.

The 6th article of the amendments to the Constitution, that "the accused shall [*484] enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law," does not conflict with the law for defining the place and district for the trial of Dawson. He committed the crime in no state. He was indicted within a district defined and ascertained by law before the crime itself was committed; therefore within the letter and within the spirit and meaning of the Constitution, howsoever the words—"which district shall have been previously ascertained by law"—may be construed to mean before the crime was committed, or before the trial. The Constitution does not intend that crimes committed by citizens of the United States on board of our vessels on the high seas, or out of any state, or in the Indian nations and tribes within the United States, should go unpunished.

This amendment of the Constitution applies only where the offense has been committed in a state. Then the trial must be in that state, and the district "previously ascertained by law" must be within that state. But where the crime is not committed in any state of this Union, the trial may be wherever within the jurisdiction of the United States the Congress shall by law direct.

Finally, it is insisted for the United States that the jurisdiction vested rightfully in the Circuit Court of Arkansas, by the indictment therein found; and as that court is in being, unrepealed, and continuing in full power and activity as a Circuit Court of the United States, that jurisdiction and cognizance to try the crime charged in the indictment continues; that it is neither abrogated nor transferred to any other tribunal by the said subsequent Act of 1851. If the Legislature had intended to transfer the cognizance of pending cases, civil or criminal, they would have used the express words and enactments to that end, which they had employed in so many previous like cases.

Mr. Justice Nelson delivered the opinion of the court:

The defendant was indicted, in the Circuit Court of the United States for the District of Arkansas, for the alleged murder of one Seaborn Hill, in the Indian country west of the State of Arkansas.

The defendant is a white man, and so was Hill, the deceased.

At a Circuit Court held at the City of Little Rock, on the 28th of April, 1853, the indictment came on for trial before the judges of that court; whereupon a motion was made, on behalf of the defendant, to quash the indictment, for want of jurisdiction of the court to try the same.

And upon the argument, the judges being divided in opinion, the following question was certified to this court for its decision:

1. Did the Act of Congress entitled "An Act to divide the District of Arkansas into two judicial districts," approved the 8d of March, 1851, by which the Western District of Arkan-

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Arkansas was created, take away the power and jurisdiction of the Circuit Court of the United States for the Eastern District to try the indictment pending against the prisoner, James L. Dawson, a white man, found in the Circuit Court of the United States for the District of Arkansas, by a grand jury impaneled on the 16th April, 1845, for feloniously killing Seaborn Hill, a white man, on the 8th of July, 1844, in the country belonging to the Creek nation of Indians west of Arkansas, and which formed a part of the Indian country annexed to the judicial district of Arkansas, by the Act of Congress approved on the 17th of June, 1844, "An Act supplementary to the Act entitled 'An Act to regulate trade and intercourse with Indian tribes, and to preserve peace on the frontiers,'" passed 80th of June, 1834.

To state the question presented for our decision in a more simple form, it is this: At the time the State of Arkansas composed but one judicial district, in which the federal courts were held, the Indian country lying west of the State was annexed to it for the trial of crimes committed therein by persons other than Indians. In this condition of the jurisdiction of these courts, the crime in question was committed in the Indian country, and the indictment found in the Circuit Court, at the April Term, 1845, while sitting at the City of Little Rock, the place of holding the court.

Subsequent to this, the State was divided into two judicial districts, the one called the Eastern, the other the Western District of Arkansas. The Indian country was attached to and has since belonged to the western district. The question presented for our decision is, whether or not the Circuit Court for the Eastern District is competent to try this indictment, since change in the arrangements of the districts.

By the 24th section of Act of Congress, June 30th, 1834 (4 Stat. at Large, 733), it was provided, that all that part of the Indian country west of the Mississippi River, bounded north by the northern boundary of lands assigned to the Osage tribe of Indians: west by the Mexican possessions; south by Red River, and east by the west line of the Territory of Arkansas, and State of Missouri, should be annexed to the territorial government of Arkansas, for the sole purpose of carrying the several provisions of the Act into effect. And the 25th section enacted, that so much of the laws of the United States as provides for the punishment of crimes [486*] committed within any place within *the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country, provided the same shall not extend to crimes committed by one Indian against the person or property of another Indian.

The Act of Congress, June 7th, 1844 (5 Stat. at Large, 680), which was enacted after the Territory of Arkansas became a State, provided, that the courts of the United States for the District of the State of Arkansas, should be vested with the same power and jurisdiction to punish crimes committed within the Indian country designated in the 24th section of the Act of 1834, and therein annexed to the Territory of Arkansas, as were vested in the courts of the United States for said territory before the same became a State; and that, for the sole purpose of carrying the Act into effect, all that

Indian country theretofore annexed by said 24th section to the said Territory, should be annexed to the State of Arkansas.

As we have already stated, the crime in question was committed in this Indian country after it was annexed, for the purposes stated, to the State of Arkansas; and the indictment was found in the Circuit Court of the United States for the District of Arkansas, which, we have seen, was co-extensive with the State. And if no change had taken place in the arrangement of the district, before the trial, there could, of course, have been no question as to the jurisdiction of the court.

But by the Act of Congress, 8d March, 1851, it was provided, that the counties of Benton and eight others enumerated, and all that part of the Indian country annexed to the State of Arkansas for the purposes stated, should constitute a new judicial district, to be styled "The Western District of Arkansas," and the residue of said State should be and remain a judicial district, to be styled "The Eastern District of Arkansas."

The 2d section provides, that the judge of the District Court should hold two terms of his court in this western district in each year at Van Buren, the county seat in Crawford County. And the third confers upon him, in addition to the ordinary powers of a District Court, jurisdiction within the district, of all causes, civil or criminal, except appeals and writs of error, which are cognizable before a Circuit Court of the United States. The fourth provides for the appointment of a district attorney and marshal for the district, and also for a clerk of the court.

It will be seen, on a careful perusal of this Act, that it simply erects a new judicial district out of nine of the western counties in the State, together with the Indian country, and confers on the District Judge, besides the jurisdiction already possessed, circuit court powers within the district, subject to the limitation as to appeals and writs of error; leaving the powers and jurisdiction *of the Circuit [487 and District Courts as they existed in the remaining portion of the State, untouched. These remain and continue within the district after the change, the same as before; the only effect being to restrict the territory over which the jurisdiction extends. Hence no provision is made as to the time or place of holding the Circuit or District Courts, in the district, or in respect to the officers of the courts, such as district attorney, marshal, or clerk, or for organizing the courts for the despatch of their business. These are all provided for under the old organization. (5 Stat. at Large, 50, 51, 176, 177, 178.)

We do not, therefore, perceive any objection to the jurisdiction of these courts over cases pending at the time the change took place, civil and criminal, inasmuch as the erection of the new district was not intended to affect it in respect to such cases, nor has it, in our judgment, necessarily operated to deprive them of it.

It has been supposed that a provision in the sixth amendment of the Constitution of the United States has a bearing upon this question, which provides, that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of

the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." The argument is, that since the erection of the new district out of the nine western counties in the State, together with the Indian country, it is not competent for the Circuit Court, in view of this amendment, to try the prisoners within the remaining portion of the old district, inasmuch as that amendment requires the district within which the offense is committed, and the trial is to be had, must be ascertained and fixed previous to the commission of the offense.

But it will be seen from the words of this amendment, that it applies only to the case of offenses committed within the limits of a state; and whatever might be our conclusion if this offense had been committed within the State of Arkansas, it is sufficient here to say, so far as it respects the objection, that the offense was committed out of its limit, and within the Indian country.

The language of the amendment is too particular and specific to leave any doubt about it: "The accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall be committed, which district shall have been previously ascertained by law."

The only regulation in the Constitution, as it respects crimes committed out of the limits of a state, is to be found in the 8d art., sec. 2, of the Constitution, as follows: "The trial of crimes, except in cases of impeachment, shall **488** be by jury, and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may, by law, have directed."

Accordingly, in the first Crimes Act, passed April 30, 1790, sec. 8 (1 Statutes at Large, p. 114), it was provided, that "the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may first be brought."

A crime, therefore, committed against the laws of the United States, out of the limits of a state, is not local, but may be tried at such place as Congress shall designate by law.

This furnishes an answer to the argument against the jurisdiction of the court, as it respects venue, trial in the county, and jury from the vicinage, as well as in respect to the necessity of particular or fixed districts before the offense.

These considerations have no application or bearing upon the question.

In this case, by the annexation of the Indian country to the State of Arkansas, in pursuance of the Act of 1844, for the punishment of crimes committed in that country, the place of indictment, and trial was in the Circuit Court of the United States for that state, in which the indictment has been found, and was pending in 1851, when the Western District was set off; and as that change did not affect the jurisdiction of the court, as it respected pending cases, but remained the same after the alteration of the district as before, it follows that the trial of the indictment in this court will be at the place and

in the court as prescribed by law, which is all that is required in the case of an offense committed out of the limits of a state.

We shall direct, therefore, an answer in the negative, to be certified to the court below, to the first question sent up for our decision, as we are of opinion the court possesses jurisdiction to hear and give judgment on the indictment.

The second question sent up in the division of opinion is as follows:

Can the District Court of the United States for the Western District of Arkansas take jurisdiction of the case aforesaid, upon the indictment aforesaid so found, in the year 1845, in said Circuit Court for the District of Arkansas.

As our conclusion upon the first question supercedes the necessity of passing upon the second, it will be unnecessary to examine it, and shall, therefore, confine our answer and certificate to the court below to the first.

***Mr. Justice McLean dissenting. [*489**

Mr. Justice McLean :

The facts and law of this case, as I understand them, have led me to a different conclusion from that of a majority of the court. The twenty-fourth section of the Act of the 30th June, 1834, after making various provisions defining the limits of the Indian country, and imposing penalties for several offenses by white persons, provides, "that for the sole purpose of carrying this Act into effect, the Indian country, bounded east by Arkansas and Missouri; west by Mexico; north by the Osage country, and south by Red River, shall be, and hereby is annexed to the Territory of Arkansas."

On the 8th of July, 1844, a murder was committed at the Creek agency, in the Creek country, west of Arkansas, for which the grand jury found a bill of indictment in the Circuit Court of Arkansas, at April Term, 1845.

By an Act of March 3, 1851, it is provided, "that from and after the passage of this Act, the counties of Benton, Washington, Crawford, Scott, Polk, Franklin, Johnson, Madison and Carroll, and all that part of the Indian country lying within the present judicial district of Arkansas, shall constitute a new judicial district, to be styled, the Western District of Arkansas; and the residue of said State shall be and remain a judicial district, to be styled, the Eastern District of Arkansas."

After the division of the district, Dawson, the defendant, was arrested for the alleged murder; and the question, whether the Circuit Court of the United States, sitting within the Eastern District, has jurisdiction to try the case, has been referred to this court.

When the offense was committed, and the indictment was found, the District of Arkansas included the State and the Indian country described; but when the defendant was arrested, and the case was called for trial, and the District had been divided; and the question is raised in the Eastern District, the murder having been committed in the Western.

In the Act dividing the district, Congress had power to provide that all offenses, committed in the district before the division, should be

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tried in the Eastern District. But no such provision being made, the question is, whether the jurisdiction may be exercised in that district without it.

Since the division of the district, capital punishments have been inflicted in the Western District for offenses committed before the division. This deprived the accused of no rights which they could claim under the Constitution of the United States, or the laws of the Union. 490*] The sixth article of the "amendment to the Constitution declares that, "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."

As the State and district are connected by the copulative conjunction, in this provision, the case before us is not technically within it. The crime is alleged to have been committed within the Indian country, which the district includes, but it is not within the State. But the case appears to me to be within the policy of the provision. Nine counties of the State of Arkansas are within the district, and from which the jury to try the defendant might be summoned. This brings the case substantially within the above provision. Had the place of the murder been within one of the above counties, the constitutional provisions must have governed the case. All the rights guaranteed by the Constitution would have been secured to the criminal by a trial in the Western District; but those rights are not realized by him on a trial in the Eastern District. And that is made the place of trial because the alleged murder was not committed within the State.

In the 2d section of the 3d article of the Constitution, it is declared that "the trials of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but, when not committed within any state, the trial shall be, at such place or places as the Congress may, by law, have directed." The latter clause of this provision covers the case now before us. The crime charged was not committed within any state; but it was committed within a district, within which such offenses are to be tried, as "directed by Congress." And there seems to me to be no authority to try such an offender in any other district, or at any other place. The Act of 1894 provides that an offender, under the Act, when arrested, should be sent for trial to the district where jurisdiction may be exercised.

The punishments inflicted in the Western District of Arkansas, for crimes committed before the division of the district, were in accordance with the above provision of the Constitution and the principles of the common law, both of which are opposed to a trial of the same offenses in the Eastern District. The tribunal is the same in both districts, except the circuit judge may not be bound to attend the Western District; but the Western District includes the place of the crime, which, by the laws of England and of this country, is the criterion of jurisdiction in criminal cases. This is never departed from, where the limits of the jurisdiction are prescribed.

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*On what ground can jurisdiction be [*491 exercised in the Eastern District? Not, I presume, on the ground that the crime was committed before the district was divided. If this be assumed and sustained, the capital punishments which have been inflicted in the Western District, for similar offenses, have been without authority. The offenders have been tried, and they have had, substantially, the benefits secured by the Constitution. They have had a jury from the district, and as near the vicinage as practicable. These privileges they would not have realized had they been tried in the Eastern District. If tried in the Eastern District, the jury must have been summoned from that district, and not from the district in which the offense was committed. The considerations in favor of the Western District, as the legal place of trial, greatly outweigh, it seems to me, any that can arise in favor of the Eastern District.

There is, however, a fact which may be supposed of great weight in deciding the question; and that is, the indictment was found before the division of the district. I will examine this. It is admitted the jurisdiction was in the Circuit Court for the entire district, when the indictment was found. This gave jurisdiction; but every step taken in the cause, subsequent to the finding of the bill, is as much the exercise of jurisdiction as the finding of the bill.

The establishment of the Western District, in effect, repealed the jurisdiction of the Eastern District, as to causes of action arising in the Western District, as fully as if the law had declared, "no jurisdiction shall hereafter be taken in any case, civil or criminal, which is of a local character, and arises in the Western District." Offenses committed in that district are made local by the Acts of Congress. This is not a case where, if jurisdiction once attaches, the court may finally determine the matter. There seems to me to be no reason for such a rule in a criminal case, especially when it is opposed to the policy of the Constitution and to the principles of common law.

A case lately decided in this court may have some bearing on this question. Under the fugitive slave law of 1793, certain penalties were inflicted for aiding a fugitive from labor to escape. A number of actions were brought in several of the States—in Ohio, Indiana, and Michigan—for the recovery of this penalty; but it was set up in defense, that this penalty was repealed by repugnant provisions in the law of 1850, on the same subject, and this court so held. The actions which had been pending for years were stricken from the docket. But it may be said the repeal, in the case stated, operated on the right of action. This is admitted. And so, it may be said, the Western District was repugnant to the Eastern, so far as causes of "local actions arise in the [*492 Western District; and is not this repugnancy as fatal to the trial as the repeal of the penalty in the Act of 1793?

All this difficulty arises from an omission of Congress to make, in the law dividing the district, the necessary provision; and it appears to me that we have no power, by construction or otherwise, to supply the omission. This could not be done in an action of ejectment.

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A writ of possession, in such a case, could not be issued to the Western District on a judgment entered in the Eastern. And if such a jurisdiction could not be sustained in a civil action, much less could it be sustained in a criminal case.

If a person guilty of a crime in the Indian country, before the division, could not be indicted and tried in the Eastern District, it follows, that the fact of the crime having been committed in the Indian country can afford no ground of jurisdiction in the present case. It must rest alone, then, it would seem, for jurisdiction, on the ground that, the indictment having been found in the Eastern District, the same jurisdiction may try the defendants, and if found guilty, sentence them to be executed. This view must overcome the locality of the crime, and the right which the defendants may claim, to have a jury as near the vicinage as practicable, at least a jury from the district where the crime was committed. These appear to me to be objections entitled to great consideration. A jurisdiction in so important a case should not be maintained under reasonable doubts of its legality.

The cases referred to in the argument to retain the jurisdiction, do not, as it appears to me, overcome the objections. Numerous instances are cited where the territory of a judicial district has been changed, provision being made in the Act, that the jurisdiction should be continued where suits had been commenced. This shows the necessity of such a provision, and is an argument against the exercise of the jurisdiction, where no provision has been made. And in those cases, like the present, where a district has been changed, without any provision, as to jurisdiction, there is no exercise of it shown, in a criminal case, especially where the punishment is death.

Where jurisdiction attaches from the citizenship of the parties, a change of residence does not affect the jurisdiction. The case of *Tyrell v. Rountree*, 7 Pet., 464, seems to have no bearing upon this question. That action was commenced by an attachment, which was laid upon the land before the division of the county; and this court said, the land remained in the custody of the officer subject to the judgment of the court. An interest was vested in him for the purposes of that judgment. 493*] *The judgment was not a general lien on it, but was a specific appropriation of the property itself. And they say the division of the county could not divest this vested interest, or deprive the officer of the power to finish a process which was rightly begun.

There may be cases where counties have been divided after jurisdiction was taken in a local action, and the suit has been carried into judgment, but such cases afford no authority in the present case.

The case relied upon as in point in 4 Washington C. C., 725, the court said, "at the first or second session of this court, which succeeded the passage of the Act of 1824, which added this and other counties to the western judicial district, we were called upon to decide, whether the present action, together with some others, then on our docket for trial, together with the papers belonging to them, 726

should be sent to the Western District or retained here. After hearing counsel on the question, the opinion of the court was, that those cases were not embraced either by the word or by the obvious intention and policy of the Act."

This does not appear to be a well-considered case. The counties were annexed to another jurisdiction, and yet the court speak of "the obvious intention and policy of the Act," and on that ground entertain jurisdiction over cases pending in the former district. This was right in regard to transitory actions, but not where the actions were of a local character.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Arkansas, and on the points or questions on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion, agreeably to the Act of Congress in such case made and provided, and was argued by counsel; on consideration whereof, it is the opinion of this court, that the Act of Congress entitled "An Act to divide the District of Arkansas into two judicial districts," approved the third day of March, in the year of our Lord one thousand eight hundred and fifty-one, whereby the Western District of Arkansas was created and defined, did not take away the power and jurisdiction of the Circuit Court of the United States for the Eastern District of Arkansas, so that it can proceed to hear, try and determine a prosecution for murder, pending against the prisoner, James L. Dawson, a white man, and not an Indian, upon an indictment, found, presented and returned *into the Circuit Court of the United States for the District of Arkansas, by the grand jury impaneled for that district, upon the sixteenth day of April, in the year of our Lord one thousand eight hundred and forty-five, against said James L. Dawson, a white man, for the felonious killing of Seaborn Hill, another white man and not an Indian, on the 8th day of July, A. D. 1844, in that county, belonging to the Creek nation of Indians, west of Arkansas, and which formed a part of the Indian country annexed to the judicial district of Arkansas by the Act of Congress, approved the 17th day of June, A. D. 1844, entitled "An Act supplementary to the Act entitled 'An Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers, passed thirtieth June, one thousand eight hundred and thirty-four,'" in which cause, so pending, no trial has yet been had. And that this answer to the first question supersedes the necessity of any answer to the second question.

Whereupon, it is now here ordered and adjudged by this court, that it be so certified to the said Circuit Court.

S. C.—Hemp., 643.

Cited—1 Black., 486; 5 Blatchf., 363; 5 Dill., 388; 8 Hughes, 677, n., 679.

THOMAS KEARNEY, THOMAS JORDAN, AND CATHERINE, HIS WIFE; ANASTASIA K. THOMAS, ANNE E. K. CHEESEBOROUGH, AND HORATIO N. KEARNEY, *Appellants*,

v.

JOHN I. TAYLOR ET AL.

Partition sale of real property of infant tenants in common—bill to set aside, for constructive fraud, dismissed.

Where land was sold in New Jersey by order of the Orphans' Court of one of the counties, the conveyance was made not to the actual bidders, but to a person whom they appointed to represent them.

Afterwards, the Supreme Court of the State having decided that such a practice was irregular, the Legislature passed a law enacting that, upon proof of the absence of fraud, such deeds might be given in evidence. This cured the defect in the title.

The purchasers were a company organized for the purpose of improving the land, and in their purchase, there was neither actual or constructive fraud.

The law examined with respect to the bidding of associations at sales by public auction.

In this instance the price obtained was greater than any previous estimate of the value of the property.

There was no constructive fraud, because, according to the evidence, the guardian of the minor children and the commissioners who decided that the property ought to be sold, did not become interested in the company until some time after the sale.

The circumstance that these persons became interested in the company before the first half of the purchase money was due, is not a sufficient reason for setting aside the sale.

According to the preponderance of the evidence, the grave charge that the auctioneer who made the sale, was one of the company, is not sustained.

495*] THIS was an appeal from the Circuit Court of the United States for the District of New Jersey, sitting as a court of equity.

The bill was filed by Thomas and Horatio Kearney, and their sisters, Catherine, Anastasia, and Anne, who were the children of Edmund Kearney, deceased. The complainants were citizens of several States, viz.: Thomas and Catherine of Mississippi; Anne of Connecticut, Anastasia of Michigan; and Horatio of Ohio. The defendants were all citizens of New Jersey, and were as follows, viz.: John I. Taylor, Edward Taylor, Isaac K. Lippincott, Ezra Osborne, John Hopping, Daniel Holmes, and also the heirs of the following persons, viz.: of Leonard Walling, of John W. Holmes, of James Hopping, and of Joseph Taylor.

The bill was dismissed by the Circuit Court, and the complainants appealed.

The case was this:

On the 30th of December, 1822, Edward Kearney, then of the County of Monmouth, in the State of New Jersey, died intestate, seised in fee of a tract of land situated in that county, called Key Grove, containing 781 acres. The land bordered upon Raritan Bay, at the foot of Staten Island, for a mile or more, with water of sufficient depth for the near approach of vessels.

At the time of his death Kearney left the following children: James Kearney, born in December, 1801; Horatio N. Kearney, born in

October, 1803; John Kearney, born in November, 1805; Mary Kearney, born in November, 1808; Thomas Kearney, born in September, 1810; Anastasia Kearney, born in October, 1818; Catherine Kearney, born in June, 1816; Anne E. Kearney, born in June, 1818.

In May, 1828, James Kearney sold all his interest in the land to Daniel Holmes and John W. Holmes.

A law of New Jersey, passed in 1820 (Revised Statutes of New Jersey of 1821, page 776 *et seq.*), directs that upon application made by the heirs of a person dying seised of lands, or by any person duly authorized in their behalf, or claiming under them, a division may be ordered; and the 19th section authorizes a sale when the land is so circumstanced that, in the opinion of the commissioners, partition cannot be made without great prejudice to the owners, and upon satisfactory proof of that fact being made to the court.

On the 15th day of April, 1829, Daniel Holmes, on behalf of himself and John W. Holmes, filed a petition for partition in the Orphans' Court of the County of Monmouth, at the April Term, 1829, against the heirs of Edmund Kearney, setting forth their purchase of the undivided one seventh part of the estate from James P. Kearney; that by reason of the minority of some of the tenants in common, no division could take place by agreement, and praying the court to order a division.

At the time of these proceedings, Joseph Taylor was the administrator upon the estate of Edmund Kearney and the guardian of all his infant children who resided in the State of New Jersey.

The court granted the petition, and appointed James Hopping, Edward Taylor, and Leonard Walling, commissioners.

The commissioners took the necessary oath to perform their duty faithfully, on the 2d of June, 1829.

On the 10th of July, 1829, the commissioners reported to the court that they had caused a survey and map of the premises to be made, and that in their judgment the said premises were so circumstanced that a division thereof could not be made without great prejudice to the interest of the owners.

At July Term, 1829, the court passed an order that the commissioners should make the sale, at public auction, to the highest bidder, giving at least sixty days' notice of the time and place of such sale, by advertisements put up in five of the most public places in the county, and also in one public newspaper circulating in the same county.

In January, 1830, the commissioners reported that they had sold the land, as follows:

Lot No. one, containing 224 ¹¹ / ₁₀₀ acres, to Isaac K. Lippincott, at \$30 per acre	\$6,744.60
Lot No. two, containing 56 ¹¹ / ₁₀₀ acres, to Thomas Carhart, for \$28.25 per acre	1,598.86½
Lot No. three, containing 82 ¹¹ / ₁₀₀ acres, to Amos Walling, for \$26.75 per acre	878.78½
Lot No. four, containing 18 ¹¹ / ₁₀₀ acres, to Jonathan Tilton, at \$38.60 per acre	709.55½

Lot No. five, containing 59 $\frac{3}{4}$ acres, to Ezra Osborn, Esq., for \$22.50 per acre	1,339.20
Lot No. six, containing 56 $\frac{3}{4}$ acres, to Ezra Osborn, Esq., for \$18.25 per acre	753.18
Lot No. seven, containing 48 $\frac{4}{5}$ acres, to Isaac K. Lippincott, for \$25.25 per acre	1,223.61 $\frac{1}{2}$
Lot No. eight, containing 24 $\frac{1}{2}$ acres, to Richard S. Burrowes, for \$43 per acre	1,036.78
Lot No. nine, containing 7 $\frac{3}{4}$ acres, to Isaac K. Lippincott, for \$18.50 per acre	135.79
Lot No. ten, containing 16 $\frac{1}{2}$ acres, to Ezra Osborn, Esq., for \$11.75 per acre	194.69 $\frac{1}{2}$
Lot No. eleven, containing 59 $\frac{1}{2}$ acres, to James Sproul, at \$33.50 per acre	1,980.85 $\frac{1}{2}$
497*] Lot No. twelve, containing 26 $\frac{3}{4}$ acres, to Thomas J. Wall- ing, for \$33 per acre	858.56
Lot No. thirteen, containing 49 $\frac{1}{2}$ acres, to Amos Walling, for \$29.50 per acre	1,457.80
Lot No. fourteen, containing 40 $\frac{3}{4}$ acres, to Joseph Carhart, for \$7 per acre	282.45
Lot No. fifteen, containing 61 $\frac{3}{4}$ acres, to Horatio Kearney, for \$12.25 per acre	751.41

\$19,941.19

Amounting, in all, to the sum of \$19,941.19, the one half of which, by the conditions of sale, was made payable on the first day of April next, when deeds were to be made, and possession given to the purchasers; the other half was made payable in one year, from the first of April next, without interest, by the purchasers giving approved security for the payment thereof.

In witness whereof we have hereunto set our hands and seals, this twentieth day of January, in the year of our Lord one thousand eight hundred and thirty.

JAMES HOPPING,	[L. s.]
EDWARD TAYLOR,	[L. s.]
LEONARD WALLING.	[L. s.]

The court ratified the sale, and ordered the commissioners to execute deeds to the purchasers accordingly.

The lots numbered 5, 6, 7, 8, 9 and 10, were the subjects of the present suit.

On the 1st of April, 1830, the commissioners executed a deed for the above lots to John I. Taylor, reciting that they did so at the request of Osborn, Lippincott, and Burrowes.

About the time of the sale, in the preceding November, a company was organized, under circumstances which will presently be explained, for the purpose of purchasing the above lots and laying out a town upon them. The company consisted of the following persons, viz.: Joseph Taylor, administrator and guardian; John I. Taylor, his son; Leonard Walling, commissioner; David S. Bray; Ezra Osborn, son-in-law of Joseph Taylor; James Hopping, commissioner; John Hopping, his brother; Primrose Hopping, another brother and auctioneer; Isaac R. Lippincott.

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The time, manner and object of the formation of the company are thus stated, in the answers of some of the defendants:

And the said John I. Taylor, for himself, further saith, that some time after the said sale, and before the deed to him from *said [*498 commissioners was executed, but the precise time when, this defendant cannot now remember, he bought of Ezra Osborn the share of Richard C. Burrowes, by verbal agreement, the said Osborn having, as this defendant understood, bought out the said Burrowes, and he, the said J. I. Taylor, paid said Burrowes \$40 for it, as an advance thereon. And the said John I. Taylor further says, that he has no recollection of anything else relating to the purchase of said Key Grove property, until, as he thinks, the meeting of the surveyors to lay out roads, in February, 1830, when it was proposed, by some one interested, that the deed for lots 5, 6, 7, 8, 9 and 10, should be made to the said J. I. Taylor, as he was then young and unmarried, for the convenience of transfers and to save expense. And this defendant, in further answering, says, that he does not know, of his own knowledge, how the said Ezra Osborn, David S. Bray, John, Primrose, and James Hopping, Isaac K. Lippincott, Leonard Walling, came to [be] interested in the property, but believes, and has always so heard and been informed, that on the second day of the sale, viz.: the 4th November, 1829, Daniel Holmes, who was anxious, and whose interest it was to make the property bring as much as possible, prevailed upon several gentlemen to join for the purpose of bidding for lot No. 8, aforesaid; and that John Hopping, Ezra Osborn, Richard C. Burrowes, Isaac K. Lippincott, Horatio N. Kearney, Septimus Stephens, and Primrose Hopping, joined for that purpose; and this defendant believes, and so charges the truth to be, that the only object of said Holmes in getting up said company was to increase the price of the property by creating competition; and that, but for the said company, the lot No. 8 would have been struck off to persons interested against improvement in that neighborhood, for about \$29 per acre. And this defendant, the said John I. Taylor, in further answering, says, that said lot number 8 was a poor, barren, sandy soil, with wood of but very little value upon it, scarcely of value enough to pay for its own cutting, and worth but little for agricultural purposes; and that, in the opinion of this defendant, no other plan could have been hit upon which would have made the said lots 5, 6, 7, 8, 9 and 10, bring as much as they did bring. And the said John Hopping, in further answering for himself, says, that so far as he is himself concerned, he did not combine with any person whatever to bring about a sale of the Key Grove property, nor does he know or believe that anybody else did; that this defendant did not attend the said sale on either day of the sale, and previous to the said sale he did not know and had not heard that any company had been or would be formed for the purchase or sale of said Key Grove property; nor had he any idea or belief *that the said Key Grove prop [*499 erty could be converted into a seaport town. And the said John Hopping further says, that in the evening of the first day's sale, after the

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adjournment, or the morning of the next day, and before the sale commenced, in a conversation between this defendant and his brother, James Hopping, the said James Hopping told him that Daniel Holmes and Septimus Stephens, talked of making up a company to buy the fishing point lot, viz.: No. 8. This defendant then asked said James Hopping if he was going to take a share, to which the said James replied that he could not, as he was a commissioner; said James then said he expected that this defendant could have a share if he wished. This defendant then told him to tell Daniel Holmes that he would take a share; and this defendant, the said John Hopping, expects that his brother did so report him. And the said John Hopping, for himself, says, that the said James Hopping had no interest in said purchase of lots No. 5, 6, 7, 8, 9 and 10, at the time of said sale, nor until about three months after, when he consented to come in and advance a part of the purchase money, at the instance and request of this defendant and his brother Primrose. And this defendant, in further answering for himself, says, that neither the said commissioners, nor the said guardian, nor any or either of them, to the best knowledge or belief of this defendant, were interested, directly or indirectly, in said purchase at the time thereof, nor had he ever heard, until after the reading of the bill in this cause, that there had been any combination, unlawful or otherwise, to bring about a sale of said Key Port property. And these defendants, in further answering, say, that the said sale was in every respect fair, as far as these defendants know, and as they verily believe, and that they never heard of any allegation to the contrary, until about the time of the commencement of the suits in ejectment referred to in the bill of complaint; and this defendant, the said Ezra Osborn, answering for himself, absolutely denies that previous to said sale he combined with any person whatever to procure a sale of said property, nor did he ever know, hear, or believe, that such combination had been entered into by any person or persons whatever, nor did he know or believe at the time of said sale, nor does he now know or believe, that the said commissioners and guardian, or either or any of them, were at the time of said sale interested, directly or indirectly, in said purchase. And this defendant, Ezra Osborn, in further answering, says, that his object in attending said sale was to bid for lot No. 1, and that he did bid for it until it got up, in the opinion of this defendant, to its full value, when this defendant stopped bidding, and Isaac Lippincott bidding higher, it was struck off to the said Lippincott just before dinner on 500*] the *second day of sale. And this defendant, in further answering, says, that according to his best memory and belief, said lot No. 1 was adjourned on the first day of sale at \$23 per acre on this defendant's bid, and that he became acquainted with said Lippincott for the first time at said sale.

Lippincott, in his answer, thus describes the formation of the company:

And that this defendant, inasmuch as he had then become the purchaser of lot No 1, and it was evidently his interest that lot No. 8 should not fall into the hands of persons whose in-

terests were averse to the Key Grove property, consented to be one of several others to join and buy said lot No. 8; that said Daniel Holmes then proceeded to hunt for others to join in the said purchase, and left us for that purpose, as he said; after a short time the said Holmes returned, and reported that he had found several who would join with us in buying said lot No. 8, and mentioned the names of Osborn and Burrowes; and in a consultation between the said Stephens, Holmes, Burrowes, Osborn, and this defendant, it was then agreed that lot No. 8 should be purchased on said joint account, and that said Burrowes should be the bidder.

And this defendant charges the truth to be, that said Holmes did not speak to either of the said commissioners or guardians to join in said purchase, or if he did, that they declined it, and that there was no understanding, directly or indirectly, that said commissioners or guardians should be interested in said purchase; or if there was, or if said Holmes spoke or agreed with either or any of them, this defendant expressly avers that it was without the knowledge and consent of this defendant.

And this defendant further says, that he was induced to join in said purchase by the said representation of said Holmes and Stephens, and that he did not want, and had no intention of bidding for or buying said lot No. 8, nor did he want it on his individual account, and should not have joined in it but for the said solicitation of said Holmes and Stephens.

And this defendant in further answering says, that according to the best of his recollection and belief, that upon said sale being re-opened in the afternoon of said 4th November, 1820, said Burrowes bid for said lot No. 8 in pursuance of said agreement, and that it was struck off and sold by the said commissioners, openly and fairly to the said Burrowes, for the said sum of \$43 per acre, as the highest bidder.

And as this defendant then thought and believes, and as he still thinks and believes, the said Burrowes was the only person then known to the commissioners as the purchaser; and this defendant charges that he was the only person legally responsible *for the purchase money, and amply able to pay the same.

Holmes, in his answer, thus speaks of it: And this defendant in further answering says, that after he got upon the ground, upon the second day of sale, he went to work, by going first to one person and then another, to get up a company to bid for said lot No. 8, in opposition to the persons who it was understood were bidding from Middletown Point; and finally, after lot No. 1 was struck off to I. K. Lippincott, and with considerable difficulty, the following persons agreed verbally to join with this defendant in purchasing said lot No. 8: Isaac K. Lippincott, Richard C. Burrowes, Horatio N. Kearney, Ezra Osborn, Septimus Stephens, and he thinks Primrose Hopping. And this defendant says that, after the adjournment of the first day of sale, he spoke also to James Hopping, one of said commissioners, to be interested, this defendant not then knowing that there was anything illegal in his becoming so, but the said James Hopping absolutely refused on account of his being a commissioner; this defendant then requested him to speak to

his brother, John Hopping, when he went home, and see if he would not come in. And this defendant says that some one, either James or Primrose Hopping, reported next day that John Hopping would come in, and he was accordingly considered as one of the company at the sale.

And this defendant in further answering says, that said company was got up by this defendant on the spur of the occasion, and for no other purpose whatever but to create competition and make property bring more, and extended originally only to lot No. 8. And this defendant in further answering says, that neither James Hopping, Leonard Walling, [n] or Joseph Taylor, were [was] at the time of the sale a part of said company, or interested in any way in the purchase of any part of said lots 5, 6, 7, 8, 9 and 10.

The evidence of Primrose Hopping was as follows:

Primrose Hopping being sworn, says: I was the crier of this vendue. I struck off No. 8 to Richard C. Burrowes. He was the highest bidder. William Walling and Richard C. Burrowes were the only two bidders some considerable time before it was struck off; one stood on my right hand and the other on the left. William Walling was on the left hand and Richard C. Burrowes on the right. They were bidding twenty-five or fifty cents per acre. William Walling was last bidder, except Richard C. Burrowes. Burrowes bid openly, and Walling by a wink. I had a timepiece, and gave notice that if I had not another bid I would strike it off to the highest bidder; and after I got a bid from Burrowes, I immediately [502*] turned to Walling *to get a bid, and did this repeatedly; and dwelt an unusual time to get a bid, but could get none. I dwelt because he looked at me as if anxious, but never bid; and finally I struck it off to Richard C. Burrowes. I gave fair warning that I was going to strike it off. I think it was put up at the first day, but don't recollect the amount it bid up to. I had no instructions from commissioners to strike it off to Burrowes. I had instructions from Edward Taylor several times not to dwell so long upon the property. The whole farm was struck off to the highest bidder, to my certain knowledge. Neither of commissioners or Joseph Taylor were interested in this property at the time it was sold. I got the highest possible price for each section of the property. It was much better to have the property sold than partitioned. I did not consider myself interested in this property at the time it was struck off. I think Richard C. Burrowes spoke to me about it. I don't recollect what I said. I don't recollect what the precise words were. I don't think I gave him a decided answer.

I think Burrowes spoke to me on the second day of sale. I don't recollect that he told me who were concerned in the company. I can't say if any of the company lots had been sold when Burrowes spoke to me. I am not sure if Burrowes said it to me, or if it was the common talk to try to make a landing there. When Burrowes asked me, I think I did not tell Burrowes I would not join. I extended the time several times in the sale of No. 8. I gave further time after Burrowes' last bid. I think

Walling was a little farthest off. I did not know Van Pelt as a bidder. Van Pelt claimed the bid. I requested the property be set up again. That was my custom. It was referred to commissioners, and they decided that it was stricken off fair and should not be set up again. I did have an interest in company property afterwards. I never paid any of the purchase money. James, and John, and self had two thirds. They were my two brothers. My share was sold to Capt. Vanderbilt with the rest in 1839. I depended on my brothers. They made payments. Brothers received purchase money, and accounted to me at our settlement after. There was a balance paid me. We had other dealings. I can't remember when I came in partner with them. I can't say whose share of these lots James and John got. I don't know which of my brothers I got the share of, John or James. I don't know when, or if before deed to John I. Taylor. I have no knowledge when I came in a partner. John I. Taylor gave me some land in exchange for lot No. 17, and some money. He and Joseph Taylor gave me $7\frac{1}{2}$ acres back, next to Vandine's. The trade was made several years ago, before the commencement of suit, &c., &c., &c.

*In April, 1830, twenty-four building [*503] lots were laid out upon part of lot No 8, sixteen of which were distributed in severalty amongst the members of the company, and the residue left to be sold by John I. Taylor for their benefit. Other measures of improvement were adopted which it is not necessary to state particularly.

In the case of *Doe v. Lambert*, 1 Green's Law Reports, 182, the Supreme Court of New Jersey decided, that a deed made by the commissioners in partition proceedings to any other person than the one reported as purchaser, was void.

In consequence of this decision, the heirs of Edmund Kearney instituted actions of ejectment in the Circuit Court of the United States for the District of New Jersey, in order to recover the property; whereupon, the company applied to the Legislature for relief.

In March, 1841, the Legislature passed an Act which recited that deeds were sometimes made to other persons than the reported purchasers, and then declared as follows:

"Sec 1. Be it enacted by the Council and General Assembly of this State, and it is hereby enacted by the authority of the same, that, upon proof being made to the satisfaction of the court or jury before whom any such deed or conveyance may be offered in evidence, that the lands or real estate therein mentioned were sold fairly and without fraud, and that such deed or conveyance was made and executed in good faith, and for a sufficient consideration, and with the consent of the person or persons reported to the court as the purchaser or purchasers, the said deed or conveyance shall have the same force and effect as though the same had been made and executed to the purchaser or purchasers reported to the court."

In October, 1841, the bill in this cause was filed by heirs of Edmund Kearney, charging a fraudulent combination between Daniel Holmes, Joseph Taylor, Leonard Walling, James Hopping, John I Taylor and others named in the bill, for the purpose of bringing

about a compulsory sale of the Key Grove estate, with a view to establishing a seaport town on a part thereof; that, to that end, Holmes made the purchase of James P. Kearney, instituted the proceedings in partition, and, through the fraudulent co-operation of Joseph Taylor, the guardian, and Leonard Walling and James Hopping, two of the commissioners, and Primrose Hopping, the crier, and others confederating with them, wrongfully and fraudulently brought about, under pretext and color of law, a sale of the entire estate, under the proceedings in partition. The bill makes a case of fraud in fact, as well as of fraud in law, growing out of the fiduciary relations which the guardian and commissioners **504***] and auctioneer *respectively sustained to the estate and to the heirs to whom it belongs. The prayer is for an account of the proceeds of all wood and timber cut from the six lots conveyed by the commissioners to John I. Taylor; for an injunction to restrain waste; that the conveyance to John I. Taylor, and the sale of these lots by the commissioners, be declared void; and for other relief.

Extracts from the answers of the principal defendants have already been given.

In April, 1842, the trial at law of the ejectment came on before Judges Baldwin and Dickenson; and the court held that, under the provisions of the Act of 1841, the defendant must prove that there was no fraud of any kind in the sale, in order to avail himself of the provisions of the Act; but the jury not agreeing, no verdict was rendered in the case.

Whilst the present suit was pending, viz.: on the 14th of February, 1844, the Legislature passed a private Act, entitled "An Act to confirm the sales of the real estate whereof Edmund Kearney, deceased, late of the County of Monmouth, died 'seised.'"

This Act recited the circumstances of the sale, and that doubts had arisen respecting the title to the lots, and then declared:

"Section 1. Be it enacted by the Council and General Assembly of this State, and it is hereby enacted by the authority of the the same, that the several deeds, so given by the said commissioners for the said several lots, shall be deemed and taken, and the same are hereby declared to be valid, and effectual in law, to convey the estate therein and thereby intended to be conveyed; and that the said deeds, or any of them, and all subsequent conveyances of the said estate, or any part thereof, shall not be impeached in any court whatever for any such alleged interest in the said commissioners, or any of them, in the property so sold by them, as aforesaid, or for any alleged defect or informality in the execution of the powers of the said commissioners, or in the proceedings of the said Orphans' Court; and that the said deeds, or any of them, shall not be invalidated or impeached upon any other ground than that of absolute, direct, and actual fraud on the part of the said commissioners."

The defendants then filed a supplemental answer, averring that there was no fraud, and praying to be allowed the benefit of this Act; and also filed a cross bill, the proceedings under which it is not material to notice in this report.

In September, 1851, the Circuit Court decreed that the bill should be dismissed with

costs, from which decree the complainants appealed to this court.

*It was argued by *Messrs. Converse* [*505 and *Ewing* for the appellants, and by *Messrs. Dayton and Johnson* for the appellees.

The arguments of the counsel on both sides were directed, in a great measure, to an examination of the facts in the case, as disclosed in the answers and evidence.

The points of law for the appellants were the following:

I. That the courts of the United States, having full jurisdiction of the case conferred on them by the Constitution, and the case being actually pending in the Circuit Court, the Legislature of New Jersey had no power, by private act or special edict, enacted or pronounced while the case was so pending, to interfere with or to control the decision of the United States court therein. That it could not itself directly pronounce or dictate to the court what judgment it should pronounce in the case; nor could it, by changing the principles of law, or the rules of evidence governing it, by such special edict, indirectly make or control the judgment or decree of the court; and that, such being the purport and end of the Act of February 14, 1844, the same is void.

II. That there was actual fraud by the commissioners in the execution of their trust, and that, if we admit the special Act of February 14, 1844, to be valid, the sale and conveyance, made by the commissioners to themselves and their partners, are void under its provisions.

III. That material recitals, in the preamble to that Act, appear to be false; and it being a private act, and the Legislature deceived, and induced by false pretenses to pass it, it is void.

I. We contend, then, that the Act of February 14, 1844, is void; and,

1st. Because it violates the 22d article of the constitution of New Jersey, which declares that the common law of England shall remain in force in that State, until altered "by a future law of the Legislature."

This Act is not a law, but a mere legislative edict interposed between two parties litigant, directing what manner of decree shall be made between them—a taking the property from one and giving it to the other. To be a law, it must be general—a rule affecting property, generally, in like circumstances. This Act is in violation of the principles of the common law, and, not being itself a law, is therefore void. (1 Bl. Com., 44, 188; *Taylor v. Porter*, 4 Hill, N. Y., 140; *Regents of University of Maryland v. Williams*, 9 Gill & Johns., 412; *Erwine's Appeal*, 16 Penn. State, 257; *McNutt v. Bland*, 2 How., 16, 17; *Webster v. Cooper*, 14 Id., 508; *Proprietors of Kennebeck v.* [*506 *Laboree et al.*, 2 Greenl., 288-295; *Attorney-General v. Stevens*, 1 Saxton's N. Jer., 369, 380; see further authorities, *post*, p. 28.)

2d. It also violates that clause of the same article of the constitution of New Jersey which declares, "that the inestimable right of trial by jury shall remain confirmed, as a part of the law of this colony, without repeal, forever." (*Scudder v. Trenton Delaware Falls Co.*, 1 Saxton, N. Jer., 696, 726, 727; *Arrowsmith v. Burlingim*, 4 McLean, 489; *Embury v. Conner*, 8 Com-

stock, 511, 516, 517; *Benson v. Mayor, &c.*, 10 Barb. S. C., 223, 224; *People v. White*, 11 *Id.*, S. C., 26, 30; *Parkham v. Justices*, 9 Ga., 341, 349-351; *McLeod v. Burroughs*, 9 *Id.*, 213, 215, 216; *Vanzant v. Waddle*, 2 Yerg., 260, 269-271; *Walley v. Kennedy*, 2 *Id.*, 554, 556; *Jones v. Perry*, 10 *Id.*, 59, 71, 72; *Holden v. James*, 11 Mass., 396; *Hake v. Henderson*, 4 Dev. N. Car., 15; 2 Kent, 1-13 and note *b*, p. 13, and note, p. 4.)

3d. This Act, not being a law, is not to be regarded as a rule of decision in the courts of the United States, under the provisions of the 34th section of the Judiciary Act, even "in a trial at common law."

4th. It violates the 2d section of the 4th article of the Constitution of the United States, which declares, "that the citizens of each State shall be entitled to all the privileges and immunities of the citizens in the several States."

This Act is a special edict against citizens of States, other than New Jersey, divesting them of their inheritance, or laying down special rules applicable to their estate only, which may have that effect. If the Act were general against all parties, citizens of other states, who might hold property so circumstanced, it would be clearly unconstitutional. We think the objection loses none of its force because the Act is special, and applied to a single case. It declares that the property of these parties, who are citizens of other states, shall not be entitled to the protection which the laws of the State extend to the property of its own citizens. (4 Johns Ch., 430.)

5th. It is against the spirit, if not the letter, of the 2d section of the 3d article of the Constitution of the United States, which gives to the courts of the United States jurisdiction in all cases "between citizens of different states."

The national tribunal would be, in effect, ousted of its jurisdiction, and the citizens of other states deprived of its protection, if the State Legislature could interpose, pending the case, and by special edict, pronounce a decree, or lay down new principles of law and new rules of evidence for that case alone, which would dictate to and control the court in the decision. [507] We should pronounce. This would defeat the end and purpose of this provision of the Constitution. For everyone is aware that the citizens of other states are much safer from injustice and wrong where their rights are adjudicated by the judiciary, than the Legislature of a state. (*United States v. Peters*, 5 Cranch, 15; *Ogden v. Blackledge*, 2 Cranch, 194; *Snydam v. Broadnax*, 14 Pet., 67, 74, 75; *Rhode Island v. Massachusetts*, 12 *Id.*, 751.)

6th. The right to pass an Act such as this is inconsistent with a republican, constitutional government, or any government with limited powers, for it deprives the citizen of one of his absolute rights—the possession and enjoyment of property. It is admissible only in a purely Asiatic despotism. (*People v. Supervisors of Westchester*, 4 Barb. S. C., 64; *Norman v. Heist*, 5 Watts & Serg., 171; *Bumberger v. Clippenger*, 5 *Id.*, 311; *Ervine's Appeal*, 16 Penn. State, 257.)

II. We contend that there was actual fraud by the commissioners in the execution of their trust; and if we admit the special Act of February 14, 1844, to be valid, the sale and con-

veyance made by the commissioners to themselves and their partners are void.

A trustee who becomes a purchaser of the trust estate is, in the estimation of law, a fraudulent purchaser; and because of the temptation and opportunity to commit fraud, and the ease with which he can cover it from detection, such purchase is of itself a fraud, and a title procured under it is void, at the option of the *cestui que trust*.

The special Act of February 14, 1844, declares that this sale and the deeds made under it, "shall be valid in law," unless "impeached for absolute, direct and actual fraud." It does not, however, require this court to change the rules of evidence applicable in all like cases, where the question is, whether there was or was not actual fraud on the part of the trustee in dealing with the property and funds of his *cestui que trust*. The special Act merely relieves the trustee from the judgment of law consequent upon their purchase. It leaves all incidental questions open, to be dealt with according to general principles.

And the trustees stand in an inauspicious relation to the property; they are vendors of the estate of others, and they are purchasers for themselves; a court of equity will, therefore, examine their acts with jealous caution, and in dubious matters it can allow them the benefit of no favorable presumption. (*Michoud v. Girod*, 4 How., 503.)

And if the trustees have resorted to artifice or falsehood to conceal their interest; or if, contrary to their duty, they have retained the trust fund, and use it for their own benefit or that of their friends; or if they combined with others to prevent investigation, *or to [508] postpone accountability, they will be held chargeable with actual fraud.

1st. Two of the commissioners, Leonard Walling and James Hopping, were undoubted partners at the time the sale was reported to the court, if not so by a secret understanding among themselves on the day of sale. But to cover and conceal their interest and that of the guardian, Joseph Taylor, they reported to the court that Ezra Osborn was the purchaser of lots 5, 6, and 10; Isaac K. Lippincott of lots 7 and 9, and Richard S. Burrowes of lot No. 8; which report was false.

And in the deed which they executed to John I. Taylor, April 1st, 1830, they recite that Osborn, Lippincott and Burrowes, bid off lots 5, 6, 7, 8, 9 and 10, for John I. Taylor, as his agent, which recital was false, and together with the conveyance to him, intended to conceal their interest in the purchase.

This falsehood and concealment was for their own advantage. Had they reported the sale and the parties in interest truly to the court, it could not have been confirmed.

2d. They retained the trust fund for a long time in their hands, and used it for the benefit of themselves and their families.

No costs appear to have been taxed in the case; and the amount is left to conjecture. We suppose that \$341.19 will be more than sufficient to cover them. This deducted will reduce the net proceeds of sale to \$19,600.

(The counsel then went into a long examination of the state of the accounts, which is omitted.)

3d. In order the better to secure to themselves the use of the trust fund, and to enable them to purchase and improve a portion of the estate with its proceeds, the commissioners associated themselves, and combined with Joseph Taylor, the guardian of four of the minor children and heirs, and through his connivance and participation avoided investigation and postponed accountability.

The record shows that, from April 1st, 1830, to April 1st 1831, there was in the hands of the commissioners and guardian, of the funds of the estate \$ 6,025.29
From April 1st, 1831, to April 1st, 1832 10,017.56

There is no evidence in the record that any part of this fund passed out of the hands of the members of the partnership prior to the 7th of April, 1837. The record shows that there did certainly remain in their hands, until the last named date, at least \$7,994.59.

The estate was thus made to pay for itself and improve itself; and it is not surprising that one of the partners (Primrose Hopping) testifies that he never paid anything on his purchase, and that John Hopping does not know when, where, or to whom he paid.

509*] *It is not at all probable that either of the commissioners, or their brothers, or the guardian, his son or son-in-law, ever paid a dollar towards their purchase.

The proceeds of the estate could not have been thus held to pay for the estate without combination between the commissioners and guardian.

4th. We will endeavor to show, that the report of the commissioners that the premises could not be divided without great prejudice to the interest of the owners was untrue, and induced by a purpose to possess themselves of a portion of the property. There were seven shares. The commissioners divided the property into fifteen parts before making their report that it could not be divided.

5th. There was a controversy at the bidding which was first decided by Primrose Hopping, a secret partner; and afterwards, on appeal, by the commissioners (two of them, as we think we have shown), also secret partners. It was decided in their own favor.

III. The recitals of the Act of February 14th, 1844, show that the Legislature was deceived and passed the Act under a mistake as to the facts. (*McIntire Poor School v. Zanesville Canal and Manuf. Co.*, 9 Hammond's Ohio, 289, 290; 2 Bl. Com., 345, 346.)

1st. The Act contemplates that the deed which it confirms had been made to a party to whom the interest in the property had been transferred for a valuable consideration—not to a person who received the conveyance to conceal the interest of others.

The combination between the commissioners and the guardian to unite in the purchase of the estate—a combination fraudulent in itself—was not made known to the Legislature.

3d. The sale and conveyance by the commissioners were not made in good faith. There were *suppressio veri* and *suggestio falsi* in all their several papers relating to both.

4th. The purchase money was not honestly and fully paid to the persons entitled.

The counsel for the appellees bestowed a great deal of attention upon the Act passed by

the Legislature of 1844. Having given the views of the opposite counsel upon this point, it is proper to state also the views taken by the counsel for the appellees.

The Act of March, 1841, required proof, to the satisfaction of the court or jury, that the lands were sold fairly, and without fraud—that the deed was executed in good faith, for a sufficient consideration, and with the consent of reported purchasers.

The obvious meaning of this Act, as we contended, was actual *fraud, actual good [*510] faith. It was so understood by the Legislature, and so understood by the remonstrants, who opposed it to the last.

Yet Judge Baldwin ruled, in effect, that our condition was made worse rather than better by this Act. He said, first, that the Act was a legislative recognition of *Doe v. Lambert*; second, that we must convince both court and jury that there was no fraud; third, that the Act did not designate the character of fraud, which was to affect such deeds; that in consequence, all fraud, actual or legal, would vitiate the deed; that if the commissioners were interested in the sale (before their duties were discharged), however innocent or ignorant, or however large the price and fair the sale, it was a fraud in law, and vitiated the deed.

This opinion of Judge Baldwin, involved a necessity for further legislation. Notice of application for a private law, was published six weeks in the Monmouth Democrat (in the county where the lands lie), under a rule of the house. The bill, after such notice, was introduced and passed into a law, 14th February, 1844.

First. Does that Act conflict with the Constitution of New Jersey or the United States?

Second. Was there "absolute, direct and actual fraud on the part of said commissioners?"

Another point is made by the answer to the cross bill, to wit:

Third. Was the Act of 1844 a fraud on the Legislature, and can it be avoided for that cause?

1. Does the Act of 1844 violate the Constitution of New Jersey?

The Act is purely remedial. It relieves against a technical exception, to wit: the making of a deed to a person other than the bidder; and it relieves from a legal or constructive fraud (if there be any), though not from actual fraud. It is important to remember that even if the commissioners did become interested (which is expressly denied) the deed was not void, but voidable only by the heirs, and them only. (*Den v. McKnight*, 6 Hal., 386.) And equity even then would put them on terms.

Our Constitution, July 2d, 1776, gives plenary powers of legislation. Nothing is reserved from their power except the rights of conscience and trial by jury.

New Jersey had no bill of rights. Her constitution did not even separate the legislative and judicial departments of government. There was no provision against interference with vested rights or against retrospective laws. (1 Kent's Com., 448; 3 Story on Cont., 266; *Bennett v. Boggs*, 1 Bald. C., 74; *Bona-partie v. C. & A. R. R. Co.*, *Id.*, 220.) Under her constitution of 1776 her *courts and [*511] jurists have even held her power of legislation

absolute, as of British Parliament. So much of the common and statute law of England was adopted as theretofore in use in the province, and until changed. (Sec. 22 of Constitution of 1776.)

The Act of 1844 did not violate the common law. Private acts are a common law assurance or conveyance. So treated in British legislation. (5 Cruise Dig., p. 1 to 15; title "Private Acts.") It shows that Parliament legislated by private acts as extensively as we do.

But if the common law were otherwise, the constitution of New Jersey adopted so much thereof only as had been in use in the province. This principle had not been in use.

Where a power to legislate and cure defects has been long exercised, as in the past history of New Jersey, it is the strongest evidence of its existence. (*Briscoe v. Bank of Kentucky*, 11 Pet., 257; *State v. Mayhew*, 2 Gill, 487.)

Commencing after the surrender by the proprietors of New Jersey of the powers of government in 1703, we have a series of these remedial acts of the most extended character.

The following public Acts are still on the statute book.

(Then followed a reference to fifty-nine private Acts.)

This long list of private Acts shows the constant exercise of legislative power over wills, deeds, partitions, trusts and other cases. They do not cure the evidence merely, but in many cases make the law to meet the case; affecting legal interests vested in minors, married women and others, in various forms and without assent. I may add here that all the adjoining States and Congress itself has passed many such remedial acts, confirming land titles, &c. (14 Pet., 353, 383.)

8. The restriction in the constitution in behalf of trial by jury is not violated. The object of this Act was to cure a mere legal fraud (if any), not that actual fraud, or fraud in fact, of which the jury is the judge. It determines a principle, not a fact, and it leaves trial by jury as it was.

Further, "trial by jury," spoken of in that constitution, refers only to such trial by jury as had been theretofore practiced in the colony. It is evident, from previous as well as subsequent legislation hereinbefore referred to, that trial by jury must have been ever held in this colony, subject to such power of legislation. There are many cases of civil right where trial by jury is directly taken away; as in appraisement of lands taken for public purposes; it was so before the adoption of the Constitution of 1776. It was so under the proprietary government. (Leam & Spi., 440.) Also under the royal government. (Allison's Laws of New Jersey, 273, sec. 3.) Also since the constitution of 1776. (Saxton Ch., 694; *Scudder v. Trenton Delaware Falls Co.*, and cases cited there.)

512*] 4. This law does not encroach on the Judicial Department (if it shall be thought that by the theory of our government, without constitutional provision, these departments are distinct). The Act does not declare what the law was theretofore, but what it shall be in future, and it applies such law to existing cases, or in other words, affects existing rights. It comes back to the same question, viz.: the

power of the Legislature as respects rights vested in law, though subject to certain equities. It is not a judicial act to rectify a bad sale. (*Wilkinson v. Leland*, 2 Pet., 660.)

All that class of laws which are held void as encroachments on the judicial departments of government, are aside the question. But aside from this, where there is no constitutional restriction, as in New Jersey, the Legislature may, in some qualified degree, exercise judicial power, &c. 2 Root, 350; 8 Dall., 386; 8 Greenl., 334, and the Acts hereinbefore cited, show that New Jersey has always done so. There is nothing in the Constitution of the United States against it. (3 Story on Cont., 266, 267.)

5. The next and a principal point is, as to the question whether the act conflicts with the Constitution of the United States. Does it destroy the obligation of a contract.

All else ends in arguments looking to the propriety of such special legislation.

The object of this law is not to disturb or impair contracts, but enforce them. The commissioners who sold, were the agents of the court. They sold and received the purchase money in full, and made a deed. This law is to enforce that contract. It confirms existing rights only in favor of the purchaser, who paid his money.

The heirs became seised, it is said, by reason of the defective character of the proceedings; but such seisin was subject to an equity, which this act recognizes and enforces. (1 Kent's Com., 455; *Goshen v. Stonington*, 4 Conn., 209; *Langdon v. Strong*, 2 Vt., 234; 3 Story on Cont., 267; *Underwood v. Lilly*, 10 Serg. & Rawle, 97; *Beade v. Walker*, 6 Conn., 190; *Booth v. Booth*, 7 Ib., 350; 3 McLean, 212; 7 Blackf., 474; 8 Mass., 472-479; *Ib.*, 360; 3 Harr. & J., 230; 6 Gill & J., 461; 3 Scammon, 443.)

A court of equity often exercises this power in favor of him who pays the purchase money. This law does no more. It only says, a deed made by request of the purchasers to John I. Taylor, as their agent, shall be good.

Legislation often does what a court of equity may do; and to control property of infants, and order sale of their estates and deeds therefor, is or was of constant occurrence. (See Acts hereinbefore cited, and 15 Wend., 436; 20 Wend., 365.)

*There were many such acts before [*513 the adoption of the Constitution of the United States; and that instrument did not mean to destroy remedial State legislation. We must look to the history of the times for its meaning, if doubtful. (*Rhode Island v. Massachusetts*, 13 Pet., 557.)

The Supreme Court of the United States has repeatedly held such acts valid, and that, too, even after judgment. (*Satterlee v. Mathewson*, 2 Pet., 380; *Wilkinson v. Leland*, 2 Ib., 657, 661; *Caldar and Wife v. Bull and Wife*, 3 Dall., 386; *Watson et al. v. Mercer*, 8 Pet., 98, 108; *Charles R. Bridge v. Warren Bridge*, 11 Ib., 420; *Watkins v. Holman*, 16, Ib., 62; 3 Story's Com., on C., 266, collects cases up to 2 Pet.; *Bennett v. Bogs*, Bald., 74; *Fletcher v. Peck*, 6 Cranch, 67, 134.)

Dicta in this case reviewed in later cases above cited.

Second Point. Was there "absolute, direct

and actual fraud on the part of said commissioners?"

Outside of the pleadings, this had been heretofore scarcely pretended. The evidence is all the other way.

The charges of fraud in the original bill are of the grossest character. The answers, which are directly responsive, are evidence.

Edward Taylor is the only surviving commissioner. He has answered fully, and been likewise sworn as a witness. He denies all fraud on the part of the commissioners, and says the property brought more than it was worth, in his judgment, and more than it would bring in the same condition at that time (April, 1844).

The company who bought the lots in question, were Daniel Holmes, Ezra Osborne, Isaac K. Lippincott, Richard C. Burrowes, Horatio N. Kearney, Septimus Stephens.

They all answer, expressly denying all fraud, except Stephens, who declined his share, and died before any question. Horatio N. Kearney was the brother and one of the heirs, and has answered, disclaiming any knowledge of fraud at the time.

The answers and evidence show, in brief, this state of facts.

Edward Kearney died in 1822. His whole personal estate was but \$1,080.33. His real estate was 781 acres of light sandy land, 481 of which only were cleared—which had been in possession of himself and ancestors for many years.

In 1829 there were living six children, I think, interested in the estate, of whom three or four were minors, and three of these minors were girls, with no means of support.

One of the children had sold his entire share (one seventh) to Daniel Holmes, for \$1,600.

The highest price any witness has put on the whole real estate was \$15,000. It rented for many years prior to the sale for \$260 to \$300 only.

514*] *Holmes applied for a partition, and commissioners having reported it could not be divided without prejudice, they were ordered to sell.

The laws of New Jersey required only that the commissioners should advertise in one newspaper in the county where the lands lie. They did, in addition, advertise in two newspapers in the City of New York, and had 100 large puffing handbills set up, showing the advantages of the property. There was a large attendance on the sale, and the property brought \$19,941.19.

The money was paid, and the heirs have had the benefit of it.

Every witness who had been examined says the sale was fair, and the price much exceeded public expectation, and was more than Horatio Kearney, one of the heirs, said it was worth.

The judgment of the Company, who bought lots 5 to 10, inclusive, may be gathered from the disposition they made of their shares at different times afterwards. Holmes, the prime mover, sold his interest to Joseph Taylor for a net profit of \$25. Burrowes sold his to Osborn for \$40. Horatio Kearney sold his to Bray for \$40. Stephens backed out, and Lippincott says the company have saved themselves from actual loss on the purchase only by the earnings

of certain vessels they have since run in connection.

Yet after the gross charges of fraud and speculation in their bill, made without knowledge, were fully met both by answers and by evidence, these same charges are recklessly repeated, again and again, in the answer to the cross bill, but without the slightest evidence to sustain them.

I cannot, in the mere statement of points, comment on the evidence in detail, but commend this part of the case to the careful examination of the court. It will show clearly there was no actual fraud on the part of the commissioners.

Third point. Was the Act of 1844 a fraud on the Legislature?

1. The first answer is, if it were, the party can't get clear of it in this way. No case can be found, to show by evidence *abunde* a law void because the Legislature did not know what it was about.

2. The Legislature understood the whole question. Six weeks' notice of the application was given.

The evidence of Mr. Sullivan shows his remonstrance was read and filed, with all its charges of fraud, before the Act in the House of Assembly was referred to the judiciary committee. Yet afterwards the Act passed unanimously. And a reference to the legislative journal of council of same year, shows it passed the other branch of the Legislature, also, upon the ayes and noes, unanimously.

*Besides this, Mr. Sullivan immediately filed his petition for repeal, and it was at once referred to the judiciary committee. The council journal shows, after full consideration, it was unanimously denied.

No private law has ever passed our Legislature after a more full and thorough discussion. The minutes of these bodies are referred to as evidence by Mr. Sullivan, the witness, counsel, and attorney at law and in fact, on part of the complainants.

Mr. Justice Nelson delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of the United States for the District of New Jersey.

The bill was filed in the court below by the heirs of Edmund Kearney, deceased, against the defendants, to set aside a sale of a part of a farm descended to them, situate on Karitan Bay, in New Jersey, under an order of the Orphans' Court in that State, in a case of partition, a sale having been ordered upon the ground that partition could not be made without prejudice to the interest of the heirs. The farm, consisting of some seven hundred and eighty-one acres, was divided by the commissioners into fifteen allotments, preparatory to the sale, and which sold for the aggregate price of \$19,041.19. The bill seeks to set aside six of these allotments, Nos. 5, 6, 7, 8, 9 and 10, embracing about two hundred and eleven acres, and which sold for the aggregate sum of \$4,638.15. At the time of the application to the Orphans' Court for the partition, April Term, 1829, there were seven surviving heirs of the estate, four of whom were minors. Daniel and John W. Holmes, who had pur-

chased some year previously the interest of James P. Kearney, one of the heirs, made the application for the partition. The Act of New Jersey, conferring the powers upon the Orphans' Court, provides that the application may be made by the heirs, for any person claiming under them; and further, that if, in the opinion of the commissioners, partition cannot be made without great prejudice to the owners, and on satisfactory proof to the court of the same, a sale of the premises shall be ordered.

It is not material to refer particularly to the proceedings before the Orphans' Court, as we do not understand that any serious question has been made upon them. It has, indeed, been objected that no personal notice of the application, or of any of the proceedings before the court, was given to the heirs, whether adults or minors; and also, that no guardian *ad litem* was appointed for the latter. But, it is conceded, neither of these steps, however judicious, and proper for the purpose of protecting the interest of the parties concerned, are required by the Statute of New Jersey or practice of the court.

516*] The main ground relied upon for setting aside the sale, is to be found in the allegations and proofs of fraud in the proceedings that took place at the commissioners' sale of the premises, under the order of the court. It is claimed that this sale is void, and should be set aside, on the ground of either actual or constructive fraud, or both. This sale took place in November, 1829, and was confirmed by the court on the report of the commissioners the January Term following.

Deeds of conveyance were made of the premises sold in the month of April thereafter, when one half of the purchase money was paid; the remaining half has been since paid in pursuance of the conditions of sale, and order of the Orphans' Court; and the whole of the purchase money received by the heirs. All of them, except three, became of age as early as at, or before, September, 1831. Another became of age in 1834. This bill was filed October, 1841, some twelve years since the sale took place, and eleven since most of the purchase money was paid. Actions of ejectment had been brought in the early part of that year; the precise date is not given.

The case has increased very much in importance since the sale by the commissioners in 1829, on account of the large and valuable erections and improvements made upon that part of the premises which is sought to be recovered. A town has sprung up on the bay, called Key Port, containing a population of several hundred inhabitants, with their dwellings, public edifices, docks or wharves; and a great portion of the property has passed into the hands of *bona fide* purchasers.

These six lots were purchased at the commissioners' sale by a company organized pending the sale, and who made the purchase with a view to the laying out and establishment of a town at that point on the bay; and after the confirmation by the court in the name of the bidders, it was agreed between all persons interested in the purchase, and the commissioners, that these lots should be conveyed to John I. Taylor, one of the company, in trust for the owners, on account of the greater convenience

in granting town lots, after the town should be laid out and these lots put into the market. The deed was executed accordingly. But it appears that some two years subsequent to this conveyance, it was decided by the Supreme Court of New Jersey (1 Greene, 182), that a deed made by the commissioners in partition to anyone, other than the person reported as the purchaser, was void. The law was supposed to be otherwise in New Jersey down to this decision, as it is in several of the States. (5 Page, 620; 1 Dana, 261; 2 Dev. & B., 108; 11 *Id.*, 616.) The title was first attacked solely on this flaw. It led to the institution of the actions of ejectment. The defendants, [*517 however, applied to the Legislature for relief, and in March, 1841, a general Act was passed, providing, upon proof being made to the satisfaction of the court or jury before whom such deed was offered in evidence, that the lands were sold fairly, and without fraud, and the deed executed in good faith, and for a sufficient consideration; and with the consent of the persons reported as purchasers, the deed should have the same effect as though it had been made to the purchaser.

This Act, as is admitted, is unobjectionable, and cured this defect in the deed; and the case, therefore, is brought down to the simple question of fraud, actual or constructive, at the commissioners' sale.

The whole of the evidence to be found in the record, except what may be derived from the pleadings, bearing upon this question, consists in notes of the testimony taken by the counsel in two trials in the ejectment suits, the one in October, 1842, and the other in April, 1844. These notes, being an abridgment of the testimony of the witnesses at these trials, are not always free from obscurity and doubt as to the meaning, and having been taken by the opposing counsel are, in some instances, inconsistent, and contradictory. But upon an attentive examination of them, and making all due allowance for the circumstances under which they were taken, we are satisfied, the clear weight of the evidence is against the charge of actual fraud in the proceedings before the Orphans' Court, or in the commissioners' sale.

An attempt was made on the argument to impeach the good faith of the report of the commissioners, which recommended a sale of the property instead of making partition. But it is not pretended that the report contained any facts bearing upon this question which were untrue or had the effect to mislead the judgment of the court. The law authorizes a sale, when the land is so circumstanced, that in the opinion of the commissioners, partition cannot be made without great prejudice to the owners, and upon satisfactory proof of that fact being made to the court. The commissioners caused a survey and map of the premises to be made which accompanied their report, and they express the opinion, after an examination of the same, that the partition could not be made without injury to the owners. We may presume the judges had satisfactory evidence before them that this opinion was well founded before they granted the order of sale; for, until some facts are shown going to impeach it, and with which the commissioners or

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parties interested were privy, such is the legal effect of the order.

Besides, if this question could be regarded as an open one now, in the absence of any evidence going to impeach the order *of the Orphans' Court, the result would not be changed: for every witness examined on the subject concurs in the opinion that the farm could not have been divided among the heirs without great prejudice to their interest.

By the law of New Jersey, and the order of the court, the commissioners were required to give sixty days' notice of the sale, by posting advertisements in five of the most public places, and publishing the same in one newspaper, in the county. The commissioners, in conjunction with Joseph Taylor, the guardian of the infant children, in addition to this notice, caused the sale to be published in two newspapers in the City of New York, and also published and circulated some one hundred handbills throughout the country. The greatest pains seem to have been taken to give the widest publicity of the day and place of sale, and to secure the fullest attendance of bidders. The farm was divided into fifteen allotments, and, according to the evidence, in the most judicious manner for the purposes of the sale, and which were struck off, not only at full prices, but at prices considerably exceeding the highest estimate of those well acquainted with the premises. On this subject the evidence is all one way. Every witness, to whom the question is put, affirms the fact. The highest estimate of value is \$15,000. The sales amounted to \$19,941.19. The highest rent the farm had previously brought was \$800 per annum, for most of the time it had been rented for \$260. The soil was light, sandy and unproductive, and it is agreed, by all the witnesses who speak on the subject, that, independently of the improvements made since the sale, it would not, at the time they were speaking, sell for more, if for as much, as it had brought at the commissioners' sale.

This may account for the circumstance, that the bill of complaint is not filed to set aside the sale of the entire farm, but only as to that portion of it upon which the large and valuable improvements have been made, and the parts connected with it; as, independently of these, there can be no inducement to disturb the sale. Success would be rather a misfortune.

The reason why the premises sold for some \$5,000 over the estimates and expectations of those best acquainted with them, was owing to the fact, that some enterprising men in the neighborhood foresaw that the Haritan Bay, at that point, was capable of being made a port of some business; and that, by an expenditure of sufficient capital to accomplish this, a town might be built up, which would afford a remuneration for the outlay, and the port afford convenience and facilities to the people of that neighborhood, as well as, probably, add something to the value of their property. The practicability of this scheme was the inducement held out by the commissioners and guardian of the infants, and persons immediately interested in the property, to the purchasers; and as is manifest upon the proof, furnished the leading motive for competition in the biddings at the sale. This enterprise, how-

ever, required a considerable outlay of capital in the construction of docks or wharves, and in the erection of a warehouse, and other edifices, for the accommodation of the public, beyond the means of any individual in that somewhat retired locality, or of any one who might be inclined to take an interest in it. To overcome this difficulty, those interested in the sale, and who were desirous the property should bring the highest price, exerted themselves to form an association or company, composed of persons in the neighborhood who had a common and general interest in the object in view, viz.: the building up of this little port and town, for the purpose of bidding in the property, and engaging in the enterprise. Holmes, the owner of one seventh, H. N. Kearney, one of the heirs, and Joseph Taylor, the guardian of the minors, were more or less active in getting up this association, and no doubt with the knowledge and approbation of the commissioners.

There was, also, another circumstance that operated in the formation of this company. A little port and town had sprung up at a neighboring point on the bay called Middletown Point; and it was given out that the people of this town had associated to bid off the site of this new one at the sale, in contemplation and with a view to prevent a rival place of business in that vicinity.

Under these circumstances, the company in question was formed, and bid at the sale in competition with the Middletown Point association; and, being the highest bidders, the property was struck off to them.

There are some cases deriving their principles from the severe doctrines of *Beauvill v. Christie*, Cowp., 396, and *Howard v. Castle*, 6 T. R., 642, to be found in books of high authority in this country, that would carry us the length of avoiding this sale, simply on the ground of this association having been formed for the purpose of bidding off the premises, for the reason that all such associations tend to prevent competition, and thereby to a sacrifice of the property. (3 Johns. Cas., 29; 6 Johns., 194; 8 *Id.*, 444; 13 *Id.*, 112; 2 Ham., 505; 5 Halst., 87; 2 Kent, 539; 1 Story's Eq. Jur., sec. 293.) Later cases, however, have qualified this doctrine, by taking a more practical view of the subject and principles involved, and have placed it upon ground more advantageous to all persons interested in the property, while at the same time affording all proper protection against combinations to prevent competition. (2 Dev., 126; 3 Metc., 384; 25 Maine, 140; 2 Const., S. C., 821; 3 Ves., 625; 12 *Id.*, 477; 11 Serg. & Rawle, 86.)

*It is true that in every association [*520] formed to bid at the sale, and who appoint one of their number to bid in behalf of the company, there is an agreement, express or implied, that no other member will participate in the bidding; and hence, in one sense, it may be said to have the effect to prevent competition. But it by no means necessarily follows that if the association had not been formed, and each member left to bid on his own account, that the competition at the sale would be as strong and efficient as it would by reason of the joint bid for the benefit and upon the responsibility of all. The property at stake might be beyond the

means of the individual, or might absorb more of them than he would desire to invest in the article, or be of a description that a mere capitalist, without practical men as associates, would not wish to encumber himself with. Much of the property of the country is in the hands of incorporated or joint stock companies; the business in which they are engaged being of a magnitude requiring an outlay of capital that can be met only by associated wealth. Railroads, canals, ship channels, manufacturing establishments, the erection of towns and improvement of harbors, are but a few of the instances of private enterprise illustrating the truth of our remark. It is apparent that if, for any cause, any one of these or of similar masses of property, should be brought to the stake, competition at the sales could be maintained only by bidders representing similar companies, or associations of individuals of competent means. Property of this description cannot be divided, or separated into fragments and parcels, so as to bring the sale within the means of individual bidders. The value consists in its entirety, and in the use of it for the purposes of its original erection; and the capital necessary for its successful enjoyment must be equal not only to purchase the structures, establishments or works, but sufficient to employ them for the uses and purposes for which they were originally designed.

These observations are sufficient to show that the doctrine which would prohibit associations of individuals to bid at the legal public sales of property, as preventing competition, however specious in theory, is too narrow and limited for the practical business of life, and would oftentimes lead inevitably to the evil consequences it was intended to avoid. Instead of encouraging competition, it would destroy it. And sales, in many instances, could be effected only after a sacrifice of the value, until reduced within the reach of the means of the individual bidders.

We must therefore look beyond the mere fact of an association of persons formed for the purpose of bidding at this sale, as it may be, not only unobjectionable, but oftentimes meritorious, *if not necessary, and examine into the object and purposes of it: and if, upon such examination, it is found that the object and purpose are, not to prevent competition, but to enable, or as an inducement to the persons composing it, to participate in the biddings, the sale should be upheld—otherwise if for the purpose of shutting out competition, and depressing the sale, so as to obtain the property at a sacrifice.

Each case must depend upon its own circumstances; the courts are quite competent to inquire into them, and to ascertain and determine the true character of each.

Applying these principles to the sale before us, it is quite clear, upon the evidence, that it should be maintained. The leading motive of the association, and purchase, was the construction of a little port and town upon the bay in their neighborhood, which, it was believed, besides the convenience afforded to their business transactions, would tend to enhance the value of the property in the vicinity. The association was composed, chiefly, of the farmers in the neighborhood, who had not the means

individually to meet the expenses of the enterprise, as the necessary outlay, to afford any chance of success would be considerable. Hence the agreement to join in the purchase and in the expense. From ten to twelve thousand dollars were, in point of fact, laid out by the company at an early day, in the construction of a dock, warehouse and tavern-house, with a view to the encouragement of the settlement of the town. The members composing it did not regard the purchase as a speculation of any great value at the time, as three of them sold out their interest soon afterwards at an advance only of from twenty-five to forty dollars each, and others withdrew from it. Holmes, one of the most active in getting it up, sold his interest for \$25, and H. N. Kearney, one of the heirs, his for \$40. And, as appears from the evidence, none of the parties concerned in the purchase, and in the building up of the town, have made profits of any account out of the enterprise. It has been, as a whole, rather an unfortunate concern, aside from the costs of this litigation, and the chances of losing the town itself, with all its erections and improvements, as the final result of it.

The only fortunate parties concerned, are the heirs, who have realized a very large price for their property—a price which, it is admitted upon the evidence, it would not sell for at the present time, aside from the new and expensive improvements. They had rented it, for a series of years, at \$260 a year. The proceeds of the sale, at interest, produces nearly \$1,400 per annum. Each heir had been in the receipt of less than \$40 a year, as his or her share of the rent: since the sale, nearly \$200 each, [*522 thus receiving an annual income equalling almost, if not quite, the net entire income of the seven.

We are satisfied that no actual fraud has been shown in the case, and that the sale cannot be disturbed on this ground.

Then, is the sale void, and liable to be set aside on the ground of constructive fraud?

It is said that the commissioners, and guardian of the minor children, were interested in it, and that from the relation in which they stood to the property, and to the heirs, this interest infected the purchase with illegality as matter of law, so as to compel a court of equity to set it aside. Admitting the facts to be true, the conclusion is not denied. But the answer is, the proofs fail to make out the allegation. Taylor, the guardian, and two of the commissioners, James Hopping and Leonard Walling, took an interest in the company some three months and more after the sale, namely, in the February following. Taylor bought out the interest of Holmes, for which he gave him an advance of \$40. Leonard Walling took the interest of Stevens, and James Hopping of another of the members, at the same time. The company were then about commencing the improvements with a view to the laying out of the town and construction of the dock or wharf. This is the first time these persons are spoken of in the evidence as having any interest in the concern, and these are the circumstances under which it was taken. The three died some years before the institution of this or of the ejectment suits, and we have not, therefore, the benefit of their explanation. Taylor, the guardian, died

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in 1836, and Hopping and Walling, the two commissioners, a year or two later. Edward Taylor, the only surviving commissioner, was examined as a witness in the ejectment suit, and expresses his confident belief that neither of these persons had any interest in the purchase at the time of the sale, and has again affirmed the same in his answer to this bill. The fact is denied in the answers of all the defendants; and there is not only no proof to contradict it, but affirmative evidence, as we have seen, sustaining the answers in this respect. Doubtless, if these persons were living, and we could have had the benefit of their own account of the matter, the explanation would have been more full and satisfactory. But the circumstance should not operate to the prejudice of the defendants. The delay in the commencement of the litigation and in the impeachment of the conduct of three of the principal parties to the transaction, until after their decease, is alone attributable to the complainants. It would be unjust to indulge in presumptions against the fairness of their conduct under such circumstances.

It has been said, also, that inasmuch as the **523*** trust imposed upon *these commissioners had not expired at the time they became interested in the company in February, 1830, even admitting their interest then commenced, the case is still within the principle forbidding the trustee to purchase. The one half of the purchase money was to be received from the purchasers on the first of April thereafter; and the security to be taken for the remainder. But, we think this conclusion would carry the application of the principle beyond the reason upon which it is founded. The only consequence of the interest taken in the purchase by the commissioners at this period was, to subject themselves personally to the first payment of the purchase money, which we do not see could operate prejudicially to the heirs.

It is also said that Primrose Hopping, the auctioneer at the sale, was interested in the company, and hence a purchaser, and that for this reason the sale should be set aside. We are free to admit, if it clearly appeared that he was one of the association, who bid off the property at the time of the sale, there would be very great difficulty in upholding it, even in the absence of any actual fraud in the case. The reasons for this conclusion are too obvious to require explanation. We have accordingly looked with some care and interest into the record, for the purpose of ascertaining whether this allegation is well founded, and although we regard this as the most doubtful and unsatisfactory portion of the defense, and one upon which different minds might arrive at different results, in this very complicated and confused mass of pleadings and of proofs, yet, the inclination of our mind after the most attentive examination is, that he was not a member of the association, and had no interest in it at the time the sale took place. Primrose himself was a witness in the ejectment suits and denies his interest, and this is substantially confirmed by Holmes, the most active man in getting up the company. Some of the answers admit, upon information and belief; others more directly, while some deny that Primrose was a member of the company. The truth is, the association

was got up suddenly by a mere verbal understanding at the time, and no one seems to have known with any certainty the exact number of persons comprising it. Hence scarcely any two of the defendants in their answers, or witnesses, agree as to the individuals engaged in it. Mr. Lippincott, who appears to have been one of the most intelligent and responsible members, says, in his answer, that the particular persons concerned in it were not finally settled upon or fixed until about the time the first payment of the purchase money in April; and this is the first time he mentions Primrose as having become a member. As we have already said, the evidence in the case, consisting of the notes of *the opposite counsel in the ejectment [**524** suits, is very much abridged, and some parts of it doubtful meaning, and frequently inconsistent and contradictory; but we think the fair construction and weight of it confirms the testimony of Primrose himself. It is very probable, and indeed is virtually admitted by himself, that he was aware at the time of the sale, he could have an interest in the company if he wished; and if this was a case that fairly admitted the question of actual fraud to be raised, this expectation, or contemplation of a possible future interest, would be entitled to great weight. But, in the absence of actual fraud, and with the admitted fact, that the property was sold not only for a full, but for a very large price, and which the heirs have received, and been in the enjoyment of for the last eight or ten years, we think it would be pressing the principle of constructive fraud to a refinement in its practical application, beyond the reason of it, as it certainly would be in utter subversion of the justice in the particular case, to concede to it the effect claimed.

The conduct of the auctioneer is also impeached in respect to the biddings upon lot No. 8, one of the most valuable lying on the bay, and in striking it off to the bidder on behalf of this company. But nearly all the witnesses examined on this subject concur in disproving the charge.

Taylor the only surviving commissioner, and who has never had any interest in the premises in dispute, and was superintending the sale at the time, says the lot was cried audibly several times to get another bid after the bidding had ceased; and that, after it was thus cried, timely notice was given by the auctioneer, that if none other was made, it would be struck off.

It is also said that, after bids had been made upon this lot the first day of the sale, the sale was stopped, and adjourned until the next day. But all the witnesses agree that this was for the purpose of preventing a sacrifice of the property, and to secure greater competition. The bid was at \$28 per acre when the adjournment took place. The next day it sold for \$43 per acre.

Without pursuing the case further, we are satisfied that the decree below in favor of the defendants is right and should be affirmed.

Messrs. Justices McLean, Wayne, and Curtis, dissented.

ORDER.

This cause came on to be heard on the tran-

525*] script of the record *from the Circuit Court of the United States for the District of New Jersey, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

Cited—8 Wall., 603; 23 Wall., 149.

AUGUSTE F. DELAURIERE, *Plaintiff in Error,*

v.

THOMAS EMISON.

French and Spanish titles to land in Missouri—validity of state grants of such lands—statutes.

The several Acts of Congress, passed in relation to claims to land in Missouri, under Spanish concessions, reserved such lands from sale from time to time. But there was an intermission of such legislation from the 26th of May, 1820, to the 9th of July, 1832; and during this interval, lands so claimed were upon the footing of other public lands, as to sale, entry, and so forth.

By an Act of the 6th of March, 1820 (3 Stat. at Large, 545), Congress gave a certain amount to the State of Missouri, to be selected by the Legislature thereof, on or before the 1st of January, 1825; and by another Act, passed on the 3d of March, 1831 (4 Stat. at Large, 422), the Legislature were authorized to sell this land.

Before the 1st of January, 1825, the Legislature selected certain lands which were then claimed under Spanish concessions, and reserved from sale under the Acts of Congress first mentioned.

In November, 1831, the land so selected was sold by the Legislature, in conformity with the Act of Congress of the preceding March.

This sale having been made in the interval between May, 1823, and July, 1832, conveyed a valid title, although the claimant to the same land was subsequently confirmed in his title by Congress, in 1836.

THIS case was brought up from the Supreme Court of the State of Missouri, by a writ of error issued under the 25th section of the Judiciary Act. It was an action of ejectment brought by the plaintiff in error, Delauriere, against Emison. Both parties claimed titles under Acts of Congress. The case was carried to the Supreme Court of Missouri, where the decision was against Delauriere, and he sued out a writ of error to bring the question before this court.

Delauriere claimed under a Spanish concession, granted by Delassus, and subsequently confirmed by Congress; and Emison, under an Act of Congress, granting certain land to Missouri, and sold by that State. The history of the laws relating to the adjustment of land titles in Missouri is given with great particularity in the report of the case of *Stoddard v. Chambers*, 2 How., 285. The following is the history of the two titles in this case, as exhibited in the court below:

Plaintiff's Title.

The plaintiff claimed title by virtue of a concession from Carlos Dehault Delassus, Lieutenant-Governor of Upper Louisiana, *to Louis Labeaume and Charles Fremon Delauriere, for 18,000 arpents of land, at a place called *La Saline Ensanglantée* (The Bloody Saline). The tract was surveyed by James Rankin, Dep-

uty-Surveyor, and certified by Antonio Soulard, Surveyor-General. Fremon Delauriere and his family resided upon the land, and made salt upon it in 1800, and for several years afterwards. The claim was filed with the Recorder of Land Titles, before the 1st July, 1808, and was reserved from sale by the Acts of 3d March, 1811, and 17th February, 1818. It was confirmed to the claimants, or their legal representatives, by the Act of the 4th July, 1836. Louis Labeaume conveyed his interest in the land to Fremon Delauriere, by a deed dated 15th July, 1806, and the present plaintiff purchased the entire interest of Fremon Delauriere at sheriff's sale.

Defendant's Title.

The defendant set up a title derived from the United States, as follows:

By the 6th section of an Act of Congress, approved March 6, 1820, entitled "An Act to authorize the people of Missouri Territory to form a constitution," &c., it was enacted that certain propositions be, and the same thereby were offered to the convention of said Territory of Missouri, when formed, for their free acceptance or rejection, which, if accepted by the convention, should be obligatory upon the United States.

Among said propositions was one, as follows, viz.: "That all salt springs, not exceeding twelve in number, with six sections of land adjoining to each, shall be granted to said State, for the use of said State, the same to be selected by the Legislature of said State, on or before the 1st day of January, in the year 1825; and the same, when so selected, to be used under such terms, conditions and regulations as the Legislature of said State shall direct: Provided, That no salt spring, the right whereof now is, or hereafter shall be, confirmed or adjudged to any individual or individuals, shall by this section be granted to said State.

And provided, also, "That the Legislature shall never sell or lease the same, at any one time, for a longer period than ten years, without the consent of Congress." (Story's Laws, Vol. III., 1762; U. S. Stat. at Large, Vol. III., p. 545.) This, with all the other propositions, was duly accepted by said convention of Missouri, by an ordinance adopted July 19, 1820. (Laws of Mo., by Edwards, Vol. I., p. 633.) Six of said salt springs, with the sections of land adjoining, were selected by the Legislature of Missouri, on or before January 12th, 1822. The seventh, with the land adjoining (six sections), was selected December 14, 1822, by said Legislature, as appears by an Act approved that day. (Laws of Missouri of 1823, p. [*527 59; Edwards' edition, Vol. I., p. 83.)

Under this last Act, and another approved the day next previous, commissioners were appointed for the purpose of selecting the remaining, with the six sections of land adjoining to each, to which the State was entitled under said Act of Congress. (Laws of Mo., by Edwards, Vol. I., p. 981.)

These Acts made it the duty of the commissioners to select five springs and adjoining lands, and make their report to the Legislature at the next session, to commence the third Monday of November, 1824. They also made it the duty of the commissioners to file with the

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register of the Land Office of the district, where any salt spring might be selected, a notice of the same, and of the land adjoining each spring, describing as precisely as practicable the locality of the same. (See sec. 4, Act December 18, 1823.)

The commissioners were required to meet in the town of Franklin on the first Monday in September, 1823, or as soon thereafter as might be, and from thence proceed to select the five salt springs and land adjoining. (Laws of Missouri, 1823, p. 57, Edwards' ed., Vol. 1, p. 983.)

Said commissioners made the selections and reported to the next session of the Legislature, as required, after which, but during that session, by an Act approved January 14, 1825, it was enacted as follows: "That the following salt springs, with the lands adjoining to each, as hereinafter mentioned, are hereby declared to be selected and accepted for the use of this State, under the provisions of an Act of the Congress of the United States, entitled 'An Act to authorize the people of the Territory of Missouri to form a constitution' (giving the full title of the Act), approved the sixth day of March, in the year one thousand eight hundred and twenty, that is to say, 'First Section.' Then follows, in regular order, an enumeration and description of the entire twelve springs and the lands adjoining each, which had been selected at various times, as before stated.

The land in controversy in this suit is a part of that selected through the commissioners appointed under said Acts of 1822.

By an Act of the Legislature of Missouri, approved January 15, 1831, entitled "An Act to provide for the sale of the saline lands," it was enacted, so soon as Congress should raise the restriction thereon, and assent to the sale for the benefit of the State, the twelve salt springs, together with six sections of land attached thereto, obtained from the United States for the benefit of the State, the whole of the said lands should be offered for sale in a manner particularly described in said Act. (Laws of Missouri, by Edwards, Vol. II., p. 179.)

528* By the 8th section of an Act of Congress, approved March 3, 1831, entitled "An Act to create the office of surveyor of public lands for the State of Louisiana," it was enacted that the Legislature of said State of Missouri shall be, and is hereby authorized to sell and convey in fee simple all or any part of the salt springs, not exceeding twelve in number, and six sections of land adjoining to each, granted to said State, by the United States, for the use thereof, and selected by the Legislature of said State on or before the 1st of January, 1825." (Story, Laws, Vol. IV., 2259; Stat. at Large, Vol. IV., pp. 439, 574.)

On the 29th of November, 1831, the land in controversy was, in the mode prescribed by said Act of the Legislature, of January 15, 1831, sold to James Emison, under whom the defendant holds, and patents therefor, from the State of Missouri, dated April 26, 1832, were duly executed to said Emison. The plaintiff asked for the following instructions, which the court refused to give, and to which refusal the plaintiff excepted:

1st. That if the land in controversy had been, before the 20th of December, 1803, con-

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ceded by the Spanish government to Fremon Delauriere and Louis Labeaume, and that said land had been surveyed before the 10th of March, 1804, and that said Delauriere and Labeaume, or their legal representatives, had filed with the Recorder of Land Titles, prior to 1st of July, 1808, notice of said claims; then said claim was reserved, and could not be lawfully selected by the State of Missouri, under provisions of the Act of Congress of the 6th March, 1820, provided said claim of Fremon Delauriere and Louis Labeaume has since been confirmed.

2d. That, by the Act of Congress of the 6th of March, 1820, the Legislature of Missouri could not lawfully select any land which had been, or was thereafter, confirmed or adjudged to any individual or individuals.

3d. That, unless the Legislature of the State of Missouri made its selection of the land in question, on or before the 1st of January, 1825, it was illegal, and is not a valid title against a confirmation under the Act of the 4th of July, 1836.

4th. That the Act of Congress of the 8d of March, 1831, conveys no title in any lands to the State of Missouri; said Act only authorizes said States to sell, absolutely, lands already granted by the Act of the 6th March, 1820.

The defendant asked, and the court gave, the following instructions to the jury, to the giving of which the plaintiff excepted. The defendant, by his counsel, first moves the court to instruct the jury.

1st. That if they believe, from the evidence in this cause, that the State of Missouri selected the land, on or before the 1st of ***529** January, 1825, under the 2d clause of the 6th section of an Act of the Congress of the United States, entitled "An Act to authorize the people of the Missouri Territory to form a constitution, &c., approved the 6th of March, 1820," and that said State of Missouri sold and patented the said land in controversy in fee simple to the said defendant, after the 3d of March, 1831, and before the 9th of July, 1832, they should find for the defendant.

2d. That, if they shall believe from the evidence, that said land was selected by the State of Missouri, undersaid Act, on or before the 1st of January, 1825, and that said State afterwards, and between the 3d of March, 1831, and the 9th of July, 1832, sold and patented the said land to the defendant, they ought to find for the defendant, although they may believe the said land was confirmed to the plaintiff's landlord by the Act of July 4, 1836.

The jury found a verdict for the defendant, which the court refused to set aside, to which refusal the plaintiff excepted. The judgment of the Circuit Court was affirmed by the Supreme Court of the State of Missouri, and the case was removed thence to this court by writ of error.

It was submitted upon a printed brief by *Mr. Wells* for the plaintiff in error, and argued by *Mr. Geyer* for the defendant in error.

Mr. Wells, for the plaintiff in error, made the following points:

1. The plaintiff in error says that the Circuit Court erred in refusing the first instruction asked by him.

That instruction asserts the principle, that if

the land had been by the Spanish government granted to Lebeaume and Delauriere prior to the 20th December, 1803, and surveyed prior to the 10th March, 1804, and a notice of the claim filed with the recorder of land titles on or before the 1st July, 1808, that it was reserved from sale and could not have been lawfully selected by the State under the Act of 6th March, 1820.

The first branch of the proposition is true beyond all doubt. That these circumstances would bring the claim within the provisions of the Acts of 1811 and 1818, and entitle it to be reserved from sale, will not be controverted. The question is, if reserved, could the State lawfully select it under the Act of March 6th, 1820. That claims of this description were protected by the Treaty of 1803, has long since been settled by this court. (See *Delassus v. United States*, 9 Pet., 130; and also 12 Pet., 410.) And that the Acts of 1811 and 1818 were intended to carry out this provision of the 530* Treaty is clear. When the Act of 6th March, 1820, passed, the Act of 1818 was in full force. Could the Act of 1820 have operated to repeal the Act of 1818? In the case of the *United States v. Gear*, 3 How., 131, this court says: "The rule is that a perpetual statute (which all statutes are, unless limited to a particular time), until repealed by an Act professing to repeal it, or by a clause or section of another Act bearing in terms upon the particular matter of the first Act, notwithstanding an implication to the contrary may be raised by a general law which embraces the subject matter, is considered to be still the law in force, as to the particulars of the subject matter legislated upon—a power to sell all lands, given in law, subsequent to another law expressly reserving lead mine lands from sale, cannot be said to be a power to sell the reserved lands when they are not named, or to repeal the reservation. In the present case there are two laws—the first a general one, reserving lands of this class from sale—the second a special one, not referring to the former, and not necessarily conflicting with it. Each can be enforced without affecting the other. In 6 Porter's Alabama Reports, 231, the court remarks: "The law never favors the repeal of a statute by implication, unless the repugnance be quite apparent." In this case there is no repugnance whatever. The State might have selected its salt springs without interfering with private claims. The Act of 1818 reserved private claims "until after the final decision of Congress thereon." This final decision was provided for by the Act of 26th May, 1824, and that Act repealed the reservation. The land in question, then, being reserved land when the State appropriated it, the appropriation was unlawful; and according to the doctrine of this court in the cases of *Stoddard v. Chambers*, 2 How., 318, and of *Bissell v. Penrose*, in 8 Howard, the location was not protected by the 2d section of the Act of 4th July, 1836.

The doctrine of those decisions is, distinctly, that to save a location by virtue of the Act of July 4, 1836, it must have been made in conformity to law.

2d. The court erred in refusing to give the plaintiff's second instruction.

This instruction asserts that it was not law-

ful for the State to select any lands which had been or were thereafter confirmed to an individual. These are the terms of the proviso of the very Act which made the grant to the State. The Act of 1820 not only did not repeal the laws reserving private claims, but it in express terms protected those reservations from the operations of the Act. If the Act of 1820 had declared to the State of Missouri that it should not appropriate Lebeaume and Delauriere's claim—that if it did select it, and the claim should ever thereafter be confirmed, [*53] that the State should get no title, the Act could not have been more plain and explicit: "Provided, that no salt spring, the right whereof now is or hereafter shall be confirmed or adjudged to any individual or individuals, shall, by this section, be granted to said State." This is a part of the grant itself—a part and parcel of the very Act upon which the State claim is founded. Does it mean anything? Does it protect claims which had been confirmed? It equally in its terms extends to those which might afterwards be confirmed! The language is the same as to both. If it has any effect at all, it must protect all private claims, whether confirmed before or after the Act of 1820. I cannot enforce this proposition by argument. It is a simple question, whether this proviso shall be held valid or void. The Circuit Court held that the grant was made good to the State by the 2d section of the Act of 4th July, 1836. That decision is at open war with the decisions of this court already cited, in which it is distinctly held, that to bring a location within the saving of that section, it must have been made in conformity to law. So far from this location having been made in conformity to law, it was made in open and direct violation of an express and positive law. The State selects Fremont's lick by name.

2d. The court erred in refusing plaintiff's third instruction. The law of 1820 required that the Legislature of the State should make its selection on or before the 1st January, 1825. The third instruction asked the court to decide that, unless the selection was made within this time, it was void as against the plaintiff's confirmation. This the court refused to do. The rule for construing powers, whether derived from an Act of the Legislature or from a private instrument, is the same. They must be strictly construed. No further or greater power must be exercised than has been given. Any other principle of construction would render all limitations of power nugatory. To say that a grant of power to the State, to be exercised within a specified time, amounts to a grant to be exercised without limit of time, is repugnant to all ideas of limited powers. The Legislature of Missouri had full power to act up to the 1st January, 1825. After that time the power had ceased; any act done afterwards was wholly unauthorized and void. (See 4 Pick., 45-47, 156; 6 T. R., 320; 2 Burr, 319.) In the last case the court says: "The proviso is a limitation of power, and amounts to a negation of all authority beyond its prescribed and clearly defined limits. It cannot be that the proviso is directory merely, for that would be to set at naught all the guards provided by the Legislature against the abuse of authority conferred by the Act."

532*] *If, then, the selection was made after the power to make it had ceased, it was not made in conformity to law, and is therefore not protected by the 2d section of the Act of the 4th July, 1836.

But it is said that the approval of the selection by the Secretary of the Treasury cured all these defects in the state title. To this it may be answered, 1st, that the Act of Congress gave to the Secretary no power whatever over the subject. His action in the matter was wholly unauthorized by law. 2d. His approval, even if he had the power to approve, came too late. It was made on the 22d August, 1837, after the confirmation of the plaintiff's title; and it was obviously made to heal the defects in the title of the defendant. Its only effect is to render those defects the more conspicuous.

4th. The Circuit Court erred in refusing the plaintiff's 4th instruction.

That instruction simply requested the court to decide that the Act of the 3d March, 1831, conveyed no title to the State.

It will be seen that the Act of 1820, making the grant to the State, prohibited the State from selling the land, or leasing it for a longer period than ten years. The 8th section of the Act of 3d March, 1831 (Land Laws, 491), removes this restriction, and authorizes the State to sell, in fee simple, the lands granted to the State, "and selected by the Legislature of said State on or before the 1st day of January, 1825"—another evidence that Congress did not regard that provision as nugatory, for the power to sell, like the original grant, was confined to lands selected within the time prescribed. This is the whole scope of this Act, and it would be a perversion of its meaning and design to attach to it any other.

5th. The Circuit Court erred in permitting the defendant to read from the journals of the Senate of Missouri a report of commissioners appointed under an Act of the Legislature of 1822, to make a selection of salt springs for the use of the State.

It was allowed to be read, for the purpose of showing that the selection by the State had been made within the prescribed time. It was illegal evidence, 1st, because the law required the Legislature to make the selection, and that was a power which the Legislature could not delegate to commissioners. The rule of law is the same when a power is conferred upon a legislative body, as if conferred on an individual person. The power conferred cannot be delegated.

2d. The report had no date, and therefore did not tend to show, even when they, the commissioners, made the selection. 3d. It was the journal of one branch of the Legislature only, and could furnish no evidence of legislative action. 4th. It was not an authentic copy of the original report. The journals of the Senate are only evidence of the action of the Senate. But, 5th, the Legislature did, by an Act approved February 14, 1825, make the selection of the land in question, and this was the best and only legal evidence of the action of that body. (See Rev. L. of Mo. of 1825, Vol. I., pages 697 and 700.)

6th. The court erred in refusing to grant a new trial. The new trial should have been granted, because the action of the court in refus-

ing the plaintiff's, and in giving the defendant's instructions, was contradictory. In refusing the plaintiff's 3d instruction, the court decided that it was not material that the selection should have been made on or before the 1st of January, 1825. In giving the defendant's, it assumed that it was necessary. Again; the court, in giving the defendant's instructions, held that if the defendant obtained his title from the State, between the 3d of March, 1831, and the 9th of July, 1832, it made his title good. Upon what principle this instruction was founded it is difficult to perceive. The question here is not whether the defendant had obtained a good title from the State, but whether the State had any title to convey. If the State obtained a title under the Act of 1820, it is sufficient to defeat the plaintiff. But if the selection of the State was void, and the State got no title thereby, it could never, at any time, convey a good title to the defendant. What magic there was in the particular period that elapsed between these two acts, that enabled the State, when it had no title to convey a good one to the defendant, it would, I think, be difficult to show.

It was decided by this court in *Barry v. Gamble*, that a patent issued to a tract of land after the reservation had been removed, was valid. But this was a patent emanating from the general government, in whom the title was. In this case the patent comes from the State, and it is the title of the State that is questioned. It is clearly a misapplication of the principle invoked, and in this the court erred.

Mr. Geyer, for the defendant in error, contended—

That the selection by the State of Missouri of the land in controversy, on or before the 16th day of January, 1825, and the sale and conveyance thereof by the said State, after the 3d day of March, 1831, and before the 9th day of July, 1832, vested in the purchaser a title valid against the United States, which has not been divested by the subsequent confirmation of a claim embracing the same land, by the Act of 4th July, 1836, although the same may have been reserved from sale by the Act of 3d March, 1811.

1st. The 2d clause of section 6, of the Act of 6th March, 1820, *and the ordinance of [*534 the Convention of Missouri, of the 19th July, 1820, operate as a grant to the State of Missouri of the number of salt springs and quantity of land therein mentioned, leaving the selection of the springs and land to the State Legislature.

No act of the federal government was necessary to locate or designate the granted lands, the selection by the Legislature within the time prescribed, severed the land selected from the domain, and vested the title in the State of Missouri.

2d. The Act of the 6th March, 1820, does not except from the grant to, or selection by the State, the lands reserved from sale by the Act of 1811. By the terms of the grant, lands embraced by claims, of which notice had been filed, are subject to appropriation by the State, as well as those embraced by claims of which no notice had been filed, or to which there was no claim whatever.

The reservation by the Act of 1811, vested

no title in any person; it suspended the authority of the executive officers to sell, but did not affect the power of Congress over the subject; the land belonged to the domain, notwithstanding the reservation, and was subject to disposition by law.

3d. The conformation of the claim embracing the land in controversy, after the selection by the State, and especially after the 3d March, 1831, neither vested a title in the claimant nor divested that of the State of Missouri or her vendee.

The first proviso excepts from the grant any salt spring, the right whereof was, at the date of the Act, or should be before the grant was completed by the selection, confirmed or adjudged to an individual or individuals. It does not except the adjoining lands, nor does it contemplate that the selections shall be subject indefinitely to defeat by confirmations of claims, whether there had been a reservation of the land from sale or not.

4th. The Act of Congress of 3d March, 1831 (Stat. at Large, Vol. IV., p. 494), authorizing the State to sell and convey in fee simple the salt springs and lands granted by the Act of 1820, and selected on or before the 1st January, 1825, is a confirmation of the selection made; and the sale and conveyance by the State vested the title in the purchaser, even if the land was not subject to selection, by reason of the reservation from sale by the Act of 3d March, 1811.

The Act authorizing the State to sell was passed, and the land in controversy sold and conveyed after the 26th of May, 1829, when the reservation ceased, and before it was revived by the Act of 1832. The title of the defendant is therefore valid as against the confirmation. (*Stoddard v. Chambers*, 2 How., 245; *Mills v. Stoddard*, 8 How., 345.)

5th. The Act of 4th July, 1836, conferred no title to the land in controversy as against the purchaser from the State of Missouri, by virtue of the Act of Congress of 3d March, 1831, because the title of such purchaser was vested prior to the 9th day of July, 1832, and could not be divested by any subsequent Act of Congress, and because the land in controversy had been located and appropriated by the State of Missouri, and surveyed and sold under and in conformity with the laws of the United States. Any appropriation of land in conformity with a law of the United States, is a location under a law of the United States, and protected against a confirmation by the Act of 1836. (*Les Bois v. Bramell*, 4 How., 449, 456.)

Mr. Justice McLean delivered the opinion of the court:

This case is before us on a writ of error to the Supreme Court of Missouri, under the 25th section of the Judiciary Act.

The plaintiff claims title by a Spanish concession to Louis Labeaume and Charles Fremon Delauriere, for ten thousand arpents of land, at a place called La Saline Ensanglantee. The tract was surveyed and regularly certified by the Surveyor General. The plaintiff resided upon the land in 1800, and for several years afterwards.

The claim was filed with the Recorder of Land

Titles before the 1st of July, 1808, and was reserved from sale by the Acts of 3d March, 1811, and the 17th February, 1818. It was confirmed to the claimants, or their legal representatives, by the Act of the 4th of July, 1836. Louis Labeaume conveyed his interest in the land, to Fremon Delauriere, by a deed dated 15th July, 1806; and the present plaintiff purchased the entire tract of Fremon Delauriere at sheriff's sale.

The defendant claims under an adverse title, derived from the State of Missouri. By an Act of Congress, approved the 6th of March, 1820, entitled "An Act to authorize the people of Missouri Territory to form a State Government, and for its admission into the Union," it was among other things provided, that all salt springs not exceeding twelve in number, with six sections of land adjoining to each, shall be granted to the said State, the same to be selected by the Legislature of the State, on or before the 1st of January, 1825; and the same so selected, to be used under such terms, conditions, and regulations, as the Legislature of such State shall direct, &c.

By another Act of Congress, approved 3d March, 1831, the Legislature of the State of Missouri were authorized to sell, in fee simple, the lands granted by the above Act. Under this Act the State sold the land in controversy to the defendant.

The questions arise under instructions prayed for by the plaintiff, *and refused by [536 the court; and also the instruction gives on the prayer of the defendant.

"1. That if the land in controversy had been before the 20th of December, 1803, conceded by the Spanish Government to Fremon Delauriere and Louis Labeaume, and that said land had been surveyed before the 10th March, 1804, and that said Delauriere and Labeaume, or their legal representatives, had filed with the Recorder of Land Titles, prior to the 1st July, 1808, notice of said claim, then said claim was reserved, and could not lawfully be selected by the State of Missouri under the provisions of the Act of Congress of the 6th March, 1820, provided said claim of Fremon and Labeaume has since been confirmed.

"2. That by the Act of Congress of the 6th March, 1820, the Legislature of Missouri could not lawfully select any land which had been, or was thereafter, confirmed or adjudged to any individual or individuals.

"3. That unless the Legislature of the State of Missouri made its selection of the land in question on or before the 1st of January, 1825, it was illegal, and is not a valid title against a confirmation under the Act of the 4th July, 1836.

"4. The Act of Congress of the 3d of March, 1831, conveys no title to any lands to the State of Missouri. Said Act only authorizes the State to sell, absolutely, lands already granted by the Act of the 6th of March, 1820."

"The defendant, by his counsel, moves the court to instruct the jury that if they believe, from the evidence in this cause, that the State of Missouri selected the land in controversy on or before the 1st day of January, 1825, under the second clause of the 6th section of an Act of the Congress of the United States, entitled 'An Act to authorize the people of the Missouri Territory to form a Constitution,' &c., ap-

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proved 6th March, 1820, and that said State of Missouri sold and patented the said land in controversy, in fee simple, to the said defendant, after the 8d day of March, 1831, and before the 9th day of July, 1832, they should find for the defendant. That if they shall believe, from the evidence, that said land was selected by the State under said Act on or before the 1st day of January, 1825, and that said State afterwards, and between the 3d of March, 1831, and the 9th July, 1832, sold and patented the said land to the defendant, although they may believe the said land was confirmed to the plaintiff's landlord by the Act of the 4th July, 1836."

And this instruction was given by the court.

We think the court did not err in refusing the instructions prayed by the plaintiff, nor in giving that which was asked by the defendant. **537*** *Notice of the plaintiff's claim was, on the 30th of June, 1808, given to the Recorder of Land Titles for the Territory of Louisiana, and the grant, survey and title papers, were filed with the recorder and duly recorded.

On the 27th of December, 1811, the claim was taken up for consideration by the board of commissioners for the adjustment of land titles, under the Act of March 2d, 1805, and rejected.

The claim was again presented to the board of commissioners, organized in pursuance of the Act of Congress of July 9th, 1832; and afterwards, on the 13th of November, 1833, the board were unanimously of the opinion, that the claim ought to be confirmed to the said Charles F. Delauriere and L. Labeaume, or their legal representatives, according to the concession.

This proceeding of the commissioners was reported to the Commissioner of the General Land Office; and on the 18th of January, 1834, it was communicated to Congress; and the decision was confirmed by the Act of Congress of July 4th, 1836.

By the Act of 2d March, 1805, all persons claiming land under the French or Spanish government, were required to file their claim in the Land Office—and by the Act of 3d March, 1807, the time was extended to 1st July, 1808. By the Act of 15th February, 1811, the President was authorized to have the lands which had been surveyed in Louisiana, offered for sale—reserving those tracts for which claims had been filed in the Land Office, as above required, till after the decision of Congress thereon. The same reservation was contained in the Act of the 17th February, 1818.

The Act of 26th of May, 1824, authorized "claimants, under French or Spanish grants, concessions, warrants or orders of survey," in Missouri, issued before the 10th of March, 1804, to file their petitions in the district courts of the United States, for the confirmation of their claims. And every claimant was declared by the same Act to be barred, who did not file his petition in two years. By the Act of the 24th May, 1828, the time for filing petitions was extended to the 26th of May, 1829. On the 9th July, 1832, an Act was passed, "for the final adjustment of land titles in Missouri," which provided that the Recorder of Land Titles, with two commissioners, to be appointed, should examine all the unconfirmed claims to

land in Missouri, which had heretofore been filed in the office of the said Recorder, according to law, prior to the 10th of March, 1804.

On the 29th of November, 1831, the land in controversy was, in the mode prescribed by Act of the Legislature of Missouri, of the 15th January, 1831, sold to Emison, under whom the defendant holds, and a patent was duly issued by the State.

The reservation under the Act of 1811 was extended by the *Act of the 17th of [*538 February, 1818, to the Act of 26th of May, 1824; which authorized claimants to file a petition in the district court—and this right was limited to two years; it was afterwards extended to the 26th of May, 1829. The reservation then expired, or in other words, the bar to the right was interposed. On the 9th of July, 1832, a further provision was made for the adjustment of such claims. But after the interposition of the bar, and before the passage of the Act of 1832, the land in controversy was purchased from the State of Missouri; and a patent obtained. During this period there was no protection to the inchoate right of the original claimants. When the State of Missouri selected the land it was reserved from sale, but that impediment was removed, when the limitation expired in 1829.

The confirmation of the claim by Congress, in 1836, had relation back to the origin of the title; but it could not impair rights which had accrued, when the land was unprotected by a reservation from sale; and when, in fact, the right of the claimant was barred. This point was settled in the cases of *Stoddard v. Chambers*, 2 How., 285; and of *Mills v. Stoddard*, 8 Id., 345.

As the instructions prayed by the plaintiff in the state court, were in conflict with the law as above stated, they were properly overruled; and as the instruction given, at the instance of the defendant, was substantially in accordance with the above views, it was correct.

The adjustment of the state court is therefore affirmed, with costs.

ORDER.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Missouri, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court in this cause be, and the same is hereby affirmed, with costs.

***JAMES ADAMS, Plaintiff in Error, [*539**

v.

PHILIP OTTERBACK.

Bills and notes—notice of non-payment—usage—insufficiency of evidence to establish.

Where a note was given in the District of Columbia on the 11th of March, payable sixty days after

NOTE.—Usage, or custom as controlling and varying demand, notice and days of grace. See note to *Mills v. B'k of U. S.*, 11 Wheat., 431.

NOTE.—Usage or custom, admissibility of in construction of contracts.

All mercantile contracts if dubious, or made with

date, and notice of its non-payment was given to the indorser on the 15th of May (being Monday), the notice was not in time.

Although evidence was given that since 1846, the bank which was the holder of the note, had changed the pre-existing custom, and had held the paper until the fourth day of grace, giving notice to the indorser on Monday, when the note fell due on Sunday. This was not sufficient to establish an usage.

An usage, to be binding, must be general, as to place, and not confined to a particular bank, and in order to be obligatory must have been acquiesced in, and become notorious.

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington.

It was an action of *assumpsit* brought by Adams, the plaintiff in error, upon a promissory note drawn by Haw, Yellott & Company, in favor of Philip Otterback, the defendant in error, and discounted by the Bank of Washington. The proceeds of the discounted note were paid by the bank upon the check of Otterback. After the note had been protested for non-payment, and notice of protest had been given to the indorser, it was assigned to Adams, the plaintiff in error.

On the trial of the cause the plaintiff gave in evidence the note, the handwriting of drawers and indorser being admitted, and proved that the note was discounted on the 11th of March, 1848, the day of its date, and the proceeds paid on defendant's check; that the note (which was payable at sixty days) was unpaid at maturity, and was delivered to George Sweeny, a notary, on Monday, the 15th day of May, 1848, after 3 o'clock, who on that day demanded payment, which was refused, and thereupon, on the same day, he delivered a notice for the indorser at his dwelling.

The plaintiff also gave in evidence by the teller and book-keeper of the bank, that after the decision of the case of *Cookendorfer v. Preston*, and about two years prior to the date of the note in controversy, the bank changed the custom which had previously prevailed in regard to the demand and protest of negotiable discounted notes held by the bank, and that in all cases of discount they had up to that time held the paper until the fourth day of grace; and by the change, if that fourth day of grace happened to fall on Sunday, it became the custom of the bank to retain them till Monday, and on that day deliver the same to the notary to demand payment and give notice. And on cross-examination it appeared that only four in-

stances of practice under this custom were shown.

*Upon this state of facts the court ***540** instructed the jury that if they should "find the whole evidence aforesaid to be true, yet the plaintiff has not thereby shown that he has used due diligence in demanding payment, and giving notice of the non-payment of said note, and is not entitled to recover in this action.

To this instruction the plaintiff excepted, and the case was now to be argued upon it.

It was argued by *Mr. Lawrence* for the plaintiff in error, and *Mr. Bradley* for the defendant in error.

Mr. Lawrence, for the plaintiff in error, contended that the instruction was erroneous. It is difficult to understand the ground upon which the instruction was bottomed; whether, in the opinion of the court, the plaintiff could not recover, admitting the custom to be proved, because the plaintiffs had not conformed to it; or whether, in the opinion of the court, the custom itself was not, as a fact, proved by the evidence; or whether, lastly, it was not legally competent for the bank to change an ancient custom and introduce a new one. Upon one or other of these grounds the instruction must have been given, and upon either of them it was erroneous.

1. That the court may instruct the jury that the plaintiff cannot recover against the indorser of a promissory note if they believe the evidence, and that evidence proves a particular custom, and at the same time proves that the plaintiff did not conform to that custom, we are not called upon to deny, because such is not the case here. The evidence clearly proves that the demand of payment and the notice of protest were in conformity with the altered usage, if that altered usage is itself established.

2. If the meaning of the instruction was that the custom itself, as alleged, was not proved by the evidence in the cause, then it was erroneous, because it was an invasion of the province of the jury. There was certainly evidence tending to prove that the old custom had been changed, and the new custom introduced. Whether that evidence did prove it, was for the jury to determine. It was not one of those cases in which a demurrer to evidence would lie, upon the ground that the quality of the evidence was not such as is required by law, whatever might be its tendency. For, in all the cases in this court, it has been held that it was competent to prove the custom of a bank by parol evidence. (*Renner v. Bank of Columbia*,

reference to usage, may be explained by parol evidence of the usage. *Cort. v. Com. Ins. Co.*, 7 Johns., 385; *Allegre v. Maryland Ins. Co.*, 6 Harr. & J., 408; *Robertson v. Clarke*, 1 Bing., 445; *Renner v. Bank of Columbia*, 9 Wheat., 591; *Columbia Ins. Co. v. Catlett*, 12 Wheat., 383; *Hancock v. Fishing Ins. Co.*, 3 Sumn., 132; *Lewis v. Marshall*, 7 Man. & G., 229; 8 Scott, N. K., 447.

But the rule is limited to the extent that the usage must be consistent with the principles of law, and not go to defeat the essential provisions of the contract. *Palmer v. Blackburne*, 3 Bing., 61; *Bryant v. Com. Ins. Co.*, 6 Pick., 131; *Rankin v. American Ins. Co.*, 1 Hall N. Y., 619; *Hall v. Janson*, 4 El. & Bl., 500; 1 Jur. N. S., 571; 24 L. J. Q. B., 97; *Miller v. Tetherington*, 6 Hurlst. & N. 278; 7 Hurlst. & N., 954.

No particular usage or custom can be admitted to alter or impair a clean and express written contract. It can only be admitted when the intention of the parties is indeterminate, and the language

of the contract may admit of various senses. *Schooner Heside*, 2 Sumn., 567; *Donnell v. Colum. Ins. Co.*, 2 Sumn., 377; *Chubb v. Oats*, 18 Law. Rep. N. S., 492.

If the words used in the contract be technical, or local, or generic, or indefinite, or equivocal, on the face of the instrument, or are made so by proof of extrinsic circumstances, parol evidence is admissible to explain by usage their meaning. If there be no such ingredient of uncertainty, then the evidence is not admissible. *Yates v. Pyrr*, 6 Taunt., 445; *Blacket v. Royal Exchange Ins. Co.*, (Comp., & Jer., 244; *Fowler v. Aetna Ins. Co.*, 202; *Trueman v. Loder*, 11 Ad. & Ell., 589.

A particular word may be shown by parol evidence to have a different meaning in some particular place, trade or business, from its ordinary acceptance. *Mallan v. May*, 13 Mees. & W., 511.

Evidence of the usage of a particular place, to affect the construction of a contract is admitted only on the principle that both parties to the con-

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9 Wheat., 587, 588; *Mills v. Bank of United States*, 11 Wheat., 431.)

Nor was the instruction proper upon the **541*** ground that the *number of instances which had occurred within the two years since the adoption of the new custom were not sufficient in number to prove a new custom, or to bring it to the knowledge of the defendant. Because, if it be admitted that a custom may be changed, there must be a time when the change must commence, and there must be a first and single instance of the new custom; and in the case of *Mills v. Bank of the U. S.*, and *Bank of Washington v. Triplett & Neale*, 1 Pet., 25, this court has already decided that it is not necessary that a custom should have actually been brought to the notice of an indorser. But on the contrary, it is the duty of the indorser to acquaint himself, by inquiry, with the custom of the bank with which he deals.

3. It was competent for the bank to change its custom whenever in its discretion the interests of the bank should require it. There is no inexorable rule of law which binds down such an institution to one eternal routine of business, notwithstanding the changing interests of commerce may demand a modification. On the contrary, this court has held that which the sound principles of commercial business dictate, viz.: that a bank may change its custom, and may prove that change in the same manner as they may prove the original custom. (*Cookendorfer v. Preston*, 4 How., 326.)

The plaintiff in error would therefore submit, that if it is competent for a bank to change its usages; if there is evidence in the case tending to prove such a change; if there is evidence in the case tending to show that the bank had made demand and given notice in accordance with such altered usage, then the instruction, that if the jury find the whole evidence of the plaintiff to be true, yet he was not entitled to recover, was erroneous.

Mr. Bradley, for defendant in error:

This case turns upon the right of a bank, without notice, public or otherwise, given to the persons dealing with it in the way of discounting negotiable paper, to change the usage and custom of the bank in respect to the demand of payment of the notes, and giving notice to the indorsers, so as to bind the indorsers by such change. In other words, to maintain the plaintiff's case, it must appear that when a man procures a note to be discounted by a bank, by that act alone, the usage

and custom of that bank are incorporated into the contract of discount, and become a constituent part of that contract between the parties to that note and the bank. And this is the case, although the parties never before had dealt with that bank; the paper was not made payable or negotiable at the bank; the usage and custom of that bank differed, in that respect, from those of all the other *banks [**542** in the same community; and this particular usage and custom had been introduced by that bank within a short period, without notice, public or otherwise, and was unknown to the parties to the note; and before such change, that bank had conformed to the usage and custom of the other banks in that community; or, in other words still, a party applying to a bank to discount for him negotiable paper, is bound to inquire, if he does not know, the special usages of that particular bank in respect to negotiable paper discounted by it, at the time of such discount, and he is not to rely either on the known and established usage and custom of all the other banks in the same community, or upon the particular usage of that particular bank up to the day before such discount, but he must ascertain if any change has been made in such usage, as he will be bound by it whether he knows it or not.

It is conceded by the defendant in error—

That a custom or usage of a bank, brought home to the knowledge of a person dealing with the bank, in respect to the discount of negotiable paper, enters into the contract, becomes a constituent part of it, and must have its due weight in the exposition of it. (*Bank of Columbia v. Magruder*, 6 Harr. & J., 180.)

This knowledge may be proved directly, or may be implied from the dealings of the parties.

It may be inferred from persons dealing with the bank, which has a well-established usage. (*Lincoln & Kennebec Bank v. Page*, 9 Mass., 155; *Same v. Hummatt*, *ib.*, 150; *Smith v. Whiting*, 12 Mass., 8.)

From the parties being accustomed to transact business of that kind with the bank. (*Blanchard v. Hilliard*, 11 Mass., 88; *Jones v. Fales*, 4 Mass., 252; *Widgery v. Munroe*, 6 Mass., 450; *Bank of Columbia v. Fitzhugh*, 1 Harr. & G., 239; *Hartford Bank v. Steadman*, 3 Conn., 489; *City Bank v. Cutter*, 3 Pick., 414; *Bank of Columbia v. Magruder*, 6 H. & J., 172; *Whitwell v. Johnson*, 17 Mass., 452.)

From the negotiable paper being made pay-

able were cognizant of the usage, and are presumed to have made the agreement with reference to it. No such presumption arises if one of the parties is ignorant of such usage or custom. *Kirchner v. Venus*, 12 Moore P. C. C., 361; 5 Jur. N. S., 385; 7 W. R., 453; *Sweeting v. Pearce*, 7 C. B. N. S., 449; 6 Jur. N. S., 753; 9 C. B. N. S., 557; 7 Jur. N. S., 800.

A custom, to control the words of a covenant, must be one which both parties to the covenant can know, and must be certain and invariable. *Abbott v. Bates*, 22 W. R., 488.

Usage may control or supersede construction or rule of law if the usage be general, uniform, notorious, reasonable, and consistent with the terms of the contract, and to a certain extent with the rules of law. A valid usage is part of the contract. 1 Duer on Ins., 255-282, 283-311; *Story on Bills*, 161; *Wallace v. Bradshaw*, 6 Dana (Ky.), 386; *Paxton v. Courtney*, 2 Post. & Fin., 131.

A custom or usage, to be admissible and valid, **HOWARD 15.**

must be certain, reasonable, and sufficiently ancient, to afford a pre-emption that it is generally known. *U. S. v. Buchanan*, 8 How., 83, 102; *Coxe v. Heisley*, 20 Penn. St., 246; *Collings v. Hope*, 3 Marsh. C. C., 149; *Wilcox v. Phillips*, 1 Wall., Jr., C. C., 47.

It must be general and uniform, but need not be universally acquiesced in. *Deshier v. Holland*, 12 Ala., 513, 519; *Benton v. McKelway*, 2 Zabr., 165, 175; *Maitland v. Ins. Co.*, 3 Rich., 331, 333.

It may be established by the testimony of a single witness, if his means of knowledge are abundant, and his testimony full and satisfactory. *Vail v. Rico*, 1 Selden, 156.

Local usage is not admissible to control the general rules of law in the interpretation of contracts. *Thompson v. Riggs*, 5 Wall., 663; *Brown v. Jackson*, 2 Wash. C. C., 24; *Hinton v. Locke*, 5 Hill, 437.

A custom opposed to a statute is void. *Walker v. Transportation Co.*, 3 Wall., 150; *Winter v. United States*, Hempst., 344.

able or negotiable at the particular bank. In addition to the cases cited, see, also *Yeaton v. The Bank of Alexandria*, 5 Cranch, 52; *Renner v. The Bank of Columbia*, 9 Wheat., 585; *Brent's Executor v. The Bank of the Metropolis*, 1 Pet., 93; *Mills v. Bank of U. S.*, 11 Wheat., 431.

But it is contended by the defendant:

I. In all cases the usage to bind the parties must be a known, established, and invariable usage. (See all the cases cited.)

II. It is not strictly a rule of judicial decision, but is compounded of law and fact, and is admissible, in evidence, to show the contract of the parties, and their assent to such usage. **543*** [See *11 Mass., 88; 4 Mass., 252; 6 Mass., 450; 1 Harr. & Gill, 239; 3 Conn., 489; and the cases in this court above cited, and those cited by plaintiff in error.]

III. A usage may be changed. (*Cookendorfer v. Preston*, 4 How., 317.) But the knowledge of that change must be brought home to the party to be affected by it. This may be in any of the modes already mentioned, or in some other mode from which it may justly be inferred that the party knew or ought to have known it.

IV. In this case it is admitted that, by the usage of the bank, existing up to the spring of 1846, the demand and notice set up in this action would have been insufficient. It is admitted that no notice, public or otherwise, was given of the alleged change; it is not shown how the change was made; there are but three instances of practice under the alleged change, all of which were in the spring of 1848.

It is not pretended that the defendant ever had any dealings with the bank prior to this time; the note was not made payable or negotiable at the bank; and the court is now asked to go, for the first time, the length of saying that every man to whose credit a note is discounted by a bank, is bound by all the usages of that bank in regard to demand and notice of that note, although he has never dealt with the bank before, and the note was not made negotiable or payable there, and there is no fact or circumstance in the case from which it can legally be inferred that he knew the said usage.

It will not do to say he received the avails. If the law binds him it binds all the intermediate parties between him and the maker. Nor does it follow, that because the avails ostensibly went to his credit, that he derived any benefit from them. He was the payee, and last indorser. They must have gone to his credit. But the money was on the same day paid to bearer on his check. It may well be inferred that it was paid to the makers; that the note was made for their benefit, to be discounted wherever they could get it done, having no reference to this particular bank, or it would have been made payable and negotiable there. The check also is for "proceeds of" this note, discounted this day for \$800, the usual form in which the proceeds of a discounted note would pass to the credit of the maker.

Nor will it do to say that it was discounted on his credit. He then stood in the condition of a surety. As surety he is not to be bound beyond the terms of his contract. His contract was made with reference to the existing and well known commercial usage, and the banking usage of the community in which he lived. It

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is a general note, so to speak—not a note payable or negotiable at any particular bank, or having any reference to any particular [*544] or special usage. His contract bound him to the general usage on its face, and as surety he is entitled to all the benefit of that general usage. It was, that if the maker did not pay at maturity he would, provided demand was made on the maker, and notice given to him as indorser, according to the general usage.

The plaintiff sets up another contract, not apparent on the face of the paper, nor to be inferred from any dealings, nor exhibited in any knowledge brought home expressly or by any recognized implication, to the defendant.

It is submitted that the Circuit Court was right in giving the instruction.

Mr. Justice McLean delivered the opinion of the court:

This was a writ of error to the Circuit Court of the United States for the District of Columbia.

This action was brought on a promissory note dated the 11th March, 1848, given by George W. Yellott, Henry Haw, and William B. Scott, in the name of Haw, Yellott & Co., in which they promised to pay to Phillip Otterback, Esquire, or order, sixty days after date, the sum of \$800, for value received; which note, before it became due, was assigned to the plaintiff.

The general issue was pleaded, and the cause was tried by a jury.

The note was discounted by the Bank of Washington, the proceeds of which were drawn by the defendant.

The following facts appear in the bill of exceptions: the note was unpaid at maturity, and on Monday, the 15th of May, after 3 o'clock of that day, was delivered by the bank, to George Sweeny, the notary employed by said bank, to demand payment thereof, and for protest if not paid. The notary stated that he demanded payment at the United States Hotel, and was answered "neither of the proprietors are within, and it cannot be paid." On the same day notice was left at the dwelling of the indorser.

The witness further stated, that he had been teller of the bank since the year 1836, and that after the decision of the case of *Cookendorfer v. Preston*, by the Supreme Court, in 1846, the said bank changed the usage and custom which had theretofore prevailed therein, in regard to the demand and protest of negotiable paper held and discounted by it; and in all cases of discount they thereafter held the paper until the fourth day of grace; and if the said fourth day fell on Sunday, it was under the said change the custom of the bank to retain it until Monday, and on that day to deliver the same to the notary to demand payment and give [*545] notice; and Sylvester B. Bowman, book keeper of the bank, states that since the decision of of said case, the usage had been changed by the bank, as above stated.

No notice of such change had been given, so far as the witness knew; and it was further stated that four cases had occurred in which the notes becoming due on Sunday, the notice was given on Monday. On the evidence, this court instructed the jury that the plaintiff had not used due diligence in demanding payment

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and giving notice of non-payment to the indorser—to which the plaintiff excepted.

This court, by several decisions, have sanctioned the usages of the banks in this district, in making demand and giving notice of non-payment, varying from the law merchant. *Renner v. Bank of Columbia*, 9 Wheat., 587, 588; *Mills v. Bank of the U. S.*, 11 Wheat., 480; and in some instances where, in this respect, notes left in a bank for collection, have been placed on a different footing from notes discounted. (*Cookendorfer v. Preston*, 4 How., 824.)

But this usages had been of long standing and of general notoriety. Rights had grown up under them which could not be disregarded without injury to commercial transactions. In the case before us the usage relied on, and under which notice to the indorser was given, had been adopted by the bank two years before the note in question was discounted, but it seems only four cases had occurred under it. No public notice was given at the time of its adoption, and no presumption can arise from the facts stated, that the indorser could have had notice of the usage.

It is said, if a bank may establish a usage, it may change it; and that there must be a beginning of acts under it. This may be admitted, but it does not follow that a usage is obligatory from the time of its adoption. To give it the force of law, it requires an acquiescence and a notoriety, from which an inference may be drawn that it is known to the public, and especially to those who do business with the bank. It is unnecessary to consider whether a usage adopted might acquire force from public notices generally circulated. No such notice was given in this case.

But to constitute a usage, it must apply to a place, rather than to a particular bank. It must be rule of all the banks of the place, or it cannot, consistently, be called a usage. If every bank could establish its own usage, the confusion and uncertainty would greatly exceed any local convenience resulting from the arrangement.

In this country and in England, three days of grace are given by the general commercial [546*] law, and the day the note matures *is not one of them. In Hamburg, the day the bill falls due makes one of the days of grace. Notice must be given to the drawer or indorser on the day the dishonor takes place, or on the next day. If notice be given through the post-office, it must be forwarded by the first mail after the demand of payment. If the note fall due on Sunday, under the general law, the demand of payment must be made on Saturday.

The usage is not proved in this case. Four instances, in the course of two years, are insufficient to establish a usage. Such a rule would, in effect, abolish the commercial law, in regard to demand and notice on promissory notes and bills of exchange. There is ground to doubt whether any deviation from the general law has not been productive of inconvenience.

No explanation is given why the demand of payment on the note was made at the United States Hotel, in this city. Such a demand would seem to be insufficient.

We are therefore of the opinion, that there was no error in the instructions of the court to the

jury; the judgment of the Circuit Court is therefore affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

WILLIAM LIVINGSTON AND EBENEZER
N. CALEF, *Appellants*,

v.

WILLIAM W. WOODWORTH, Administrator of WILLIAM WOODWORTH, Deceased;
JAMES G. WILSON, ARTEMAS L. BROOKS, AND IGNATIUS TYLER, *Appellees*.

Misjoinder, objection of, too late on appeal—Measures of damages on bill for account of profits on infringement of patent—Confined to those actually made.

Where the assignors of a patent right were joined with the assignee for a particular locality, in a bill for an injunction to restrain a defendant from the use of the machine patented, and the defendant raised, in this court, and after a final decree, an objection arising from a misjoinder of parties, the objection comes too late.

Moreover, in the present case, the parties consented to the decree under which the account in controversy was adjusted.

That consent having been given, however, to a decree by which an account should be taken of gains and profits, according to the prayer of the bill, the defendant was not precluded from objecting to the account upon the ground that it went beyond the order.

The report having been recommitted to the master, with instructions to ascertain the amount of profits which might have been realized with due diligence, and the master having framed [*547] his report upon the theory of awarding damages, this report, and the order of the court confirming it, were both erroneous.

Under the circumstances of this case, the decree should have been for only the actual gains and profits during the time when the machine was in operation, and during no other period.

THIS was an appeal from the Circuit Court of the United States for the District of Massachusetts.

All the facts of the case are stated in the opinion of the court, to which the reader is referred.

It was argued by *Mr. Schley* for the appellants, and by *George T. Curtis* for the appellees.

Mr. Schley made the following points:

1. The account ought not to have been taken from the date of the patent. The title of the complainant, Tyler, was not complete until 1st July, 1848, nor the title of Brooks until the 10th May, 1848. At the furthest, the account ought not to have been taken from a period prior to the latter day.
2. The account ought not to have been con-

NOTE.—Rule of damages. Approved in *Dean v. Mason*, 20 How., 198.

tinued beyond the time of the filing of the bill. There are cases, undoubtedly, in which the account is continued to the date of the report; but this is not such a case.

8. It was clearly erroneous to allow interest, from the day of filing the bill, on the whole amount; as part of the amount accrued after that date.

Upon the case, as it stood in court, actual "gains and profits," and nothing more, ought to have been charged against the defendants. If damages, beyond actual gains and profits, were asked, the complainants should have sought another forum. (Curtis on Patents, sec. 848; *Hindmarsh on Patents*, 361-365; *Crossley v. The Derby Gas Light Co.*, 3 Mylne & Craig, 428, 433; *Bacon & Spotswood*, 1 Beav., 887; *Colborn v. Sims*, 2 Hare, 560; 2 Eden on Injunctions, 251; Phillips on Patents, 457; Webster on Patents, 119, 168, 238; *Lee v. Alston*, 1 Ves., Jr., 82.)

5. The allowance of \$1 per thousand was not warranted by the evidence in the cause; even if, in other respects, the decree was right. The allowance was excessive, upon the merits, as disclosed in evidence.

The points made by Mr. Curtis, for the appellees, were the following:

I. The first point that will be submitted, on behalf of the appellees, will be, that this being a bill for an injunction and an account, and a decree having been entered by consent 548*] of parties *(Record, p. 68), that the complainants were entitled to the injunction and account prayed for in the bill, an appeal does not lie from the final decree, which merely ascertains the items of the account which the appellants consented should be taken.

That an appeal cannot be taken from a decree entered by consent, counsel will cite 2 Daniel's Ch. Pr., 1179, 1180; *Bradish v. Gee*, Amb., 229; *Harrison v. Rumsey*, 2 Ves., 488; *Atkinson v. Marks*, 1 Cow., 693; *Corning v. Cooper*, 7 Paige, 597.

There is a case in Ohio which is otherwise, founded on the peculiar provisions of the statute allowing appeals. (*Brewer v. The State of Conn. et al.*, 9 Ohio, 189.)

But there is nothing in the provisions of the Judiciary Act of 1789, or in the Act of March 3, 1803, sec. 2, allowing and regulating appeals in equity, to prevent the application by this court of the rule, that when a decree has been taken by consent, it cannot be disturbed by an appeal or a rehearing. The object of the Act of 1803 is stated in the case of *The San Pedro*, 2 Wheat., 141, 142. The only question in this case is, whether the consent decree, entered May Term, 1840 (p. 18), does not render the final decree (p. 51, 52) a decree by consent also. It will be contended that it does:

1. Because, by the first decree, the appellants consented that the appellees were entitled to the perpetual injunction, and "the account prayed for in the bill;" and all that remained to be done was to ascertain what account was prayed for in the bill.

2. Because, by the first decree it was expressly declared that the parties consented to have the account commence at such a time as should be found by the master, and be confirmed by the court—a stipulation as binding on both

parties as if they had made the same point the subject of arbitration.

But if the appeal was rightly taken, counsel for the appellees will contend,

II. That the second decretal order to the master, by which he was directed to ascertain "the amount of profits which may have been, or, with due diligence and prudence, might have been, realized by the defendants for the work done by them" with the machine complained of, taken in connection with the principles laid down by the court in their opinion (see appendix to this brief), stated the true rule for this case.

1. It appears, by an account filed with the master at the first hearing, that the appellants had been using the machine complained of from July, 1845, to July, 1848, and had planed therewith 3,962,760 feet of boards during that time.

It also appears that they had received an average of \$2 per thousand feet for this work; and in their answer they state that this work was done at an average expense of \$1.50 per thousand *feet, leaving 50 cents, only, [*549 as the net profit actually realized on a thousand feet. But they do not profess to do this with entire accuracy, but as an "approximate estimate."

In this state of the facts, the master, assuming that he was to find only the actual net profits realized, heard evidence on the part of the complainants which tended to show that a thousand feet of boards could be planed for a less cost; and also, evidence on the part of the respondents, tending to show that it would cost as much as they had stated in their answer; but he held that the result of the whole evidence did not authorize the conclusion that the respondents had not truly stated the actual cost, and, accordingly, he reported \$1.50 as the cost per thousand, leaving an actual profit of 50 cents only.

As it stood on the master's first report, therefore, there was evidence tending to show that, in charging \$1.50 per thousand as the cost of planing, the respondents had conducted the business with less skill and prudence than it might have been conducted. The master's conclusion was based wholly on the idea that the actual net profits furnished the rule, and that the evidence did not control the statement of the answer as to the amount of such actual profits.

An exception being taken and argued, it appeared to the court that here was a state of facts which required the application of a different rule, and the cause was recommitted to the master, by the second decretal order, and the accompanying instructions.

The rule announced was, that the master was to report the profits which the respondents might have made with due diligence and prudence; and the principle adopted by the court was, that the respondents were to be charged as involuntary trustees, accountable, like mortgagees in possession and other similar trustees, for the profits which might have been received with due care and prudence.

To apply this rule rendered it necessary to hear evidence on both sides, and to take the average given by all the testimony of what it would cost to plane 1,000 feet. The result of

the whole evidence, given to the master at both hearings, may be thus stated.

(The counsel then went into some long calculations respecting the cost of planing.)

2. There is no technical difficulty in a court of equity in adopting and applying such a rule as that directed by the second decretal order to the master.

Where the court has jurisdiction to give the principal relief sought, it will make a complete decree, and give compensation for the past injury. As in bills for specific performance. **550*** [*Newham v. May*, 18 Price, 749; *Nelson v. Bridges*, 2 Beav., 239; *Phillips v. Thompson*, 1 Johns. Ch., 150; *Parkhurst v. Van Cortlandt*, *Ibid.*, 273; *Pratt v. Luv & Campbell*, 9 Cranch, 456; *Cathcart v. Robinson*, 5 Pet., 269; 2 Story Eq. Jurisp., sec. 796.] So also in injunction bills for waste. (*Jesus College v. Bloom*, 3 Atk., 263; *Garth v. Cotton*, *Ibid.*, 751; *Lee v. Alston*, 1 Bro. Ch., 194.)

The jurisdiction in equity conferred upon the circuit courts in patent causes, by statute, contemplates full power to give the plaintiff as ample redress as he could have at law, except that the damages cannot be trebled. (Patent Act of July 4th, 1836, secs. 17, 14.)

3. There being no technical difficulty in applying a rule that involve elements of computation, and gives an approximate compensation to the party injured, the question is simply one of principle, viz.: What rate of profits shall a party, who has long infringed a patent, be required to account for in equity?

The court below did not direct the master to find damages, nor did he go into that inquiry. He inquired, as he was directed to do, whether the profits actually made by the respondents were as large as they might have been with the exercise of due care and prudence.

a. Any other rule, in a case of this kind, would put the patentee entirely in the power of the trespasser, and enable the latter to fix the rate at which he should account for the use of the machine.

b. The rule applied in this case by the court below was correct in principle. It was to hold the party accountable, as an involuntary trustee, for what the patentee might have realized by the same exercise of the right, the evidence showing that he had made the cost of the work excessive. The principle is well settled, that a court of equity sometimes forces the character of a trustee upon an intruder, or wrong-doer, or one who is in possession under color of right, and who takes rents or profits which belong to another, or might have taken them.

The particular class of trustees referred to in the opinion of the court below are mortgagees.

The following authorities show the application of the rule. *Anonymous*, 1 Vern., 45; *Chapman v. Tanner*, *Id.*, 267; *Coppring v. Cooke*, *Id.*, 270; *Jennings v. Eldredge*, 3 Story, 825, 829, 330, 331; *Dexter v. Arnold*, 2 Sumn., 108, 130.

c. This is a case of first impression. All the authorities and precedents which declare that the infringer is to account in equity for the "profits" made by the unlawful use of the invention, contemplate a case where the actual profits are all that could have been made, or else that question has not been raised. This

*is a case where the evidence shows [**551** that the respondents so conducted their business that the actual profits were less than half what might have been realized by the patentee from the same business.

III. The objection that the account ought not to have been taken from the date of the (re-issued) patent, viz.: July 8th, 1845, but should have commenced May 20th, 1848 (the date of Wilson's deed of confirmation to Brooks, one of the complainants), is now too late. By consent of parties, the account was to commence at such time as should be found by the master and confirmed by the court. (P. 18.) The master found the facts, and the court directed the account to commence at the date of the re-issued patent. No appeal lies from the decree thus consented to.

Besides, the bill was brought in the name of the original owner of the reissued patent, Woodworth's administrator, Wilson, his assignee, and Brooks & Tyler, the sub-assignees; and by consent, the respondents admitted the right to the injunction and account prayed for.

IV. If the appeal can open this question, it is submitted that the decree was right.

The first patent to Woodworth, the inventor, was granted December 27th, 1828. November 16th, 1842, Woodworth's administrator obtained from the commissioner, under the Statute of 1836, sec. 18, an extension for seven years from December 27th, 1842. December 7th, 1842, the administrator granted to Brooks an exclusive territorial right for the residue of the extended term, viz.: to December 27th, 1849.

January 11th, 1844, the administrator conveyed all his interest to Wilson.

July 8th, 1845, the administrator surrendered the renewed patent granted to him by the commissioner, and obtained a re-issue under the Act of 1836, sec. 18, on account of a defective specification.

July 20th, 1847, Brooks assigned to Tyler one half of his territorial right.

May 20th, 1848, Wilson, by his deed, confirmed Brooks' title, and Brooks, by his deed, dated July 1st, 1848, confirmed his previous grant to Tyler.

The bill was filed July 10th, 1848, in the name of the administrator, Wilson, Brooks, and Tyler, to obtain an account for infringements commenced at least at the date of the surrender and re-issue, and steadily continued to the time of filing the bill. The court directed the account to commence with the date of the re-issued patent.

Three positions will be maintained:

1st. That the complainants, who sought this redress, jointly *represented the [**552** whole legal and equitable title, and were jointly entitled to the relief from the date of the re-issued patent. Even if it were true that a re-issue does not give a legal title to the assignee whose grant was taken before the re-issue (which is not admitted), it still leaves his equitable title, as against strangers and trespassers, as valid as it was before.

2d. An assignee of the whole existing interest under a patent has the same legal title in the re-issued patent granted under the Act of 1836, sec. 13, for a defective specification, which he had before the re-issue, without any confirmation-

ry grant from the patentees. (*Woodworth v. Stone*, 8 Story, 749; *Woodworth v. Hall*, 1 Wood. & M., 248.)

The two cases of *Wilson v. Rousseau*, 4 How., 646, and *Bloomer v. McQueen*, 14 How., 539, deny to previous assignees a legal title under an extension, and recognize only their right to continue the use of the specific machines purchased.

They admit, therefore, that the extension is a grant of a new estate to the patentees. A re-issue under the 13th section of the Statute is not a new grant in any sense, but merely the correction of errors or omissions in the specifications; and the Statute merely restricts the right of recovery to infringements committed after the correction has been made.

3. If the complainants, Brooks and Tyler, needed any confirmation of their title, they had it before the bill was filed, and it relates back to the earliest period when the Statute will permit recovery for infringements under a re-issued patent.

V. The objection that the account ought not to have been taken beyond the time of filing the bill, covers the work done in the course of fifteen days. The bill was filed July 10th, 1848, and the account covers the work done to July 25th. It appears that the injunction was served on the last-mentioned day. (Record, pp. 13, 14.) The amount planed in the month of July was 73,821 feet; so that, at the rate of 4,200 feet per day, the respondents must have worked their machine more than seventeen days in the month of July—that is to say, they did more than seven days' work after the bill was filed. (Record, p. 19.) It does not appear precisely why the master took the account to the 25th of July, but probably it was because the respondents rendered it to that time, they not having stopped before. After the bill was filed they had notice of the complainant's rights, and on their own admission they were infringers and bound to account. To allow the present objection to prevail would be to say, that in a suit for an injunction and account, the right being admitted, the respondent may go on working after the bill is filed, and the complainant must file another bill to recover for what is done after the first bill is filed and before the account 553*] is taken. There is no technical necessity for this, and it would be most onerous, as leading to endless litigation.

VI. The objection as to the interest allowed on the items which accrued after the filing of the bill, assumes that work was done by the respondents after the bill was filed. By their own admission they had no right to use the machine. The master brought the account down to the time when the respondents rendered it, July 25th; and if a part of the items thus covered accrued after the respondents were notified, those items must, in contemplation of law, be treated as if they had already accrued when the bill was filed, in taking a continuing account.

Mr. Justice Daniel delivered the opinion of the court:

The appellees, on the 24th of July, 1848, obtained from the court above mentioned an injunction to restrain the appellants from using

or vending one or more planing machines substantially the same in construction and mode of operation as the machine which had been patented to William Woodworth, deceased.

In their bill they allege the originality of the invention of the patentee, the extension of the patent after his death for the space of seven years beyond its original limitation to the appellee, William W. Woodworth, as administrator of the inventor, and the grant by said administrator to the appellee, Brooks, of the exclusive right to construct and use the invention within certain specified limits for the entire period of that extension. The bill further alleges a second extension by Act of Congress of the patent of said administrator for the term of seven years from the 27th day of December, 1849; but states that in consequence of doubts entertained as to the correctness of the specification, and of the fact of said letters patent having been found to be inoperative, they were duly surrendered, and new letters patent bearing date on the 8th day of July, 1845, were issued to the appellee, William W. Woodworth and his assigns, for the residue of the term of 28 years from 27th of December, 1828; that subsequently to this last renewal the appellee, William W. Woodworth, had granted to the appellee, Wilson, and to his assigns, all the right and title acquired by him by the issue of the last letters patent with the amended specification. That the appellee, Brooks, by his deed of the 20th of July, 1847, had granted and assigned to the appellee, Tyler, one half Brooks' right in the patent to Woodworth for the term ending on the 27th of December, 1849, to be used within the town of Lowell, and not elsewhere. That the appellee, Wilson, by the deed of the 20th of May, 1848, assigned and confirmed to Brooks and his assigns, the exclusive right of constructing and using twenty [*554] planing machines according to the letters patent with the amended specification, and gave authority to Brooks, in Wilson's name, to execute all such deeds of confirmation to the assignees of any rights and privileges within the County of Middlesex as he should deem fit, and that in virtue of this power and authority, he, Brooks, did by his deed of July 1st, 1848, grant and confirm to the appellee, Tyler, in the name and behalf of the said Wilson, as well as in his own name, all the rights and privileges described in the deed from Brooks to Tyler of the 20th of July, 1847. The bill further alleges that the appellants were then using, and for some time had used, within the City of Lowell, one of the machines substantially the same in construction and mode of operation as the planing machine in the said last-mentioned letters patent described, the exclusive right to make, use and vend which is by law vested in the appellees. The bill therefore charges that theretofore two actions at law had been instituted in that court, the one against a certain James Gould, and the other against Rodolphus and James, Edwards and Cyrus Smith, for the violation of the exclusive privileges granted to the plaintiffs in those actions under patent last aforesaid, by using a machine substantially the same with the said planing machine invented by the said William Woodworth; and that, upon issues made up in both these actions, the jury found that the defendants had infringed

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the patent, and subjected them to the payment of damages. It avers the use, as before stated by the appellants, of their machine, to be an infringement of the Woodworth patent, and a violation of the exclusive rights and privileges of the appellees; and concludes with a prayer that the appellants may be decreed to account for and pay over to the appellees all gains and profits which have accrued from using their said machines since the expiration of the said original patent; that they may be restrained, by injunction, from using or vending any one or more of said machines; that the machine or machines, in the possession or under the control of the appellants, may be destroyed or delivered over to the appellees, who ask also for general relief.

The appellants, by their answer, state that during a part of the time which has elapsed between the autumn of 1841 and April 1st, 1844, they have used in their mill at Lowell a single planing machine constructed according to a patent granted to James H. Hutchinson on the 16th of July, 1839, which machine, in some of its combinations, substantially resembles the machine specified in the patent granted to Woodworth in 1845, but is unlike any machine specified in the patent to Woodworth in 1828. They aver, also, that the planing business had been carried on as aforesaid, in virtue of the 555*) Hutchinson machine, at Lowell, with the full knowledge of the appellees, Brooks, and without objection from him until within a short time previously; and that they had no knowledge or belief of any infringement by them of the patent to Woodworth, until after the decision in *Gould's* case; after which decision they were informed that the patent to Woodworth had been surrendered and re-issued with a new specification, the validity of which re-issued patent had not, within their knowledge or belief, been established until the decision of the suit against the said Edwards and Smith. The answer denies the originality of Woodworth's claim, by averring that James, Joseph, Aaron and Daniel Hill, and Leonard Gilson, in the District of Massachusetts, as early as 1827, and John Hale of Bloomfield, in the State of New York, in the year 1828, had knowledge of and had made and used planing machines essentially the same and prior to the pretended invention of William Woodworth, deceased.

At the May Term of the court, 1849, this cause coming on to be heard upon the bill, the answers, replications and exhibits, by the consent of the parties it was decreed by the court that the appellees (the complainants below) were entitled to the perpetual injunction and to the account prayed for by the bill; said account to commence at such time as shall be found by the master, and be confirmed by the court. The decree proceeds, that the master in taking said accounts shall have power to require the parties to produce before him, on oath, all books and papers relating thereto, and to hear such oral evidence as either party may produce, and on the motion of either of the parties, to examine either of the other parties, upon interrogatories. And all further directions are reserved until the coming in of the master's report.

In pursuance of this decretal order, upon the examination of the parties on oath, and

upon evidence produced *aliunde*, the master reported that the amount of gains and profits received by the defendants below upon 3,962,700 feet of plank, the number of feet planed by them, was at the rate of 50 cents per thousand feet, no exception being taken to the amount of the work stated to have been done by the said defendants, or to the gross amount at which the work was charged by them per thousand, but exception being taken to the report of the master upon the ground that the rate of profit charged to the defendants below should have been \$1 instead of 50 cents per thousand, the court by a further decretal order recommitted the report to the master, with instructions to ascertain the amount of profits which may have been, or with due diligence and prudence might have been, realized by the defendants, for the work done by them or their servants, by the machines described *in [*556 the complainant's bill, and that the account of profits should commence from the date of the letters patent issued with the amended specifications. In obedience to the decretal order last mentioned, the master made a second report, by which he charged the defendants for profits on the work done by their machine at the rate of \$1 per thousand feet, instead of 50 cents, as in his former report, from the 8th day of July, 1845, the date of the re-issued patent. He says it is true that the rate of profit adopted by him is conjectural, "but that he does not think he has infused into the case any element too unfavorable to the defendants. That by the decision of the court they were trespassers and wrong-doers, in the legal sense of the words, and were consequently in a position which might make them liable to be mulcted in damages greater than the profits they have actually received; the rule being not what benefit they have received, but what injury the plaintiffs have sustained." To this second report of the master, exceptions were filed by the appellees, the plaintiffs below, founded upon the departure of the master from the safe and just rule of actual profits, as prayed for by the bill, and the adoption of a rule of proceeding which was vague and conjectural, and unsustained by the evidence in the cause. At the May Term, 1851, the Circuit Court decreed that this report of the master, except so far as interest is thereby disallowed, should be confirmed, and that the appellants should, within ten days, pay to the appellees, the sum of \$3,962.96, with interest thereon from the day of filing the bill, with costs. It is this decree, founded upon the antecedent proceedings herein adverted to, that we are to review; and it may here be remarked, that the statement to those proceedings has been unavoidably protracted from the necessity for considering two questions of a preliminary character raised in the argument, and which it is proper to dispose of before deciding upon, and before reaching the merits of this cause. 1st. It has been insisted, on behalf of the appellants, that the appellee, Tyler, claiming as assignee under Woodworth, Wilson and Brooks, and asserting a title complete in himself, within a certain locality, could not regularly unite in his bill those persons whom he had shown had no title within the same locality, and who could not therefore be embraced in a decree in his favor; a decree which,

in its terms and effect, must exclude every kind of interest in those co-plaintiffs within the same limits. It is true, as a rule of equity pleading, that none should be made parties, either as complainants or defendants, who have no interest in the matters in controversy, or which can be affected by the decree of the court. *Vide* Story's Equity Pleading, ch. 4, sec. 281; so, 557*] too, in sec. 232 of the same work *it is said: "In cases where the want of interest applies, it is equally fatal when applicable to one of several plaintiffs as it is when applicable to one of several defendants. Indeed, the objection in the former case is fatal to the whole suit, whereas, in the latter case, it is fatal (if taken in due time) only as against the defendant improperly joined." In the same work, sec. 544, it is said that, "in cases of misjoinder of plaintiffs, the objection ought to be taken by demurrer, for if not so taken, and the court proceeds to a hearing on the merits, it will be disregarded, at least if it does not materially affect the propriety of the decree." The language of Lord Langdale, in the case of *Raffity v. King*, as reported in the Law Journal, Vol. VI., p. 93, is very clear upon this question, where he says: "As to the objection to John Raffity being made a plaintiff, I am not satisfied it would, under any circumstances, be considered of such importance as to deprive the other plaintiffs of the relief they are entitled to. There have been cases in which the court, with a view to special justice, has overcome the difficulty occasioned by a misjoinder of plaintiffs;" and in the case of *Morley v. Lord Hawke*, cited in two *Younge & Jervis*, 520, before Sir William Grant, the rule is thus stated as to the misjoinder of plaintiffs: "The defendant objected to any relief being granted in that state of the record; and without determining the effect of the objection if brought forward earlier, I think it is now too late. If the objection had been stated in the answer, the plaintiffs might have obtained leave to amend their bill, and might have made John Raffity a defendant instead of a plaintiff, for which there is an authority in the case of *Aylwin v. Bray*, 2 *Younge & Jerv.*, 518, *note*, and in such a case as this, where the objection is reserved to the last moment, I think it ought not to prevail."

In the case before us the objection of misjoinder of the plaintiffs nowhere appears upon the pleadings, nor, for aught that is disclosed, was it insisted upon even at the hearing: it is urged for the first time after the hearing and after a final decree, and to allow this objection at so late a stage of the proceedings, would be a surprise upon the appellees, and might operate the most serious mischiefs. In this case, and at this time, the allowance of such an objection would be peculiarly improper, for here the objection cannot be viewed as having been merely waived by reasonable and ordinary implication, but the defendants have expressly consented to a decree between the parties as they were then arrayed upon the record. As to this objection, therefore, we think it comes too late to be of any avail, and should not affect the cognizance of the court either as to the parties or the subject matter of the controversy. 2d. 558*] On the part of the appellees (the complainants in the Circuit Court) it has been in-

sisted that the decretal order, made in this cause by consent, covered and ratified in advance all the subsequent proceedings on the part of the court, rendering those proceedings inclusive of the final decree a matter of consent, which the appellants could have no right to retract, and from which, therefore, they could not legally appeal. In order to try the accuracy of this argument and of the conclusions sought to be deduced therefrom, it is proper to examine the order which is alleged in support of them. The words of that order are as follows:

"This cause came on, &c.—and by consent of parties it is declared by the court"—what? "That the complainants are entitled to the perpetual injunction and the account prayed for by the bill." It seems to us incomprehensible, that by this consent of the defendant below, he has consented to anything precise and unchangeable beyond the perpetual injunction, much more so that he had thereby bound himself to acquiescence in any shape or to any extent of demand which might be made against him under the guise of an account. Indeed, the complainants below, and the Circuit Court itself, have shown by their own interpretation of this decretal order, that they did not understand it to mean, as in truth by no just acceptance it could mean, anything fixed, definite and immutable; for the complainants below excepted to the report of the master, and the court recommended that report with a view to its alteration. Nor can we regard the reference to the master as in the nature of an arbitration; for if so deemed, the award of that officer must have been binding, unless it could be assailed for fraud, misbehavior or gross mistake of fact. In truth, the account consented to was the account prayed for by the bill, and in the plain words of the bill, viz: "that the defendants may be decreed to account for and pay over all such gains and profits as have accrued to them from using the said machines since the expiration of said original letters patent." This language is particularly clear and significant—such gain and profits, and such only, as have actually accrued to the defendants; and we are unable to perceive how, by such an assent, the appellants, the defendants below, could have been concluded against exceptions to anything and everything which might have been evolved by that report, however illegal or oppressive.

Considering next the decretal order for the recommitment of the first report, the second report, made in obedience to that order, and final decree founded upon the second report, we are constrained to regard them all as alike irreconcilable with the prayer of the bill, with the just import of the consent decree, and with those principles which control the action of courts of equity. In the instructions to the mas- [*559 ter it will be seen that he is ordered "to ascertain and report the amount of profits which may have been, or with due diligence and prudence might have been realized by the defendants for the work done by them or by their servants by means of the machines described in the complainant's bill, computing the same upon the principles set forth in the opinion of the court, and that the account of such profits commence from the date of the letters patent issued with the amended specifications."

The master, in this report, made in pursuance of the instructions just adverted to, admits that the account is not constructed upon the basis of actual gains and profits acquired by the defendants by the use of the inhibited machine, but upon the theory of awarding damages to the complainants for an infringement of their monopoly. He admits, too, that the rate of profits assumed by him was conjectural and not governed by the evidence; but he attempts to vindicate the rule he had acted upon by the declaration, that he was not aware that he had "infused into the case any element too unfavorable to the defendants. That by the decision of the court they were trespassers and wrong-doers, in the legal sense of these words, and consequently in a position to be mulcted in damages greater than the profits they have actually received: the rule being not what benefit they have received, but what injury the plaintiffs have sustained." To what rule the master has reference in thus stating the grounds on which his calculations have been based, we do not know. We are aware of no rule which converts a court of equity into a instrument for the punishment of simple torts; but upon this principle of chastisement the master admits that he has been led, in contravention of his original view of the testimony, and upon testimony, and upon conjecture as to the reality of the facts and not upon facts themselves, to double the amount which he had stated to be a compensation to the plaintiffs below, and the compensation prayed for by them; and the Circuit Court has, by its decree, pushed this principle to the extreme by adding to this amount the penalty of interest thereon from the time of filing the bill to the date of the final decree.

We think that the second report of the master, and the final decree of the Circuit Court, are warranted neither by the prayer of the bill, by the justice of this case, nor by the well-established rules of equity jurisprudence.

If the appellees, the plaintiffs below, had sustained an injury to their legal rights, the courts of law were open to them for redress, and in those courts they might, according to a practice which, however doubtful in point of essential right, is now too inveterate to be called in question, have claimed not compensation merely, but vengeance, for such injury as they could show that they had sustained. But before a tribunal which refuses to listen even to any, save those whose acts and motives are perfectly fair and liberal, they cannot be permitted to contravene the highest and most benignant principle of the being and constitution of that tribunal.

There they will be allowed to claim that

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which, *ex æquo et bono*, is theirs, and nothing beyond this.

In the present case it would be peculiarly harsh and oppressive, were it consistent with equity practice, to visit upon the appellants any consequences in the nature of a penalty. It is clearly shown that the appellants, in working their machine, were proceeding under an authority equal to that (the same indeed) which bestowed on Woodworth and his assignees the right to their monopoly. The appellants were using a machine patented by the United States to Hutchinson, and might well have supposed that the right derived to them from such a source was regular and legitimate. They were, then, in no correct sense, wanton infringers upon the rights of Woodworth, or of those claiming under him. So soon as the originality and priority of the Woodworth patent was ascertained by law, the appellants consented to be perpetually enjoined from the use of their machine (the Hutchinson machine), and to account for whatever gains and profits they had received from its use. Under these circumstances, were the infliction of damages, by way of penalty, ever consistent with the practice of courts of equity, there can be perceived in this case no ground whatever for the exercise of such a power.

On the contrary, those circumstances exhibit, in a clearer light, the propriety of restricting the account, in accordance with the prayer of the bill, to the actual gains and profits of the appellants (the defendants below) during the time their machine was in operation, and during no other period. We are therefore of the opinion, that the decree of the Circuit Court is erroneous, and should be, as it is hereby, reversed, with costs; and that this cause be remanded to the Circuit Court, with instructions to proceed therein in conformity with the principles ruled in this opinion.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Massachusetts, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, for further proceedings to be had therein in conformity to the opinion of this court.

Cited—20 How., 208; 9 Wall., 802; 3 Otto, 70; 7 Otto, 139; 15 Otto, 194; 6 Blatchf., 36, 136; 13 Blatchf., 157; 18 Blatchf., 5; 8 Cliff., 569; 3 Hughes, 177.

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REPORTS

OF

CASES

ARGUED AND ADJUDGED IN

THE

Supreme Court of the United States,

IN DECEMBER TERM, 1853.

BY BENJAMIN C. HOWARD.

Counselor at Law, and Reporter of the Decisions of the Supreme
Court of the United States.

JUDGES
OF THE
SUPREME COURT OF THE UNITED STATES
DURING THE TIME OF THESE REPORTS.

The Hon. ROGER B. TANEY, *Chief Justice.*
The Hon. JOHN M'LEAN, *Associate Justice.*
The Hon. JAMES M. WAYNE, *Associate Justice.*
The Hon. JOHN CATRON, *Associate Justice.*
The Hon. PETER V. DANIEL, *Associate Justice.*
The Hon. SAMUEL NELSON, *Associate Justice.*
The Hon. ROBERT C. GRIER, *Associate Justice.*
The Hon. BENJAMIN R. CURTIS, *Associate Justice.*
The Hon. JOHN A. CAMPBELL, *Associate Justice.*

CALEB CUSHING, Esq., *Attorney-General.*
WILLIAM THOMAS CARROLL, Esq., *Clerk.*
BENJAMIN C. HOWARD, Esq., *Reporter.*
JONAH D. HOOVER, Esq., *Marshal.*

RULE NO. 63.

1st. In all cases where a writ of error or an appeal shall be brought to this court from any judgment or decree rendered thirty days before the commencement of the term, it shall be the duty of the plaintiff in error or appellant, as the case may be, to docket the cause, and file the record thereof with the clerk of this court within the first six days of the term; and if the writ of error or appeal shall be brought from a judgment or decree rendered less than thirty days before the commencement of the term, it shall be the duty of the plaintiff in error or appellant to docket the cause and file the record thereof with the clerk of this court, within the first thirty days of the term; and if the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed, upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, stating the cause, and certifying that

such writ of error or appeal has been duly sued out and allowed.

And in no case shall the plaintiff in error or appellant be entitled to docket the cause and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court or consent of the opposite party.

2d. But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of the court; and if the case is docketed and a copy of the record filed with the clerk of this court, by either party, within the periods of time above limited and prescribed by this rule, the case shall stand for argument at the term.

3d. In all cases where the period of thirty days is mentioned in this rule, it shall be extended to sixty days in writs of error and appeals from California, Oregon, Washington, New Mexico, and Utah.

THE DECISIONS
OF THE
Supreme Court of the United States,
AT
DECEMBER TERM, 1853.

JOHN H. LEWIS, *Appellant*,
v.
SARAH DARLING.

Chancery practice—necessary parties—case remanded from appellate court with leave to add—pleading—where real estate will be charged with legacies without reference to personal—relief granted when land lies out of state.

Where a bill in chancery was filed by a legatee against the person who had married the daughter and residuary devisee of the testator (there having been no administration in the United States upon the estate), this daughter, or her representatives if she were dead, ought to have been made a party defendant.

But if the complainant appears to be entitled to relief, the court will allow the bill to be amended, and even if it be an appeal, will remand the case for this purpose.

Where the will, by construction, shows an intention to charge the real estate with the payment of a legacy, it is not necessary to aver in the bill a deficiency of personal assets.

The real estate will be charged with the payment of legacies, where a testator gives several legacies, and then, without creating an express trust to pay them, makes a general residuary disposition of the whole estate, blending the realty and personalty together in one fund. This is an exception to the general rule that the personal estate is the first fund for the payment of debts and legacies.

Where it appears, by the admissions and proofs, that the defendant has substantially under his control a large property of the testator which he intended to charge with the payment of the legacy in question, the complainant is entitled to relief, although the land lies beyond the limits of the state in which the suit is brought.

THIS was an appeal from the District Court of the United States for the Northern District of Alabama, exercising circuit court equity jurisdiction, under the Act of Congress of February 19, 1831, ch. 28 (4 Stat. at Large, p. 444).

The following is the statement contained in the brief of the counsel for the appellant, which is adopted by the court, in their opinion:

A bill was filed March 16, 1846, by the appellee against the appellant—alleging that in the year 1823 one Samuel Betts, a citizen of the State of Connecticut, but transacting business at Havana, in the Island of Cuba, as a partner

in the firm of F. M. Arredondo & Son, died at Havana, leaving a will in due form of law, proven and admitted to record in that city, by which he bequeathed to the complainant, [*2] Darling, a legacy of \$2,500. That Betts left but one child, his daughter Mary, who has since married the defendant Lewis—and that a tract of several hundred thousand acres of land, in the present State of Florida, was held and owned by the firm, of which Betts was a partner. That by a decree of the proper court of the State of Florida, Lewis, the defendant, has been declared entitled to 60,000 acres of this land, in right of his wife, the daughter of said Betts, which is worth more than \$100,000; that Lewis had also received a deed of conveyance for 15,000 acres of land, valued at \$50,000, which was the property of Betts as a partner of the firm. And in addition to this, also received large sums of money belonging to Betts' estate. The bill prays that Exhibit A (a copy of Betts' will), and Exhibit B (a copy of the answer of the defendant, Lewis, to a bill filed in the Superior Court of the District of East Florida, in the now State of Florida, by John Brush "et al." v. Lewis "et al.") be considered parts of the bill. And propounds interrogatories to Lewis: 1st. As to whether Exhibit A is a correct copy of that which defendant, in the case against him in Florida, had set out in his answer there, as the will of Betts. 2d. Whether the original will was in defendant's possession: if not, why, and where it was, and was it admitted to probate in Havana. 3d. Whether defendant received any property, lands or moneys, from the estate of Betts, and if so, whether it was the property of Betts, individually, or as a partner of the firm of Arredondo & Son, and what was its value. 4th. Whether Exhibit B was a true copy of the answer it purported to be. 5th. Whether Joseph Fenwick (who by the will of Betts was appointed executor in the United States) did ever, or did then, reside in Alabama, or where he then resided. 6th. What the value of the property was, received by defendant from Betts' estate; when was it received, and what was the rate of interest in Florida and in Cuba. And prays process to procure full answers to the interrogatories, and payment of the legacy, if it appear that the defendant has received from Betts' estate enough to satisfy the complainant.

On page 5 of Record, in complainant's Ex-

NOTE.—*Legacies and debts, when chargeable on the realty.* See note to Wright v. Denn, 10 Wheat., 204; and note to Stump's Ex'rs v. Deneale, 1 Pet., 585.

HOWARD 16.

hibit A, will be seen the appointment of Joseph Fenwick as the executor of Betts in the United States, and the legacy bequeathed, as stated in the bill. The residue of the testator's property, after a few minor dispositions, is devised to his only child, the wife of the defendant.

Exhibit B, which complainant makes a part of her bill, shows that the large tract of land mentioned in the bill did belong to the firm of Arredondo & Son, of which Betts was a member, and sets out how Lewis, by marriage with 3*] the daughter, *the sole heir of Betts, became entitled to a portion of it. Lewis, in that answer, also states, with regard to the 15,000 acres mentioned in the bill in this case, that, being ignorant of the true rights of his wife, in the year 1881 he agreed with F. M. Arredondo upon the terms of a compromise as to his wife's interest in said lands; by which agreement he and his wife were to receive 15,000 acres, as an undivided portion of the balance of the tract, after certain sales which had been previously made by Arredondo & Son; and in consideration of which, he and his wife were to relinquish forever, all rights to any further or other portion of said land, by virtue of the interest of Samuel Betts. That a deed was executed by said F. M. Arredondo, conveying to Lewis and wife 15,000 acres of the land, and signed and delivered to Lewis and wife, but that he and his wife had refused to execute any deed of release or relinquishment of their interest in said land—alleging as a reason for not doing so, that he ascertained Arredondo had not made full and fair representations of Betts' interest in the land, and had, either by mistake or with fraudulent purpose, made incorrect statements in the recitals of the deed of the sales previously made, and that he (the defendant) had therefore always regarded the said deed of Arredondo to himself and wife as void, and had claimed nothing under it since he ascertained the facts above referred to, and had always refused to carry out the verbal agreement of the compromise, and averring Betts' interest as partner to the extent of one third, in the large tract of land belonging to the firm of Arredondo & Son; he prays a decree for partition of said lands, and that the portion to which he is entitled in right of his wife, when established to the satisfaction of the court, be allotted to him by a decree to that effect.

On page 11 of Record, is defendant Lewis' first answer to the present bill, in which he totally denies having ever received one cent of value from Betts' estate, either in real, personal or mixed property. But this answer being objected to as insufficient and evasive, the court below, May 21st, 1846, ruled that it was insufficient—but also ruled, that the bill did not allege sufficient matter for equitable relief, it not showing that the executor had not paid the legacy, and if it had not been paid, did not show any reason for proceeding against the residuary legatee instead of the executor.

Thereupon the complainant filed her amended bill, stating that "no one, to her knowledge or belief, had ever taken out letters testamentary or of administration upon the estate of Betts, either in the State of Alabama or elsewhere," and "that no person had ever paid the legacy, or any part thereof," and that no person but defendant had ever received any part of Betts'

*estate, and called upon defendant to state [*4 whether anyone had taken out letters upon the the estate.

Defendant then puts in his second answer, stating that he was a defendant in a suit in Chancery in Florida, brought against him and others by John H. Brush and others, and that before the termination of said suit, a copy of the will of Betts was filed by him as part of the evidence of his claim, in right of his wife. The original will was in Spanish, and he obtained a Spanish copy of it from the proper depository in the City of Havana. He believed that a Spanish copy and an English translation were filed among the papers in that suit. That the suit was not tried in the regular way—but the parties entered into a covenant or agreement, which was put upon the records of the Court of Florida, and was by consent, made the decree of that court. That the will was not adjudicated upon; cannot say on his oath that the Exhibit A is a correct translation of the original—but it does not differ from the English copy filed in the Florida case. To the third interrogatory, he states that he received no property, lands or moneys from the estate of Betts. That a decree in the Florida case had been entered by consent of parties, and that the decree gave to his wife a large amount of land—but there was no decree in favor of him—and the decree in favor of his wife was not a final one—needing the report of commissioners appointed to make partition of the land before it became a final decree. Cannot say what is the value of the land decreed to his wife, because the decree is not final, and awaits the further action of the court. He admits the Exhibit B to the bill to be a true copy of the answer filed by him in the Florida case. States that Joseph Fenwick did reside in Alabama, and believes he is dead; and that he does not know or believe that any person has taken out letters of administration upon the estate of Betts in the United States. He does not know whether there was or was not administration in Cuba—and has no information on the subject; and suggesting the want of parties, prays to be dismissed.

No exception to this answer appears on record; but on the 23d of November, 1847, the court decide the answer to be insufficient, and also that the bill was defective in not alleging sufficient matters for equitable relief, in not showing that the executors had not paid the legacy, and that not being shown in alleging no reasons for proceeding against the residuary legatee instead of the executor.

Leave to amend was granted; but instead of so doing the complainant filed her replication—averring the sufficiency of her bill, the insufficiency of the answer, and traversing the statements of the latter.

*On November 28d, 1847, the court [*5 below decreed in favor of complainant, ordering that she recover against the defendant \$7,045.45, the amount of the legacy, with interest and costs, and ordered execution to issue accordingly.

On November 24th, 1847, defendant filed a petition for rehearing, alleging error in the decree; because the decree in the Florida case was not final, and he had not, as yet, received in right of his wife, or on his own account, the least benefit from that decree, nor was it certain

that he ever would. For the report of the commissioners appointed to make partition in the suit in Florida had been objected to by some of the parties, and set aside by the court, and that another commission had been appointed which could not report before the next term of the court, in June, 1848; that he would, therefore, under the decree, have to pay a large sum of money to the complainant out of his own funds, when he had received nothing under the decree rendered in favor of his wife. He also states that in the case in Florida, a petition for leave to file a bill in the nature of a bill of review for the purpose of opening the decree in that court was then pending there, and submits a decision of the Supreme Court of the State of Florida, showing that by the decision of that court and the Acts of Assembly of Florida, the decree directing the partition of lands is not a final but an interlocutory decree.

He also urges that he should not be charged with the 15,000 acres mentioned in the deed from Arredondo, because the complainant makes his answer in the Florida case a part of her bill, and in that answer it is shown that that deed is treated as void, and he has never claimed anything under it, and that so far as it can be considered as a portion of his wife's interest in the estate, it is wholly merged in the decree for 60,000 acres in the suit in Florida.

On November 29th, 1848, defendant filed his affidavit, stating that since his petition for rehearing, the leave to file a bill in the nature of a bill of review in the court of Florida, referred to in said petition, had been granted in that court; that the bill had been accordingly filed, and that it had wholly suspended the execution of the decree there obtained—that he had answered that bill, and the same is at issue. That neither himself nor his wife had as yet received one dollar in real, personal or mixed property from Betts' estate.

On December 2d, 1848, the court, upon argument of the petition for rehearing, dismissed it, and thereupon the defendant prayed an appeal. Nearly all the testimony embraced in the residue of the record appears to bear upon the partnership relations and the interest of Betts in the Florida lands, facts which are not disputed.

[*] But on page 77 it will be seen that the proceedings in a case in the court below between this appellant and Burr Hubbell Betts (who is one of the legatees in the will of Samuel Betts), were produced in evidence in the trial, and that the bill in those proceedings, which in its general nature resembles the present bill, refers to a certain portion of the property of Betts (the deceased) which had come into the hands of the appellant by a conveyance there referred to as Exhibit C. That conveyance will be found on page 28 of record, and is a deed made by F. M. Arredondo, to appellant and wife in 1831, stating that Samuel Betts had in his lifetime conveyed to the grantor certain property in trust for creditors, and the grantees having obtained from these creditors assignments of all their right and claim to the property, it was thereby conveyed to the grantees.

The first appeal was not taken within the time specified by law, and another appeal was granted 23d May, 1850.

This appeal, also, was not acted upon for the reason assigned on page 86, that a compromise

was pending between the parties. In the meantime the case was docketed and dismissed under the rule of this court, and accordingly a third appeal was granted, and is now prosecuted.

The case was argued by **Mr. Reverdy Johnson**, and **Mr. Reverdy Johnson, Jr.**, for the appellant, and by **Mr. Butler** for the appellee.

The points made by the counsel for the appellant were the following:

1st. The bill is materially defective for want of parties; the wife of defendant, through whom alone he claims, and whose right he represents, being an essential party to the proceedings. (Story's Eq. Pl., secs. 75, 77, 137, 138, 22d and 52d Rules of Eq. Prac.)

2d. Neither the original nor the amended bill allege that all the personal property (whatever it was) had come into the possession of the defendant, nor that the part that did come was sufficient to pay the legacy. (Story's Eq. Pl., secs. 241, 257.)

3d. Nor do they aver that in fact there was not sufficient personal property to pay the legacy. (1 Story's Com. Eq., sec. 571; *Hoye v. Bewer*, 3 Gill & Johns., 153.)

4th. The effect of the plaintiff's replication being to admit the sufficiency of defendant's second answer, there is no evidence to authorize the decree against the defendant. (Story's Eq. Pl., 877; 61st Rule Eq. Prac.)

5th. If this be not the effect of the replication, yet the answer is distinct and full, and there is no evidence that any property belonging to the estate of Samuel Betts ever came into the hands of the defendant, and he cannot be held liable "*de bonis propriis*." (1st Florida Rep., 455, *Putnam v. Lewis*.)

*The points made by **Mr. Butler**, for [*7 the appellee, were the following:

First. The specific legacy is charged upon the residuary legacy of those who have a right to take it.

Second. It is certain that the residuary legacy now capable of being reduced into possession by the residuary legatee, is more than sufficient to pay off the specific legacy.

Third. The replication of the complainant must be regarded as evidence in the case, as it has not been contradicted by any direct denial of the defendant, but must be regarded as a traverse of the assumptions of the answer. (Story's Eq. Pl., pp. 793, 794, 801, 802.)

Fourth. Admitting the technical truth of the defendant in his evasive answer, that the defendant (Lewis) has not received any property of the testator, Samuel Betts, still it appears that he can receive, and is entitled by law to receive, property more than sufficient to pay all the debts of the testator and the specific legacies contained in his will.

Fifth. The defendant having intermeddled with, and appropriated to himself an interest in, the estate of Samuel Betts, he cannot exonerate himself from liability to creditors without making some such disclosure as would discharge him under a plea of *plene administravit*.

Sixth. The defendant ought not to be allowed to take any exception to the bill of the complainant at this stage of the proceedings; if any exception could have been taken originally (which the complainant contends could not), such exception may be regarded as having been

waived by the defendant. (Story's Plead., pp. 74, 89, 801, 802.)

Mr. Justice Wayne delivered the opinion of the court:

We have verified the statement of the pleadings in this case attached to the brief of the counsel for the appellant, by a comparison of it with the record, and shall adopt it for the purpose of giving our judgment upon this appeal.

Upon this statement, the counsel for the appellant urges five grounds for the reversal of the judgment.

1. It is said that the bill is materially defective for want of parties, that the wife of the appellant, through whom alone he claims and whose rights he represents, ought to have been made a party.

2. That there is no allegation in the original or amended bill, that all the personal property of the testator had come into the hands of the appellant, or that so much of it as he may have received, was sufficient to pay the legacy claimed by the appellee, Sarah Darling.

3. That there is no averment in the bill that there was not sufficient personal property to pay the legacy.

4. That the effect to the plaintiff's replication being an admission of the sufficiency of the defendant's second answer, there is no evidence to authorize the decree against the defendant.

5. If this be not the effect of the replication, yet the answer is distinct and full, and there is no evidence that any property belonging to the estate of Samuel Betts ever came into the hands of the defendant, and that he cannot be liable *de bonis propriis*.

We have given these points because they raise every objection which can be made against the judgment of the court below, either upon the pleading or the merits of the case. We will discuss them successively.

The record certainly discloses the fact that the wife of the appellant has such an interest in the controversy that no decree can be given which will not affect it. She is the residuary legatee of her father, and all the property given by that clause of his will became hers immediately upon his death. The interest which the appellant may have in it was acquired from his marriage with her, after her father's death. It is strictly marital, and the extent of it during the coverture, or afterwards if he lives longer than his wife, depends upon the law of the sovereignty where the real estate may be, and so far as the personal property is concerned, upon the investiture of it in the legatee according to the law of her father's domicile at the time of his death. Or it may depend upon a marriage contract, if any was made. We have not undertaken to say what that interest is, or may become. We have only intimated upon what it may depend; and will further say, that the children, in the event of their mother's death, may acquire an interest in the property, independently of their father's control. If she be already dead, then such of the children as are *sui juris* should be made parties to the plaintiff's bill. And if there are other children still minors, the court should have them made parties by a guardian of its appointment, ex-

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cluding their father from such an office. As the case stands, it is not too late to amend the bill by making the proper parties. The rule in equity, permitting it to be done, is this: that on the hearing of a cause, even upon an appeal, an order may be made for the cause to stand over, with liberty to the plaintiff to amend by adding proper parties, if it appears that the plaintiff is entitled to relief, but that it cannot be given for the want of proper parties. The equity of the plaintiff is sufficiently obvious in this case for the application of the rule. The proofs in the case show that she has a strong claim up [*9] on the appellant for the legacy for which she sues him. It is manifest that the legacy has been made by the testator a charge upon both the real and personal estate which he means to give to his daughter. It will not do, then, to permit it to be defeated in this suit by any mistake or unskillfulness in pleading. We shall then reverse the judgment appealed from, in conformity with the first objection made against it. But we will remand the cause to the Circuit Court for further proceedings, and for the proper parties to be made.

The second and third objections are also exceptions to the sufficiency of the plaintiff's pleadings. It is said that there are no averments in the bill, that all the personal property of the testator had come into the possession of the appellant. And if any part had come, that it was sufficient to pay the legacy. And further, that the bill contains no averment that there was not sufficient personal property to pay the legacy. These objections are made upon the supposition that the legacy, in this instance, cannot be charged upon the real estate of the testator until it has been shown that there is not personal property enough to pay the legacy. That depends upon the intention, as it is to be collected from the residuary clause of the testator's will.

It is: "And as to all the rest and remainder of my property, debts, rights and actions, of what kind and nature soever, that may belong or appertain to me. I name and appoint as my sole and universal heiress, the above-named Maria Margaret Betts, my lawful daughter, in order that whatever there may appear to appertain and belong unto me, she may have and inherit the same, with the blessing of God and my own." The testator's real and personal property are found blended by him in the clause together. He leaves to his daughter all of his property, of every kind, which may remain after the antecedent bequests and devises in his will have been paid and given to the objects of his bounty. His daughter is to have "the rest and remainder of his property, debts, rights and actions, of what kind and nature soever." He had previously, in the will, declared that his property consisted of one third in the House established in this city under the firm of Fernando de la Maza Arredondo & Son, and that it would appear from the accounts, books, and other papers of the company. And he further declares that as both the debts due by him and to him will appear by the books of the company, that he confides it to his partners to collect and pay them. His executors were not to have anything to do with the collection and payment of his debts.

Their office was to secure any surplus which

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there might be after his debts were paid, and to 10*] apply it according to his will, "in the manner required by the law of Cuba, where the testator was domiciled at the time of his death. The testator then appoints an executor to fulfill his will in the United States, where he had no personal property. Now, it does not appear that either of his executors in Cuba or in the United States ever undertook to administer the testator's estate under his will. Indeed, the reverse is to be taken for the fact, from the statement of the appellant. There can be, then, no personal property of the testator *eo nomine* in the United States over which a court of equity in the United States could have any control for the payment of the legacy.

Nor is this a suit against a party, properly representing the testator, for the application of his personal property to the payment of the legacies. Between the appellant and the testator there is no official privity to give to him any of those rights or imposing upon him any of the obligations of an executorial trust. It is a suit against a defendant who is charged with having received large sums of money for which he is accountable, and which may be applied by a court of equity to the payment of the legacies bequeathed by the testator; and when that has been done, to the purposes of the residuary clause of his will. He is also charged with having under his control the real estate of the testator without the sanction or authority of the executor who was appointed to administer it in the United States. The proofs in the record show it to be so. In such a case such averments as are called for by the second and third objections are not necessary. If this were not so, the language of the will would make such averments unnecessary. The testator has made bequests of money antecedently to that clause, without creating an express trust to pay them, and has blended the realty and personalty of his estate together in one fund in the residuary clause. That of itself makes his bequests of money a charge upon the real estate, excluding from it the previous devises of land to Fenwick, Wallace, and to John and Fernando Arredondo.

The rule in such a case is, that where a testator gives several legacies, and then, without creating an express trust to pay them, makes a general residuary disposition of the whole estate, blending the realty and personalty together in one fund, the real estate will be charged with legacies, for in such a case, the "residue" can only mean what remains after satisfying the previous gifts. (Hill on Trustees, 508.) Such is the settled law both in England and in the United States, though cases do not often occur for its application. Where one does occur, a legatee may sue to recover the legacy, without distinguishing in his bill the estate into the two kinds of realty and personalty, because it 11*] is the manifest intention of the testator that both should be charged with the payment of the money legacies. Nor does this conflict at all with that principle of equity jurisprudence, declaring that generally the personal estate of the testator is the first fund for the payment of debts and legacies. The rule has its exceptions, and this is one of them.

Ambrey v. Middleton, 2 Eq. C. Abr., 479; *Hassel v. Hassel*, 2 Dick., 526; *Brudenell v. Boughton*, 2 Atk., 268; *Bench v. Biles*, 4 Madd., HOWARD 16.

187; *Cole v. Turner*, 4 Russ., 376; *Mirehouse v. Seaisfe*, 2 M. & Cr., 695, 707, 708; *Edgell v. Haywood*, 3 Atk., 358; *Kidney v. Cousmaker*, 1 Ves., Jr., 436; *Nichols v. Postlethwaite*, 2 Dall., 131; *Hassandever v. Tucker*, 2 Binn., 525; *Witman v. Norton*, 6 Binn., 395; *Mo-Lanahan v. Wyant*, 1 Penn., 111; *Adams v. Brackett*, 5 Met., 280; *Van Winkle v. Van Houten*, 2 Green Ch., 172; *Downman v. Rust*, 6 Rand., 587; *Lupton v. Lupton*, 2 Johns. Ch., 618, has been supposed to conflict with the rule, but it does not do so, for there it is said to be dependent upon the testator. The same is the case of *Dudley v. Andrews*, in 8 Taunt.; and *Paxson v. Potts*, in 2 Green Ch., 318, is a case in point with this case.

We now proceed to the consideration of the fourth and fifth objections.

It is denied in these points that there is any evidence to authorize a decree in favor of the plaintiff, even if her bill had proper parties. We think differently. The appellant is charged in the bill with having obtained a decree in a court in Florida, in behalf of his wife, for 60,000 acres of land, it being the real estate of her father, and that it was worth more than \$100,000. He is also charged with having received large sums of money of the estate of the testator, and that he has refused to pay the plaintiff's legacy. He is not charged with having received the money *eo nomine* as the personal estate left by the testator, but as money received for which he is accountable to the estate. The difference between the two is obvious. He answers that he had not received as yet, of the estate of the testator, one cent of value. And when he answers concerning the real estate, he does not deny, but admits that he had obtained a decree in the State of Florida for the land of the testator. His answers are made with such reserve that they must be considered as having been meant to keep from the plaintiff the discovery of what her bill seeks to obtain. The natural and candid reply of the appellant, from his unofficial connection with the testator's estate, should have been a disclosure of the condition of the real estate of the testator—what had been done with it by himself; what contracts had been made by himself in respect to it, whether any arrangement *or bargain had been made for the sale [*12 of any part of it; whether any money had been received on account of it, or was to be paid to him. He should have made also a frank disclosure how the personal estate of the testator had been administered by the parties and executors of the testator, if they had administered it at all, and how and to what extent he had received, or arranged to receive it, as a part of his wife's interest in her father's estate.

This admission is found in his petition for a rehearing of this cause. In that he says that he has obtained a decree in the court of Florida, in behalf of his wife, for 62,000 acres of the grant of land which had been made in 1817, to Arredondo & Son, containing 289,645½ acres, of which the testator owned one third—that the grant had been confirmed and held to be valid by the Supreme Court of the United States; and that the grant had been located and surveyed under the authority of the government of the United States. Now, it does not matter, for the purposes of this case (the owner-

ships of the testators to one third of that grant having been admitted and proved), that the writ of partition obtained for it by the appellant in Florida is only interlocutory, in the sense that it is not final until the partition shall be made and returned to the court. The ownership of the land is determined by the decree of the Supreme Court of the United States, and the testator's legacies have been made by him a charge upon it. The ownership of the testator of a part of that land cannot be affected by any proceedings, finished or unfinished, in the courts of Florida.

Further, there is proof in the record that the appellant has received for himself and his wife from Fernando M. Arredondo a conveyance for certain property which Betts, the testator, had conveyed to Arredondo and others in trust for the payment of sundry debts due at its date by the testator. Lewis, the appellant, obtains for his wife and for himself assignments from the creditors of the testator of their demands, and takes a reconveyance of the property. What that property is, does not appear, but whatever it may be it is liable as well as the rest of the testator's property, for the payment of the legacy. Again, the appellant admits, and the proof is that he negotiated with the partners of the testators, for a conveyance of that portion of the Arredondo grant which was conveyed to the testator in behalf of his wife. It appears to have been made by Arredondo, but not to the extent of the testator's interest. On that account he rejected the deed tendered to him, and afterward obtained from the proper court in Florida a decree for 62,000 acres in behalf of his wife in that grant.

13*] *We shall not pursue this part of the case further. We are satisfied that the merits of the controversy were not misunderstood by the learned judge in the court below.

It appears, then, from the admissions and proofs in this case, that the appellant has substantially under his control a large property of the testator, which we think from his will that he meant to charge with the payment of the plaintiff's legacy, excluding, as we have said, the devises of land to Fenwick, Wallace, and Fernando and Joseph Arredondo. We repeat that it is a charge upon the rest of the real as well as the personal property of the testator. But he states that the real estate is in another sovereignty than that in which the plaintiff has sued, and is therefore out of the jurisdiction of this court to make any decree concerning it. It is true that the court cannot, in such a case, order the land to be sold for the payment of any decree which it may make in favor of the plaintiff. But it is not without power to act efficiently to cause the defendants to pay any such decree.

The land may be declared to be charged with the payment of the legacy so as to compel the parties who claim the same as the property of the testator to set off or sell a part of it for such purpose. And we further say, if, in the proceedings of the court below hereafter, it shall appear that the appellant has received or made arrangements to receive any fund or money equitably belonging to the testator, sufficient to pay her the plaintiff's legacy, that a decree may be made against him for application of it to that purpose.

We do not consider it necessary to say more in the case.

We shall direct the judgment of the court below to be reversed, for the want of proper parties, and that the court shall allow them to be made parties, with such other amendments to be made by the plaintiff to her bill as the court may judge have not been put in issue by the bill with sufficient precision, and that a master shall be appointed to report upon the testator's estate, and to take an account thereof.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Alabama, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said District Court in this cause be, and the same is hereby reversed, with costs, for the want of proper parties; and that this cause be, and the same is hereby remanded to the District Court, in order that proper parties may be made, and for further proceedings to be had therein in conformity to the opinion of this court.

Cited—11 Wall., 227; 22 Wall., 253.

*HENRY F. TURNER, JAMES F. [14
PURVIS, AND STERLING THOMAS.
Plaintiffs in Error,
v.
JOSEPH C. YATES.

What questions are for court—charge to jury—agent's authority—when becomes principal, is fact for jury—evidence to prove, admissible—exceptions must be noted at trial—bill of, may be afterwards signed nunc pro tunc.

A bond, with sureties, was executed for the purpose of securing the payment of certain money advanced for putting up and shipping bacon. William Turner was to have the management of the affair, and Harry Turner was to be his agent.

After the money was advanced, Harry made a consignment of meat, and drew upon it. Whether or not this draft was drawn specially against this consignment was a point which was properly decided by the court from an interpretation of the written papers in the case.

It was also correct to instruct the jury that if they believed, from the evidence, that Harry was acting in this instance either upon his own account, or as the agent of William, then the special draft drawn upon the consignment was first to be met out of the proceeds of sale, and the sureties upon the bond to be credited only with their proportion of the residue.

The consignor had a right to draw upon the consignment with the consent of the consignee, unless restrained by some contract with the sureties, of which there was no evidence. On the contrary,

NOTE.—*Exception, when must be taken to be available on review.* See note to Phelps v. Mayer, 15 How., 160.

How far admissions and statements of attorney, or his clerk, bind client.

An admission made by an attorney, on the trial, is evidence against his client, in that action, if it is done to save the necessity of proving some fact on the trial, or for convenience as to some matter of practice. Chambers v. Mason, 5 Scott, N. S., 50; Haller v. Worman, 9 Scott, N. S., 322; Colledge v. Horn, 3 Bing., 119; Talbot v. M'Gee, 4 Moir., 37;

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there was evidence that Harry was the agent of William, to draw upon this consignment as well as for other purposes.

It was not improper for the court to instruct the jury that they might find Harry to have been either a principal or an agent of William.

An agreement by the respective counsel to produce upon notice at the trial table any papers which may be in his possession, did not include the invoice of the consignment, because the presumption was, that it had been sent to London, to those to whom the boxes had been sent by their agent in this country.

A correspondence between the plaintiff and Harry offered to show that Harry was acting in this matter as principal, was properly allowed to go to the jury.

The testimony of an attorney was admissible, reciting conversations between himself and the attorney of the other parties in their presence, which declarations of the attorney were binding on the last-mentioned parties.

Evidence was admissible to show that a charge of one per cent. upon the advance made upon the consignment, was a proper charge according to the usage and custom of the place.

It is not necessary that the bill of exceptions should be formally drawn and signed, before the trial is at an end. But the exception must be noted then, and must purport on its face so to have been, although signed afterwards *nunc pro tunc*.

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of Maryland.

The facts of the case are set forth in the opinion of the court, to which the reader is referred.

It was argued by *Messrs. Barroll and May* for the plaintiffs in error, and by *Mr. Johnson* for the defendant in error. There was also a brief filed upon that side by *Mr. S. T. Wallis*.

The points on behalf of the plaintiffs in error were the following:

First and fifth exceptions: That the court erred in ruling out the parol testimony offered, of the contents of the invoice sent to the defendant in error by William H. F. Turner from Chattanooga.

Second, third, and sixth exceptions. That **15*** the court erred in admitting the testimony to prove the separate contract alleged to

have been made by Mr. Yates with H. F. Turner, &c., as set forth in the statement upon page 84 of printed record. (*Cole v. Hebb*, 7 G. & J., 20; *Davis v. Calvert*, 5 G. & J., 269; *Clark v. State*, 8 G. & J., 111; *Mayall v. Kauffman*, 4 Serg. & Rawle, 317, 321; *Franklin Bank v. Penn.*, Del. & Md. S. N. Co., 11 G. & J., 28; *Gilpins v. Consequa*, 1 Pet. C. C., 87.)

Fourth exception. That the court erred in admitting the evidence of usage for commission to be charged on advances on shipments made to London, because the said evidence was irrelevant.

Sixth exception. That the court erred in admitting the evidence of Mr. Teackle, because it was incompetent testimony, and because it was irrelevant.

Seventh exception. That the court erred in rejecting the prayers of the defendants, and in its instructions to the jury, for the following reasons:

1. Because said instructions are vague and uncertain, and therefore calculated to mislead the jury. 2. Because the first instruction is not limited to the interview (or subsequent ones) in which the defendants requested plaintiff's counsel to see Mr. Ward. 3. Because said first instruction embraces the acts and declarations of Mr. Ward, in the interview with Mr. Teackle. 4. Because said first instruction directs the jury that the defendants are bound by the acts and declarations of Mr. Ward, although he was only retained by H. F. Turner as such, unless such limitation of retainer was stated to plaintiff or his counsel. (3 Ph. Ev., 359; 1 Greenl. Ev., secs. 197, 199.) 5. Because the said Purvis and Thomas, two of the defendants, were not bound in law by the acts or declarations of said Ward, if the jury believed the testimony, that said Ward was not their agent or counsel, and did not claim or profess to act as such with their knowledge or consent. (Same authorities.) 6. Because, in order to make the defendants liable for the declarations of said Ward, it ought to have been put to the

Pike v. Emerson, 5 N. H., 393; *Alton v. Gilmanton*, 2 N. H., 393.

Matter of conversation with attorney not evidence against client. *Parkins v. Hawshaw*, 2 Stark., 239.

Admissions of attorney made in course of cause, evidence against client. *Doe, d. Wetherell, v. Bird*, 7 Car. & P., 6; *Field v. Hemming*, 7 Car. & P., 619.

Where clerk of attorney has management of cause, what he says is evidence against client. *Standage v. Creighton*, 5 Car. & P., 408.

Letters from attorney, found in possession of client, admissible against him. *Meyer v. Sefton*, 2 Stark., 274.

A letter written by attorney, before his appearance in the cause, is not evidence against client, for whom he afterwards appears, without proof that client authorized it. *Wagstaff v. Wilson*, 4 Barn. & Ad., 339.

The court will not act upon any unwritten agreement of attorney or counsel, about which they differ. *Bushin v. Whitlaw*, 1 M'Cord, 492; *Shippin v. Bush*, 1 Dall., 251; *Parker v. Root*, 7 Johns., 320; *Griawold v. Lawrence*, 1 Johns., 507; *Dubois v. Boosa*, 3 Johns., 145; *Combs v. Wyckoff*, 1 Calnes, 147; *Bain v. Thomas*, 2 Calnes, 95; *Shadwick v. Phillips*, 3 Calnes, 129; but see *Chamberlin v. Fitch*, 2 Cow., 243.

It is the common practice, upon trials of causes, to read the admissions of the attorney on record of either of the parties; and they bind the party for whom the attorney appears. 2 Stark. Ev., 82; *Griffiths v. Williams*, 1 Term R., 710, 711; *Hays v. Perkins*, 3 East., 568.

The admissions of attorneys of record bind their

clients in all matters relating to the progress and trial of the cause. But to this end they must be distinct and formal, or such as are termed solemn admissions, made for the express purpose of alleviating the stringency of some rule of practice, or of dispensing with the formal proof of some fact at the trial. In such cases they are in general conclusive; and may be given in evidence even upon a new trial. 1 Greenl. Ev., sec. 186; *Gregory v. Parker*, 1 Camp., 394; *Paletthorp v. Furnish*, 2 Esp., 511, note; *Clifford v. Benton*, 1 Bing., 199; 8 Moore, 16; *Petty v. Anderson*, 3 Bing., 170; *Cotes v. Davis*, 1 Camp., 485.

But other admissions which are mere matters of conversation with an attorney, though they relate to the facts in controversy, cannot be received in evidence against his client. *Young v. Wright*, 1 Camp., 139, 141; *Elton v. Larkins*, 1 Mood. & Ro., 190; *Doe v. Richards*, 2 Car. & K., 216; *Watson v. King*, 3 Com. B., 608.

If the admission is made before suit, it is equally binding, provided it appear that the attorney was already retained to appear in the cause. *Marshall v. Cliff*, 4 Camp., 133.

Where the attorney is already constituted in the cause, admissions made by his managing clerk or his agent are received as his own. *Taylor v. Williams*, 2 Barn. & Ad., 845, 853; *Taylor v. Forster*, 2 Car. & P., 196; *Griffiths v. Williams*, 1 Term R., 710; *Truslove v. Burton*, 9 Moore, 64; *Holt v. Squire*, Ry. & M., 282.

The admission by attorney of the due execution of a deed, does not preclude the party from taking advantage of a variance. *Goldie v. Shuttleworth*, 1 Camp., 70.

jury to find that defendants, although present, heard such declarations, or were in a position to be able to hear, if so disposed. (*Gale v. Spooner et al.*, 11 Vt., 152; *Edwards v. Williams*, 2 How., Miss., 846; *Ward v. Hatch*, Ired., 282.)

And so far as the second instruction is concerned, that the court erred in giving the same. Because, 1. The said instruction invades the province of the jury, by assuming as facts the making of the draft for \$5,733, and also that said draft was drawn as an advance on said bacon. (*Lewis v. Kramer et al.*, 3 Md. R., 294.) 2. The said instruction calls upon the jury to 16*] "decide a question of law, in leaving them to find what are liens on said bacon. (*Plater v. Scott*, 6 G. & J., 116.) 3. The said instruction requires the jury to deduct from the net proceeds of sales the draft for \$5,733, without requiring them to find the fact that said Harry drew said draft, as agent of William, and had authority so to do, or the facts from which such authority may be inferred. 4. Because there was no evidence from which the jurors had the right to infer that the draft for \$5,733 was in fact drawn by Harry as the agent of William; or that said draft was accepted, or paid by the plaintiff to said Harry, as agent of William, the admission of the payment of said draft being that such payment was to Harry, in his individual capacity, and not as agent. 5. Because the principle announced in said instruction, that if the jury find Harry acted as agent of William in the transactions after occurring in relation to the bacon at Chattanooga, then Harry had authority to draw said draft, and William and his property are bound therefor, is in conflict with the principles of law, there being no evidence in the cause from which an authority to Harry, to draw and negotiate drafts as agent of William, can be sustained. The plaintiffs in error will contend that the agency of Harry was not otherwise than as overseer and adviser for William, in slaughtering hogs and packing the meats, and did not authorize said agent to procure advances, by pledging the meat before or after its shipment, to Messrs. Gray & Son. And that the character of the agency was known to the defendant in error from the beginning. And in ascertaining whether Harry had authority to draw the draft in question, the court are bound to exclude from their consideration all the testimony limited to the proof, that Harry acted as principal, and not as agent, in drawing such draft. (Sto. Ag., secs. 87, 251, 390.) 6. Because the advance of \$5,733, under the circumstances of the case, was a fraud upon the sureties in the bonds, if such advance was made upon William's meat. 7. Because the said instruction does not require the jury to find that the advance of \$12,000 was made in pursuance of the bond. 8. Because the court erred in allowing the plaintiff below to contend before the jury, upon two distinct, inconsistent propositions. (*Winchell v. Latham*, 6 Cow., 689; *Beake's Ex. v. Birdsell*, 1 Cox, 14.)

Additional objections to the court's second instruction.

1. Because the court erred in its instruction to the jury, that only half the net proceeds of the bacon was to be credited to the defendants. 826

The plaintiffs in error will contend that the whole net proceeds of the bacon should have been credited to the "amount of the advance of \$12,000, and the jury instructed to give a verdict for the amount found to be due by William H. F. Turner. They will contend that under the instruction, as given, the jury were bound to find a verdict against the defendants for a greater sum than was owing by William, the excess being to the extent of the other half of the net proceeds not credited.

2. They will also contend, that whether the meat belonged to William or Harry, the \$5,733 draft, paid by Mr. Yates, was not a lien on the meat, because the bill of lading was not indorsed. That there can be no lien without an actual or constructive possession of the thing intended to be given in pledge, and that, in the case at bar, Mr. Yates had no such possession. (14 Pet., 445.)

3. In the court's instruction the term "liens" was intended to embrace the item of \$5,733, under the fourth exception. The plaintiffs in error will contend that such item was a personal charge against him to whom the advance was made, and was not a lien on the meat; and the jury should not have been instructed to deduct the same as a lien.

The points on behalf of the defendant in error were:

1. That the parol evidence referred to in the first exception was properly excluded.

Because notice, at the trial table, to produce the invoice, was insufficient except under the agreement, and the agreement referred only to papers in the actual possession of the parties. The agreement rested obviously on the good faith of the parties and their counsel; and the declaration of the plaintiff below, that the paper was not in his possession, was *prima facie* sufficient to establish that fact, and exclude the paper from the effect of the agreement.

Because, even if the notice had been sufficient to justify parol proof of a paper constructively in the possession of the plaintiff below, the invoice in question was not so constructively in his possession, having been forwarded to accompany meat, destined for the Messrs. Gray, and received by them, and being therefore, by legal presumption, in their possession.

It will be further argued that the plaintiffs in error were not prejudiced by the exclusion of the parol proof, even if it was admissible under the other proof in that stage of the cause, because it afterwards appeared that the invoice had been actually transmitted to the Messrs. Gray, and was still in their possession, which would have made the parol proof incompetent, even if it had been admitted, under the notice to Yates.

It will further be contended that no prejudice resulted to the plaintiffs in error, in any event, from the rejection of the proof, "because [*18 its whole purpose was to show notice to Yates, that the meat on which he advanced \$5,733 was William Turner's, not Harry's, and the court rightly instructed the jury afterwards, that it made no difference, for the purposes of the case, to which of the Turners the meat, in fact, belonged.

2. That the plaintiffs in error could under no circumstances be entitled to a credit, on the bond in suit, of the proceeds or any part

of the proceeds of the shipments to the Messrs. Gray, unless the meat so shipped belonged to William H. F. Turner; that the proof offered by the defendants in error, and the admission of which forms the matter of the second exception, was offered in connection with other direct proof stated in advance, and afterwards adduced, showing that there was a separate contract with Harry F. Turner for the shipment of meats and receiving advances thereon, which separate contract was known to the plaintiffs in error (Henry F. Turner himself being one of them) when they signed the bond in suit; that the defendants in error, with this knowledge, and forewarned of the difficulties which might result from the two co-existing contracts, insisted nevertheless on becoming sureties in the mode proven; that by the very terms of the bond they constituted Harry F. Turner (one of themselves) their agent, as to William H. F. Turner's business, and placed him in the position of deceiving or misleading Yates in regard thereto, and of managing and shipping the meat as his own or his son's—which they were forewarned might happen; that there were thus bound by Harry F. Turner's action in the premises; that the correspondence between Harry F. Turner and Yates furnished the only positive evidence of the capacity in which Turner shipped the meat and asked and received Yates' advance thereupon, and such correspondence was therefore clearly admissible, for that purpose, which was the only purpose for which it was offered, and went directly to the question of the right of the plaintiffs in error to be credited on the bond with any part of the shipments to the Messrs. Gray.

That the letters of Turner, and the Messrs. Gadsden, who shipped for him at Charleston, inclosing the bills of lading, and relating to the shipment of the meat, were part of the *res gestæ*, and bore directly on the points for which the proof was offered.

That the accounts of sales of the bacon, rendered by the Messrs. Gray, had been previously spoken of by Robert Turner, the witness of the plaintiffs in error, and were admissible on that ground, as well as part of the *res gestæ*.

That the letters of Harry F. Turner to Yates, about the meat, and in regard to drawing thereupon, had been spoken of *by the same witness, and were admissible, on that score, if on none other.

That the capacity in which Harry F. Turner acted at Chattanooga, had been proven by Wilkins and James S. Turner from said Harry F. Turner's acts, and his letters, accompanying his acts and transactions there, were competent to go the jury for the same purpose.

8. That the evidence of Mr. Thomas was clearly admissible for the purpose for which it was offered.

4. That the proof in the fourth exception of the custom in Baltimore to charge one per cent. on advances upon shipments to London, and that the plaintiff (below) claimed it, on his advance of \$5,733, was admissible, because the advance of \$5,733 was properly made, and the plaintiff being entitled to charge for it in account was entitled to the usual commission upon it. The plaintiffs in error themselves, had proven, by the production of Mr. Yates' letter, that such a percentage was chargeable.

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5. That the evidence, as to the invoice claimed to be admissible by the fifth exception, was properly rejected, for the reasons previously stated (No. 1.), and because it was not rebutting evidence, and was inadmissible at that stage of the cause.

6. That the evidence of Mr. Teackle, sought to be excluded by the sixth exception, was not only competent in itself, but was rendered proper by the proof previously introduced by plaintiffs in error themselves, and embodied in the same exception.

That the letters between the Messrs. Gray and Harry F. Turner, were competent proof, because it had been shown that the plaintiffs in error, when they signed the bond, were notified of the existence of the agreement which these letters constituted, and of which they were the best proof.

That they were likewise admissible, because the plaintiffs themselves had previously produced Mr. Yates' letters, referring to the understanding between Harry F. Turner and the Messrs. Gray, of which the letters here referred to were the only proof.

7. That under the circumstances of this case, and in view of the relation of the plaintiffs in error, Purvis and Thomas, to Harry F. Turner, as their joint obligor and co-defendant, with whom they had taken joint defense, they were bound by his acts and declarations in the premises. (*Van Reimsdyk v. Kane*, 1 Gall., 635; *Simonton v. Boucher*, 2 Wash. C. C., 473; *Martin v. Root*, 17 Mass., 237; *Montgomery v. Dillingham*, 3 Sm. & Marsh., 647; *Armstrong v. Farrar*, 8 Mo., 627; 1 Greenl. Ev., sec. 174; 2 Stark. Ev., 25; 1 Phil. Ev., 92.)

*8. That even if the proof offered and [*20 objected to in the second, third, and sixth exceptions was inadmissible, as against Purvis and Thomas, it was clearly competent as against Harry F. Turner, and as the objections were taken, generally, to the admissibility of the proof against all the defendants, they were properly overruled.

9. That the objection to testimony in the third, fourth and sixth exceptions, was too indefinite to be allowed. (*Camden v. Doremus*, 3 How., 530.)

10. That if the court erred in reference to the instructions prayed or given, it was in favor of the plaintiffs in error, by rejecting the prayer of the plaintiff below, which was based upon evidence properly before the jury, and tending to the conclusion which the prayer adopted.

That the first prayer of the plaintiffs in error was properly rejected, because it excluded from the jury all consideration of the contract between Yates and Harry F. Turner individually, as well as of the question whether the meat in controversy was or was not his individual property; and because, further, it made the right of the defendants to a credit from the said meat dependent exclusively on the fact of its belonging to William H. F. Turner, without reference to Yates' knowledge or ignorance of that fact, or to the responsibility of William H. F. Turner and his sureties, under the circumstances, for the acts and declarations of Harry F. Turner, whom they had constituted their agent in the transaction.

Said first prayer is further defective, obviously, in that it claims credit to the extent of

the whole sale, and receipt of proceeds of the meat, whereas, in no case could the plaintiffs in error have been entitled to a credit of more than one half the said proceeds; the sureties on the other bond being in equal right and entitled to divide whatever credits might appear.

The prayer is likewise improper, because the cause of action being joint, and the defense and issues joint, it nevertheless asks an instruction that the jury may sever in their finding, and give to the defendants, Thomas and Purvis, a credit to which their co-defendant, Turner, is not entitled.

The second prayer of the plaintiffs in error was properly rejected, upon the grounds expressed in the court's first instruction, it being immaterial whose attorney Mr. Ward in fact was, or whether he represented himself to be the attorney of Purvis and Thomas, provided the jury believed, that in their presence and with their knowledge, he acted for them, and that the attorney of Yates was referred by them to him, to settle the differences then pending in regard to the bond.

11. That the rule of court was lawful and 21*] governed the case, *and the court properly refused to postpone the swearing of the bailiff and the discharge of the jury until the signing and sealing of the exceptions. (*Walton v. United States*, 9 Wheat., 651; *Ex-parte Bradstreet*, 4 Pet., 106, 107; *Brown v. Clarke*, 4 How., 15.)

The defendant in error will argue upon the whole case, that the agreement of William H. F. Turner to send his shipments to Gray & Son, to pay off the advance of \$12,000, and whatever else he might be allowed to draw for, was no part of the bond or of the consideration upon which the plaintiffs in error joined in it; but a stipulation made afterwards to Yates, not by him, for his benefit, nor that of Turner and his sureties; that it in no way precluded Yates from making subsequent advances, or pledged him to appropriate the proceeds of the meat first to the \$12,000 loan; but, on the contrary, expressly provided for further advances and their payment; that whether Harry F. Turner signed himself "agent" or not to the \$5,733 draft, made no difference whatever, provided Yates accepted and paid the same in good faith, on a pledge of the meat; that whatever be the shape of the transactions, it is manifest that the original loan was to have been made to Harry F. Turner, on the terms of his letters to Messrs. Gray; that bonds to that effect were drawn with the knowledge of Purvis and Thomas; that the substitution of William H. F. Turner was only as to the loan of \$12,000, and was made for the benefit of Harry F. Turner, without the participation of William, who was in Chattanooga, and at the request of the sureties, against the remonstrance of Yates' attorney; that Harry F. Turner was agent of William and manager of the whole business, its property and correspondence, with the privacy and at the desire of the sureties; if he committed a fraud on Yates, or on them, they must bear the burden, as he was of their selection; and that they are under no circumstances entitled to have carried to the credit of the bond more than the amount given by the jury; that is to say, the margin left of the proceeds of the

shipments, after allowing for the usual stipulated advances.

Mr. Justice Curtis delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the District of Maryland. The action was debt on the bond of the plaintiffs in error, the condition of which was as follows:

Whereas the said Joseph C. Yates is about to lend and advance to William H. F. Turner the sum of \$12,000, in such sums and at such times as the said William may designate and appoint; which designation and appointment *and advances it is hereby agreed shall *22 be evidenced by notes drawn by the said William in favor of the said Harry F. Turner, agent, and by the latter indorsed, or by drafts drawn by the said William H. F. Turner in favor of the said Harry F. Turner, agent, on, and accepted or paid by the said Yates, indorsed by said Harry F.

And whereas, the said Harry F. Turner, Sterling Thomas, and James F. Purvis, have agreed, as the consideration for the said loan, to secure the said Yates the payment of the sum of \$6,000, and interest thereon, part of the said loan; and the said Harry F. Turner, with Robert Turner and Absalom Hancock, have entered into a bond similar to this, for the payment of the other \$6,000 and interest.

Now, the condition of the above obligation is such, that if the said William H. F. Turner, at the expiration of twelve months from the date hereof, shall well and truly pay to the said Joseph C. Yates, his executors, administrators or assigns, all such sum or sums of money as may be owing to the said Yates, by the said William H. F. Turner, evidenced as aforesaid, at the said expiration of the said twelve months, or in case the said William H. F. Turner should fail or omit to pay said sum or sums of money, at said time, if the said Sterling Thomas and James F. Purvis, or either of them, shall well and truly pay to the said Yates, his executors, administrators or assigns, so much of said sum or sums of money as may then be owing, as shall amount to \$6,000 and interest, in case so much be owing, with full legal interest thereon, or such sum or sums of money as may be owing, with interest thereon, in case the same should amount to less than \$6,000, then this obligation to be null and void, otherwise to remain in full force and virtue in law.

HARRY F. TURNER, [SEAL.]
STERLING THOMAS, [SEAL.]
JAMES F. PURVIS, [SEAL.]

The defense was that, seven hundred boxes of bacon had been consigned by William Turner to Gray & Co., in London, for sale, and having been sold, the whole of its proceeds ought to be credited against the advance of \$12,000 mentioned in the condition of the bond. The plaintiff did not deny that the merchandise was received by Gray & Co. for sale, and sold by them, but insisted that the property belonged to Harry, and not to William Turner, and so no part of its proceeds were thus to be credited; and that, if bound to credit any part of these proceeds, there was first to be deducted the amount of a draft for \$5,733, drawn by

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Harry Turner on the plaintiff specifically against this property, which draft the plaintiff was admitted to have accepted and paid.

23*] *Upon this part of the case, the District Judge who presided at the trial ruled:

"If the jury believe that defendants executed and delivered the bond now sued upon, and that Harry F. Turner, in the transactions after occurring, in relation to the bacon at Chattanooga, was either the principal in such transactions, or acted as agent of William H. F. Turner, then defendants are entitled only to be credited for one half the net amount of the shipments of bacon made by them, after deducting from the proceeds of sales of such bacon, all liens thereon, including in such liens the draft of \$5,783 drawn as an advance on such bacon."

This ruling having been excepted to, several objections to its correctness have been urged at the bar by the counsel of the plaintiffs in error.

The first is, that the bond does not show the advances were actually made, and therefore the judge ought to have directed the jury to inquire concerning that fact. It is a sufficient answer to this objection to state what the record shows, that in the course of the trial, the plaintiff, having put in evidence drafts corresponding with those mentioned in the bond, amounting to \$12,000, the defendants admitted their genuineness, and that they were all paid at the times noted thereon. The fact that the \$12,000 was advanced was not therefore in issue between the parties, and there was no error in not directing the jury to inquire concerning it.

It is further objected that in his instruction to the jury the judge assumed that the draft of \$5,783 was drawn against this consignment, instead of leaving the jury to find whether it was so drawn. The draft itself and the letter of advice were in the case. The draft requested the drawee to "charge the same to account as advised." The letter of advice states: "I have this day drawn on you at ninety days for \$5,783, being \$10.50 per box on 544 boxes singed bacon, &c." This was a part of the merchandise in controversy. It was clearly within the province of the court to interpret these written papers, and inform the jury whether they showed a drawing against this property. When a contract is to be gathered from a commercial correspondence which refers to material extraneous facts, or only shows part of a course of dealing between the parties, it is sometimes necessary to leave the meaning and effect of the letters, in connection with the other evidence, to the jury. (*Brown v. McGraw*, 14 Pet., 493.)

But this was not such a case; and we think the judges rightly informed the jury that this draft was drawn against this property. Whether, being so drawn, it bound the property and its proceeds, so that in this action its amount 24*] was to be deducted therefrom, depended upon other considerations, which are exhibited in the other part of the instruction. Assuming, what we shall presently consider, that there was evidence from which the jury might find that Harry, who drew the draft, was either himself the owner of the property, and so the principal, or if not, that he was the agent of William, there can be no doubt of the correctness of this instruction, unless there was something in the case to show that the owner of the

consignment could not bind its subject by a draft made and accepted on the faith of it. This is not to be presumed; and if the two defendants, who were sureties on this bond, assert that they had a right to have the whole of the proceeds of this property appropriated to the repayment of the advance, of \$12,000, for which they were in part liable, it was incumbent on them to prove that the ordinary power of a consignor, by himself, or his agent, to draw against his property, with the consignee's consent, was effectually restrained by some contract with the sureties, or of which they could avail themselves. We have carefully examined the evidence on the record, and are unable to discover any which would have warranted the jury in finding such a contract.

The bond itself contains no intimation of it. And although the evidence tends to prove that the sureties had reason to expect that bacon would be packed and sent to Gray & Co., and that, through such consignments, the advance of \$12,000 might be partly or wholly repaid, they do not appear to have stipulated or understood that William was to have no advance on such property. Indeed, the real nature of the transaction seems to have been that the bond was taken to cover an ultimate possible deficit, after the property should have been sold and all liens satisfied; leaving William, their principal, free to create such liens as he might find expedient in the course of the business.

We are also of opinion that there was evidence in the case, from which the jury might find that Harry was held out to the plaintiff, by William, as his agent, as well for the purpose of drawing against this property as for other purposes. The letter from William Turner to the plaintiff of the 14th November, 1849, and the agreement of Harry appended to it, tend strongly to prove this. They are as follows:

"CHATTANOOGA, Tenn., Nov, 14, 1849.

MR. JOS. C. YATES:

Dear Sir: In consideration of the advance of \$12,000 made me by you for the purpose of packing meats for the English market, I hereby bind myself to make my whole shipments, of whatever kind they may be, to your friends in London or Liverpool, Messrs. B. [25 Charles T. Gray & Son, for the entire season, or longer, till such advance shall have been paid off, together with any other that I may be permitted to draw for.

I am, dear sir, your most obedient servant,
W. H. F. TURNER.

I agree to see the above carried out in good faith, and bind myself for the due fulfillment of it.

HARRY F. TURNER, Agent of
W. H. F. TURNER."

It thus appears that further advances to William were contemplated as a part of the arrangement with him, and Harry, as agent of William, was to see the whole arrangement carried out upon his personal responsibility. If, as these witnesses show, Harry was agent for William for carrying out the whole arrangement, and further drawing was contemplated as a part of it, it necessarily follows he was his agent thus to draw. It is shown by the correspondence that Harry had the sole charge of

getting the property down to the seaboard from the interior and of shipping it; and that he had incurred large debts on account of it; and finally, William Turner has not, so far as appears, repudiated his act in drawing, and the defendants now claim the benefit of a consignment, on the faith of which the draft in question was accepted.

Under these circumstances our opinion is that it was not improper for the judge to leave it to the jury to find whether Harry was the agent of William, if he were not himself the owner of the property. Nor do we think these two states of fact present such inconsistent grounds as ought not to have been submitted to the jury. It is true Harry could not be at the same time principal and agent; but it often happens in courts of justice that a right may be presented in an alternate form or upon different grounds.

It one party has dealt with another as an agent, it would be strange if the transaction should be held invalid because it is proved on the trial he was principal—and *é converso*. The substantial question, in such a case, is a question of power to do such an act; and this power may be shown, either by proving that he had it in his own right or derived it from another. Of course there may be cases where the allegations of the parties on the record restrict them to one line of proof; and there may be others in which the court, to guard against surprise, should not allow a party to open one line of proof, and in the course of the trial abandon it and take an inconsistent one. But this last is a matter of practice, subject to the sound discretion of the court, and not capable of revision here upon a writ of error.

26*) *We hold the second instruction, which involved the merits of the case, to be correct.

The other bills of exception relate chiefly to questions of evidence.

In the course of the trial the defendants introduced a witness, who testified that he made out an invoice of the 700 boxes of bacon, and sent it by mail to the plaintiff, who was the agent of Gray & Co., to whom the property was consigned in London.

The defendants then called on the plaintiff to produce this invoice under the following agreement:

"It is agreed between the plaintiff and defendant in this cause, that either party shall produce, upon notice at the trial table, any papers which may be in his possession, subject to all proper legal exceptions as to their admissibility or effect as evidence; and that handwriting, where genuine, shall be admitted without proof.

S. T. WALLIS, for plaintiffs,
BENJ. C. BARROLL, for defendants."

The plaintiff said the invoice was not in his possession. The defendants then offered to prove its contents. But the court was of opinion it was to be presumed the invoice had gone to the consignees in London, who were competent witnesses to produce the original; and therefore parol evidence of the contents of the paper was excluded.

This ruling was correct. So far as appears, this was the only invoice made. Every consignment of merchandise, regularly made, re-

quires an invoice. It is the universal usage of the commercial world to send one to the consignee. The revenue laws of our own country, and we believe of all countries, assume the existence of such a document in the hands of the consignee on the arrival of the merchandise. It was the clear duty of the plaintiff, when he received the invoice, to send it to the consignees in London. The presumption was that he had done what is usually done in such cases, and what his duty required. If the paper was in the hands of the consignees in London, secondary evidence was not admissible. For it was not within the written agreement to produce papers, which applied only to those in the possession of the plaintiff; and though the plaintiff was an agent of those consignees, and seems to have been suing for their benefit, yet aside from the written agreement they must be treated either as parties or third persons. If as parties, they were entitled to notice to produce the paper; if as third persons, their depositions should have been taken, or some proper attempt made to obtain it. This also disposes of the fifth exception; because, if the evidence in the cause had some tendency to prove the document had been retained, the offer of the plaintiff to prove the contrary, and the election by *the defendants to rest their motion [*27 for the admission of the parol evidence upon a concession that the fact was as the plaintiff offered to prove it, instead of first calling for that proof, must preclude them now from objecting that the proof was not given.

The second exception relates to the admission of certain correspondence respecting this property between the plaintiff and Harry Turner and Messrs. Gadsden & Co., of Charleston, S. C., before the property was shipped to London, and also the accounts of sales of the property, which were introduced by the plaintiffs for the purpose of showing that they were dealing with Harry Turner as principal, and under a separate contract with him. We have no doubt of the admissibility of this evidence for the purpose for which it was offered. Whether Harry was principal or agent, it was competent and important for the plaintiff to prove that he was dealt with and treated as a principal; and there could be no better evidence of it than the correspondence concerning the transaction. On the trial of a commercial cause such a correspondence is not only generally admissible, but it is often the highest evidence of the nature of the acts of the parties and the capacities in which they acted and the relations they sustain to each other. It must be observed that the plaintiff, in one aspect of his case, had three things to prove. First, that there was a distinct arrangement with Harry to ship property to Gray & Son and receive advances on it. Second, that the plaintiff and Gray & Son acted on the belief that this consignment was made under that arrangement. Third, that in point of fact this consignment was made by Harry on his own account, and not on account of William. And evidence showing that Harry, being in possession of the property, consigned it to them, accompanied or preceded by such letters as showed the consignment to be for his own account, was clearly admissible upon each of these points. It is true it might, nevertheless be the property of William, and really

sent for his account, but that was a question for the jury upon the whole evidence.

The third exception relates to the admission of the testimony of Mr. Thomas respecting certain declarations made to him by Mr. Ward. We do not deem it necessary to detail the evidence, it being sufficient to say, that so far as these declarations were made in the presence of all the defendants, they were of such a character, and made under such circumstances, as imperatively to have required them to deny their correctness if they were untrue; and therefore they were clearly admissible. So far as Mr. Ward's declarations were made to Mr. Teackle, when the defendants were not present, they are stated to have been merely a repetition of his former statements.

28*] "The judge left them to the jury with the following instructions:

"If the jury find that W. J. Ward, Esq., was, in his communication with the plaintiff's counsel, accompanied by the defendants, and that defendants referred plaintiff's counsel to said Ward to adjust and settle the differences between them, that said defendants are bound by the acts and declarations of said Ward, although he was only retained by H. F. Turner as such, unless such limitations of retainer were stated to plaintiff or his counsel."

This was sufficiently favorable to the defendants. It was really of no importance whether Mr. Ward was counsel for one or all the defendants, if they united in referring Mr. Thomas to him to adjust the mode of preparing the papers; and in our opinion, there was evidence from which the jury might find such an authority to have been given by the defendants jointly.

We consider the fourth exception untenable. If it was usual to pay a commission for such services, it was properly charged in this case, there being no evidence to show that there was a special agreement to render the services without pay, or for less than the customary commission.

The sixth exception was taken on account of the admission of the testimony of Mr. Teackle, and certain letters of Gray & Co. and Harry Turner. The former has already been disposed of in considering the third exception, and the latter in considering the second exception respecting the correspondence of Harry Turner, most of the observations upon which are applicable to these letters.

The remaining bill of exceptions is in the following words:

"Upon the further trial of this case, after the instructions prayed for had been argued, and the court had decided to refuse the same, and had granted the two instructions set out on the defendants' seventh exception, the defendants' counsel having prepared out of court their exceptions thereto, and to the other points of law ruled by the court and excepted to during this trial immediately after the court had so decided, and before the bailiff to the jury was sworn, or the jury had withdrawn from the bar of the court, presented their said exceptions, and moved the court to sign and seal the same before the verdict should be rendered; but the court refused so to do, and refused to consider the said exceptions, or either of them, under

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the rule of that court, November 25th, 1846, at the November Term thereof.

Ordered, that whenever either party shall except to any opinion given by the court, the exception shall be stated to the court before the bailiff to the jury is sworn, and the bill of exceptions afterwards drawn out in writing, and presented to the court during the term at which it is reserved; otherwise it will not be sealed by the court."

*In *Walton v. The United States*, 9 [*29 Wheat., 657, this court said, "we do not mean to say (and in point of practice we know it to be otherwise) that the bill of exceptions should be formally drawn and signed before the trial is at an end. It will be sufficient if the exception be taken at the trial and noted by the court with the requisite certainty, and it may afterwards, according to the rules of the court, be reduced to form and signed by the judge; and so in fact is the general practice. But in all such cases the bill of exceptions is signed *nunc pro tunc*, and it purports on its face to be the same as if it had been reduced to form and signed during the trial; and it would be a fatal error if it were to appear otherwise; for the original authority under which bills of exception are allowed has always been considered as restricted to matters of exception taken pending the trial and ascertained before the verdict."

To what was there said, this court has steadily adhered. (4 Pet., 106; 11 Pet., 185; 4 How., 15.) The record must show that the exception was taken at that stage of the trial when its cause arose. The time and manner of placing the evidence of the exception formally on the record are matters belonging to the practice of the court in which the trial is held. The convenient despatch of business, in most cases, does not allow the preparation and signature of bills of exceptions during the progress of a trial. Their requisite certainty and accuracy can hardly be secured, if any considerable delay afterwards be permitted; and it is for each court in which cases are tried to secure, by its rules, that prompt attention to the subject necessary for the preservation of the actual occurrences on which the validity of the exception depends; and so to administer those rules that no artificial or imperfect case shall be presented here for adjudication. The rule of the Circuit Court for the District of Maryland is unobjectionable, and this exception is overruled.

The judgment of the Circuit Court is affirmed, with costs.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Maryland, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs and interest until paid, at the same rate *per annum* that similar judgments bear in the courts of the State of Maryland.

Cited—20 How., 254, 430; 2 Black., 568; 8 Wall., 268; 20 Wall., 418; 3 Otto., 555 Benn., 65; 11 Bank Reg., 232.

30*] *JOHN C. YERGER, *Appellant*,

v.

WILLIAM H. JONES and ROBERT S. BRANDON, Executors of WILLIAM BRANDON, Deceased.

Ward of acting, but not legal guardian, cannot rescind contract for land bought in trust and recover amount paid—remedy.

When a person who was acting as guardian to a minor, but without any legal authority, being indebted to the minor, contracted to purchase real estate for the benefit of his ward, and transferred his own property in part payment therefor, the ward cannot claim to receive from the vendor the amount of property so transferred.

He can either complete the purchase by paying the balance of the purchase money, or set aside the contract and look to his guardian for reimbursement; but in the absence of fraud, he cannot compel the vendor to return such part of the purchase money as had been paid by the guardian.

THIS was an appeal from the District Court of the United States for the Northern District of Alabama, sitting as a court of equity.

It was a bill filed by John C. Yerger, a minor, suing by his next friend, against William Brandon in his lifetime, and after his death revived against his executors.

The material facts in the case were not disputed; but the controversy depended upon the construction put upon those facts.

In 1835, Albert Yerger, the father of the appellant, and a citizen of Tennessee, made a nuncupative will and died. In this will he expressed his desire that, with certain exceptions, all his property should be equally divided between his wife and son. There was also this clause in it; and he also stated he wished Col. James W. Camp to manage his plantation, and to have discretionary power as to its management, and to sell it if he thought it most beneficial to do so; and he desired, and declared his will to be, that his son should have his plantation.

Camp removed into Madison County, Alabama, at some period which is not exactly stated in the record, but probably about 1837. He carried with him some eight or ten negroes, which belonged to the boy.

In August, 1842, and May, 1843, Camp executed two deeds of trust to James W. McClung, for the benefit of certain creditors.

On the 14th of August, 1843, McClung had a sale of the property, when William Brandon purchased the tract of land upon which Camp lived, containing 960 acres.

On the 23d of August, 1843, Camp made an arrangement with Brandon to this effect, viz.: that Camp should repurchase the land from Brandon for \$8,000, give his note for that sum payable in two years with interest, and convey 31*] certain property to him as security. Brandon, on his part, gave to Camp a bond of conveyance.

The language made use of in these instruments was as follows:

In the first it is said, "Whereas the said James W. Camp, as guardian of said John C. Yerger, and for the benefit of said John C. Yerger, hath this day purchased, &c., &c., &c."

The note was as follows:

"HUNTSVILLE, August 23, 1843.

Within two years from the date above, I, James W. Camp, as guardian of John C. Yerger, promise to pay William Brandon \$8,000 with interest from date, being the amount which I, as guardian, have agreed to give the said William Brandon for the tract of land whereon I now live, for the benefit of said John C. Yerger.

In testimony whereof I hereunto set my hand and seal. JAMES W. CAMP. [SEAL.]"

The conveyance to Brandon to secure the above note included a considerable amount of personal property, and ran as follows:

To have and to hold all the above-described property to said William Brandon, his executors, administrators or assigns, forever. Upon trust, nevertheless, that said Brandon shall take immediate possession of all the above-described property; that he shall gather said crops and sell them, and all the other property above described, either at public or private sale, as may appear best, for ready money; that said Brandon may retain out of the proceeds of sales reasonable compensation for his trouble and expense in executing the trust hereby created; and the said Brandon shall apply the residue of said proceeds to the payment, as far as they will extend, of the debts first above mentioned, all to be done as early as practicable; and the said William Brandon hereby covenants, to and with the said James W. Camp, that he, the said William Brandon, will faithfully execute the trusts above reposed in him, but without being responsible for losses beyond his control.

From August, 1843, to January, 1845, Brandon continued to make sales of the property, sometimes at public auction and sometimes at private sale.

On the first of January, 1844, Camp made out an account between himself and Yerger, by which it appeared that he owed Yerger on that day (chiefly for the hire of negroes), \$8,017.29. In 1845 Camp died insolvent.

On the 4th of October, 1847, Yerger filed his bill, reciting most of the above facts, and charging,

"That Camp, as guardian of complainant, contracted on the 23d of August, 1843, with the defendant, to purchase of defendant for the use of complainant, certain real estate mentioned in the bond of conveyance, executed by defendant to Camp, as guardian. The complainant charges that Camp had no authority by the laws of Alabama to convert his ward's personal into real estate, at least without the direction of a court of equity, which was not obtained; and that said contract was prejudicial to the complainant, as the property was not worth more than half of what Camp, as guardian, agreed to give for it; that to secure the payment, Camp, on the 23d August, 1843, executed a deed of trust, filed with the bill. By sales of property under this deed of trust, and otherwise, Camp paid the defendant \$5,000 or \$6,000 on account of the purchase, and the present bill alleges that these payments are to be regarded in equity as payments made on account of the complainant, and out of funds in the hands of Camp as his guardian; that he is entitled to have the contract rescinded and the money previously paid to defendant paid to complainant, with interest; that Camp died in

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Alabama on 9th October, 1845, wholly insolvent, and there was no administration upon his estate. The bill further states, that the defendant claims a large balance on account of the contract, for which complainant would be responsible in case the contract is binding.

The defendant, William Brandon, put in his answer, admitting the Exhibit C to bill, and the sale of the land, and the contract thereby shown; and also Exhibit D to bill, the deed of trust from Camp to him, stating that he sold all the property embraced in that deed (except a few articles referred to) for \$5,234.23, and retained out of said proceeds, agreeably to the provisions of the deed, \$1,868.47, as a reasonable compensation for gathering the crops and selling the property, and refers to his Exhibit H, as his account of sales, with his charges for expenses and trouble. He then states, that a short time after the execution of the deed of trust, two parties having executions against Camp, levied upon certain articles contained in the deed of trust; for which they and the sheriff levying, were sued by the defendant, and judgment for \$1,607.38 obtained against them, which sum the defendant collected; but he claims that counsel fees for prosecuting that matter, the amount of which is not yet ascertained, should be deducted from the amount of the judgment; states that, with these exceptions, nothing else had been received by him on account of the land, and there still remained a balance due; admits that Camp died insolvent; that at the time of his death, and for many years previous, he resided in Alabama; he died intestate, and no administration had ever been **33*** taken out upon his estate; that complainant's father lived in Tennessee and there died, while the complainant was quite a small boy, and that he is a minor; that, some years ago, Camp brought complainant to Alabama, "where he kept and treated him as a member of his family, and seemed to control him and his property." But he denies that Camp was ever appointed guardian of the complainant, either by any court or the will of the father; or that he ever was his guardian. The contract for the land and the deed of trust securing the purchase money, were both made in Alabama, and all the property embraced in the latter, and sold under said deed, belonged to Camp individually, and not in the capacity of guardian.

He states: The purchase was made by Camp, to be paid for out of his own individual property, and not out of that of complainant. The land was worth what Camp agreed to pay, and there was no fraud contemplated by the purchase or the sale, either on the part of Camp or the defendant. He insists that his lien for the balance or the purchase money is binding, and avers his readiness, upon the payment of the balance, to convey the land according to the contract; suggesting the necessity of making Camp's personal representative a party to the bill, and denying all fraud and combination, prays to be dismissed.

On the 17th November, 1852, the court dismissed the bill with costs, and the complainant appealed to this court.

The cause was argued by **Mr. Reverdy Johnson** and **Mr. Reverdy Johnson, Jr.**, for the appellant, and **Mr. Badger** for the appellees.

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The counsel for the appellant made the following points:

1st. The bill and answer showing that Camp, the guardian, died insolvent, and that there was no administration upon his estate, the bill is not defective for want of his personal representative as a party. (1 Story's Eq. Pl., sec. 91.)

2d. The relation of guardian and ward subsisting in fact between Camp and the complainant (though Camp may never have been legally appointed guardian), Brandon dealing with the guardian, as such, and having, therefore, full notice of the fiduciary capacity in which he acted, cannot in equity, while seeking to maintain the contract, deny the existence of the guardianship. (1 Story's Eq. Jur., sec. 511; 2 *Id.*, sec. 1356; *Field v. Schieffelin*, 7 Johns. Ch., 150; *Lloyd v. Ex'r of Cannon*, 2 Desaus., 232; *Drury v. Connor*, 1 Harr. & Gill, 220; *Bibb v. McKinley*, 9 Porter's Ala., 636.)

3d. By the contract itself (Exhibit C), and the deed of trust of 23d August, 1843 (Exhibit D), apart from the declarations of Brandon, in evidence, he and his representatives are estopped *denying that Camp was the guardian ***34** of complainant. (1 Phil. Ev., 367; Cowen & Hill's notes to same, 1st part, 372.)

4th. The contract for the purchase is not binding upon the complainant, and Camp being insolvent at the time, and largely indebted to the complainant, equity will regard the payments on the purchase made under the trust deed (Exhibit D) as so much money paid out of the ward's funds on account of the land, and will decree them to be re-imbursed. (2 Story's Eq. Jur., secs. 1257 and 1357; 2 Kent's Com., 229; *Cawthorn v. McCraw*, 2 Ala., 519.)

5th. The contract should be set aside, because the evidence shows that the investment was injurious to the infant—the land not being worth \$8,000.

6th. The amount, claimed by Brandon as a reasonable compensation under the deed of trust, is exorbitant, being more than twenty per cent. on the amount of sales—and is unsustained by the evidence.

The counsel for the appellees made the following points:

First. That Camp was not the guardian of appellant, the will of his father not appointing him guardian. (*Peyton v. Smith*, 2 Dev. & Bat. Eq., 325.)

Second. That there is no proof admissible against the appellees, that at the time of the contract for the land in August, 1843, Camp was indebted to appellant at all; and if there were such proof, it cannot be heard by the court for want of an allegation in the bill of the existence of such an indebtedness at that time, the only averment in the bill being that at the time of his death, which the bill avers took place in October, 1845, more than two years thereafter, he was so indebted.

Third. That it is proved the land is fully worth the price agreed to be given for it.

Fourth. That it is fully proved that all the property conveyed by the deed of trust to secure payment of the purchase money of the land, belonged to Camp in his own right, and none of it ever belonged to appellant. As, therefore, Camp might have applied these funds of his own to purchase the land for himself, it

is absurd to suppose it an injury to the appellant to apply them in making the purchase for the benefit of appellant.

Fifth. That there is no evidence, at all events none admissible against the appellees, that anything whatever was paid to William Brandon, on account of the purchase, from any other source than the sale of the property conveyed by the deed of trust; and therefore, that no money, funds or effects of the appellant, in the hands of Camp, or elsewhere, were paid to or received by Brandon.

35*] *And therefore, it will be insisted that the appellant's bill is without support in any point material to the relief asked by him, supposing such relief could be rightfully claimed upon his bill, if proved to be altogether true.

But it will be further insisted, that if the case made by the bill and the proofs were that Camp, being the guardian of appellant, and having funds of his ward in his hands, had purchased the land for his ward, and paid for it with those funds, with an intent to convert the funds into real estate, the appellant would not be entitled, upon these facts merely, to call for an account of the money from Brandon; for such purchase might be a wise and judicious investment: as if the ward had slaves without lands on which to employ them, and money with which lands could be purchased; and Brandon could only be liable for partaking in an apparently injurious application of the ward's funds, in itself implying a breach of trust. However, it might be a question whether the ward might not, on his arrival at age, repudiate the purchase as between the guardian and himself, and call upon the guardian to keep the land and account for the money; because, further, the right to elect either to take the purchased land or repudiate the contract, is one to be exercised by the ward on arriving at full age, and ought not to be trusted to a next friend: because, to hold the contrary would be to embarrass without necessity, and with great injury to the public, all the transactions of guardians in investing the funds of their wards; and because, finally, this purchase would have been, upon the supposition made, an advantageous one to the ward, and its character is not to be affected by events of subsequent occurrence.

It will be also insisted that the ground taken in Brandon's answer, that a personal representative of Camp is a necessary party to this suit, is a sound one. To determine the right of the appellant, upon the very frame of his bill, requires the accounts between himself and his guardian to be taken; but this can only be done when his personal representative is before the court.

Finally, it will be insisted that, upon any view of this case, the bill was properly dismissed, and the decree below must therefore be affirmed.

Mr. Justice Grier delivered the opinion of the court:

The appellant, John C. Yerger, a minor, suing by his next friend, filed his bill against William Brandon, setting forth that the father of complainant died in the State of Tennessee, leaving him his only child and heir at law; that his father made a nuncupative will, by which 36*] James W. Camp was appointed *guardian of complainant; that Camp, acting as such,

took possession of his property, and removed to the State of Alabama, where he died in 1845, insolvent. That at the time of his death Camp was largely indebted to his ward for the use and hire of his slaves, and stated an account admitting the sum of about \$6,000 to be due. That Camp contracted with Brandon to purchase a tract of land, for the use of his ward, for the price or sum of \$8000. That Camp paid to Brandon about \$5,000 or \$6,000, on account of such purchase, by a sale of certain property under a deed of trust. That Camp had no right, as guardian, to convert the personal property of his ward into real estate; that the price agreed to be paid for the land was exorbitant, and a large balance is still due on said contract, which the complainant is unwilling to pay in order to obtain the title. He therefore prays the court to rescind and annul the contract, to take an account of the payment made by Camp and Brandon, and decree that the amount be restored to the complainant.

The answer denies that Camp was the legal guardian of complainant, but admits that he lived in the family of Camp after he came to Alabama, and apparently under his control. That the purchase made by Camp was for a fair price, and the property transferred by him, in part payment, was the property of Camp and not of complainant; and that the contract was made without any view to injure or defraud the complainant, and did not have that effect; and that respondent is ready and willing to convey the tract of land to complainant, on receipt of the balance of the purchase money.

The evidence in the case does not show that Camp was appointed guardian of the complainant by his father's will, or by any competent legal authority, either in Tennessee or Alabama. But it appears that when Camp came to Alabama, that the complainant lived in his family, and that Camp acted as his guardian, having control of his person and of his property, which consisted of negroes. Camp had a farm of 980 acres in Alabama, and employed the negroes of complainant to work for him, and was largely indebted to him on account thereof. He was indebted also to Brandon, and his farm was subject to a deed of trust or mortgage. To satisfy this mortgage the land was sold and bid in by Brandon for the sum of \$4,500. Some negroes belonging to Camp were also included in the mortgage, and were bid in for the sum of over \$2,000, for the use of Yerger (the complainant), and paid for by Camp. An agreement was also made between Camp and Brandon, that Brandon should convey the farm purchased by him to the complainant, on receiving the sum of \$8,000, being the amount of the purchase money *advanced by Brandon and of the debt [*37 due by Camp to him. To secure the payment of this sum Camp gave Brandon a bill of sale, or trust deed, for a large amount of personal property, consisting of 350 acres of cotton, 450 acres of corn, 800 hogs, besides horses, mules, farming utensils, &c. Brandon was to sell this property, and apply it in payment of this contract for the land, after deducting reasonable compensation for his trouble and expenses. The defendant, in his answer, admits the amount of sales under this trust to be \$5,285.24; deducting charges and expenses, \$1-

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868.48, leaves a balance applicable to the purchase money of the farm, of \$3,365.75.

The bill does not allege that there was any fraud or collusion between the parties to this transaction, or any intention to injure the complainant. Nor would the evidence in the case support any such allegation. Brandon was endeavoring to secure his own debt in a manner least oppressive to Camp, by an arrangement which would leave him in possession of the farm on which he resided. Camp was endeavoring to save something for his ward, to whom he was indebted, out of the wreck of his estate. By this transaction the remains of his personal estate was vested in a valuable property, for the use of his ward, and put out of the reach of other creditors, with the incidental advantage to himself of retaining a home to himself and family. He was not converting the property of his ward to his own use, or to pay his own debts by collusion with Brandon, but was applying his own personal property in the best manner he could, to secure his ward from loss. His death has prevented his good intentions from being fulfilled to the extent contemplated. It is not easy to perceive on what principle of equity or justice the complainant can invoke the aid of a court of chancery to rescind and annul this contract, and compel the defendant to refund the amount paid by Camp on it. It is true a guardian has no power to convert the personal property of his ward into realty. Nor is the ward bound to fulfill or perform the contract made with Brandon. He has a right to hold his guardian accountable for the balance due him, and repudiate the contract made for his use. Or he may elect to take the land bargained for, but cannot demand a title from Brandon without payment of the balance due on the contract.

In Alabama, and some others of the states, a guardian cannot sell even the personal property of his ward without the leave of the court. By the common law, and in those states where it has not been modified by statute, he is considered as having the legal power to sell or dispose of the personal property of his ward, and a purchaser who deals fairly has a right to presume that he acts for the benefit of his ward, and 38*) is not bound to inquire *into the state of the trust, nor is he responsible for the faithful application of the money unless he knew, or had sufficient information at the time, that the guardian contemplated a breach of trust, and intended to misapply the money, or was in fact, by the transaction, applying it to his own private purpose. The cases on this subject are reviewed by *Chancellor Kent*, in *Field v. Schieffelin*, 7 Johns. Ch., 150. In order to follow trust funds which have been transferred to third persons, there must be a breach of trust in their transfer, and a collusion by the purchaser or assignee with the guardian, executor or trustee.

If Brandon had taken the negroes belonging to plaintiff from his guardian, in payment of his debt, knowing the guardian was insolvent, and abusing his trust, a court of equity would compel him to return them to the ward, or pay their full value. But, in the case before us, Camp was dealing with his own property, and there is no pretense of any collusion with him by Brandon in the abuse of his trust. He has re-

ceived nothing which belonged to the ward, or which he is under any obligation to restore to him.

So far as the interests of the complainant were affected by this transaction, the object of it was to benefit, not to injure him. He may therefore assume the contract, and demand a specific execution of it from the defendant, but has shown no right to rescind it and recover the money advanced in execution of it.

The decree of the court below is therefore affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Northern District of Alabama, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said District Court in this cause be, and the same is hereby affirmed, with costs.

FREDERIC D. CONRAD, *Plaintiff in Error*,
v.
DAVID GRIFFEY.

Witness—what affirmatory declarations not admissible, when contradictory statements have been proved.

In 11 How., 480, it is said: "Where a witness was examined for the plaintiff, and the defendant offered in evidence declarations which he had made of a contradictory character, and then the plaintiff offered to give in evidence others, affirmatory of the first, these last affirmatory declarations were not admissible, being made at a time posterior to that at which he made the contradictory declarations given in evidence by the defendant."

The case having been remanded to the Circuit Court under a *retrite facias de novo*, the plaintiff gave in evidence, upon the new trial, the deposition taken under a recent commission, of the same witness whose deposition was the subject of the former examination, when the defendant (*39 offered to give in evidence the same affirmatory declarations which upon the former trial were offered as rebutting evidence by the plaintiff.

The object of the defendant being to discredit and contradict the deposition of the witness taken under the recent commission, the evidence was not admissible. He should have been interrogated respecting the statements, when he was examined under the commission.

If his declarations had been made subsequent to the commission, a new commission should have been sued out, whether his declarations had been written or verbal.

THIS case was brought up by writ of error from the Circuit Court of the United States for the Eastern District of Louisiana.

It was before this court at December Term, 1850, and is reported in 11 How., 480.

In order to give a clear idea of the point now brought up for decision, it may be necessary to remind the reader of some of the circumstances of that case.

Griffey was a builder of steam engines, in Cincinnati, and made a contract with Conrad, a sugar planter, in Louisiana, to put up an

NOTE.—Evidence of contradictory statements to impeach witnesses. In regard to what facts, inquired of on cross-examination, the witnesses may be contradicted. See note to *Ellcott v. Pearl*, 10 Pet., 412. When proof can then be introduced that he has made statements consistent with his evidence. See note to *Conrad v. Griffey*, 11 How., 480.

engine upon his plantation for a certain sum. Disputes having arisen upon the subject, Griffey brought his action against Conrad to recover the amount claimed to be due.

Upon the trial, in 1849, the testimony of Leonard N. Nutz, taken under a commission, was given in evidence. He was the engineer who was sent by Griffey to erect and work the machine. The deposition was taken on the 1st April, 1847. This evidence being in favor of Griffey, the counsel for Conrad offered the depositions of three persons to contradict the evidence of Nutz. Griffey then produced, as rebutting evidence, a letter written by Nutz to him, under date of April 3, 1846, which was admitted by the court below, and the propriety of which admission was the point brought before this court in 11 Howard. This court having decided that the letter ought not to have been received in evidence, the cause was remanded under an order to award a *venire facias de novo*.

Before the cause came on again for trial, Griffey took the testimony of Nutz again under a commission, on the 28th of June 1852, when the following proceedings were had, and bill of exceptions taken:

Be it known, that on the trial of this cause, the plaintiff having read in evidence the deposition of Leonard N. Nutz, taken under commission on the 28th June, 1852, and filed on the 9th July, 1852, the defendant then offered in evidence a letter of Leonard N. Nutz, dated at New Albany, on the 3d April, 1846, with an affidavit annexed by said Nutz of the same date, all addressed to the plaintiff in this cause; and as preliminary proof to the introduction of said letter, the defendant adduced the bill of 40*] exceptions *signed upon a former trial of this cause, and filed on the 23d February, 1849, and the indorsement of the clerk upon said letter of its being filed, showing that said letter had been produced by the plaintiff in said former trial, and read by his counsel in evidence as the letter of said Nutz in support of a former deposition of the same witness. And the said letter and affidavit were offered by said defendant to contradict and discredit the deposition of said witness taken on the said 28th of June, 1852: but upon objection of counsel for the plaintiff that the said witness had not been cross-examined in reference to the writing of said letter, or allowed an opportunity of explaining the same, and that upon the former trial the counsel for the defendant had objected to the same document as evidence (and the objection had been sustained by the Supreme Court of the United States), the court sustained the said objections, and refused to allow the said letter and affidavit annexed to be read in evidence; to which ruling the defendant takes this bill of exceptions, and prays that the interrogatories and answers of said Nutz, taken on said 28th June, 1852, the said letter and affidavit annexed, of date the 3d April, 1846, with the indorsement of the clerk of filing the same, and the bill of exceptions filed on the 23d February, 1849, be all taken and deemed as a part of this bill of exceptions, and copied therewith accordingly.

THO. H. McCaleb, U. S. Judge. [SEAL.]

Upon this exception, the case came up again to this court.

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It was argued by *Mr. Benjamin* for the plaintiff in error, and by *Mr. Gilbert* for the defendant in error.

Mr. Benjamin, for plaintiff in error:

From this bill of exceptions, it appears that the defendant in error, who was plaintiff in the cause below, offered in support of his case the testimony of Leonard N. Nutz, taken in St. Louis, on the 18th June, 1852, under a commission issued by the Circuit Court on the 5th of the same month. This testimony is found at p. 14 of the record.

After the testimony of Nutz had been read, the defendant offered in evidence a letter of Nutz, dated 8d April, 1846, with his affidavit of the truth of the statements contained in the letter, in order, as stated in the bill of exceptions, "to contradict and discredit his deposition taken on the 28th June, 1852."

The evidence thus offered by defendant, was rejected on two grounds: 1st. That "the witness had not been cross-examined in reference to the writing of said letter or allowed an opportunity of explaining the same;" and 2d. That "upon the former trial, the counsel for defendant had objected to the same document *as evidence, and that the objection had *41 been sustained by the Supreme Court of the United States."

On the first ground, the objection to the evidence proceeds on a misapprehension of a rule of practice in relation to the cross-examination of a witness. The rule and its reason are so clearly set forth in 1 Greenleaf on Evidence, sec. 462, 6th ed., and the authorities there cited, that comment on it is unnecessary. The witness was not under cross-examination; his testimony was not taken in court in the presence of the parties where it was possible to give him an opportunity of explanation. It was impossible for the defendant, in New Orleans, to know in advance what answers the witness would make in St. Louis to the questions propounded to him; and when those answers were read on trial, it was perfectly legitimate to offer the former written and sworn statements of the witness on the subject matter, to contradict and discredit his later statements.

On the second ground, it is sufficient to say that evidence is frequently admissible against a party that he is not allowed to offer in his own favor; that it is frequently admissible at one period of the trial, when not admissible to another; that it is frequently admissible for one purpose, when not admissible for another; and that the decision of the Supreme Court, in 11 Howard, did not determine that the evidence in question was totally inadmissible for any purpose by either party, at any time, but only that it was not admissible for the plaintiff in the cause for the purpose for which he offered it. An array of authorities in support of these elementary principles of the law of evidence, would be deemed disrespectful to the court.

Mr. Gilbert, for defendant in error, made the following points:

First. To authorize proof of previous acts or declarations of a witness, for the purpose of invalidating his testimony, the witness must, previous to the introduction of such evidence, be examined as to the matter. The attention of the witness, Nutz, not having been called to the letter offered in evidence, and no opportu-

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nity allowed to explain what he intended by it, such letter was inadmissible in evidence to discredit him.

A witness should always be allowed to explain what he has said or done concerning the matter under investigation, otherwise his reputation might suffer wrongfully. If his attention is not called, by cross-examination, to the supposed contradiction, he will have no opportunity to explain seeming contradictions, or errors, by making more full statements, or showing the connection of things, or defining his meaning of expressions and the terms he may have used. No man always conveys his ideas in the same language. Many, even of the most learned, fail to [42*] "express themselves clearly and properly. In such case, a few explanatory words may reconcile seeming contradictions. It would be unjust that the party should suffer where he has no means of giving an explanation, which may be most ample, and cruel to a witness to discredit him, thereby injuring his character, without allowing him an opportunity to show that he has committed no fault. Hence the rule that contradictory statements and acts of an inconsistent character cannot be given in evidence, without preparing the way for its admission by cross-examining the witness as to the supposed contradictory statements.

Phillips on Evidence, p. 294, says: "Thus it appears that a witness ought to be regularly cross-examined as to the contradictory statements supposed to have been made by him on a former occasion, before such contradictory statements can be admitted in evidence to impeach the credit of his testimony. And this rule has been extended not only to such contradictory statements, but also to other declarations of the witness, and acts done by him through the medium of declarations or words."

Roscoe, Criminal Evidence, p. 182, says: "But in order to let in this evidence, in contradiction, a ground must be laid for it in the cross-examination of the witness who is to be contradicted. When a witness has been examined as to particular transaction, if the other side were permitted to give in evidence declarations made by him respecting those transactions at variance with his testimony, without first calling the attention of the witness to those declarations, and refreshing his memory with regard to them, it would, as has been observed, have an unfair effect upon his credit."

In *The Queen's case*, 2 Brod. & Bing., 812 (6 Com. Law, 180, 181), Abbott, Ch. J., said: "If the witness admits the words or declarations imputed to him, the proof on the other side becomes unnecessary; and the witness has an opportunity of giving such reason, explanation, or exculpation of his conduct, if any there may be, as the particular transaction may happen to furnish."

In *Angus v. Smith*, 1 Moody & Malkin, 478 (23 Com. Law, 360), Tindal, Ch. J., said: "I understood the rule to be, that before you can contradict a witness by showing that he has at some other time said something inconsistent with his present evidence, you must ask him as to the time, place and person involved in the supposed contradiction." (Cow. & H. Notes, 774, 775; *Williams v. Turner*, 7 Ga., 348; *Doe v. Reagan*, 5 Black., 217; *Johnson v. Kinsey*, 7 Ga., 428; *Franklin Bank v. Steam*

Nav. Co., 11 Gill & J., 28; *Palmer v. Haight*, 2 Barbour, Sup. C., 210, 213; *McKinney v. Neil*, 1 McLean, *540; *Moore v. Battis*, 11 Humph., [*43 67; *The U. S. v. Dickinson*, 2 McLean, 325; *Chapin v. Siger*, 4 McLean, 378, 381; *Weinzorpfen v. The State*, 7 Blackf., 186; *Cheek v. Wheatley*, 11 Humph., 556; *Beebe v. DeBavin*, 8 Eng., 510; *McAteer v. McMullen*, 2 Barb., 32; *Clementine v. The State*, 14 Mo., 112; *Regnier v. Cabot*, 2 Gilman, 34; *King v. Wicks*, 20 Ohio, 87.)

The rule is the same whether the evidence offered by way of contradiction rests in parol, or is in writing. In Roscoe's Criminal Evidence, p. 182, he says: "So, what has been said or written by a witness at a previous time may be given in evidence to contradict what he has said on the trial, if it relate to the matter in issue." "But in order to let in this evidence in contradiction, a ground must be laid for it in the cross-examination of the witness who is to be contradicted."

3 Starkie's Evidence, 1740, 1741: "Where the question is so connected with the point in issue that the witness may be contradicted by other evidence, if he deny the fact, the law itself requires that the question should be put to the witness, in order to afford him an opportunity for explanation, although the answer may involve him in consequences highly penal." (Same, pp. 1753, 1754, *The Queen's case*, 2 Brod. & Bing., 284 (6 Com. Law, 112), proceeds throughout upon this principle.

Greenleaf, Vol. I., p. 579, in relation to laying a foundation by cross-examination, before offering contradictory evidence, says: "This course of proceeding is considered indispensable, from a sense of justice to the witness; for as the direct tendency of the evidence is to impeach his veracity, common justice requires that by first calling his attention to the subject he should have an opportunity to recollect the facts, and, if necessary, to correct the statement already given, as well as by a re-examination to explain the nature, circumstances, meaning and design of what he has proved elsewhere to have said. And this rule is extended, not only to contradictory statements by the witness, but to other declarations, and to acts done by him through the medium of verbal communications, or correspondence, which are offered with a view either to contradict his testimony in chief, or to prove him a corrupt witness himself, or to have been guilty of attempting to corrupt others."

In *Carpenter v. Wall*, 11 Adol. & El., 803 (39 Com. Law, 234), Denman, Ch. J., the other judges concurring, said: "When words are to be proved as having been uttered by a witness, it is always expected that he shall have an opportunity to explain." (*Regina v. St. George*, 9 Car. & Pa., 483 (38 Com. Law, 198; *Johnson v. Todd*, 5 Beavan, 600, 602, cited 1 Greenleaf on Ev., p. 581; *Conrad v. Griffey*, 11 How., 480.)

*1 Greenleaf on Ev., p. 579, in note b. [*44] ginning at the bottom of the page, where it is said the rule in *The Queen's case* is adopted in the United States, except in Maine and Massachusetts, and cites 2 Cowen & Hill's Notes on Phil. Ev., p. 774.

Jenkins v. Eldridge, 2 Story, 181, 284, Story, J., says: "If one party should keep back evi-

dence which the other might explain, and thereby take him by surprise, the court will give no effect to such evidence, without first giving the party to be affected by it an opportunity of controverting it. This course may be a fit one in cases where otherwise gross injustice may be done."

Crowley v. Page, 7 Carrington & Payne, 789 (32 Com. Law, 787): "If the witness made a previous contradictory statement, in writing, on a matter relevant to the issue, he may be asked, on cross-examination, whether the paper containing it is in his handwriting; and if he admit it, that will entitle the other side to read it; and if he contradicts the evidence of the witness, he may be called back to explain it." (4 Harrison's Dig., 2948, No. 11.)

Yeos v. The State, 4 Eng., 42: "Where a witness has made a different statement from the one made by him on the trial, he is not thereby discredited, unless the discrepancy is willful."

Story v. Saunders, 8 Humph., 643: "When the deposition of a witness is taken, evidence of his having made contradictory statements are not admissible to impeach his testimony, unless an opportunity to explain had been first offered him."

The contradictory statement offered in this case was the witness's testimony on a previous trial.

In *Ecerson v. Carpenter*, 17 Wend., 419, referring to the requisites for admitting a written instrument by way of contradiction, Cowen, J., said: "It was introduced, with the proper preliminary question to the witness, whether he had made the indenture and the representation about to be imputed to him. He answered with such explanations as occurred to him. Here was all the precaution required by this kind of examination by *The Queen's case*, and others."

In *Kimball v. Davis*, 19 Wend., 437, Nelson, Ch. J., considered this question at length, in a case where the defendant offered to prove that witnesses who had been examined under a commission, had subsequently made statements contradicting their written testimony. The marginal note of this decision is in these words:

"The declarations of witnesses whose testimony has been taken under a commission, made subsequent to the taking of their testimony, contradicting or invalidating their [§ 45] testimony as *contained in the depositions, is inadmissible in evidence, if objected to; the only way for the party to avail himself of such declarations, is to sue out a second commission; such evidence is always inadmissible until the witness whose testimony is thus sought to be impeached, has been examined upon the point, and his attention particularly directed to the circumstances of the transaction, so as to furnish him an opportunity for explanation or exculpation."

This case went to the Court of Errors, and is reported in the 25th of Wend., 259, where it was affirmed. Walworth, Chancellor, there said: "I concur with the Supreme Court in the opinion that it was improper to give the declarations of the witnesses in evidence without giving them, in the first place, an opportunity to explain; and the fact that the witnesses had been examined under a commission

did not prevent the operation of the principle upon which the rule is founded."

Edwards, Senator, said he was satisfied with Chief Justice Nelson's reasoning on this question.

Howell v. Reynolds, 12 Ala., 128: "The rule that a witness cannot be contradicted by proof of previous counter declarations, either written or verbal, applies to testimony taken by deposition, and if such supposed contradictory declarations exist at the time the deposition is taken, the witness must have an opportunity afforded him of explaining it, if in his power."

"The reason of the rule is, that he may have it in his power to explain the apparent contradiction, and the rule is the same, whether the declaration of the witness supposed to contradict his testimony be written or verbal." (3 Stark. Ev., 1741.) "The question is usually made when the witnesses are examined orally in open court, and in our opinion it must also apply to testimony taken by deposition, as the deposition is a mere substitute for the witness; and we can perceive no reason why a witness testifying in this should not be entitled to the same protection as if he had testified orally, in the presence of the court and jury. If this paper existed when the plaintiff was notified that the deposition of the witness was to be taken, and was informed by the interrogatories of the testimony the witness was expected to give, it was his duty to give him an opportunity of explaining it, if he could, and reconciling it with the evidence he then gave, if there was any real or apparent contradiction between them."

Mr. Justice McLean delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States, for the Eastern District of Louisiana.

This action was brought to recover the balance of \$3,781.58, *claimed to be due [*46 under a contract to furnish, deliver and set up, on the plantation of the defendant, in the parish of Baton Rouge, a steam engine and sugar mill boilers, wheels, cane carriers and all other things necessary for a sugar mill; all which articles were duly delivered.

The defendant in his answer set up several matters in defense.

The error alleged arises on the rejection of evidence offered by the defendant on the trial before the jury, and which appears in the bill of exceptions. The plaintiff read in evidence the deposition of Leonard N. Nutz, taken under a commission on the 28th of June, 1852, and filed the 9th of July succeeding. The defendant then offered in evidence a letter of the witness, dated at New Albany, on the 3d April, 1846, with an affidavit annexed by him of the same date, addressed to the plaintiff Griffey. As preliminary proof to the introduction of said letter, the defendant adduced the bill of exceptions signed upon a former trial of this cause, and filed on the 23d February, 1849, showing that the letter had been produced by the plaintiff in the former trial, and read by his counsel in evidence as the letter of Nutz, in support of a former deposition made by him. And the said letter and affidavit were offered by the defendant to contradict and discredit

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the deposition of the witness taken the 28th June, 1853; but upon objection of counsel for the plaintiff that the witness had not been cross-examined in reference to the writing of said letter, or allowed an opportunity of explaining the same, it was rejected.

At the former trial the letter was offered in evidence by the plaintiff in the Circuit Court, to corroborate what Nutz, the witness, at that time, had sworn to; and the letter was admitted to be read for that purpose by the court. On a writ of error, this court held that the Circuit Court erred in admitting the letter as evidence, and on that ground reversed the judgment. (*Conrad v. Griffey*, 11 How., 493.)

The rule is well settled in England, that a witness cannot be impeached by showing that he had made contradictory statements from those sworn to, unless on his examination he was asked whether he had not made such statements to the individuals by whom the proof was expected to be given. (*The Queen's case*, 2 Brod. & Bing., 313; *Angus v. Smith*, 1 Moody & Malkin, 478; 3 Starkie's Ev., 1740, 1753, 1754; *Carpenter v. Wall*, 11 Adol. & Ellis, 803.)

This rule is founded upon common sense, and is essential to protect the character of a witness. His memory is refreshed by the necessary inquiries, which enables him to explain 47*] the statements*referred to, and show they were made under a mistake, or that there was no discrepancy between them and his testimony.

This rule is generally established in this country as in England. (*Doe v. Reagan*, 5 Blackf., 217; *Franklin Bank v. Steam Nav. Co.*, 11 G. & J., 28; *Pulmer v. Haight*, 2 Barbour's Sup. Ct., 210, 218; 1 McLean, 540; 2 *Id.*, 825; 4 *Id.*, 878, 881; *Jenkins v. Eldridge*, 2 Story, 181, 284; *Kimball v. Davis*, 19 Wend., 487; 25 Wend., 259.) "The declaration of witnesses whose testimony has been taken under a commission, made subsequent to the taking of their testimony, contradicting or invalidating their testimony as contained in the depositions, is inadmissible, if objected to. The only way for the party to avail himself of such declarations is to sue out a second commission." "Such evidence is always inadmissible until the witness, whose testimony is thus sought to be impeached, has been examined upon the point, and his attention particularly directed to the circumstances of the transaction, so as to furnish him an opportunity for explanation or exculpation."

This rule equally applies whether the declaration of the witness, supposed to contradict his testimony, be written or verbal. (2 Starkie's Ev., 1741.)

A written statement or deposition is as susceptible of explanation as verbal statements. A different rule prevails in Massachusetts and the State of Maine.

The letter appears to have been written six years before the deposition was taken which the letter was offered to discredit. This shows the necessity and propriety of the rule. It is not probable that, after the lapse of so many years, the letter was in the mind of the witness when his deposition was sworn to. But, independently of the lapse of time, the rule of evidence is a salutary one, and cannot be dispensed with in the courts of the United States.

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There was no error in the rejection of the letter, under the circumstances, by the Circuit Court; its judgment is therefore affirmed, with costs.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel; on consideration whereof, it is now here ordered, and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs and interest, until paid, at the same rate *per annum* that similar judgments bear in the courts of the State of Louisiana.

S. C.—11 How., 480.
Cited—2 Hughes, 24.

*SAUNDERS BURGESS, Plaintiff in [*48
Error.
v.

JOHN M. GRAY, THOMAS BURGESS, JR.,
AARON BURGESS, SIMEON BURGESS,
JAMES BURGESS, JR., SAMUEL T.
NORTHCUT, *alias* NORTHCRAFT; SI-
LAS HUSKY, AARON A. SMIRL,
GEORGE ARNOLD, AUSTIN M. JOHN-
STON, GEORGE W. OGDEN, JOHN C.
HARRINGTON, JOHN WATSON, LEW-
IS BUSH, AND JAMES G. CROMME.

Jurisdiction of State Court—inchoate land title under treaty with France, not tried in—construction of U. S. Stats.—rights derived from possession of public land.

No equitable and inchoate title to land in Missouri, arising under the Treaty with France, can be tried in the State Court.

The Act of Congress, passed on the 2d of March, 1807 (2 St. at Large, 440), did not *proprio vigore* vest the legal title in any claimants; for it required the favorable decision of the Commissioner, and then a patent before the title was complete.

The Act of 12th April, 1814 (3 St. at Large, 121), confirmed those claims only which had been rejected by the Recorder upon the ground that the land was not inhabited by the claimant on the 20th of December, 1803.

Where it did not appear by the report of the Recorder that a claim was rejected upon this specific ground, this Act did not confirm it.

The question whether or not the Recorder committed an error in point of fact, was not open to the State Court of Missouri upon a trial of the legal title.

The mere possession of the public land, without title, for any time, however long, will not enable a party to maintain a suit against anyone who enters upon it; and more especially against a person who derives his title from the United States.

THIS case was brought up from the Supreme Court of the State of Missouri, by a writ of error issued under the 25th section of the Judiciary Act.

The facts of the case are stated in the opinion of the court.

NOTE.—*Missouri private land claims.* See note to *Les Bois v. Bramell*, 4 How., 449. *What necessary to constitute adverse possession. Requirements of.* See note to *Ricard v. Williams*, 7 Wheat., 59. *Occupancy necessary to constitute adverse possession.* See note to *Ewing v. Burnet*, 11 Pet., 41.

It was argued by *Mr. Garland* for the plaintiffs in error, and by *Mr. Darby* for the defendants in error.

Mr. Garland laid down the three following propositions:

First Proposition. This claim was confirmed by the 2d sec. of the Act of 8d March, 1807, which is in these words:

"That any person or persons, and the legal representative of any person or persons, who, on the twentieth day of December, one thousand eight hundred and three, had, for ten consecutive years, prior to that day, been in possession of a tract of land not claimed by any other person, and not exceeding 2,000 acres, and who were on that day residing in the Territory of Orleans, or Louisiana, and had still possession of such tract of land, shall be confirmed in their titles to such tract of land: provided, that no claim to a lead mine or salt spring shall be confirmed merely by virtue of this section: and provided, also, that no more land shall be granted by virtue of this section than is actually claimed by the party, nor more than is contained within the acknowledged and ascertained boundaries of the tract claimed."

The Supreme Court of Missouri, commenting on this section, says: "The words which declare that a certain class of claims 'shall be confirmed,' are only a direction to the Board of Commissioners to confirm the claims which may be brought within the class of evidence produced before them, and by no means import a present confirmation, by direct action of Congress upon the claims."

Whether the words in this section are merely directory I will hereafter examine, but that this may import a present confirmation has been decided by this court. In *Rutherford v. Greene's Heirs*, 2 Wheat., 196, it is so decided. The Legislature of North Carolina had made a donation of land to General Nathaniel Greene, in these words: "Be it enacted that 25,000 acres of land shall be allotted for, and given to, Major-General Nathaniel Greene, his heirs and assigns, within the bounds of the lands reserved for the use of the army, to be laid off by the aforesaid Commissioners."

On the part of the appellant it is contended, say the court, that these words give nothing; they are in the future, not in the present tense, and indicate an intention to give in future, but create no present obligation on the State, nor present interest in General Greene. The court thinks differently. The words are words of absolute donation, not, indeed, of any special land, but of 25,000 acres in the territory set apart for the officers and soldiers.

As the act was to be performed in future, the words directing it are necessarily in the future tense—"Twenty-five thousand acres of land shall be allotted for, and given to, Major-General Nathaniel Greene." Given when? The answer is unavoidable—when they shall be allotted. Given how? Not by any further act, for it is not the practice of legislation to enact that a law shall be passed by some future Legislature, but given by force of this Act. It has been said, that to make this an operative gift, the words "are hereby" should have been inserted before the word "given," so as to read, "shall be allotted for, and are hereby given to," &c. Were it even true that these words would make

the gift more explicit, which is not admitted, it surely cannot be necessary now to say that the validity of a legislative act depends in no degree on its containing the technical terms usual in a conveyance. Nothing can be more apparent than the intention of the Legislature to order their Commissioners to make the allotment and to give the land, when allotted, to General Greene.

The allotment and survey marked out the land given by the Act and separated it from the general map liable to appropriation by others. The general gift of 25,000 acres lying in the territory reserved for the officers and soldiers of the line of North Carolina, had not become [550] a particular gift of 25,000 acres contained in this survey."

In the Treaty with Spain ceding the Floridas, the 8th article says: "All the grants of land made before the 25th January, 1818, &c., shall be ratified and confirmed." The counterpart in the Spanish language, rightly translated, reads thus: "Shall remain ratified and confirmed." This court, commenting on these words, in *The United States v. Percheman*, 7, Pet. 89, say: "Although the words, 'ratified and confirmed,' are properly the words of contract stipulating for some future legislative act, they are not necessarily so. They import that they shall be ratified and confirmed 'by force of the instrument itself. When we observe that in the counterpart of the same Treaty, executed at the same time, by the same parties, they are used in this sense, we think the construction proper, if not unavoidable."

Here are two important cases decided by this court, in which the words, "shall be given," and the words, "shall be confirmed," are construed into a present grant and confirmation, by force of the instrument itself.

Let us now see whether such is not the true construction of the Statute before us. The Supreme Court of Missouri says that the words "shall be confirmed," are only a direction to the Board of Commissioners. The Act of 2d March, 1805, created a Board of Commissioners to decide on claims of land in Louisiana. The 1st and 2d sections prescribed the character of claims to be acted on, and the kind of evidence to be given in their support. The supplemental Act of April 21st, 1806, modified the evidence to be given. The decision of the board amounted only to a recommendation to Congress. These Statutes, and the restrictions in them, giving much dissatisfaction, Congress passed the 4th section of the Act of March 3d, 1807, in which they conferred on the Board of Commissioners full powers to decide, according to the laws and established usages and customs of the French and Spanish governments, upon all claims to lands, where the claim is made by any persons who were, on the 20th of December, 1803, inhabitants of Louisiana, and for a tract not exceeding the quantity of acres contained in a league square, and which does not include either a lead mine or salt springs; which decision, when in favor of the claimant, shall be final against the United States.

Here we see power conferred on the Board to decide, according to the laws and established usages and customs of the French and Spanish governments. They were restricted to claims coming under those laws and usages, and what

might be those laws and usages they had full **51*** power to determine. *Now, the claims embraced in the second section of the same Act do not necessarily fall under this head; if they do, then the second section was superfluous; the Board having full power, under the fourth section, to decide such claims as are described in the second. But that the subject matter of the second section was not intended to be referred to the Board, is made plain by the eighth section, which says that the Commissioners shall report to the Secretary of the Treasury their opinion on all claims to land which they shall not have finally confirmed by the fourth section of this Act.

If the law had intended that they should act on claims in the second section, that section would have been included in the above clause, and it would read, "shall not have finally confirmed by the second and fourth section of this Act." The report would be in these words: The Commissioners would have confirmed such and such a claim, by virtue of the second section of the Act of March 1807, but for such and such defects. This was generally the style of their negative reports. But we see that the claims under the second section were not subjects on which they were authorized to report adversely upon; of course they were not subjects on which they would act at all.

Again; the second section makes no allusion to the claims therein described, being recognized and valid by the laws and usages of the country; on the contrary, we are bound to infer that Congress did not consider them as so recognized, and therefore singled them out as the special objects of their bounty. There were but two classes of claims recognized by the Spanish; both were described by the first and second sections of the Act of 2d of March, 1805. The first was some written evidence of title, a concession or warrant, or order of survey; the second was a mere verbal permission to occupy and cultivate, hence it was called a "Settlement Right."

Now, the claims in the second section cannot come under the head of "Settlement Rights." A settlement right could not exceed 800 arpents, and required inhabitation and cultivation to give it validity. The claims under the second section largely exceed the quantity in a settlement right, and only required proof of possession, which does not necessarily involve inhabitation or cultivation. Hence, I conclude that the subject matter of the second section was not intended to be referred to the Board of Commissioners for their action.

Let us now examine the second section in its own terms. If the claimant was an inhabitant of the territory at the change of government, and was still in possession at that time, if the tract claimed had acknowledged and ascertained boundaries, not exceeding two thousand acres and not adversely claimed, his **52*** title shall be confirmed. If the second section stood by itself, no one would fail to construe these words into a present grant, being in all respects similar to the two cases above cited. If, then, the words of the section are sufficient to create a present grant, it is a forced construction to prevent them from having that effect, and to throw the confirmation on the future decision of a Board of Commissioners, for

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the reasons already given. First, if the Board had power to act on the subject, the second section was superfluous. Second, the eighth section implies an exclusion of the second from the jurisdiction of the Board. Third, the language of the second section leads us to presume that the Legislature did not think that the claims therein embraced were recognized by the Spanish laws and usages, or they would have left them to be decided by the Commissioners under their general powers.

The proviso of the second section puts it beyond doubt that the claims were intended to be confirmed by force of the Act itself. The proviso says, that no claim to a lead mine or salt spring shall be confirmed merely by virtue of this section. The necessary inference is, that a tract of land, not containing a lead mine or salt spring, but in other respects complying with its terms, shall be confirmed merely by virtue of this section. It may be said that this proviso was intended as an instruction to the Board of Commissioners; but the fourth section, which confers the powers on the board, and imposes limitations on them, has this very same prohibition. This affords us good evidence of the meaning of the Legislature. They did not intend under any circumstances to confirm a lead mine or a salt spring; therefore, in the second section, where they intended to confirm certain claims, merely by force of the section, they introduced a proviso exempting lead mines and salt springs from its operation; and in the fourth section, where full powers are given to the Board to decide all French and Spanish claims, they introduced a claim imposing the same restriction on them, in regard to lead mines and salt springs. This is the only way in which we can give an independent existence to the second section and preserve it from being a mere superfluity.

There is nothing in the words of the section that necessarily requires further action on the part of the Legislature or its ministerial agents. All that the claimant would have to do, when his right is brought in question, is to show that he comes within the provisions of the statutes, just as the claimants of village lots under the Act of the 18th June, 1812. He will have to establish his title by showing a tract, not exceeding 2,000 acres, with defined and ascertained limits; proving uninterrupted possession for ten consecutive years; residence in the province *and possession at the time of the **[53]** change of government. These facts would work a title in him, having relation back to the time of the passage of the Act.

Second Proposition. The next statute on which we rely for a confirmation, is the second section of the Act passed April 12, 1814, entitled "An Act for the final adjustment of land titles in the State of Louisiana and Territory of Missouri."

(The argument of *Mr. Garland* upon this proposition is too long to be inserted.)

Third Proposition. If the court are not satisfied that the claim of John Jarrott was confirmed by the Acts we have been commenting on, there is another view of the case to which I would now ask their attention.

By the facts set forth in the petition, and admitted to be true by the demurrer, it seems that Jarrott had been in possession of the land

more than ten consecutive years prior to the 20th December, 1803; that it did not exceed in quantity 2,000 acres, and that he was an inhabitant of the Territory, and still in possession on that day. By the second section of the Act of 3d March 1807, he was entitled to a confirmation from any tribunal authorized to act on the subject. The claim was presented to the Recorder of Land Titles, and by him rejected, it was reserved from sale by the Act of 17th February, 1818, third section. It was afterwards surveyed and marked on the books of the Surveyor-General and on the books of the Register, as reserved to fill the claim of John Jarrott. In 1824 an Act was passed authorizing the representatives of certain French and Spanish claims to prosecute them before the District Court. Various other Acts were subsequently passed on these claims which it is not necessary to mention. On the 17th June, 1844, an Act was passed reviving for five years the Act of 1824.

The claim of John Jarrott did not come within the purview of these statutes. The Act of 26th May, 1824, gave jurisdiction to the District Court over claims to lands, "by virtue of any French or Spanish grant, concession, warrant or order of survey legally made, granted or issued before the 10th day of March, 1804," by the proper authorities. Jarrott's claim was neither a grant, a concession, a warrant or order of survey; it was founded on verbal permission only, and was called a settlement right; as such it was filed, and as such it was acted on by the Recorder. That it did not come under the jurisdiction of the court, is put beyond question by a comparison of other statutes on the same subject. On the 9th of July, 1832, an Act was passed creating a Board of Commissioners "to examine all the unconfirmed claims to land in that State (Missouri), heretofore filed in the office of the Recorder according to law, founded upon any incomplete grant, **54*** concession, warrant or order of survey, issued by the authority of France or Spain, prior to the 10th day of March, 1804." It will be perceived that the class of claims embraced in this statute is precisely the same as that in the Act of 1824, over which the District Court took cognizance. They were claims originating in a grant, concession, warrant or order of survey. Donation or settlement claims were not embraced; accordingly Congress passed a supplemental Act embracing those claims.

On the 2d of March, 1833, it was enacted that the provisions of the Act of the 9th of July, 1832, shall be extended to, and embrace in its operations every claim to a donation of land in the State of Missouri, held in virtue of settlement and cultivation. This supplement shows the understanding of the Legislature, and proves that Jarrott's claim, which was a "donation right," was not embraced by the Act of 9th of July, 1832, and consequently not by the Act of 26th May, 1824, giving jurisdiction to the court, to precisely the same class of claims.

Since writing the above, I have seen the opinion of this court in the case of *The United States v. Billieux*, 14 How., 189, which fully sustains the conclusion that the District Court had no jurisdiction in this case.

After the Act of 1818, reserving this tract

from sale, there was no other statute operating on it till the supplemental Act of March, 1833, extending the provisions of the Act of 1832 to donation and settlement rights. It was made duty of the Commissioners to examine all the unconfirmed claims heretofore filed in the office of the Recorder, to take additional testimony, if they thought proper, in regard to those claims, and then to class them so as to show, first, what claims, in their opinion, would in fact have been confirmed under former authorities; and second, what claims, in their opinion, are destitute of merit. They were required to proceed, with or without any new application of the claimants, and to lay before the Commissioners of the General Land Office a report of the claims so classed, to be laid before Congress for their final decision upon the claims contained in the first class.

The third section then enacts, "that from and after the final report of the Recorder and Commissioners, the lands contained in the second class shall be subject to sale as other public lands, and the lands contained in the first class shall continue to be reserved from sale as heretofore, until the decision of Congress shall be made thereon." Jarrott's claim was not embraced in either class; it was not acted on at all. The law made it the duty of the Board to proceed without further application. The claim was regularly filed in the office of the Recorder; the Commissioners might take additional testimony if the case required it. The ***repre** [55] sentatives of Jarrott had nothing to do; they could only wait in silence the action of the Board. Their claim was overlooked or not reached; the Board made their final report and dissolved. Now, it is a well-settled principle of law that no person shall suffer in his rights in consequence of the delay or neglect of government officers. This tract of land stands reserved from sale, as heretofore, to fill the claim of John Jarrott's representatives.

In *Menard v. Massey*, 8 How., 309, this court have said: "That this provision (section 6th of Act 3d March, 1811) is an exception to the general powers conferred on the officers to sell, is not an open question; having been so adjudged by this court in the case of *Stoddard v. Chambers*, reported in 2 Howard; and again, at the present term, in the case of *Bissell v. Penrose*. Nor is it an open question, that the Act of February 17, 1818, folio 8, re-enacts and continues in force the exception as respects such lands. This was also decided by the above cases; and that such was the opinion of Congress, is manifest from the third section of the Act of 9th July, 1832, under which the last Board acted; for it declares that lands of the first class shall be reserved from the sale as heretofore." Now, it is manifest that lands not classed at all, not acted on by the Board, must continue reserved from sale as heretofore. We can come to no other conclusion without admitting that the neglect or delay of public officers can deprive a person of his rights, which is not consistent with law or justice.

The Supreme Court of Missouri, in a similar case, have held that the lands continue to be reserved as heretofore. In *Perry v. O'Hanlon*, 11 Mo., 596, they say: "What, then, was the condition of the land, the title to which is now in controversy, in 1847, when the patent is

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sued? The Act of July 9th, 1832, directed the Commissioners to divide the claims submitted to them into two classes. The first class was to embrace such claims as, in their opinion, were meritorious and ought to be confirmed; and the second class to include such as were destitute of merit. The Act declared that after the final report of the Board, the lands embraced in the second class should be subject to sale as other public lands; that the lands contained in the first class should be reserved from sale until the final action of Congress thereon. Congress finally acted on this report in 1836; and the Act July 4, 1836, confirmed the claims recommended by the Commissioners, with certain exceptions specified in the Act. Perry's claim was not in the second class, for it was never rejected by the Board; it was not in the first class, for it was not reported for confirmation. How, then, has the reservation been removed? By the [56*] Act of 1832, this land was expressly *reserved from sale. No proceeding under that Act has had the effect of taking off this reservation, nor has any subsequent law been enacted having such purpose or tendency. If Perry, then, by virtue of the proceedings under the proviso to the third section, failed to acquire a complete title to the land by purchase, it still continues under the general reservation. Whether Perry's title be good or otherwise, until Congress shall direct the land to be brought into market, no other individual can acquire a title. It was expressly reserved on account of Perry's claim under Valle. That reservation still remains."

This tract of land, therefore, stands reserved from sale "as heretofore," and all the entries made upon it are consequently void. But the Supreme Court of Missouri tell us there is no remedy. "Suppose it be true," say they, "that the reservation did exist, and that its effect would be to render the purchases void, still his position (plaintiff's) in court is not changed thereby. The reservation confers no title on him; and the nullity of purchases made by the defendants does not enhance the merits of his title. He is still without any title that we can enforce."

They came to this conclusion on the authority of cases decided by this court. "The Supreme Court of the United States," say they, in *Les Bois v. Bramell*, 4 How., 462, and in *Menard v. Massey*, 8 How., 307, "distinctly declare that until an inchoate title originating under the Spanish government has been 'confirmed,' it has no standing in a court of law or equity."

In the view I am now about to press upon the consideration of the court, I do not rest the case on the "unconfirmed title" filed in the Recorder's office. The above authorities, therefore, and the principle deduced from them, are inapplicable.

I maintain that we have a right to the aid of the court on the ground of possession; legal possession of a tract of land with acknowledged and ascertained boundaries, by permission and authority of the Congress of the United States. We are tenants of the government, and have a right to be protected in our possession.

The Statute of Missouri says: "The action of ejectment may be maintained in all cases where the plaintiff is legally entitled to the possession of the premises."

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In this case, Burgess, as representative of Jarrott, is legally entitled to the possession of the premises.

Kendall, who purchased of Jarrott's heirs, filed his claim with the Recorder under the seventh section of the Act 13th June, 1812, which required him to be an actual settler on the land. As the claim was not confirmed on other grounds we are to presume *that he com-[57] plied with the law in this respect, and was an actual settler. We know, from the record, he was. The land thus actually settled was reserved from sale by a subsequent Act of Congress. It was surveyed and marked on the book of surveys, in the Register's office, as reserved from sale, to fill the claim of John Jarrott's representative. This representative was in the actual occupation and use of the land. Here, then, is a specific tract of land in the actual occupation of Kendall, who has authority by law to hold the same until Congress shall determine whether or not he has a right to demand a legal title for it. Until that event he has possession, and a legal right to the possession.

Burgess, in his petition, sets out his possession and the ouster of possession by the defendants. After describing the chain of events, and proving himself the legal representative of John Jarrott, the petition then proceeds: "And your petitioner has been in possession of 640 acres of said land ever since he purchased it as aforesaid."

The petition goes on to show that the land was marked on the books as reserved from sale, and was reserved from sale to fill the claim of Jarrott's representatives, "until the 30th day of December, 1847, a period of twenty-nine or thirty years, when, in violation of law, the several Acts of the Congress of the United States, and the rights of the legal representatives of the said Jarrott, the Register suffered pre-emptions to be taken on it; "and the persons who took said pre-emptions had full knowledge at the time of the claim of John Jarrott's legal representatives to said land, and now having possession of said land, and claiming the same as their property (although attempted to be unlawfully obtained), and are keeping the legal representatives of the said Jarrott out of their possession of the same, notwithstanding it is their property, and belongs to no other person whatever." And, in conclusion, the petition prays "that said defendant be, by verdict and judgment in your petitioner's behalf, compelled to abandon their illegal claim to said land or any part of it, to wit: your petitioner's 640 acres of it."

This petition is awkwardly worded, but the Statute of Missouri requires no particular form, only that the petitioner shall set out his case in full, and in language so that a man of common understanding shall know what is meant. There can be no mistake as to the meaning of this petition. Burgess had bought 640 acres of this land by deed, and was in the actual possession of the same, according to the metes and bounds of his deed, when the defendants intruded and unlawfully obtained possession, and are holding the same against the lawful possession of him, the legal representative of John *Jarrott, and he prays that they may be [58] adjudged to surrender up this unlawful claim to his land.

It is on this right of possession we now ask the judgment of the court.

That the entries are void, cannot be questioned. (See *Stoddard v. Chambers*, 2 How., 284; *Menard v. Massey*, and *Bisell v. Penrose*, 8 How.; and *Perry v. O'Hanlon*, 11 Mo., 585.) The entries being void, our right of possession will be recognized and enforced.

The political power has acted on this claim, and it is now cognizable by the courts of law. The claim was required by statute to be filed with the Recorder of Land Titles; to be investigated and reported to Congress. Another statute declares that until the final action of Congress thereon it shall be reserved from sale. The executive officers are instructed to carry these laws into effect. The Surveyor-General marks it out on the maps of his office; draws lines around the claim, and writes on the face of it, "Reserved from sale, to fill the claim of John Jarrott's representatives." Will not the courts recognize a claim in this condition, and enforce the law in regard to it? They do not look upon it as an unconfirmed Spanish grant, having no standing in a court, but as a claim filed and reserved from sale by the laws of Congress: it has a legal existence. They enforce the laws of Congress and say: the possession of Jarrott's representatives is recognized by statute, and is valid until the final action of Congress: in the mean time all the entries on this land are without authority and void. The Supreme Court of Missouri admit that they have power to pronounce the entry of the defendants void, because the land is reserved from sale by a law of Congress; but deny that they can go further, and protect the right of possession in the plaintiff, because he sets up nothing more than an unconfirmed Spanish grant which is not recognized by law. But he does more; he sets up a right of possession in this land under the law of Congress. It is admitted that the plaintiff is in possession, and has been from the beginning. It must also be conceded that the reservation was made in respect of this possession, because every law on the subject of incomplete Spanish grants is based on the idea of actual possession or inhabitation or cultivation. This reasoning is specially applicable to the present case, because it has written evidence of title, and rests entirely on actual settlement or possession. Here, then, is a claim founded in possession only, recognized by law. If, therefore, the courts can protect the reservation by declaring all entries on it, subsequent to the reservation, void, they can likewise protect and enforce the right of possession on which the reservation was founded. The same 59] law that gives them power to protect the reservation, gives them power to protect the possession under it. If this be not so, then a bona fide holder of land under the authority of Congress can be ousted of his possession, and the courts have no power to protect him. But this is not law. An ejectment can be maintained on a bare possession against a trespasser. In the case of *Crockett v. Morrison*, 11 Mo., page 6, the court say: "As the action of ejectment is a possessory action, where no title appears on either side, a prior possession, though short of twenty years, will prevail over a subsequent possession which has not ripened into a

title, provided the prior possession be under a claim of right and not voluntarily abandoned.

* * * This doctrine is recognized by the New York courts in a variety of cases. * * * In all these cases it will be found that the defendants, against whom a recovery was permitted, were mere trespassers, and that they, or those under whom they claimed, or from whom they obtained possession, entered upon the actual or constructive possession of the plaintiff."

In the present case there is no question of title; that remains in the United States. The Supreme Court of Missouri admit that Burgess is in possession, and that the entry of the defendants is void. Then the defendants are mere trespassers on the actual and constructive possession of the plaintiff, and ought to be ejected by the present action.

Mr. Darby, for defendants in error:

The petition of the plaintiff shows that he has no title. His claim is not based upon a concession, and was never confirmed. The only action ever taken with the claim by the parties purporting to represent it, was when it was presented to the Recorder of Land Titles, by Kendall, after his purchase in 1812. The Recorder refused to recommend it for confirmation, and rejected it; and from that time to the commencement of this suit, a period of nearly forty years, the claim appears to have been abandoned. At least, no steps appear to have been taken to bring it before the Recorder, or any of these several Boards of Commissioners, for confirmation. It does not appear to have been presented to Congress, or any department of the government or other tribunal, for their sanction, approval or confirmation.

The opinion of the Supreme Court of Missouri has shown, most conclusively, that it was not confirmed by the second section of the Act of the 3d of March, 1807 (2 U.S. Stat. at Large, 440), as was contended by the counsel in that court, in the argument of this cause.

The plaintiff, then, has nothing more than an unconfirmed, "unprosecuted claim to [*60 land, which has been rejected by the Recorder of Land Titles, and that rejection acquiesced in for nearly forty years; and which the defendants, as shown by the plaintiff's petition, have purchased, at different times, of the United States, and to which they have severally a title from the government. It is manifest the plaintiff has no such title as will authorize a court of justice to give him the relief prayed for in his petition.

The claim was not filed under the provisions of the Act of Congress of May 28, 1824, giving jurisdiction to the District Court of the United States, for the Missouri District, to adjudicate and pass on these unconfirmed claims. The claim was consequently barred. The fifth section of that Act provides, "That any claim not brought before the District Court within two years from the passing thereof, shall be forever barred, both in law and equity; and that no other action at common law, or proceeding in equity, shall ever thereafter be sustained in relation to said claim."

In further support of this position, the defendants refer to the case of *Barry v. Gamble*, 3 How., 55, and also to the case of *Chontau v. Eckhart*, 2 How., 352.

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To show, moreover, that the plaintiff's claim has "no standing in a court of law or equity," the defendants rely with much confidence on the case of *Les Bois v. Bramell*, decided in this court at the January Term, 1846, 4 How., 462. And in the case of *Menard v. Massey*, 8 How., 307, the same principle is still more strongly asserted and adhered to.

The decision of the Supreme Court of Missouri is made in accordance with the decisions referred to, and is governed by them. The demurrers were rightfully sustained on both points.

The defendants were improperly joined in the action. They held separately, each in his own right, under entries made at the Land office at different times, and under pre-emptions allowed in favor of each of the defendants. The petition shows that they did not hold or claim title in common, but that they held separately.

In conclusion, the defendants adopt, as a part of their argument, a portion of the able opinion of *Chief Justice Gamble*, in delivering the opinion in this cause:

"The plaintiff, then, has no title which authorizes him to ask the relief prayed for in this petition. But he alleges that the land was, by different Acts of Congress, reserved from sale in order to satisfy his claim, and therefore the purchases made by the defendant were void. Suppose it to be true that the reservation did exist, and that its effect would be to render the purchases void, still his position in court is **§ 11*** not changed thereby. *The reservation confers no title on him, and the nullity of purchases made by the defendants does not enhance the merits of his title. He is still without any title that he can enforce."

Mr. Chief Justice Taney delivered the opinion of the court:

This was a suit brought by petition in the Circuit Court of Jefferson County, in the State of Missouri, by the plaintiff in error, against the defendants.

"The petition sets forth, in substance, that John Jarrott, *alias* Gerrard, in 1780, with the consent and permission of the officers of the Spanish government, settled upon a tract of land in what is now Jefferson County, in the State of Missouri, and that he continued to inhabit and cultivate it until about 1796, when he was driven off by the Indians. His son Joseph succeeded him in the possession of the land, and continued to reside upon and cultivate it until he sold it to Kendall, in the year 1812. Kendall filed a notice of the claim with the United States Recorder of Land Titles, who rejected it. The right of Kendall passed by descent to his heirs at law, who sold to the plaintiff, as appears by conveyances filed with the petition. It appears, moreover, that the plaintiff has always been in possession since the purchase of Kendall's heirs. A plat of the claim was laid down on the maps of the public lands, in the Registrar's office, representing it as being reserved to satisfy the claim of John Jarrott's legal representatives. After the claim had been examined and rejected by the Recorder of Land Titles, no further action appears so have been taken on the claim.

"In the years 1847-48 and 9, different portions of the same tract of land were entered

at the Registrar's office, by different individuals under pre-emptions allowed to them; the entries being made at different times, each person purchasing in his own right and in his own individual name, separate and distinct from the others. The several persons making these separate and different entries are made the defendants to this suit:

"The defendants demurred to the petition, and assigned as causes of demurrer: first, that the plaintiff showed no right, in his petition, to maintain the action; second, that separate and distinct causes of action against different persons were joined in the petition.

"The Circuit Court of Jefferson County sustained the demurrers, and the plaintiff appealed to the Supreme Court of Missouri. The Supreme Court affirmed the decision of the Circuit Court, and the plaintiff has brought his case before this court, by writ of error, to reverse the decision of the Supreme Court of Missouri."

"In proceeding to deliver the opinion [***62** of the court, it is proper to observe, that by the laws of Missouri the distinction between suits at law and in equity has been abolished. The party proceeds by petition, stating fully the facts on which he relies, if he seeks to recover possession of land to which he claims a perfect legal title; and he proceeds in the same manner if he desires to obtain an injunction to quiet him in his possession, or to compel the adverse party to deliver up to be canceled evidences of title, improperly and legally obtained, and he may, it seems, assert both legal and equitable rights in the same proceeding, and obtain the appropriate judgment.

This has been done by the plaintiff in error in the present case. His suit is brought according to the prayer of his petition to recover possession of land to which he claims title, and upon which, as he alleges, the defendants have unlawfully entered; and also to compel them to abandon (as he terms it) their illegal claim.

The demurrer admits the truth of the facts stated in the petition. And consequently, if these facts show that he had any legal or equitable right to the land in question, under the Treaty with France, or an Act of Congress, which the State Court was authorized and bound to protect and enforce, he is entitled to maintain this error, and the judgment of the State Court must be reversed.

Now, as regards any equitable and inchoate title which the petitioner may possess under the Treaty with France, it is quite clear that the State Court had no jurisdiction over it. For it has been repeatedly held by this court, that under that Treaty, no inchoate and imperfect title derived from the French or Spanish authorities, can be maintained in a court of justice, unless jurisdiction to try and decide it has first been conferred by Act of Congress. Certainly no such jurisdiction has been given to any State Court. And the Supreme Court of Missouri were right in sustaining the demurrer, as to this part of the petition, even if it had been of opinion that the permit to settle on the land, and the long possession of it under the Spanish government, gave him an equitable right, by the laws of Spain, to demand a perfect and legal title. The court had no jurisdiction upon the question. And the judgment of the State Court cannot be reversed unless

the plaintiff can show that he had a complete and perfect title derived from the Spanish or French authorities; or a legal or equitable title under the laws of the United States.

The petitioner does not claim a perfect grant from the French or Spanish government; nor a patent from the proper officers of the United States. But he insists that the Act of Congress of March 3, 1807, 2d Stat., 440, vested in him a complete legal title, and needed no patent to confirm it.

[63*] *Undoubtedly Congress may, if it thinks proper, grant a title in that form, and it has repeatedly done so. And we proceed to examine whether the title, claimed by the plaintiff, was confirmed to him by the Act referred to.

The plaintiff relies on the second section as a confirmation of his claim. But it evidently will not bear that construction when taken in connection with the whole Act. For the fourth section directed Commissioners to be appointed, who were authorized to decide upon all claims to land under French or Spanish titles in the Territories of Louisiana or Orleans; and by the sixth section, whenever the final decision of the Commissioner was in favor of the claimant, he was entitled to a patent for the land, to be issued in the manner provided for in that section. The eighth section required the Commissioners to report to the Secretary of the Treasury their opinion upon all claims not finally confirmed by them—the claims to be classified in the manner therein prescribed. And it was made the duty of the Secretary to lay this report before Congress for their final determination.

This Act of Congress did not, *proprio vigore*, vest the legal title in any of the claimants. For even when the decision of the Commissioners was final in their favor, yet a patent was still necessary to convey the title. The report was made conclusive evidence of the equitable right, and nothing more. And when the final decision was against the validity of the claim, he was directed to report his opinion upon its merits; and Congress reserved to itself the ultimate determination.

The powers and duties of the Commissioner were subsequently transferred to the Recorder of Land Titles. And this claim was presented to him in 1812, with the evidence upon which the claimant relied to support it. It is a claim under a settlement right derived from the Spanish authorities, and which the claimant insisted was within the provisions, and entitled to confirmation under the second section of the Act of 1807.

The Recorder reported against it. His report states that there was "possession, inhabitation and cultivation in 1781, and eight following years, and again two or three years." He assigns no particular reason for rejecting the claim, but simply enters in his report "not granted." And in this form it was laid before Congress, together with the other claims not finally decided by the Recorder in favor of the claimants. It does not therefore appear from the report whether it was rejected because, in the judgment of the Recorder, the possession of ten consecutive years was not sufficiently proved: or because no evidence was offered (and none appears to have been offered) to prove that the party under whose title the claim

was made was a resident of the territory on the 20th of December, 1808.

*On behalf of the petitioner it is contended, that the decision of the Recorder was erroneous, and founded upon a mistake as to a matter of fact; and that it appears by the evidence returned with the report to the Secretary of the Treasury, that the possession spoken of was proved to have been for more than ten consecutive years before the 20th of December, 1808—and not broken, as stated in the report.

This may be true. The Recorder may have fallen into error. But it does not follow that plaintiff was entitled, on that account, to maintain his petition in the Missouri court. That court had no power to correct the errors of the Recorder if he made any; nor to revise his decision; nor to confirm a title which he had rejected. That power, by the Act of 1807, was expressly reserved to Congress itself; and has not been committed even to the judicial tribunals of the general government. The decision of the Recorder against him is final, unless reversed by Act of Congress; and the petitioner can make no title under the United States, by virtue of the provisions in that Act.

It is, however, insisted, that if it was not confirmed by the Act of 1807, it was made valid by the Act of 1814. And this confirmation is claimed under the first section, which confirms all claims where it appears by the report of the Recorder that it was rejected merely because the land was not inhabited by the claimant on the 20th of December, 1808.

But it is very clear that this Act does not embrace it. The report of the Recorder does not place its rejection merely on that ground. On the contrary, it would seem to place it upon the want of proof of continued residence upon the land for ten consecutive years; and upon none other.

It may indeed have happened that the son of John Jarrett was in possession, and actually inhabited the land on the day mentioned in the law; and that from ignorance of its provisions, or from other cause, he omitted to produce proof of it to the Recorder, and that the claim was in fact rejected on that account. But that question was not open to inquiry in the Missouri court. The Act of Congress does not confirm all claims where this fact existed and could be proved, but those only in which it appeared on the face of the report that the want of this proof was the sole cause of its rejection. This must appear on the written report of the Recorder to bring it within the provisions of this Act, and cannot be supplied by other evidence. And as it does not so appear in the present case, the Act of 1814 does not embrace it nor confirm it.

Neither can the petition be maintained upon the long and continued possession held by the petitioner and those under whom he claims.

The legal title to this land, under the Treaty with France, was *in the United States. [65*] The defendants are in possession, claiming title from the United States, and with evidences of title derived from the proper officers of the government. It is not necessary to inquire whether the title claimed by them is valid or not. The petitioner, as appears by the case he presents in his petition, has no title of any description derived from the constituted authorities of

the United States, of which any court of justice can take cognizance. And the mere possession of public land, without title, will not enable the party to maintain a suit against anyone who enters on it; and more especially he cannot maintain it against persons holding possession under title derived from the proper officers of the government. He must first show a right in himself, before he can call into question the validity of theirs.

Whatever equity, therefore, the plaintiff may be supposed to have, it is for the consideration and decision of Congress, and not for the courts. If he has suffered injury from the mistake or omission of the public officer, or from his own ignorance of the law, the power to repair it rests with the political department of the government, and not the judicial. It is expressly reserved to the former by the Act of Congress.

We see no error in the judgment of the Supreme Court of Missouri, and it must be affirmed, with costs.

ORDER.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Missouri, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court in this cause be, and the same is hereby affirmed, with costs.

Arg—15 Mo., 220.

Cited—18 How., 294; 2 Otto, 347; McAll., 164.

JOSIAS PENNINGTON, *Plaintiff in Error*,
v.
LYMAN GIBSON.

*Courts of equity and of law are of equal dignity
—Action on judgment in equity—Averment as to jurisdiction.*

Whenever the parties to a suit and the subject in controversy between them are within the regular jurisdiction of a court of equity, the decree of that court is to every intent as binding as would be the judgment of a court of law.

Whenever, therefore, an action of debt can be maintained upon a judgment at law for a sum of money awarded by such judgment, the like action can be maintained upon a decree in equity which is for a specific amount: and the records of the two courts are of equal dignity and binding obligation.

A declaration was sufficient which averred that "at a general term of the Supreme Court in Equity for the State of New York," &c., &c. Being thus averred to be a court of general jurisdiction, no averment was necessary that the subject matter in question was within its jurisdiction. And the courts of the United States will take notice of the judicial decisions in the several States in the same manner as the courts of those States.

66] *THIS case was brought up by a writ of error from the Circuit Court of the United States for the District of Maryland. The facts of the case are set forth in the opinion of the court.

It was argued by Mr. Schley for the plaintiff in error, and by Messrs. Frick and Colman for the defendant in error.

Mr. Schley stated that there were three causes assigned for the demurrer to the declaration. They were:

1. For that it appears from the declaration, that the cause of action is an alleged decree of

an alleged court of equity, as set forth in said declaration; whereas, an action at law cannot be maintained in this court, on such a decree; at least without averment in pleading, that said decree, within the limits of its territorial jurisdiction, is of equal efficacy with a judgment at law.

2. For, even if an action at law can be maintained for the recovery of the sums of money directed by such alleged decree to be paid, as stated in said declaration, yet the form of action adopted in this case is not the proper form of action for the enforcement of such recovery.

3. For that it does not appear in and by the said declaration, nor is it therein averred, in any manner, that the said alleged court of equity had any jurisdiction to pass a decree against this defendant for payment to the plaintiff of any of the sums of money in the said declaration mentioned.

After joinder in demurrer, the court gave judgment upon the demurrer in favor of the plaintiff below, for \$6,134.86, and \$3,000 damages: the damages to be released on payment of the debt, with interest from 25th November, 1848, and costs of suit.

The counsel for the plaintiff in error will insist that several causes of demurrer were well assigned.

As to the first ground. There is no averment that said "Supreme Court in Equity of the State of New York" is a court of record. The decree is referred to "as remaining in the office of the County Clerk of Steuben County." No averment that such a decree in the State of New York is of equal efficacy with a judgment at law.

It is conceded that it has been held, in many cases, in this court, that a decree in chancery is equally as conclusive as a judgment in a court of common law. In *Hopkins v. Lee*, 6 Wheat., 109, the decree was evidenced by the record of the proceedings in Chancery in the Circuit Court for the District of Columbia; and being offered in evidence in the same court, the only question was as to the effect of said decree as evidence. *But *Hugh v. [67 Higgs*, 8 Wheat., 697, is an express decision on the very point, and sustains the demurrer. *Smith v. Kernochen*, 7 How., 217, merely decided the effect, in evidence, of a decree in Chancery, as between the parties. It was not the case of an action at law grounded on a decree. On this point, the following cases will also be relied on: *Carpenter v. Thornton*, 8 B. & Ald., 52; *Houlditch v. Marquis of Donegal*, 8 Bligh, N. S., 301; and 1 Stat. at Large, 122, and notes there, will be cited.

On the second point, the following cases will be cited: *Walker v. Witter*, 1 Doug., 1; *Duplex v. Deroven*, 2 Vern., 540; *Crawford v. Wittall*, and *Sinclair v. Fraser*, Doug., 4.

As to the ground of demurrer thirdly assigned, it will be insisted that the courts of the United States cannot judicially know the extent or character of the jurisdiction of the said Court of Equity; and of course cannot know whether it had jurisdiction over the subject matter, or over the plaintiff in error. There is no averment in the declaration as to the jurisdiction of said court; nor is it even averred that said court was holden at a place within its jurisdiction, or that said decree was pro-

nounced within its jurisdiction. It is consistent with all that is averred in pleading that the decree may be merely void. The following cases will be cited: *Boswell's Lessee v. Otis*, 9 How., 349; *Allen v. Blunt*, 1 Blatch., C. C., 480; *D'Arcy v. Ketchum*, 11 How., 165; *Crawford v. Howard*, 30 Maine (17 Shep.), 422; *Burckle v. Eckart*, 3 Denio, 279; *Cobb v. Haynes*, 8 B. Mon., 187; *Van Buskirk v. Mullock*, 3 Harr., 184; *Moravia v. Sloper*, and *Herbert v. Cook*, Willes, 80, 37; *Read v. Pope*, 1 Cr., Mee. & R., 302; S. C., 4 Tyrw., 403. It is not to be intended that because a court is termed a superior court, that it is a court of general jurisdiction. It may be an inferior court, and of limited jurisdiction.

The counsel for the defendant in error thus stated and argued the points:

The questions for argument arise upon the demurrer, which raises substantially three points, namely:

1. That an action at law cannot be maintained in the courts of the United States, upon the decree of a state court of equity.

2. That if such action be maintainable, the declaration must set forth that the decree, within the limits of the State in which it is passed, is of equal efficacy with a judgment at law; and also that the court had jurisdiction to pass the decree in question.

3. That the action, if maintainable, must be *assumpsit*, not debt.

68*] *1st. Under the Constitution of the United States, and the laws of Congress, the judgments of the courts of each State are to be regarded in all other States, not as foreign, but domestic judgments, and as equally conclusive with domestic judgments. (*Mills v. Duryee*, 7 Cranch, 484; *Hampton v. McConnell*, 3 Wheat., 234.)

And where the court has jurisdiction of the parties and the subject matter, a decree in chancery is equally conclusive between the parties with a judgment at law. "In this there is, and ought to be, no difference between a verdict and judgment in a court of common law and a decree of a court of equity. They both stand on the same footing, and may be offered in evidence under the same limitations; and it would be difficult to assign a reason why it should be otherwise." (*Hopkins v. Lee*, 6 Wheat., 113, 114.)

In all the States where the question has arisen (in Kentucky, Louisiana, Tennessee, South Carolina, Maine, and New York), decrees in chancery have been held to be within the Constitution and Act of Congress; which make them equally with judgments at law, of the same dignity in all other States as in the State in which they are pronounced. (See Cow. and H. Notes to Phil. Ev. Part II., p. 900, and the cases there cited.)

This being so, the money decree of a court of chancery of competent jurisdiction is, in every other State, the final and conclusive ascertainment of a debt, upon which a legal obligation to pay arises. And there can be no sufficient reason why an action of debt should not be maintained as well on such a decree as upon a judgment at law. There may be decrees in chancery, which cannot well form the basis of a suit at law. Such are decrees for specific performance, or such as contain

multifarious matter, or require acts and conditions to be performed by each party. But this objection cannot be made to a final decree for the payment of a specific sum of money free from conditions or qualifications of any kind. A legal obligation to pay is necessarily implied by such a decree.

"Every man is bound, and hath virtually agreed to pay such particular sums of money as are charged on him by the sentence or assessed by the interpretation of the law. Whatever the laws order anyone to pay, that becomes instantly a debt, which he hath beforehand contracted to discharge. This implied agreement gives the plaintiff a right to institute a second action, founded merely on the ground of contract, to recover such a sum. So, if he hath obtained judgment, he may bring an action of debt on this judgment, &c., &c.; and the law implies, that by the original contract of society, the defendant hath contracted a debt, and is bound to pay it." (3 *69 Bl., Com., 160.) It is on this ground alone, that "*assumpsit*" lies on foreign judgments; and why not on a decree in equity for the payment of money.

It has been said, that a legal obligation cannot be implied from a merely equitable obligation to pay; and that an action at law cannot be maintained upon a decree in equity for the payment of money founded on equitable considerations only. (*Carpenter v. Thornton*, 3 Barn & Ald., 52, 5 E. C. L., 225.) In that case, it appeared from the record, that the bill was filed for the specific performance of an agreement to purchase; and the decree was manifestly on the ground of that particular equity. The chief objection to the suit urged in argument, was, that it had been brought in England upon a decree of the High Court of Chancery of England, having, of course, the power to enforce its own decrees in the territory in which the suit was brought. It was determined, under the circumstances of that case, that the action would not lie.

But in a subsequent case (*Henley v. Soper*, 8 Barn & Cress., 16; 15 E. C. L., 147), it was admitted and held that debt would lie on the decree of a colonial court of equity (in Newfoundland) for the payment of a specific balance found to be due by one partner to another. Lord Tenterden (by whom *Carpenter v. Thornton* was determined) said: "There is a great difference between the decree of a colonial court, and a court of equity in this country. The colonial court cannot enforce its decrees here; a court of equity in this country may. In the latter case, there is no occasion for the interference of a court of law; in the former, there is, to prevent a failure of justice. The case of *Carpenter v. Thornton* does not establish the broad principle for which it was cited," that is, that no action at law could be maintained on a decree in equity.

In *Sadler v. Robins*, 1 Campb., 253, it was also held, that an action at law was maintainable upon the decree of a colonial court of equity. The amount of the decree in that case was indefinite. But Lord Ellenborough said: "Had the decree been perfected, I would have given effect to it, as well as to a judgment at common law. One may be the consideration for an *assumpsit* equally with the other."

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This question in England, seems to have been settled by the two cases last referred to. In 7 Wentworth's Pleadings, 95, is a precedent for an action of debt for a sum of money decreed by the Lord Chancellor to be paid to the plaintiff; and the form is attributed to Mr. Tidd. The books of precedents all contain forms of actions upon foreign decrees in equity. The only exception would seem to be the case of an [*70] action at law, brought *in the same territorial jurisdiction, to enforce a decree in equity, appearing on its face to be grounded on equitable considerations only. (See *Carpenter v. Thornton*.)

It has been repeatedly ruled in this country, that the action would lie upon a chancery decree ordering the payment of money. (*Post v. Neafle*, 3 Caines, 22; *Dubois v. Dubois*, 6 Cowen, 496; see also, 19 Johns., 166, 577; *Evans v. Tatem*, 9 Serg. & Rawle, 252; *Howard v. Howard*, 15 Mass., 196; *McKim v. Odom*, 3 Fairfield, 84.)

In the first case (*Post v. Neafle*) Chief Justice Kent dissented from the opinion of the court; but chiefly on the ground, that as the Supreme Court of New York, in *Hitchcock & Filch v. Aicken*, 1 Caines, 469, had determined the judgments of sister states to be only *prima facie* evidence, and open to inquiry upon their merits, to sustain an action at law upon the decree in equity of another state, would involve the court in the discussion and determination of questions of exclusively equitable jurisdiction, which a court of law was not competent to pass upon. The overruling of the case of *Hitchcock v. Aicken*, and the settlement of the question by this court, that a judgment is conclusive in every other state if a court of the state where it was rendered would hold it so, has removed, it may fairly be presumed, the reason of Chancellor Kent's objection to the ruling in *Post v. Neafle*. (See 1 Kent's C., 5th ed., 260, 261, note C.)

In the case of *McKim v. Odom*, 3 Fairfield, 84, the whole subject is most fully and learnedly discussed, and the authority is worthy of special reference.

To refuse the jurisdiction contended for, it is obvious would, in this country, amount in many cases to an absolute denial of justice. In some of the States there is no court of equity, so called; and if a plaintiff in such states, to enforce a decree in equity obtained lawfully in another state, may not resort to a court of law, where the defendant has removed from and holds no property in the state in which the decree was passed, but has both residence and property in the state in which he must be sued at law, if at all—there is, to all practical intent, a right for which there is no remedy. In the American cases cited, the distinction taken in *Carpenter v. Thornton*, between decrees passed upon legal and equitable considerations, does not seem to have been regarded; but the distinction, even if well founded, cannot apply to this case. For from anything that appears to the contrary on the record, the obligation of the defendant in equity (plaintiff in error) upon which the decree was passed, might have been binding in law as well as in equity.

[*71] *2d. If the action can be maintained, it is not necessary to set forth in the declaration that the decree sued on is of equal efficacy in the State in which it was passed, with a judgment at law; or that the court had jurisdiction to pass the decree. By the Act of May, 1790, it is provided, that the judicial proceedings of the state courts shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which the records are or shall be taken. If they are conclusive in the state where pronounced, they are so everywhere. If open to examination there, they are so everywhere. A decree in chancery is, from its nature, equally conclusive with a judgment at law. (6 Wheat., 113, &c.) It may not have equal efficacy in the state in which it was passed, with a judgment at law, in respect to the mode and means of its enforcement; but it is of like conclusiveness, as "*res adjudicata*," provided the court had jurisdiction of the parties and subject matter. It is averred by the declaration in this case, that the decree in question was duly signed and enrolled, &c.; and as the record of the judicial proceedings of another state (every presumption being in favor of the jurisdiction), it is *prima facie* evidence that the court had jurisdiction over the parties and subject matter (see 4 Cowen, 294, 296, and 8 Cowen, 311); and it is conclusive upon them while not reversed, set aside, &c., unless that evidence be rebutted. But that issue is matter of defense, and must be so tendered. It is not necessary to aver in pleading, by the declaration, that there was jurisdiction to pass the decree, in a suit on such decree, any more than to aver the jurisdiction to render a judgment, in a suit on such judgment: nor to allege the conclusiveness of the one, any more than that of the other. As the plea to an action of debt upon the judgment of another state must be "*nul tiel record*," and not "*nil debet*," so the plea to an action on a decree of another state must be of like import. In either case, of course, a special plea to the jurisdiction would be good; and if the conclusiveness of either cause of action is to be called in question, it may, and must be done as matter of defense. No precedent can be found of debt on judgments or decrees, where the jurisdiction is averred in the declaration.

In England, there is a distinction between superior and inferior courts. In the former everything is intended to be within the jurisdiction; in the latter, every material fact must be alleged to be within the jurisdiction. It is necessary, therefore, in a suit in a superior, upon the judgment of an inferior court, to allege not merely that the latter had jurisdiction, but that the "original cause of action arose within the jurisdiction, &c." (*Read v. Pope*, 1 C. M. & R., 302, Exchequer.)

*So, in pleading the judgments of [*72] courts of limited and special jurisdiction, it may be necessary to state the facts upon which the jurisdiction is founded; but with respect to courts of general jurisdiction, the rule is, that they are presumed to have jurisdiction until the contrary clearly appears. The want of jurisdiction must be averred, as matter of defense. "Every presumption is in favor of the jurisdiction of the court. The record is *prima facie* evidence of it, and will be held conclusive, until clearly and explicitly disproved." (4 Cowen, 294, 296; Cow. & H. Notes, Part II., 905, 906.)

We have considered this case on the assumption that the decree sued on was that of a chan-

cery court, exercising general equity jurisdiction. But in fact, it was passed by a court exercising no separate equity jurisdiction, but having general jurisdiction over the whole cause of action, whether founded on legal or equitable considerations. Its decree, so called, was as much a judgment at law as it was a decree in chancery, to certain intents and purposes, in the State of New York, and was made so by the constitution and laws of that State.

The federal courts, supreme and inferior, considering their relations to the States, are supposed to have judicial knowledge of the constitutions, laws and public usages of all the states. Whatever question may be as to the propriety of the state courts taking such judicial notice, there can be none in regard to this court. (See Cow. & H. Notes, Part II., pp. 901, 903.) The New Constitution, the Judiciary Act, and Code of Procedure of the State of New York, may therefore properly be examined, to ascertain the jurisdiction of the court which passed the decree on which this action was brought.

The New Constitution of New York, adopted November, 1846, art. 6, sec. 3, provides: "There shall be a supreme court, having general jurisdiction in law and equity." Sec. 6: "The Legislature shall have the same power to alter, and regulate the proceedings in law and equity, as they have heretofore possessed." Art. 14; sec. 8: "The offices of Chancellor, Vice-Chancellor, &c., are abolished, from and after the first Monday in July, 1847."

The Judiciary Act, passed after the adoption of the New Constitution (Laws of 1847, ch. 280, sec. 16) provides: "The Supreme Court, organized by this Act, shall possess the same powers and exercise the same jurisdiction, as is now possessed and exercised by the Supreme Court, and Court of Chancery, &c., and all laws relating to the present Supreme Court, and Court of Chancery, and the jurisdiction, powers and duties of said courts, &c., shall be applicable to the Supreme Court, organized by this Act, &c., so far as the same can be so applied, and are consistent with the Constitution, and the provisions of this Act."

73*] *The Code of Procedure, passed April 12, 1848, ch. 379, sec. 63, provides: "The distinction between actions at law and suits in equity, and the forms of all such actions and suits, as heretofore existing, are abolished; and there shall be in this State hereafter but one form of action for the enforcement or protection of private rights, and the redress or prevention of private wrongs, which shall be denominated a civil action."

Sec. 63: "The party complaining shall be known as plaintiff, &c."

Sec. 119: "The first pleading on the part of the plaintiff is the complaint."

Sec. 120: "The complaint shall contain, 1. The title of the cause, &c. 2. A statement of the facts constituting the cause of action, &c. 3. A demand of the relief to which the plaintiff supposes himself entitled. If the recovery of money be demanded, the amount thereof shall be stated."

This Act (sec. 391) went into effect July 1, 1848. The decree of the Supreme Court, in this case, was signed and enrolled April 30, 1849. At the time of its rendition, the distinc-

tion, in New York, between actions at law and suits in equity was abolished, and there was but one form of action in all civil cases. The decree, therefore, so called, was of "equal efficacy" with a judgment at law. It was passed by a court of general jurisdiction, whose judgments were conclusive in New York; and moreover, by whatever technical title known, it was a final judgment for the payment of money, rendered by a court having no separate equity jurisdiction or powers, though properly exercising complete jurisdiction over the parties and subject matter. In no other court in New York could it be a matter of inquiry, whether that judgment was founded upon legal or equitable considerations. How, then, in any other state court, or court of the United States, could it be viewed as a decree in chancery, founded upon equitable considerations only? What other action could be maintained in another state for its enforcement, than an action at law, there being only one form of civil action, for that purpose, in the State of New York?

8d. Debt is the proper remedy; *assumpsit* would not lie. The latter is maintainable only upon the judgment of a foreign court, which is not regarded as a record, nor as a specialty, but only as *prima facie* evidence of a simple contract debt; as in England, upon an Irish judgment, or Scotch decree; or in this country, before the Revolution, upon judgments of other states. (Chitty's Pleading, Vol. I., p. 106.)

But the judgments of other states are not now regarded as foreign judgments, but as of the same nature and effect as domestic judgments. The original debt is therefore thereby merged, *and the plaintiff must resort to his high- [*74 est remedy. The decree is a record (and there is here the proper averment, *provat patet per recordum*, &c.), and debt or *scire facias* is the only remedy on such records.

In the case of *Hugh v. Higgs and Wife*, 8 Wheat., 607, the action was "case," to recover money due under the decretal order of a court of equity. It was conceded by both the counsel, as stated by the court, that the action would not lie for the money ordered to be paid by the decree; but it was supposed, and so argued, that the record showed the money had been received by the defendant upon transactions which took place after the decree, and the right to recover was put in argument on that ground.

It is quite clear, however, that if *assumpsit* would lie in this case, debt also could be maintained; for it lies concurrently with *assumpsit*, upon all foreign judgments, decrees of colonial courts, &c.; in fact, on all judgments or decrees upon which *assumpsit* would lie. (Chitty Pl., Vol. I., p. 111.)

Mr. Justice Daniel delivered the opinion of the court:

The defendant in error, a citizen of the State of New York, instituted in the Circuit Court an action of debt against the plaintiff in error, a citizen of the State of Maryland, to recover the amount of a decree, with the costs thereon, which had been rendered in favor of the defendant against the plaintiff in error by the Supreme Court in Equity in the State of New York. the averments in the declaration are as follows: that at a general term of the Supreme Court in Equity of the State of New

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York, one of the United States of America, held at the court house in the Village of Coopers-town, in the County of Otsego, in the State of New York, on the first Monday in November in the year 1848, present William H. Shankland and others, *Justices*, it was ordered, adjudged and decreed by the said court, in a certain suit therein pending, wherein the said Lyman Gibson was complainant, and the said Josias Pennington and others were defendants, that the said Lyman Gibson recover against the said Josias Pennington, and that the said Josias Pennington pay to the said Lyman Gibson the amount of the consideration money paid by the said Lyman Gibson to a certain Samuel Boyer, as agent and attorney of the said Josias Pennington, as should appear by the several indorsements upon the contract mentioned and set forth in the bill of complaint, and produced and proved as an exhibit in said suit, with interest on the several payments and indorsements respectively, amounting in the aggregate on the 25th of November, 1848, to the sum of \$5,473.18, and also that the said Josias Pennington pay to the said complainant his costs in said suit, which were taxed at the sum of \$661.68, as by the said decree duly signed and enrolled at a special term of the Supreme Court in Equity aforesaid, held on the 30th of April in the year 1849, at the Village of Bath, in the County of Steuben, in the State of New York, and now remaining in the office of the Clerk of Steuben County aforesaid, will on reference appear.

To the declaration as above stated, the defendant, the now plaintiff in error, demurred; and upon a joinder in demurrer, the court overruled the demurrer of the said defendant, and gave judgment for the plaintiff, the now defendant in error, for the debt and costs in the declaration set forth, together with costs of suit.

The defendant in the Circuit Court assigned for causes of demurrer the three following:

1. For that it appears from the said declaration that the cause of action in this case is an alleged decree of an alleged court of equity, as set forth in the said declaration, whereas an action at law cannot be maintained in this court on such a decree; at least without an averment in pleading that said decree within the limits of its territorial jurisdiction is of equal efficacy with a judgment at law.

2. For even if an action at law can be maintained for the recovery of the sums of money directed by such alleged decree to be paid, as stated in said declaration, yet the form of action adopted in this case is not the proper form of action for the enforcement of such a recovery.

3. For that it does not appear in and by the said declaration, nor is it averred in any manner, that the said alleged court of equity had any jurisdiction to pass a decree against this defendant for payment to the plaintiff of any of the sums of money in the said declaration mentioned.

In considering these cases of demurrer, the attention is necessarily directed to the ambiguous terms assumed in the first assignment, by propounding a proposition general or universal in its character, and afterwards conceding a modification or change in that proposition in-

consistent not merely with its scope and extent, but with its essential force and operation. For instance, it is first stated that "the cause of action is an alleged decree of an alleged court of equity, whereas an action at law cannot be maintained in this court on such a decree."

We can interpret this proposition to have no other intelligible meaning than this, and to be comprehended in no sense more restricted than this, namely: that an action at law cannot be maintained in a court of law when the cause of action shall be a decree of the court of equity. In other words, that the character of the foundation, *or cause of action, namely: its being a decree of a court of equity, must, in every such instance, deprive the court of law of cognizance of the cause. The proposition, thus generally put, is then followed by a qualification in these words: "at least without an averment in pleading, that the decree within its territorial jurisdiction is of equal efficacy with a judgment at law." By this language the universality of the previous proposition is modified, or rather contradicted, for it contains an obvious concession, that provided a particular efficiency can be affirmed with regard to it, an action at law may be maintained even upon a decree of a court of equity.

We will first examine the correctness of the general position, that an action at law cannot be maintained upon a decree in equity; and will, in the next place, inquire how far the jurisdiction of the court pronouncing this decree, and the efficiency of its proceedings with reference to the parties before it, may be inferred or rightfully taken notice of, from its style or character, or from proper judicial knowledge of the subject matter of its cognizance, independently of a particular special averment.

We are aware that at one period courts of equity were said not to be courts of record, and their decrees were not allowed to rank with judgments at law, with respect to conflicting claims of creditors, or in the administration of estates; but these opinions, the fruits of jealousy in the old common lawyers, would now hardly be seriously urged and much less seriously admitted, after a practice so long and well settled, as that which confers on courts of equity in cases of difficulty and intricacy in the administration of estates, the power of marshaling assets, and in the exercise of that power the right of controlling the order in which creditors, either legal or equitable, shall be ranked in the prosecution of their claims. The relative dignity of courts of equity, and the binding effect of their decrees, when given within the pale of their regular constitution and jurisdiction, are no longer subjects for doubt or question.

We hold no doctrine to be better settled than this, that whenever the parties to a suit and the subject in controversy between them are within the regular jurisdiction of a court of equity, the decree of that court solemnly and finally pronounced, is to every intent as binding as would be the judgment of a court of law, upon parties and their interests regularly within its cognizance. It would follow, therefore, that wherever the latter received with regard to its dignity and conclusiveness as a record, would constitute the foundation for

proceedings to enforce it, the former must be held of equal authority. These are conclusions which reason and justice and consistency sustain, and an investigation will show them to be supported by express adjudication. It is 77*] true that, owing to the peculiar character of equity jurisprudence, there are instances of decisions by courts of equity which can be enforced only by the authority and proceedings of these courts. Such, for example, is the class of cases for specific performances; or wherever the decision of the court is to be fulfilled by some personal act of a party, and not by the mere payment of an ascertained sum of money. But this arises from the nature of the act decreed to be performed, and from the peculiar or extraordinary power of the court to enforce it, and has no relation whatever to the comparative dignity or authority between judgments at law and decrees in equity.

We lay it down, therefore, as the general rule, that in every instance in which, an action of debt can be maintained upon a judgment at law for a sum of money awarded by such judgment, the like action can be maintained upon a decree in equity which is for an ascertained and specific amount, and nothing more; and that the record of the proceedings in the one case must be ranked with and responded to as of the same dignity and binding obligation with the record in the other.

The case of *Sadler v. Robins*, 1 Camp., 258, was an action upon a decree of the High Court of Chancery in the Island of Jamaica, for a sum of money; "first deducting thereout the full costs of the said defendants expended in the said suit, to be taxed by one of the masters of the said court; and also deducting thereout all and every other payment which S. & R., or either of them, might on or before the 1st day of January, 1806, show to the satisfaction of the said master, they or either of them had paid, &c." In this case Lord Ellenborough said, "had the decree been perfected, I would have given effect to it as to a judgment at law. The one may be the consideration for an *assumpsit* equally with the other. But the law implies a promise to pay a definite, not an indefinite sum."

The case of *Henty v. Soper*, 8 Barn & Cress., 16; of *Dubois v. Dubois*, 6 Cow., 496, and of *McKim v. Odom*, 3 Fairfield, 94, are all expressly to the point, that the action of debt may be maintained equally upon a decree in chancery as upon a judgment at law. But if this question had been left in doubt by other tribunals, it must be regarded as settled for itself by this court, in the explicit language of its decision in the case of *Hopkins v. Lee*, 6 Wheat., 109, where it is declared as a general rule, "that a fact which has been directly tried and decided by a court of competent jurisdiction, cannot be contested again between the same parties, in the same or in any other court. Hence a verdict and judgment of a court of record, or a decree in chancery, although not binding on strangers, puts an end to all further 78*] controversy concerning the points decided between the parties to such suit. In this there is, and ought to be no difference between a verdict and judgment in a court at law and a decree of a court of equity. They both

stand upon the same footing, and may be offered in evidence under the same limitations; and it would be difficult to assign a reason why it should be otherwise. The rule has found its way into every system of jurisprudence, not only from its obvious fitness and propriety, but because, without it, an end could never be put to litigation. It is therefore not confined in England or in this country to judgments of the same court, or to the decisions of courts of concurrent jurisdiction; but extends to matters litigated before competent tribunals in foreign countries." The case of *Dubois v. Dubois*, 6 Cow., was an action of debt upon a decree for a specific sum, by a surrogate of one of the counties of the State of New York. One of the objections in that case was, that the action of debt could not be maintained; and another that no jurisdiction was shown by the declaration. The Supreme Court, in its opinion, say: "The principal question raised is, whether debt will lie. The general rule is that this form of action is proper for any debt of record, or by specialty, or for any sum certain. It has been decided that debt lies upon a decree for the payment of money made by a court of chancery in another State, and no doubt the action will lie upon such a decree in our domestic courts of equity. The decree of the surrogate, unappealed from, is conclusive, and determines forever the rights of the parties. It may be enforced by imprisonment, and is certainly evidence of a debt due; whether the surrogate's court be a court of record need not be decided. It has often been said, that a court of chancery is not a court of record. It is sufficient that a decree in either court, unappealed from, is final—debt will lie." In opposition to the doctrine we have laid down, the case of *Carpenter v. Thornton*, from 3 Barn. & Ald., 52, has been cited, to show that the action of debt will not lie upon a decree of a court of equity. But with respect to the case of *Carpenter v. Thornton* it must be remarked, that Lord Tenterden, who decided that case, has, in the subsequent case of *Henty v. Soper*, 8 Barn. & Cress., 20 explicitly denied that the former case can be correctly understood as ruling any such doctrine or principle as that for which it has been here adduced. In *Henty v. Soper*, his Lordship says of *Carpenter v. Thornton*, "I think it does not establish the broad principle for which it is cited. It appears by the report that I then expressed myself with much caution, and I do not find that I ever said that a decree of a court of equity fixing the balance due on a partnership account could not be enforced in a court of law *unless the items of the account [*79 could be sued for. My judgment proceeded on the particular circumstances of that case; the bill was for the specific performance of an agreement, which is a matter entirely of equitable jurisdiction. But it is a general rule that if a partnership account be settled, and a balance struck by due authority, that balance may be recovered in an action at law." In support of the objection that the action in this case is founded on a decree in chancery could not be maintained, the counsel for the plaintiff in error has cited the case of *Hugh v. Higgs and Wife*, reported in 8 Wheat., 697. This is a short case, presenting no precise statement of

the facts involved in it, and as far as the facts are disclosed by the report, they are given in a somewhat confused and ambiguous form. It is true that the objection to the action, as founded on a decree in chancery, is said by the court to have been urged in its broadest extent. But if we look to the decision of this court, and the reasoning upon which that decision is rested, we find the objection to the judgment of the Circuit Court, or rather the principle of that objection, narrowed and brought considerably within the extent of the objection itself. For this court say that the judgment of the Circuit Court must be reversed for error in the opinion, which declares that the action is maintainable on the decretal order of the Court of Chancery. It might very well be error to allow the action of debt upon a decretal order of the chancery, and yet perfectly regular to sustain such an action upon the final decree. The former is subject to revision and modification, the latter is conclusive upon the rights of the parties. There is yet another ground on which this case of *Hugh v. Higgs and Wife*, so imperfectly stated, might form an exception to the rule which authorises actions of debt upon decrees in equity. In the case last mentioned, the action at law was brought and the judgment rendered within the regular limits of the equity jurisdiction of the court, and to the full extent of which limits the Court of Equity had the power to enforce its decrees. Under these circumstances it might well be ruled, that a party having the right to avail himself directly of the power and process of the court, should not capriciously relinquish that right, and harass his adversary by a new and useless litigation. An exception like this is perfectly consistent with the rule that where the decree of the Court of Equity cannot be enforced by its own process, and within the regular bounds of its jurisdiction, such decree, when regular and final, and when especially it ascertains and declares the simple pecuniary responsibility of a party, may, and for the purposes of justice must, be the foundation of an action at law against that party whose responsibility has been thus ascertained. Upon this principle it is that the courts of law in England, whilst they have been inclined to restrict the plaintiff to the proper process of the Court of Equity for the purpose of enforcing the decrees of the court within the bounds of its jurisdiction, have undeviatingly maintained the right of action upon decrees pronounced by the colonial courts. The process of the colonial courts could not run into the mother country, but this fact did not impair the rights settled by the decrees of those courts or render them less binding or final as between the parties. On the contrary, it is assigned as the special reason why the courts of law should take cognizance of such causes without which an entire failure of justice would ensue.

For this rule of decision in the English courts the cases of *Sadler v. Robins*, and of *Henly v. Super*, may again be recurring to; and for its adoption by courts in our own country, may be cited *Post v. Neafie*, 3 Caines, 22, and *Dubois v. Dubois*, and *McKim v. Odom*, already mentioned.

Having disposed of the general proposition in the first assignment of causes of demurrer by HOWARD 16.

the plaintiff in error, we will next inquire into the force of the condition or modification he has annexed to it, in the alleged necessity for an express averment in pleading of the efficacy or legal obligation of the decree within the territorial jurisdiction of the court by whom the decree has been pronounced.

Of the binding obligation, and conclusiveness of decrees in equity where the parties and the subject matter of such decrees are within the regular cognizance of the court pronouncing them, and of their equality in dignity and authority with judgments at law, we have already spoken. It remains for us only to consider what may be legally intended or concluded from the pleadings in this cause as to the territorial extent of jurisdiction in the court whose decree is made the foundation of this action.

The declaration avers, "That at a General Term of the Supreme Court in equity for the State of New York, one of the United States of America, held at the Village of Cooperstown in the State of New York, on the 1st Monday in November, in the year 1848, it was ordered, adjudged and decreed, &c.; and further, that on the 25th of November, 1848, the complainant's costs were taxed, &c., as by the said decree duly signed and enrolled at a special term of the said Supreme Court, &c., and now remaining in the office, &c., reference being there-to had, will appear."

It is undeniably true in pleading, that where a suit is instituted in a court of limited and special jurisdiction, it is indispensable to aver that the cause of action arose within such restricted jurisdiction; but it is equally true, with regard to superior courts, or courts of general jurisdiction, that every presumption is in favor of their right to hold pleas, and that if an exception to their power or jurisdiction is designed, it must be averred, and shown as matter of defense. Such is the general rule as laid down by Chitty. Vol. I., p. 442. So, too, in the case of *Shumway v. Stillman*, in 4 Cow. 206. The Supreme Court of New York, speaking with reference to a judgment rendered in another State, says: "every presumption is in favor of the judgment. The record is *prima facie* evidence of it, and will be held conclusive until clearly and explicitly disproved." And in further affirmation of the doctrine here laid down, we hold that the courts of the United States can and should take notice of the laws and judicial decisions of the several States of this Union, and that with respect to these, nothing is required to be specially averred in pleading which would not be so required by the tribunals of those States respectively. In the case before us the declaration avers that the decree on which the action is founded was a decree of the Supreme Court in equity of the State of New York—of a court whose jurisdiction in equity was supreme, not over a section of the State; but that it was the Supreme Court as to subjects of equity of the State, that is, of the entire State; and its decrees being ranked, in our opinion, as equal in dignity and obligation with judgments at law, its decree in the case before us was of equal efficacy with any such judgment throughout its territorial jurisdiction, or, in other words, throughout the extent of the State.

The second and third causes of demurrer

assigned by the plaintiff in error, are essentially comprised in the first assignment, and are mere subdivisions of that assignment; and in disposing therefore of the first, the second and third causes of demurrer are in effect necessarily passed upon. We are of the opinion that the demurrer of the plaintiff in error was properly overruled, and that the judgment of the Circuit Court be, as it is hereby affirmed, with costs.

ORDER.

This cause came to be heard on the transcript of the record from the Circuit Court of the United States for the District of Maryland, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with cost, interest, until paid, at the same rate *per annum* that similar judgments bear in the courts of the State of Maryland.

Cited—24 How., 203; 9 Wall., 121; 4 Cliff., 562, 614.

82*] *EDWARD P. FOURNIQUET AND WIFE, AND MARTIN W. EWING AND WIFE, *Appellants*,

v.

JOHN PERKINS.

Reference to master in chancery—Interlocutory decrees open for revision.

Where a case in equity was referred to a master, which came again before the court upon exceptions to the master's report, the court had a right to change its opinion from that which it had expressed upon the interlocutory order, and to dismiss the bill. All previous interlocutory orders were open for revision.

The Decree of dismissal was right in itself, because it conformed to a decision of this court in a branch of the same case, which decision was given in the interval between the interlocutory order and final decree of the Circuit Court.

THIS was an appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

The controversy between the parties had been at several different times, in various shapes before this court, as will be seen by reference to 6 How., 206; 7 How., 160, and 14 How., 813.

The case in 6 Howard was this: the Circuit Court had decreed, on the 12th of April, 1847, that a community of acquets and gains had existed between Perkins and wife, during the marriage, and that the present appellants, representing Mrs. Perkins, were entitled to an account. Accordingly, the matter was referred to a master to ascertain the landed property, and to divide it and report an account. This was held by this court to be an interlocutory order only, and not a final decree, and the appeal was dismissed. (6 How., 208.) The mandate sent from this court, after reciting the decree or order appealed from, and the reference to a master, concluded thus: "You therefore are hereby commanded that such further proceedings be had in said cause, as, according to right and justice and the laws of the United States, ought to be had, the said appeal notwithstanding."

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Under this mandate the master took up the reference, and made a report awarding a large sum of money and a large amount of land to Fourniquet and wife and Ewing and wife. Both parties filed exceptions to the report. These exceptions were before the court, upon argument, in February and March, 1852.

In the mean time, viz.: at January Term, 1849, the case of *Fourniquet et al. v. Perkins* was decided by this court as reported in 7 How., 160. The Circuit Court appeared to consider this case as deciding the points involved in a different way from that in which it had itself decided them when referring the case to a master to state an account. Upon hearing the exceptions, it therefore reversed the former decree, and dismissed the bill.

The complainants appealed to this court.

*It may be proper to mention that [*83 whilst this appeal was pending another branch of the case reached this court, which is reported in 14 How., 313.

The appeal was argued by Mr. Henderson for the appellants, and by Messrs. Benjamin and Johnson for the appellees.

Mr. Henderson contended that it was entirely irregular to dismiss the bill, when the only point before the court was the exceptions to the master's report: and that, even if such an order was proper at such a time, still the reasons upon which it was founded were insufficient. He then proceeded to distinguish the case from that in 7 How., and went into a minute examination of it upon the merits. The first proposition is the only one which it is thought necessary to insert in this report, namely:

We concede the point as not debatable, that an interlocutory decree, before enrollment, or before sanctioned on appeal (where appealable), continues subject to the Chancellor's power to review, amend or set aside, at any time before final decree.

But a rightful power must be rightly exercised, or the power becomes usurpation.

Now, the exceptions only were at hearing before the court. (See Ch. R., 83.) This "decretal order" had been enrolled. (Rule 85; see 1 Ves., 93; 1 Stark. Ev., 245.)

The case, therefore, was in no attitude for a rehearing to be entertained, certainly not at that time.

But a rehearing cannot be granted except on petition. (11 Ves., 602; Stor. Eq. Pl., sec. 426 and n.; 17 Ves., 178; 19 Ch. R., 201; 3 Ed. Ch., 479, 480; 7 Paige, 392; Walk. Ch., 336; 2 Haywood, 175; 1 Paige's Ch., 39; 2 Hill, 156; and Ch. Rule 88.)

And as one petition for a rehearing was overruled in 1847, this is a reason why a rehearing should not have been entertained again, especially for the same cause. (16 Ves., 214; 3 Ed. Ch., 479, 480; Walk. Ch., 309.)

Especially shall not a rehearing be allowed after the party has proceeded to take an account before the master. (8 J. Ch., 365, 366; 11 Ves., 602; 3 Barb. S. C., 232.)

The case of *Conseque v. Fanning*, 3 J. Ch., 364, is not dissimilar to the case before the court, as it was there a decretal order to account, and the defendants had attended the master; and after report returned, filed petition for rehearing. It was granted, but on stringent terms. (See the case.)

HOWARD 18.

The case of *Hunter v. Carmichael*, 12 Sm. & M. Miss., 726, is very like the present case, though less objectionable, where the Chancellor set aside an interlocutory decree (but did **84***) not dismiss *the bill) without motion, petition, or other cause assigned, or appearing on record. The case is carefully considered by the Supreme Court, with its accustomed ability. In their opinion they say:

"The order seems without any foundation to support it. No petition is filed, no proofs exhibited, no ground laid, no reasons assigned, no excuse offered for delay, no cause of any kind shown. This seems to us not the exercise of a "sound judicial discretion," but the exertion of power without legal warrant. If this order be sustained, then the rights of the parties, in some degree, rest not upon fixed and established rules of law, but upon the varying opinions of the court. The parties could not know on what to repose, and certain reliance on judicial proceedings would be greatly diminished. We do not mean to say it is not in the power of the Chancery Court to set aside an interlocutory decree, but only that some cause must be shown sufficient to authorize the act. Where there is error upon the face of the decree, or report under it, that is in itself sufficient ground for the court to act on. But no such error appears in this case.

The order setting aside the interlocutory decree without cause is erroneous. It is therefore reversed, and cause remanded for further proceedings."

A very similar case is that of *Moore v. Hilton*, 12 Leigh., 30. The court say that where new evidence is brought forward as a ground to change an interlocutory decree, the application must be made on motion, or notice to rehear the cause on the new evidence, or by petition for rehearing.

The counsel for the defendant in error replied to this argument.

The counsel for appellants concedes that an interlocutory decree continues subject to the Chancellor's power to review, amend, or set aside, at any time before the final decree but he urges that the power must be rightfully exercised, or it becomes usurpation.

Taking the position of the counsel as correct, the question recurs, whether this power was rightfully exercised; and on his own statement, connected with the record, it appears that the court heard his argument on the merits, and became satisfied on a review of its opinion, and on the authority of two cases decided since the interlocutory decree was rendered, that it had erred in its construction of the releases, and its decision on their effect as a legal bar to the complainants' demand, and therefore corrected its error and dismissed the complainants' bill. In this view of the merits, the court below has since been sustained by the opinion of this court **85***) in 14 How. If appellants' position be *sustained, it would now be necessary to reverse the final decree of the lower court, and to send the case back with directions to carry out the erroneous interlocutory decree to an erroneous final decree, in order that this court might then reverse the erroneous final decree rendered in accordance with its own mandate, and restore the final decree which it had previously reversed.

The complainants' brief, after urging the ir-

regularity of the action of the lower court in reversing its interlocutory decree, is confined to reiterating the argument and authorities already adduced in the case decided in 14 How. As the court has already passed judgment on the subject, we respectfully refer to the argument for defendant, and the decision in that cause, as conclusive of the present controversy.

Mr. Chief Justice Taney delivered the opinion of the court:

This case came before the court some years ago, on an appeal from an interlocutory order of the Circuit Court, which stated that the appellants were entitled to recover certain claims set out in their bill, and directed an account to be taken by the master. It is reported 6 How., 206. The appeal was dismissed, upon the ground that an appeal would not lie from an interlocutory order, and the case was remanded to the court below, with directions to proceed to a final decree. Upon receiving this mandate the Circuit Court proceeded to take the account upon the principles stated in its interlocutory order; and when the report of the master came in, exceptions were taken to it on both sides. At the argument of these exceptions, it appears that the court reconsidered the opinion it had expressed on the merits in the interlocutory order; and believing that opinion to be incorrect, dismissed the complainants' bill. The case now before us is an appeal from that decree.

The decree is undoubtedly right. For it conforms to the opinions expressed by this court in relation to the matters now in controversy in the case between Fourniquet and wife and the present appellee, reported 7 How., 160; and again in the case between these appellants and Perkins, the appellee, in the case reported in 14 How., 313. It is unnecessary to state here the facts in the present case, or the matters in dispute, as they are fully set out in the cases referred to; and especially in the one last mentioned. For, in that case, the parties and the matters in dispute were the same with those now before the court.

The counsel for the appellants, however, objects to the decree of dismissal, because it was made at the argument upon the exceptions to the master's report, and is contrary to the opinion on the merits expressed by the court in its interlocutory order.

*But this objection cannot be main- **86** tained. The case was at final hearing at the argument upon the exceptions; and all of the previous interlocutory orders in relation to the merits were open for revision, and under the control of the court. This court so decided when the former appeal hereinbefore mentioned was dismissed for want of jurisdiction. And if the court below, upon further reflection or examination, changed its opinion, after passing the order, or found that it was in conflict with the decision of this court it was its duty to correct the error.

The Circuit Court on this occasion has properly done so, and the decree of dismissal must be affirmed, with costs.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel; on con-

sideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

S. C.—6 How., 206.

EDWARD H. McCABE, *Plaintiff in Error*,
v.

LLOYD D. WORTHINGTON.

Land Titles in Missouri—inchoate title under Act of 1807—what entries take precedence.

The Act of Congress, passed on the 3d of March, 1807 (2 St. at L., 440), declared that all claims to land in Missouri should be void unless notice of the claim should be filed with the Recorder of Land Titles, prior to the 1st of July, 1808.

Hence, in the year 1824, a claim which had not been thus filed had no legal existence.

The Act of the 26th May, 1824 (4 St. at L., 52) authorizing the institution of proceedings to try the validity of claims, did not reserve from sale lands, the claims to which had not been filed as above.

Therefore, when the owner of such a claim filed his petition in 1824, which was decided against him; and he brought the case to this court, which was decided in his favor in 1836, but in the mean time entries had been made for parts of the land, the latter were the better titles.

Moreover, the Act of May 24, 1828 (4 St. at L., 228), provides that confirmations and patents under the Act of 1824 should only operate as a relinquishment on the part of the United States. Therefore, the confirmation by this court in 1836 was subject to this Act.

THIS case was brought up from the Supreme Court of the State of Missouri, by a writ of error issued under the 25th section of the Judiciary Act.

It was an action of ejectment commenced by the plaintiff against the defendant in the state Circuit Court of Missouri, where the defendant had judgment, which, on appeal by the plaintiff to the Supreme Court of the state of Missouri, was affirmed by that court.

87*] *The plaintiff's title rested on a concession by the Spanish government in 1796, which was confirmed by a decree of the Supreme Court of the United States on the 21st January, 1836, on an appeal from the District Court of Missouri, which exercised jurisdiction of the subject matter, under the provisions of the Act of Congress of May 26th, 1824, entitled "An Act enabling the claimants to lands within the limits of the State of Missouri and Territory of Arkansas, to institute proceedings to try the validity of their claims." The petition was filed by the claimant, Antoine Soulard, on the 22d August, 1824.

In January, 1825, an amended petition was filed by Antoine Soulard, who afterwards died; and on the 4th Monday of March following, the proceedings were reviewed in the name of the widow and heirs of the said Soulard, and such proceedings were had that a decree was rendered against the petitioners by the District Court on the 4th Monday of December, 1825, from which an appeal to the Supreme Court of the United States was taken within one year from its rendition, where, on the 21st January, 1836, the decree of the District Court was reversed, and the claim of the petitioners was con-

firmed for all the land claimed, except that which had been sold by the United States before the filing of the petition in the case.

In pursuance to this decree, the land claimed and confirmed was surveyed, and the survey returned to the Commissioner of the General Land Office; on which, on the 22d December, 1845, a patent was issued to the petitioners, under whom the plaintiff claims. The land sued for is comprehended within the limits of the survey, and in the patent of Soulard's widow and heirs. No notice in writing, stating the nature and extent of his claim, was ever delivered by Soulard to the Recorder of Land Titles under any of the Acts of Congress in relation to that subject. The defendant relied on patents from the United States issued in the year 1836, founded on entries made in the year 1834, while the case of Soulard, widow and heirs, against the United States, was pending in the Supreme Court; which patents embraced the land in controversy.

On the trial in the state Circuit Court, the counsel for the plaintiff prayed the court to instruct the jury as follows:

First. That the decree of confirmation, made by the Supreme Court of the United States on the 21st day of January, 1836, to Julia Soulard, widow, and James G. Soulard and others, heirs of Antoine Soulard, deceased, relates back to the time of filing the petition of confirmation, and passes to the confirmees the title to the land thereby confirmed, so as to cut out all titles and claims thereto originating after the filing of said petition.

Second. If the jury believe from the evidence that the land *sued for was patented by [*88 the United States on the 22d day of December, 1845, to the widow and heirs of Antoine Soulard, deceased; that such patent was issued for land surveyed for said patentees in pursuance of a decree of confirmation made by the Supreme Court of the United States; and that such decree of confirmation was founded on a petition for a confirmation filed in the United States Court for the District of Missouri, on the 22d day of August, 1824, such patent conveyed to the patentees a better title to the land sued for than that derived from an entry of the same made after the said 22d of August, 1824, or from a patent issued on such entry.

Third. If the jury believe from the evidence that Antoine Soulard, on the 22d day of August, 1824, petitioned the District Court of the State of Missouri for the confirmation of his title to a claim for 10,000 arpents of land; that said Antoine Soulard died, and the suit was revived and prosecuted in the name of his widow and children; that the said District Court decreed against the said claim; that said suit was appealed to the Supreme Court of the United States within one year from the time of the rendition of said decree by the District Court; that said Supreme Court afterwards decided in favor of the said claim, and by a decree confirmed the same to said widow and heirs; that the Surveyor of Public Lands for the State of Missouri caused the land specified in said decree to be surveyed for said confirmees; if the jury find these facts to be true, then the said widow and heirs of Antoine Soulard had, by virtue thereof, a better title to the land included in such survey than the defendant can have to any part of

NOTE.—*Missouri private land claims.* See note to *Les Bois v. Bramell*, 4 How., 446.

it by virtue of an entry made after the said 22d of August, 1824, or by virtue of a patent issued on said entry.

Fourth. The title under the confirmation of the Supreme Court of the United States to the representatives of Antoine Soulard is a better title than that of the defendant.

Fifth. The Act of May the 26th, 1824, passed by the Congress of the United States, reserved from sale the lands included within the bounds of all claims of the character embraced within the provisions of the first section of that Act, from the time of the filing of the petition for confirmation of such claims in the District Court of Missouri, until such time as said claims should be finally decided against the claimants.

Sixth. Any entry of land made within the limits of any claim, of the character embraced within the provisions of the first section of the Act of May 26th, 1824, after the filing of the petition of the claimant in the District Court, as provided for by said Act, and before said claim shall be finally decided against the claimant, is a void entry, and the patent issued there-⁸⁹ on is a *void patent. Which instructions the court refused to give; to which refusal the plaintiff then and there at the time excepted.

And the court, on motion of defendant, gave the following instructions, to wit:

1. If notice of the Soulard claim was not filed with the Recorder of Land Titles in St. Louis prior to the first day of July, 1808, then said claim was not by law reserved from sale; and if not reserved from sale by law, was subjected to sale as other public lands.

2. If Soulard's claim was not reserved from sale, then the entry of the defendant, if made according to law, being older, is a better, title than the plaintiff's confirmation.

3. The patent of the defendant is *prima facie* evidence that this entry was regular and lawful.

4. The Act of Congress of 26th May, 1824, under which Soulard's claim was confirmed, did reserve from sale the land covered by said claim, and any sales of such lands regularly made prior to the confirmation, conveys to the purchaser a better title than said confirmation, such claim not having been filed with the recorder prior to July 1st. 1808.

5. The commencement of a suit by Soulard in the United States court, for the purpose of obtaining a confirmation of his claim, did not operate as notice of his claim, so as to affect a title otherwise regularly obtained from the United States; and sales of such land, made after the commencement of this suit, stands upon the same ground as if made before such suit was commenced.

To the giving of which instructions the plaintiff then and there at the time excepted.

Upon these exceptions the case went up to the Supreme Court of Missouri, where the judgment of the court below was affirmed. And to review this decision the case was brought here.

It was argued by *Mr. Geyer* for the plaintiff in error, and *Mr. Wells* for the defendant in error.

Mr. Geyer, for the plaintiff in error:

The Supreme Court of the State of Missouri, on the appeal, decided that the claim of Antoine Soulard, at the date of the Act of 1824, had

no legal existence; the United States were under no obligation, moral or political, to make any provision for its recognition or confirmation; it was forfeited, by reason of its owner failing to give notice of it within the time prescribed by law. That the Act of 1824 conferred a gratuity, and the claimants under it, especially those in the class of Soulard, were applicant to the bounty or favor of Congress. The land claimed *was public land, liable to sale and entry [⁹⁰ as other public lands, pending the suit.

The plaintiff in error submits that the decree of confirmation made by the court on the 21st of January, 1836, vested in Julia Soulard, widow, and James G. Soulard, and the other heirs of Antoine Soulard, deceased, all the title of the United States in the land in controversy, as it was at the commencement of the suit, and consequently that the sale pending the suit was void.

1. The Act of Congress of May 26, 1824, under which the proceedings were had, was not designed to confer gratuities upon claimants, but to provide a remedy by which legal, just and *bona fide* claims might be established. "The mischief intended to be provided for by the Act, was the inchoate or incomplete condition of titles having a fair and just legal inception, under either the French or Spanish governments of Louisiana, but which by reason of the abdication or superseding of their governments, and by that cause only, had not been completed. (*The United States v. Reynes*, 9 How., 127, 145; 4 Stat. at Large, 52.)

2. It may be conceded that the claim of Soulard was barred as against the United States by the neglect to file notice thereof, as required by the Act of March 8, 1807, yet as the bar was removed by the Act of May 26, 1824, and the land remained undisposed of, the claim was restored to its original standing, precisely as if the Act of 1807 had not passed. The Act of 1824 enables all claimants, under incomplete titles, having a fair, legal and just origin, to bring such titles before the courts of the United States, and there establish them by proof of the legality and justice of their origin and character, without regard to any proceedings or notice under previous Acts of Congress.

3. The effect of the Act of 1824 is to reserve from sale and location the lands embraced by any incomplete title, within the description of the first section, until the final decision of the case where a suit is prosecuted, and for two years where the claimant fails to prosecute his claim under the Act. (See secs. 5 and 7, and the case of *Stoddard v. Chambers*, 2 How., 284.)

Mr. Wells, for defendant in error:

Did the court err in refusing to give the instructions prayed for by the plaintiff, or in giving those for the defendant?

1. It is clear that Soulard's claim was not reserved from sale by the Acts of 1811 or 1818, or, indeed, by any other Act prior to that of May 26, 1824; for the only condition upon which such reservations were made, was that notice of the claim should have been filed with the Recorder of Land Titles, on or before the 1st of July, 1808. Of this claim no such notice had *ever been filed. It stood, then, [⁹¹ by the terms of the Acts of 2d March, 1805, and of March 8, 1807, a barred claim. The

fifth section of the latter Act provided that "the rights of such persons as shall neglect to file such notices within the time therein limited (the 1st July, 1808), shall, so far as they are derived from, or founded on any Act of Congress, ever after be barred and become void, and the evidence of their claims never after admitted as evidence in any court of law or equity whatever." The claim, then, at the date of the Act of 1824, was wholly destitute of merit. Whatever claims it might originally have had upon the justice of the government, had long since been lost by the laches of the claimant, and by the lapse of time. Its confirmation to him then was a mere naked gratuity.

2. The Act of May 26, 1824, did not make any express provision for the reservation of this or any other claim. Its provisions extended to two classes of claims—those which had been filed with the recorder, as required by law, and which were reserved by the Acts of 1811 and 1818, and those which had not been so filed and reserved. And, indeed, it is the only Act of Congress that has ever opened the door for confirmation to this latter class, since they were barred.

The fifth section of the Act provides, "That any claim to lands, tenements or hereditaments, within the provisions of this Act, which shall not be brought by petition before said courts within two years from the passing of this Act, or which, after being brought before the said courts, shall on account of the neglect or delay of the claimant, not be prosecuted to a final decision within three years, shall be forever barred, both at law and in equity, and no other action at common law or proceeding in equity shall ever thereafter be sustained in any court whatever in relation to said claims."

This provision can only relate to the class of claims which had, by former laws, been reserved from sale. As to the other class, they were already, by the Act of 1807, barred, and no new legislation was required to bar them. Those which had been reserved must continue to stand reserved until some Act was passed to take off the reservation. This fifth section effectually secured that object. It could not have been intended to bar a claim already barred, and liable to be sold as other public land.

But the fifth section only barred the claims from future adjudication. It did not provide for the sale of the lands within those claims. When the claim ceased to be held up for adjudication, it became necessary, according to the policy of Congress, that the land should be offered for sale as other public land.

92*) And accordingly the seventh section of the Act was introduced for that purpose. It reads thus: "That in each and every case tried under the provisions of this Act, which shall be finally decided against the claimant, and in each and every case in which any claim cognizable under the terms of this Act shall be barred by virtue of any of the provisions contained therein, the land specified in such claim shall forthwith be held and taken as a part of the public lands of the United States, subject to the same disposition as any other public land in the same district."

It is this section which it is supposed operated by implication to establish the reservation

of Soulard's claim. But it is clear that it could not relate to that class of claims. It relates to claims barred by the provisions of this Act. Soulard's claim was not barred by this Act, for it had been barred many years before by the Acts of 1805, 1806 and 1807. It had been incorporated with the other public lands, and surveyed, and offered for sale with them. No new legislation was required to put it in the market, for it was already in market, and as stated by the petitioner himself in his petition to the District Court, "the quantity of 1,947¹¹/₁₆ acres had been definitively sold by the United States," and he gives the name of the persons to whom sold. (See Record, p. 7.)

The language of the Act is, "shall forthwith be held and taken as a part of the public lands of the United States." This language is appropriate when applied to lands which had always been reserved from sale; which had never been in market; which had been treated as private property, and never "held and taken as a part of the public lands of the United States," but can have no proper application to those lands which had in every respect been subject to all the laws relating to public lands since 1808.

3. But there are other provisions of the Act of 1814, which preclude the idea that it was intended by Congress that the title acquired by the claimant should ever be brought into conflict with sales made by the United States.

The sixth section provides that the clerk of the court shall furnish the successful claimant with a copy of the decree, who shall deliver it to the Surveyor of Public Lands in Missouri. And the surveyor shall cause the same to be surveyed. The eleventh section then provides, "That if in any case it should so happen that the lands, tenements or hereditaments, decreed to any claimant under the provisions of this Act, shall have been sold by the United States or otherwise disposed of, or if the same shall not have been heretofore located in each and every such case, it shall and may be [§93] lawful for the party interested to enter after the same shall have been offered at public sale, the like quantity of lands in parcels, conformable to sectional divisions and subdivisions, in any land office in the State of Missouri," &c.

Now, in order to understand more clearly the import of the phrase in this section, "lands, tenements or hereditaments, decreed to any claimant," it will be necessary to examine for a moment the provisions of the first section. By that section the claimant was not only required to set out his own title in full, but also "the name or names of any person or persons claiming the same or any part thereof by a different title from that of the petitioner." This was done by Soulard in his petition. He showed that 1,947¹¹/₁₆ arpents had been sold by the United States to other persons before his suit was brought. He did not claim this land, but claimed the residue of the 10,000 arpents. It could not, then, have been this land, already sold, which the Act of Congress supposed might be "decreed to the complainant." This could not have been decreed to him under any circumstances. He did not ask for it, nor could he demand it, for it had already been lawfully sold to other persons. It was then a part of the residue that the statute contemplated

might be decreed to him, when it had already been sold by the United States, and it was this for which this section provided. To give the Act this construction leaves it in harmony with all the legislation of Congress on the subject. It has been the uniform policy of Congress to protect those to whom they have sold for a valuable consideration. To say that Congress, by this provision, intended to protect those entries only which had been made before the suit was brought, is to impute to that body the folly of passing a law which, so far at least as this class of cases are affected, was wholly unnecessary. These entries were lawful and valid, and needed no legislation to protect them from subsequent grants. But to construe the provision to extend to entries made at any time prior to the decree, it is to place the Act of 1824 upon the ground of the Act of July 4, 1836, and, it is believed, all other Acts for the confirmation of such claims. In the case of *Menard's Heirs v. Massey*, this court has held that the second section of that Act protects all lands sold by the United States. In that case (8 How., 306) the court says:

"From the first Act, passed in 1803, up to the present time, Congress has never allowed to these claims any standing other than mere orders of survey, and promises to give title; and which promises addressed themselves to the sovereign power in its political and legislative capacity, and which must act before the courts of justice could interfere to protect the [94*] claim. And *so this court has uniformly held. The title of Cerre, having no standing in court, before it was confirmed, it must of necessity take date from its confirmation, and cannot relate back so as to overreach the patents made in 1826 and 1827." These remarks apply with eminent force to Soulard's claim. It was a claim which had been barred, and abandoned by the claimant for twenty years. In the case cited, the Spanish claim had been filed with the recorder, and was so far within the provisions of the Acts reserving such claims. But it had never been surveyed. In relation to this branch of the case, the court remarks: "In reserving lands from sale, it was necessary to know where they were situated, and how far they interfered with the public surveys. Either the President or some other officer must have had the power to designate the lands as those adjoining to salt springs or lead mines; or it must have appeared in some public office appertaining to the Land Department, what the boundaries of reserved lands were; and if it did not appear, no notice of the claim could be taken by the surveyors, nor by the registers and receivers, when making sales." (8 How., 309.)

I request the court to note the fact, apparent from the record, that no record or memorandum of this claim was to be found in any office belonging to the Land Department, except in Soulard's old book of Spanish surveys. There he states in his petition he recorded it. But no attention was ever given, by surveyors or other officers, to the surveys of claims not recorded. No copy of such surveys were ever sent to the Register's office. Even if Congress had in terms required him to withhold this land from sale, it would have been impossible for him to do so. He could not know where it was.

HOWARD 16.

When the Act of February 18, 1818, passed, just before the land sales in Missouri, requiring certain claims to be reserved from sale, an order was issued from the Land Department directing the Recorder of the Land Titles to furnish to the several registers descriptive lists of such land within their respective districts, as the Act required, should be withheld from sale. Had this not been done, the registers would have been unable to carry into effect the Act of 1818. As it was, large quantities of those lands were sold through mistake, and even these sales were protected by the second section of the Act of July 4, 1836. But in this case the register had no such information. Congress could not have intended that he should suspend any of his sales, or adequate provision would have been made to enable him to do so. So obvious was this view of the law, that the learned judge, in delivering the opinion of this court in the case, citing *Menard's Heirs v. Massey*, p. 307, says: "It was therefore *manifest that claims resting on the first [*95] incipient steps must depend for their sanction and completion upon the sovereign power, and to this course claimants had no just cause to object, as their condition was the same under the Spanish government. No standing, therefore, in any ordinary judicial tribunal has ever been allowed to these claims, until Congress has confirmed them and vested the title in the claimant. Such, undoubtedly, is the doctrine assumed by our legislation. To go no further, the Act of May 26, 1824, allowing claimants a right to present their claims in a court of justice, pronounces on their true character. It declares that the claim presented for adjudication must be such an one as might have been perfected into a complete title, under and in conformity to the laws, usages and customs of the government under which the same originated, had the sovereignty not been transferred to the United States; and by the sixth section, when a decree has been had favorable to the claim, a survey of the land shall be ordered and a patent issue therefor; and, by section eleventh, if the decree shall be in the claimant's favor, and the land has been sold by the United States or otherwise disposed of, the interested party shall be allowed to enter an equal quantity of land elsewhere."

This admits of no comment.

4th. But it is said that the filing of his petition for conformation, by Soulard, in the District Court, was notice, and that no one could purchase the land in prejudice of his right.

The rule here invoked is this: when a party commences judicial proceedings for the purpose of establishing his right to a particular piece of property, no one is permitted to purchase that property of another, and claim to be an innocent purchaser, without notice. The pendency of his suit is notice of all the right the plaintiff has. But in the case of Soulard he had no right or title whatever to the lands for which he sued. It belonged to the government and not to him; and if it belonged to the government, then the government might lawfully sell it to anyone before it granted to him. He petitioned for a grant of the land, and when he obtained his grant, he acquired only the title which the government then had. His petition to the court placed him on the ground of all

other applicants for a grant of land, the title to which was in the government. He who first obtains the title, and not he who first applies, will hold it.

With these remarks, and the able argument of the learned judge who delivered the opinion of the Supreme Court of Missouri, the defendant in error submits the case.

Mr. Justice Catron delivered the opinion of the court:

This cause comes here by writ of error to the 96*] Supreme Court *of Missouri, under the twenty-fifth section of the Judiciary Act. The error assumed to have been committed below is, that the court misconstrued the Act of May 26, 1824, enabling claimants to lands in Missouri, to institute proceedings to try the validity of their claims.

The action being an ejectment, and the defendant in possession by virtue of patents from the United States, the only question is whether the plaintiff has a better legal title.

The plaintiff relies on a decree of this court, made in 1836, in favor of Soulard's heirs, against the United States for 10,000 arpents of land including the premises sued for. The decree is of younger date than the entries of the defendant which were made in 1834, and are a good title to sustain or defend an ejectment in Missouri.

Soulard's claim was filed in the District Court, in August, 1824, and a confirmation demanded, but which was refused, and the petition dismissed in 1825; from this decree an appeal was prosecuted, and in 1836 a decree was rendered by this court confirming the claim. And the question here is, whether the decree in the Supreme Court related back to the date of filing the petition against the United States in the District Court. If it did, then the plaintiff is entitled to recover; and if it did not, then the judgment below must be affirmed.

The Act of March 3, 1807, declared that all claims to lands should be void unless notice of the claim, &c., should be filed with the Recorder of Land Titles prior to the 1st of July, 1808. Soulard's claim was not filed with the recorder, nor was it presented to any tribunal for action on it, till suit was brought in 1824, in the District Court. Up to that time, the land claimed was subject to sale. This is admitted. But the argument for the plaintiff is, that the Act of 1824 removed the bar, and restored the claim to its original standing as if the Act of 1807 had not been passed. Admitting this to be true, still it proves nothing, as the United States could beyond question have sold this land before 1807, and passed the legal title; and hence the removal of the bar, imposed by the Act, left the land equally open to sale, at any time after 1807 as it was before that time.

The Act of February 17, 1818, laid off local land districts in Missouri, one of which embraced the land in dispute, and provided for the sale of public lands, from time to time, in each district. But an exception was made according to the Act of 1811: That till after the decision of Congress thereon, no tract of land shall be offered for sale, the claim to which has been in due time and according to law pre-

sented to the Recorder of Land Titles, and filed in his office.

*The claims thus reserved from sale [*97 were the ones Congress supposed would come before the District Court and be adjudicated under the Act of 1824; and as they stood protected from sale, no further provision was made by the Act to protect such claims as that of Soulard, which had never been recorded.

Having given no additional protection by the Act of 1824, and Congress having the power to grant the land, or to cause it to be done, through the Department of Public Lands, the Commissioner of the General Land Office (June 25, 1831), ordered the registers and receivers of the various land districts in Missouri to proceed to sell the lands not adjudicated under the Act of 1824, which had been subject to adjudication: holding that, notwithstanding the provisions of the Acts of 1811 and 1818, all claims not brought before the court, or if brought, not prosecuted to a final decision in three years by reason of neglect on the part of the claimant, were subject to be offered at public sale. (Volume of Instructions and Opinions, No. 704.) Under this established construction, the land in question was sold to the defendant. He could not know that Soulard's heirs claimed the land, as their claim was nowhere recorded in any office appertaining to the Department of Public Lands; and if he had known that such claim existed, still the Land Court in Missouri had ceased to exist on the 26th of May, 1830, four years before he purchased. Soulard's claim had been rejected in that court, and had been pending on appeal in the Supreme Court, for nearly ten years after the suit was instituted; whereas, the Act of 1824 required that it should be prosecuted to a final decision within three years. Thus stands the equities of the defendant. But another consideration is conclusive of this case. The Act of May 24, 1828, sec. 2, provides that confirmations had by virtue of the Act of 1824, and patents issued thereon, should only operate as relinquishments on the part of the United States, and should in nowise affect the right or title, either in law or equity, of adverse claimants to the same land. The Act spoke of confirmations by decree, and declared that the decree should operate prospectively; and consequently embraced a case, where the land was acquired by purchase from the United States before the decree was made, unless the Acts of 1811 and 1818 protected the land from sale.

For these reasons, we agree with the Supreme Court of Missouri, that the defendant has the older and better legal title, and order the judgment to be affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Missouri, *and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court in this cause be, and the same is hereby affirmed, with costs.

Att'g—16 Mo., 514.
Cited—11 Otto, 808.

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GEORGE W. AND HENRY SIZER, *Plaintiffs in Error*,

v.

WILLIAM V. MANY.

Jurisdiction—amount—this court no jurisdiction of patent case, when—Practice—costs taxed nunc pro tunc.

Whereas judgment in a patent case was affirmed by this court with a blank in the record for costs, and the Circuit Court afterwards taxed these costs at a sum less than \$2,000, and allowed a writ of error to this court, this writ must be dismissed on motion.

The writ of error brings up only the proceedings subsequent to the mandate: and there is no jurisdiction where the amount is less than \$2,000, either under the general law or the discretion allowed by the patent law. The latter only relates to cases which involve the construction of the patent laws and the claims and rights of patentees under them.

As a matter of practice this court decides, that it is proper for circuit courts to allow costs to be taxed, *nunc pro tunc*, after the receipt of the mandate from this court.

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of Massachusetts.

Mr. George T. Curtis, on behalf of the defendant in error, moved to dismiss the writ of error for want of jurisdiction.

The circumstances were these:

At the October Term, in the year 1848, of the Circuit Court of the United States for Massachusetts District, Many, the defendant in error, recovered a judgments against the plaintiffs in error, in an action for the infringement of letters patent, which was entered and recorded in the words following:

"It is thereupon considered by the court that the said William V. Many recover against the said George W. and Henry Sizer the sum of \$1,733.75 damages, and costs of suit taxed at ———."

The said Sizers thereupon, at the same term of the Circuit Court sued out a writ of error to this court, for the purpose of having the said judgment revised. This writ of error was duly entered and prosecuted in this court, and at the December Term, 1851, the judgment of the Circuit Court was affirmed by a divided court, and therefore it is not reported in Howard.

The mandate which went down, recited the judgment of the Circuit Court as above given, and then proceeded thus:

"You therefore are hereby commanded that such execution and proceedings be had in said 99*) cause as, according to right *and justice and the laws of the United States, ought to be had, the said writ of error notwithstanding."

On the receipt of this mandate, the attorney for the defendant in error (the original plaintiff below) presented the same to the Circuit Court, held by the District Judge, and applied for leave to have the costs in the action taxed and inserted in the blank left in the original record of the judgment. This motion was refused by the District Judge.

The defendant in error thereupon, at the De-

cember Term of this court, in the year 1852, applies to this court for a *mandamus* to direct the court below to tax and allow his costs in the original action, amounting to \$1,811.59. The court refused the application, for reasons which appear in the case. (*Ex parte Many*, 14 How., 24.)

In May, 1853, Mr. Curtis, counsel for Many, renewed his motion to the District Judge, setting out in writing the mandate of this court in the original cause, and the amount of the costs, and praying the court to make an order allowing of their taxation and insertion in the original judgment; and praying for execution as directed by the mandate of this court.

Opposition was made to this motion by Sizer *et al.*, but the motion was granted, as appears by the following extract from the record. It is proper to remark that the court was held by the District Judge alone, Mr. Justice Curtis having been of counsel and not sitting. The costs in the Circuit Court amounted to \$1,811.59.

And the said Sizer *et al.*, by their counsel, objected to the granting of the said motion for an *allocatur* as to the said costs, or to their being inserted in the judgment, and claimed and requested that if the court should allow the said costs, and direct the clerk to insert the amount in the record of said judgment, then the defendants should have a right to sue out a writ of error, and for that purpose, that the court here should either certify that it is reasonable that there should be such writ of error, or should add interest upon the amount of said costs from the time of the rendition of the original judgment to the present time, so as to make the amount more than \$2,000; and that no execution should issue if, within ten days, a writ of error should be sued out, and security given according to law; to which claims and requests, made by the defendants, the plaintiffs objected, and insisted upon the said motion.

And now, the court having considered the said motion filed by the plaintiff, and the objections, claims and requests made by the defendants, and deeming it to be the legal right of the plaintiff to have the said costs allowed, and the amount thereof inserted in the original judgment in this cause, and that it is *not [*100 within the discretion of the court to allow or disallow the same, it is ordered by the court that the said costs, as taxed in said motion, be allowed, and that the amount thereof be inserted in the original judgment in this cause.

And the court here doth deem it reasonable that the said defendants should be allowed to bring a writ of error to the Supreme Court, and it is further ordered by the court, that execution, as prayed for in said motion of the plaintiff, shall issue after the expiration of ten days, Sundays exclusive, from the making of the order, unless the said defendant shall, within said ten days, give security according to law, and serve a writ of error, by leaving a copy thereof for the plaintiff in the office of the clerk of this court; and if such security should be given, and such service made within ten days, then that execution should not issue until the further order of the court.

By the court, H. W. FULLER, Clerk.

The writ of error was sued out and brought all these proceedings up to this court.

NOTE.—Jurisdiction of U. S. Supreme Court dependent on amount. Interest cannot be added to give jurisdiction. How value of thing demanded may be shown. What cases reviewable without regard to sum in controversy. See note to Gordon v. Ogden, 3 Pet., 83.

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The motion to dismiss was argued by *Mr. Curtis* in favor of it, and by *Mr. Robb* against it.

Mr. Curtis: The writ of error now before the court, although it brings up the proceedings in the Circuit Court prior to the mandate in the original cause, in contemplation of law, can present for revision here solely the question, whether the Circuit Court erred in making the order by which the costs were allowed and directed to be inserted in the original judgment.

Over this question this court can have no jurisdiction, because,

1. The amount in controversy is less than \$2,000.

The sole amount, or item, in controversy under the motion of the plaintiff below, and involved in the order of the Circuit Court thereon, was the costs prayed for, being \$1,811.59.

The original judgment had been reviewed in this court by the first writ of error; and after a mandate has issued from this court, affirming a judgment below, and directing execution, a second writ of error can bring up nothing but the proceedings subsequent to the mandate. (*Ex-parte Sibbald*, 17 Pet., 488, 492; *Brouder v. McArthur*, 7 Wheat., 58.)

It cannot be pretended that this court can acquire jurisdiction of this writ of error upon the ground that the court below has allowed it in the exercise of a discretion conferred by statute (July 4, 1836, sec. 17), in patent cases, where the amount in controversy is less than \$2,000. The settled construction of that statute is, that it confers a discretion on the courts below to allow writs of error in cases where [101*] the amount in controversy *is less than \$2,000, for the purpose of having some question settled that involves the construction of the Patent Acts. (*Hogg v. Emerson*, 6 How., 439, 478; *Wilson v. Sandford*, 10 How., 99.) The court below, by allowing the first writ of error, which brought up the original judgment for a revision of the merits of the case, had exhausted all the discretion that the Statute confers; and the question of allowing the plaintiff's costs to be taxed *nunc pro tunc*, and inserted in the judgment, had nothing to do with the construction of the patent laws.

Again, this court cannot take jurisdiction of this writ of error, because,

2. The order of the court below, although in form a final order or judgment, is, in fact and substance, an interlocutory order. The part of the order of which the plaintiffs in error complain is that allowing the costs; and this was asked and allowed as a proceeding *nunc pro tunc*, and therefore was in contemplation of law prior to the final judgment from which the first writ of error was prosecuted. That part of the order which allows the execution, in case the writ of error is not prosecuted within ten days, is not a final judgment, in the sense of the Judiciary Act.

Mr. Robb made the following points:

1. The amount in dispute between the parties exceeds the sum of \$2,000, although the amount of costs allowed by the court below to be inserted in the judgment, by way of amendment, is less than that sum. The necessary result of the allowance of the amendment is to subject the plaintiff to the payment of \$2,800, and upwards.

2. The defendant in error cannot be a voluntary remittitur of the excess of \$2,000, against the counsel of the plaintiffs in error, defeat their right to a writ of error from this court.

3. This court will not regard the order of the court below, allowing the amendment as a proceeding *nunc pro tunc*, and as of the October Term, 1848, of that court, if thereby the right of appeal to this court will be defeated.

4. The proceedings of the court below, in the execution of the mandate, are the subject of revision by this court. And it is error in the inferior court to grant any relief whatever after the mandate, or to examine it for any other purpose than execution. (*Ex-parte Sibbald*, 13 Pet., 492.)

And the order or judgment purporting to be pursuant to and in execution of the mandate will be reviewed by this court. And if it appear by the record that such order is at variance with the mandate, the court will exercise jurisdiction for the purpose of examining into the grounds of such variance. The variance in this case is matter of substance. In contemplation of law, a *judgment for a sum expressed [*102 as damages and "costs to be taxed," or taxed at ———, is a judgment for damages alone, and execution can issue only for that sum. (*Cook et al. v. Brister*, 4 Harr., 73, and cases cited.) This court will exercise jurisdiction over such proceedings, although the additional relief erroneously granted in the court below be less in amount than \$2,000.

5. This cause is now for the first time properly before this court upon the entire record, and the previous writ of error and the proceedings thereon on this court were without jurisdiction, because the judgment of the Circuit Court upon which it was brought was not final. When costs are taxed upon a judgment, such taxation is to be considered as the period at which final judgment is pronounced. (*Seller v. Slade*, 3 Nev. & M., 717; *Butler v. Bulkley*, 8 Moore, 104; 1 Bing., 233; *Godson v. Lloyd*, 1 Gale, 244; *Wright v. Lewis*, 4 Jur., 1112, B. c.; *Blackburn v. Kymer*, 1 Chas. Marsh., 278.) And the order of the court allowing the costs to be taxed should be treated as the completion of the judgment of the Circuit Court in the cause.

6. The present writ of error, therefore, is properly allowed by the court below in the exercise of the discretion conferred by the 17th section of the Act of July 4, 1836.

Mr. Chief Justice Taney delivered the opinion of the court:

A motion has been made to dismiss the writ of error in this case for want of jurisdiction.

The case as it comes before us is this: Many, the defendant in error, in the year 1848, recovered a judgment in the Circuit Court for the District of Massachusetts, against the plaintiffs in error, in an action for the infringement of certain letters patent. The verdict and judgment was for less than \$2,000, but the writ of error to remove the case to this court was allowed under the Patent Law of 1836. From some oversight or accident the costs were not taxed in the Circuit Court before the transcript of the record was transmitted to this court. And the judgment as it stood upon the transcript was for the damages awarded by the

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jury, and costs of suit—leaving a blank space open for the insertion of the amount of the costs.

The judgment of the Circuit Court was affirmed at the December Term, 1851, and the usual mandate sent down directing execution.

Upon the receipt of the mandate by the Circuit Court the defendant in error applied for leave to have the costs taxed and the amount inserted in the blank left for that purpose in the original record of the judgment. The motion was refused. And thereupon the defendant in error, at December Term, 1852, applied [103*] to *this court for a *mandamus* directing the court below to tax and allow his costs in the original action, amounting, as he alleged, to \$1,811.59. But the court refused the motion, upon the ground that a *mandamus* could not lawfully be issued to a Circuit Court to guide its judgment in the taxation of costs.

At a subsequent term of the Circuit Court, the defendant in error renewed his motion, for an order allowing the taxation of these costs and their insertion in the original judgment; and the court thereupon allowed the taxation of costs, and directed the amount above mentioned to be inserted in the original judgment. But the court at the same time allowed a writ of error from their decision, and ordered that this second writ of error should operate as a *superedeas* of the execution prayed for, if sued out within the time fixed by law. It is this writ of error that is now before the court, and which the defendant in error has moved to dismiss.

It has been settled, by the decisions of this court, that after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or re-examined upon the second; and there is nothing therefore now before the court but the taxation of costs. (7 Wheat., 58; 12 Pat., 488, 492.)

The sum taxed being less than \$2,000, no writ of error will lie under the Act of 1789. This Act gives no jurisdiction to this court over the judgment of a Circuit Court, where the judgment is for less than that sum.

Neither can the allowance of the writ by the Circuit Court give jurisdiction, where the only question is the amount of costs to be taxed; and the amount allowed is less than \$2,000. The discretionary power in this respect vested in the Circuit Court by the Act of July 4, 1836, sec. 17, is evidently confined to cases which involve the construction of the patent laws, and the claims and rights of patentees under them. But the amount of costs which either party shall be entitled to recover is not regulated by these laws. The costs claimed are allowed or refused in controversies arising under the Patent Acts upon the same principles and by the same laws, which govern the court in the taxation of costs in any other case that may come before it. The same laws, therefore, must be applied to them in relation to the writ of error, and must limit the jurisdiction of this court as in other cases.

The writ of error must, therefore, be dismissed for want of jurisdiction. But as the ques-

tion raised in this case may often occur in the Circuit Courts; and it is important that the practice should be uniform, it is proper [*104] to say, that we consider the decision of the Circuit Court, allowing those costs to be taxed after the receipt of the mandate from this court, to have been correct, and conformable to the general practice of the courts. The costs are, perhaps, never in fact, taxed, until after the judgment is rendered; and in many cases, cannot be taxed until afterwards. And where this is the case the amount ascertained is usually, under the direction of the court, entered *nunc pro tunc* as a part of the original judgment. And this mode of proceeding is necessary for the purposes of justice, in order to afford the necessary time to examine and decide upon the several items of costs, to which the successful party is lawfully entitled.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Massachusetts, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that this cause be, and the same is hereby dismissed, for the want of jurisdiction.

Cited—20 How., 451; 17 Wall., 284; 4 Otto, 499; 18 Blatchf., 494; McAll., 98.

PIERRE CLAUDE PIQUIGNOT, *Plaintiff*
in Error,
v.

THE PENNSYLVANIA RAILROAD COMPANY.

What ruling on plea in abatement reviewable here—form of judgment—declaration must show jurisdiction.

Under the twenty-second section of the Judiciary Act of 1789, this court cannot reverse the judgment of the court below, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court.

In Pennsylvania it is not usual to make a record of the judgment in any legal form. But there is no necessity that the courts of the United States should follow such careless precedents.

Where a suit was brought in which the plaintiff was described as a citizen of France, against the Pennsylvania Railroad Company, without any averment that the defendants were a corporation under the laws of Pennsylvania, or that the place of business of the corporation was there, or that its corporators, managers or directors were citizens of Pennsylvania, the absence of such an averment was fatal to the jurisdiction of the court.

THIS case was brought up by writ of error from the Circuit Court of the United States for the Western District of Pennsylvania.

The facts in the case are stated in the opinion of the court.

It was submitted, upon printed arguments, by *Messrs. Kennedy and Alden* for the plaintiff in error, and *Mr. Snowden* for the defendants in error. But as the point of jurisdiction was not mentioned in the arguments, which were directed exclusively to other points, it is not thought necessary to give them.

105*] *Mr. Justice Grier* delivered the opinion of the court:

The caption of this suit, and the declaration, describe the plaintiff as a citizen of France, but contain no averments as to the citizenship of the defendant. Nor does it state whether "The Pennsylvania Railroad Company" is a corporation or a private association, or the name of an individual. The declaration avers that the defendants are transporters of emigrants for hire, and undertook to convey the plaintiff and his wife from Philadelphia to Pittsburg, but did it in such a negligent and careless manner that his wife was frozen to death on her passage. The defendant pleaded in abatement, another action pending for the same cause of action between the same parties, in the District Court of Alleghany County. To this plea the plaintiff demurred; and the court gave "judgment upon the demurrer in favor of the defendants." Whereupon the plaintiff brought this writ of error.

The question raised by the plea in abatement, in this case, is one of considerable importance, and on which there is some conflict of opinion and decision, but the judgment of the court below on the plea is not subject to our revision on a writ of error.

The twenty-second section of the Judiciary Act, which defines what decrees or judgments in civil actions may be made the subjects of appeals or writ of error, provides, "that there shall be no reversal on such writ of error, for error in ruling any plea in abatement other than a plea to the jurisdiction of the court."

The question of jurisdiction has not been made the subject of plea or exception, nor is it necessary, where it is patent on the face of the record. The judgment of the court, so far as the record is concerned, does not distinctly show whether the court quashed the writ on the plea in abatement, or dismissed the suit for want of jurisdiction, as it might well have done. In Pennsylvania, it is not usual to make a record of the judgment in legal form. The word "judgment" for the party in whose favor it is, being the usual minute made by the clerk, from which a formal record of judgment may be made, but seldom if ever is made. It stands as a symbol to represent what the judgment ought to be, and therefore can never be erroneous. But there is no necessity that the courts of the United States should follow such careless precedents.

On a demurrer the court will look to the first error in pleading, and if the declaration does not show that the court has jurisdiction of the parties, it may dismiss the cause on that ground. In this case the declaration states the plaintiff to be a citizen of France, but gives no character as to the citizenship of the defendant. The name is most probably not in-106*] tended to designate an individual; if not, the record does not state that it is a corporation incorporated by the laws of Pennsylvania, or having its place of business there, or that its corporators, managers or directors are citizens of Pennsylvania; nor can the want of such averment be supplied by inference from the name. It is true, the Act of Congress describes the jurisdiction of the court to be "where an alien is a party," without describing the character of the other party; and the

pleader may have been led into the error by looking no farther. But the Constitution, which is the superior law, defines the jurisdiction to be, "between citizens of a state, and foreign states, citizens or subjects;" and although it has been decided (*Mason v. The Blaireau*, 3 Cranch, 264) that the courts of the United States will entertain jurisdiction where all the parties are aliens if none of them object to it, yet it does not appear in this case that the defendant is an alien.

It follows, therefore, that whatever construction be put on this record, the judgment of the court below must be affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Western District of Pennsylvania, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

Cited—19 How., 567; 11 Wall., 688; 12 Wall., 135 McAll., 93; Deady, 227; 7 Batchf., 443.

WILLIAM ROBERTSON, Trustee of the
COMMERCIAL BANK OF NATCHES, Plaintiff
in Error,

HENRY R. COULTER AND JAMES RICHARDS, Executors of JOSEPH COLLINS, Deceased.

This court has no jurisdiction to review decision of state court construing state statute.

In the State of Mississippi, a judgment of forfeiture was rendered against the Commercial Bank of Natches, and a trustee appointed to take charge of all promissory notes in possession of the Bank. The trustee brought an action upon one of these promissory notes.

The defendant pleaded that the plaintiff, as trustee, had collected and received of the debts, effects, and property of the Bank, an amount of money sufficient to pay the debts of the Bank, and all costs, charges and expenses incident to the performance of the trust.

To this plea the plaintiff demurred.

The action was brought in a state court, and the highest court of the State overruled the demurrer, and gave judgment for the defendant.

This court has no jurisdiction, under the twenty-fifth section of the Judiciary Act, to review this decision. The question was merely one of construction of a statute of the State, as to the extent of the powers of the trustee under the statute.

THIS case was brought up from the High Court of Errors and Appeals of the State of Mississippi, by a writ of error issued under the twenty-fifth section of the Judiciary Act.

The facts of the case are stated in the opinion of the court.

NOTE.—Jurisdiction of U. S. Supreme Court to declare state law, void as in conflict with state constitution: To revise decrees of state courts as to construction of state laws. Power of state courts to construe their own statutes. See note to *Jackson v. Lamphire*, 3 Pet., 280. It is for state courts to construe their own statutes. Supreme Court will not review their decisions except when specially authorized to by statute. See note to *Commercial Bank v. Buckingham*, 5 How., 817.

Mr. Lawrence, for the defendants in error, moved to dismiss the writ for want of jurisdiction, inasmuch as there does not appear to have been drawn in question any treaty or law of the United States, and the state law (the validity of which was affirmed by the court below) was in no respect repugnant to the Constitution of the United States.

This motion was argued by **Mr. Lawrence** in support of it, and by **Messrs. Porter and Wharton** against it.

Mr. Lawrence. The Act of 1843 of the Mississippi Legislature, prescribing the mode of proceeding against delinquent banks (Hutch. Code, 329), had provided that an information in the nature of a *quo warranto* might be filed against banks suspected of having violated their charter, and upon trial and proof a judgment of forfeiture should be pronounced; upon which judgment of forfeiture it was made the duty of the court to appoint a trustee to take charge of the books and assets, and to collect all debts due such banks, and to apply the same to the payment of the debts of such banks in such manner as he should thereafter be directed by law.

Under this Act, judgment of forfeiture had been obtained against the Commercial Bank of Natchez in the Adams County Court, the plaintiff in this suit had been appointed the trustee, all the debts of the Bank had been paid, and all costs and charges incident to the trust discharged when the present suit was instituted. The pleas which the defendant put in, raised the question as to the extent and nature of the trust created by the Act of 1843; whether, on the one hand, the trustee was a mere officer of the court which appointed him for the simple purpose of receiving and collecting the assets of the Bank for the purpose of paying the debts of the Bank; or whether, on the other hand, he was constituted a full and complete representative of the Bank for the benefit of stockholders as well as of debtors of the Bank. The highest court of Mississippi have decided that the intention of the Legislature, in the Act of 1843, was simply to constitute an officer to collect the debts due to the Bank for the sole purpose of paying the debts due from the Bank, and that when that object was accomplished the trust was extinct, leaving the stockholders where the common law left them upon the dissolution of a corporation.

108*] *It is difficult to see, from this simple statement of the case, what possible ground there is for the jurisdiction of this court. It is nothing more than the exposition, by the highest judicial tribunal of a state, of the meaning of a legislative act of that state. It is not contended that the Act of 1843 itself is invalid, for the plaintiff derives all his authority from that Act. It is not pretended that the Act of 1843, as construed by the court, takes away any right secured by any previous Act of the Legislature. All that is maintained is, that because the Court of Appeals have not thought that the Act of 1843 gives to Mr. Robertson, as trustee, quite as extensive powers as he supposes that Act to give him, therefore the construction of the Act has taken from him a right which his own construction had invested him with, and consequently this court has jurisdiction to overrule that construction.

It will be seen, therefore, upon the face of

the record, that the high court of Mississippi was employed in ascertaining what were the powers of a trustee under the Act of 1843, what was the nature and extent of the trust, and whether, under that Act, the trust was limited to preservation of the rights of the creditors of the Bank. And the court decided that the Act of 1843 saved from the common law consequences of forfeiture, the debts due to the Bank for the benefit of the creditors of the Bank, and for no other purpose; that upon the true construction of the Act of 1843, the trust being a limited official trust, was discharged and extinguished when the object for which it was created was attained; that the trustee had no power remaining after the trust was discharged. All of which was the mere construction of a legislative act by the judicial tribunals of a state, which construction this court have no more jurisdiction to inquire into and reverse upon this writ of error, than they would have to reverse the judgment of the Queen's Bench upon the construction of an Act of Parliament.

As, however, a very metaphysical argument has been incorporated into the record under the form of a petition, it is proper to examine its soundness, so far as it may touch the jurisdiction of this court.

The substance of that argument is, that by the common law debts to and from a bank were not extinguished by its dissolution, but only that they could not be enforced because there was no longer a party in existence for or against whom to enforce them. That the moment a representative of the bank is created by the law, those debts are revived or continued in full vigor. From which two premises the conclusion is leaped to, that the law which takes away from such representative a right to collect for the benefit of all persons concerned in the bank, would be unconstitutional and void.

*Now, we deny both the premises in [*109 this argument, and yet say that if they were admitted the conclusion would not follow; because where the creation and limitation of rights are both derived from and contained within the same legislative act, no such constitutional question can arise. If the rights were created by one act, and the limitation or restriction were made by another and subsequent one, then there might arise a question as to the validity of such subsequent act. And such was the very predicament in *The Commercial Bank v. Chambers*, 8 S. & M., 1. In that case the court decided that under the Act of 1843 the trust was for the benefit of creditors, and that the trustee being invested with the power to sue and collect for the benefit of creditors, who had an interest in the fund, that this right became vested by the Act of 1843, and that the subsequent Act of 1846, taking away the right to sue for and collect for the benefit of creditors was so far void. But in this case the whole matter is contained in the same law. And the discussion below, and the decision of the court, was to determine the result of that whole law.

But it will be perceived that the argument of Mr. Yerger assumes what the whole current of decisions, and especially those of Mississippi, contradict, namely: that the dissolution of a corporation does not extinguish the debts due

to and from it. (See the cases cited in the decision of the court, 2 Cush., 321.)

But especially will it be seen, that the argument assumes that which was the question under discussion in the court below. It is a pure *petitio principii*. Mr. Yerger takes for granted that the trustee appointed by the court, under the Act of 1843, was a full and complete representative, for all purposes, and for the benefit of all, of the extinct corporation. Now, that was the very question in the court below; and so far from agreeing with the view of Mr. Yerger, the court below decided, as the court had decided in 8 S. & M., 1, that the trustee was not, upon the true construction of that Act, a full representative of the Bank, but was an official trustee to carry out the object of the Act, namely: the payment of the creditors of the Bank. And this court in effect decided the same thing in the case of *Peale v. Phipps*, 14 How., 374.

As to that part of the argument which seems to deny the competency of the Legislature to preserve so much of the effects of a dissolved bank from the effects of forfeiture as may pay the debts of the bank, leaving the interests of the stockholders to their fate at common law, I shall say but a word. If the Legislature should deem it a matter of sound policy and justice to preserve from destruction the debts due to creditors who were innocent of any of the acts which called for a forfeiture of the charter, [10*] and at the same time to leave just where they were those persons who had abused their trust, and made it necessary for the judicial tribunal to declare that trust at an end, certainly it would be within the legislative power to do so. The interests of stockholders are distinct from those of creditors. The policy of making a distinction between them in the conservative intervention of the Legislature is very apparent. It is then a simple question of construction whether or not in fact the Legislature has so done.

Messrs. Porter and Wharton, against the motion:

It will be observed that the plea does not question the right of the plaintiff to bring the suit. It expressly sets forth that after his appointment, "and after the commencement of this suit, he, the said plaintiff, collected and received" "a large amount of money, sufficient to pay," &c. Stated in other words, the defendants' position is, that the plaintiff had a clear title to the notes and a perfect right to bring the suit, but that afterwards, because other debtors paid their debts, it became unnecessary and consequently unlawful to prosecute the action.

Let it be observed that this plea strikes directly at the rights of the stockholders. If, as alleged, the debts of the Bank are paid, these are the only parties to be affected by the decision of the court on the plea. The property of this large class of claimants who are distributed as we suppose over the whole Union, is thus left in the possession of those most expert in obtaining this property on solemn contracts to pay it back, made with the authorized agents of the stockholders. It is, therefore, respectfully urged that the decision of the Court of Appeals affects the rights of the stockholders.

The plaintiff contends that the construction given by the latter Court to the Statute of 1843,

impairs the obligation of the contract entered into by the drawer of these notes. This court will, it is true, adopt the construction given to the Statute by the Court of Appeals, but if that construction impair the obligation of a contract, this court will certainly reverse the decision of the inferior court. The authorities on this point are so numerous as to require no citation.

On a motion like the present, to dismiss the writ for want of jurisdiction, we suppose it sufficient to show that the case presents a fair legal question on the constitutionality of the Mississippi law. The motion can be applicable only where there is a clear, absolute want of jurisdiction. If the question were to some extent doubtful, it should stand over until the case came up regularly for argument. But we maintain that this court has jurisdiction.

*If the title to the debt passed to the [*111 plaintiff, it would be a violation of the constitutional provision respecting the obligation of contracts, to allow the defendant to avoid his obligation on the ground assumed by him and sustained by the Court of Appeals, namely: that since the institution of the suit, the plaintiff had collected so large an amount of money as to render it unnecessary to collect this money from the defendant. Such a plea admits the contract. It admits that the plaintiff had once a right to sue upon it and to collect the debt secured by it. The fact relied on is alleged to have arisen, not only after the contract had been made, but after the action upon it had been commenced. The obstacle thus interposed is that the plaintiff, as trustee, does not need the money for certain indicated purposes. The decision of the Court of Appeals is then made, discharging the defendant from liability on the note. If there was any contract whatever (which the plea admits), is not this impairing its obligation? Is it not destroying the contract altogether?

Can it be doubted that the title to the debt did pass to the plaintiff? If it had been intended to extinguish it, this would have been done. The death of the corporation did not extinguish the debt morally, and the statute in terms does not do so, but merely removes a legal difficulty by designating the person who is to sue for it. The very same statute which destroyed the Bank, preserved the debt alive, vested the ownership of it in the plaintiff, and, by implication, required him to sue for it. He was fully authorized to recover it; when recovered, he was directed to apply it in a particular manner—to do a future act which in no way concerns the defendant, for the recovery discharges him. It seems clear, therefore, that the debt did remain and did pass to the plaintiff. If it remained at all, it remained as a unit. It could not remain for the half, and not for the whole. There is no instance of a contract thus being cut into pieces by legislative action. If recoverable at all, the whole is recoverable. If the contract stood, the amount of money which it secured must be determined by the contract, and not by the caprice, dishonesty or energy of every other man in the community who had made similar contracts. It would be as reasonable to prescribe that a debt should remain, but that the amount of it should depend on the state of the weather at some future time, and that, too, without naming a time.

In the defendant's brief it is suggested that the plaintiff cannot question the validity of the Act of 1843, because he derives his authority from it. Certainly he cannot, and his position does not require that he should. That Act empowers him to collect the debts due to the Bank, and to apply the same to the payment of the debts of the Bank. The Act does not declare [112*] *that after this point has been attained, he shall have no power to collect, or that he shall then begin to pay back to the debtors, sums previously received. If we are right in supposing the contract an entirety, and the debt a unit, the very power to collect any amount entitles him to collect the whole. For the surplus, he would be liable as any other trustee, to the parties having rightful claims upon it.

These parties are the stockholders. This construction commends itself to our sense of justice. It was the duty of the Legislature, when that body forfeited the charter of the Bank, to protect the property in which individuals were interested. The rights of the State were satisfied by the divestiture of the chartered privileges of the Bank. The presumption is, that the Legislature intended to do what was right, by protecting private property, and not to inflict need less and wanton injury on individual rights. The construction contended for by the defendants and adopted by the Court of Appeals is, that this debt, and all others similarly situated, are absolutely forfeited, and that the stockholders, on whose behalf the contracts were made, shall suffer the loss. Against so unjust a result, every fair presumption should be made.

It will be seen, by reference to the arguments which accompany the record, that the points here taken were made in the court below. It was there argued that so much of the Act of 1843 as prevented a recovery for the benefit of stockholders, and restricted it to the benefit of the creditors, was void. We beg leave to refer to those arguments, and to make them a part of this brief.

Mr. Chief Justice Taney delivered the opinion of the court:

This case is brought here by writ of error directed to the High Court of Errors and Appeals of the State of Mississippi, under the 25th section of the Act of 1789, upon the ground that a law of that State, under which this decision was made, impairs the obligation of contracts.

It is an action of *assumpsit*. The plaintiff declares on a promissory note made by Collins, in his lifetime, to the Commercial Bank of Natchez. The declaration avers that after the execution of the note, and before the commencement of this suit, a judgment of forfeiture was rendered against the Bank on the 12th of December, 1845, according to a statute of the State in such case made and provided; and that the plaintiff was appointed by the court trustee, and as such took possession of this note; and that by means thereof and by force of the statute of the State, Collins became liable to pay him the money.

The defendants pleaded that the plaintiff, as [113*] trustee, had collected *and received of the debts, effects and property of the Bank, an amount of money sufficient to pay the debts of the Bank, and all costs, charges and expenses

incident to the performance of the trust. To this plea the plaintiff demurred.

The Court of Appeals overruled the demurrer, and gave judgment for the defendant, upon the ground that the plea was a full and complete bar to the enforcement of the right set out in the declaration. And this judgment is now brought here for revision by writ of error.

A motion has been made to dismiss the writ for want of jurisdiction. And in the argument of this motion, a question has been raised whether, by the common law, the debts due to a bank at the time of the forfeiture of its charter would not be extinguished, upon the dissolution of the corporation, and the creditors without remedy. And cases have been referred to in the Mississippi Reports, in which it has been decided that by the common law (previous to any state legislation on the subject) upon the dissolution of a banking corporation, its real estate reverted to the grantor, and its personal property belonged to the State; that the debts due to it were extinguished, and the creditors without remedy against the assets or any of them which belonged to the Bank at the time of the forfeiture.

But this question is not before us upon this writ of error, and we express no opinion upon it. The suit is not brought by a creditor of the Bank, seeking to recover a debt due to him by the corporation at the time of its dissolution. But it is brought by a trustee appointed by a court of the State, under the authority of a statute of the State; and the question before the state court, which the pleadings presented, was whether the trustee was authorized, by the law under which he was appointed, to collect more money from the debtors of the corporation than was necessary to pay its debts, and the expenses of the trust.

Now, in authorizing the appointment of a trustee where a banking corporation was dissolved, the State had undoubtedly a right to restrict his power within such limits as it thought proper. And the trustee could exercise no power over the assets or credits of the Bank beyond that which the law authorized. The Court of Appeals, it appears, decided that the statute did not authorize him to collect more than was sufficient to pay the debts of the corporation and the costs and charges of the trust. And as the demurrer to the plea admitted that he had collected enough for that purpose, the court held that he could not maintain a suit against the defendants to recover more.

The question therefore presented to the state court was merely as to the powers of a trustee, appointed by virtue of a statute of Mississippi. His powers depended upon the construction *of the statute. And we have no right [*114] to inquire whether the state court expounded it correctly or not. We are bound to receive their construction as the true one. And this statute, as expounded by the court, does not affect the rights of the creditors of the Bank or the stockholders. The plaintiff does not claim a right to the money under a contract made by him, but under the powers and rights vested in him by the statute. And if the statute clothes him with the power to collect the debts and deal with the assets of the Bank to a certain amount only, and for certain purposes, we do not see how such a limitation of his authority

interferes in any degree with the obligation of contracts.

The writ of error to this court must consequently be dismissed for want of jurisdiction.

ORDER.

This cause came on to be heard on the transcript of the record from the High Court of Errors and Appeals of the State of Mississippi, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that his cause be, and the same is hereby dismissed, for the want of jurisdiction.

REUBEN CHAPMAN, Governor, &c., for the use of JOHN B. LEAVITT AND RUFUS LEAVITT, *Plaintiff in Error*,

v.

ALEXANDER SMITH, BOLLING HALL, MALCOLM SMITH, AND JOHN G. GRAHAM.

Alabama law—issue upon suggestion as to diligence of sheriff—Practice—demurrer.

By the laws of Alabama, where property is taken in execution, if the sheriff does not make the money, the plaintiff is allowed to suggest to the court that the money might have been made with due diligence, and thereupon the court is directed to frame an issue in order to try the fact.

In a suit upon a sheriff's bond, where the plea was that this proceeding had been resorted to by the plaintiff and a verdict found for the sheriff, a replication to this plea alleging that the property in question in that trial was not the same property mentioned in the breach assigned in the declaration, was a bad replication and demurrable.

Where the sheriff pleaded that the property which he had taken in execution was not the property of the defendant, against whom he had process, and the plaintiff demurred to this plea, the demurrer was properly overruled.

THIS case was brought up by writ of error from the District Court of the United States for the Middle District of Alabama:

It was a suit upon a sheriff's bond. Alexander Smith was the sheriff, and the other defendants in error his sureties. The Leavitts were citizens of New York.

115*]. *It was altogether a case of special pleading. There were fourteen breaches as signed in the declaration, ten pleas, with replications and demurrers on both sides. There were demurrers to the breaches, demurrers to the pleas and demurrers to the replications, upon which sometimes one party obtained a judgment, and sometimes the other; and whilst all this was going on between the principals, the sureties kept up an outside war of their own, by pleading the Statute of Limitations which led to a succession of other pleadings. The record contained thirty-eight printed pages, which were occupied exclusively with pleas, replications, demurrers, joinders, and judgments upon them; and finally the case came up to this court upon two judgments upon demurrers. In giving a narrative of all this, the controversy between the plaintiffs and the sureties will be detached from the tangled history, and left out of this report.

The facts of the case, upon which this system of pleading arose, were these:

On the 28th of September, 1839, John W. and Rufus Leavitt obtained a judgment against Jeremiah M. Frion, in the Circuit Court of the County of Coosa, Alabama, for \$3,472.

On the 17th of the ensuing October, a writ of *fieri facias* was issued, and placed, on the 24th, in the hands of Alexander Smith, the sheriff.

The return day of this writ was the fourth Monday in March, 1840, when the sheriff returned that he had levied, on the 1st February, 1840, upon dry goods, hardware, carriages &c.

On some day after this, but when the record did not show, the time of the sheriff expired, and on the 12th of September, 1840, the sheriff, by leave of the said Circuit Court first had and obtained, altered or amended his said return on said writ by adding thereto the following words and figures, to wit:

"The above goods have been claimed by A. B. Dawson and Samuel Frion, assignees of J. M. Frion, defendant in execution, and claim bond given to William J. Campbell, now sheriff and my successor in office, September 12, 1840.

A. SMITH, late Sheriff."

It is now necessary, before the next step in the narrative is referred to, to mention two statutes of Alabama, which are so minutely stated in the opinion of the court that they may be succinctly mentioned here. One is, that if a person, other than the debtor, claims the property levied upon, he may make affidavit that he is the owner, and give bond that it shall be forthcoming, whereupon the sheriff shall suspend the sale. The other is, that the plaintiff in the suit may make a suggestion to the next court, that the money could have been made by the sheriff by the exercise of due diligence, whereupon the court shall order *an [*116 issue to be framed to determine the fact whether or not due diligence was used. We now proceed with the narrative.

At the April Term, 1843, of the Circuit Court for the County of Coosa, John W. and Rufus Leavitt made a suggestion, in conformity with the above statute, that the money might have been made by the sheriff, if he had used due diligence; and thereupon an issue was made up between them and the sheriff, who denied the allegation.

At September Term, 1847, this issue was tried, and resulted in a verdict by a jury in favor of the sheriff.

In October, 1848, J. W. and R. Leavitt, using the name of the Governor, to whom the bond was given, brought this suit against the sheriff and his sureties, upon the official bond, in the District Court of the United States for the Middle District of Alabama.

The declaration assigned fourteen breaches.

First. That the Leavitts, at the Fall Term of 1839 of the Circuit Court of Coosa County, recovered judgment against one Frion, for \$3,472; that a *fi. fa.* issued thereon, and came to the hands of the said Smith: that although there were goods, &c., of the said Frion, out of which the said judgment might have been levied, and of which the said Smith had notice, yet he neglected and refused to levy, &c.

Second. That Smith did seize certain goods, and might have levied the money by sale, and neglected to sell.

Third. That he seized goods which he might

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have sold, but did not, and returned the levy on the goods.

Fourth. That he seized, might have sold, but did not; returned that he had levied. Afterwards, on 12th September, 1840, amended his return by adding that the goods had been claimed, &c. Averring amended return to be false, because no claim was made before the return day of the writ.

Fifth. Same as last, except that it averred that the amended return was false, because no claim on oath was made.

Sixth. Same as fourth, except averring that no bond was given by claimants.

Seventh. That the amended return was false, because no person claimed the property, and made oath, and no person claimed the same and gave bond according to the statute.

Eighth. Seizure, claim, duty of sheriff to prepare bond, but did not.

Ninth. Seizure, claim, no bond taken, goods delivered to claimants and wasted by them.

Tenth. Seizure, claim, no bond taken, goods delivered to claimants and by them consumed [17*] and wasted, and no part of *the goods delivered to the Leavitts, nor any part of the damages to them.

Eleventh. Same, except that it is alleged that Smith suffered goods to be wasted, &c.

Twelfth. Same as last.

Thirteenth. Seizure, claim, bond, and, by negligence of Smith, bond lost.

Fourteenth. Same as last, except that the bond taken was not returned.

Spring Term, 1850. The defendants demurred to the 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th and 14th breaches.

To the 1st, 2d and 3d breaches, the defendants pleaded that the said Leavitts, in the Circuit Court of Coosa County, according to the Statute of Alabama, suggested the issuing of the *fi. fa.*; that it came to the hands of Smith to be executed; that he might by due diligence have made the money and did not; that an issue was made up whether Smith by due diligence could have made the money, &c.; that the issue was tried and found for Smith, for whom judgment passed, &c. And the defendants aver, that the writ of execution mentioned in the breaches, and that mentioned in the suggestion, were one and the same; and that the alleged neglects and defaults mentioned in both, were one and the same, and not different.

The plaintiff filed a joinder in the demurrer to the 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th and 14th breaches.

To the three pleas put in by the defendants to the first, second and third breach, the plaintiff put in a replication that the defaults, in the said pleas mentioned, were not the same defaults mentioned in the breaches.

The defendants demurred to this replication, and the plaintiff joined in the demurrers.

At the Fall Term of 1850, the court sustained the defendants' demurrer to the 8th and 13th breaches of the plaintiff, and overruled it as to the 4th, 5th, 6th, 7th, 9th, 10th, 11th, 12th, and 14th breaches, and that the defendants have leave to plead to the last-named breaches.

The demurrer of the defendants to the replication of the plaintiff to the plea of the defendant's 1st, 2d and 3d breaches, was sustained. And on motion, the plaintiff had leave to

amend the 8th and 13th breaches of the declaration.

December Term, 1849. The demurrer of the defendants to some of the breaches having been overruled, they now filed a plea to the 4th, 5th, 6th and 7th breaches. They set forth the suggestion to the court, the issue, trial and verdict. They aver *that upon that trial the [*118 truth of the amended return was brought up, and that the verdict found the amended return to be a true return; and that this is the same as the amended return mentioned in the breaches.

And the defendant also filed pleas to the 9th, 10th, 11th, 12th, and 14th breaches, their demurrers to which had been overruled. The first plea, called the sixth in number from the beginning, set forth, that after the levy, the goods were claimed by one A. B. Dawson, and one Samuel Frion, as assignees of J. M. Frion; that an affidavit was made by Dawson; that Dawson and Samuel Frion gave a bond; that the affidavit and bond were duly returned to court; that the suit of the Leavitts against the claimants was put upon the docket; that at the Fall Term of 1840, the plaintiffs refused farther to prosecute their levy; whereupon the court ordered the goods to be restored to the claimants.

Seventh plea—to same breaches, same in substance nearly as preceding.

Eight plea—nearly same.

Ninth. That the property taken in execution was not the property of Jeremiah M. Frion, the defendant in the suit.

Tenth—not guilty of the several breaches.

The plaintiff demurred to the 4th, 6th, 7th, 8th, 9th and 10th pleas.

Spring Term, 1851. The plaintiff's demurrer to the 4th, 8th, 9th and 10th pleas was overruled; the demurrer to the 7th plea was sustained; the demurrer to the 6th plea, as a plea to the 9th, 10th, 11th and 12th breaches, was sustained; the demurrer to said 6th plea, as a plea to the 14th breach, was overruled.

The plaintiff had leave to reply to the pleas, the demurrer to which was overruled; and the defendants had leave to amend the pleas, the demurrer to which was sustained.

May Term, 1851. The defendants filed an amended 7th plea to the 9th, 10th, 11th and 12th breaches in the declaration. The plea averred that before the return day of the execution, the goods were claimed by Dawson and Frion, and an affidavit made by Dawson; that the execution and claim were returned to the court, and a suit docketed between the Leavitts as plaintiffs, and Dawson and Frion as defendants; that at the Fall Term of 1840, the Leavitts refused to make up an issue; that the court thereupon ordered the goods to be restored to the claimants; that they were accordingly restored.

The plaintiffs demurred to this amended plea, which demurrer was overruled, and then the plaintiffs filed a replication.

The replication averred that after the return day of the writ, to wit: on the second day of the term, Dawson made his affidavit that the *goods were not the property of Jere- [*119 miah M. Frion, but were the property of himself and Samuel Frion; that, on that day, Dawson and Samuel Frion, together with one Graham, executed their bond to the plaintiffs in the sum of \$3,479, conditioned to pay all damages

that the jury might assess against the obligors; that they also executed another bond to one William J. Campbell for a like sum with a like condition; that before that day Smith had ceased to be sheriff, and that Campbell was the sheriff; that the plaintiffs moved the court to dismiss the claim of Dawson and Frion, on the ground of the insufficiency of the claim bonds, which motion was overruled; that at the fall term a judgment of nonsuit was rendered against the plaintiffs for declining to make up an issue; that the judgment thus rendered against them referred to the claim bonds above described and not in any claim suit commenced by said affidavit described in the said amended 7th plea of defendant, nor in any other or different claim suit; that the affidavit described in said 7th amended plea, was never returned to said court, either before or after the return of said writ of *feri facias*; that the plaintiff never knew or had any notice until the year 1847, that said last-mentioned affidavit had been made; that the said goods levied upon, as aforesaid, were delivered to the said Dawson and Samuel, by Campbell, in obedience to the said last-mentioned judgment or order of said court, without this, that they were delivered to them by the said Alexander in obedience to any other judgment or order of said court; that the plaintiffs prosecuted their writ of error to the Supreme Court of said State to reverse said last-mentioned judgment, and that the said judgment was, by said Supreme Court, at January Term, 1842, reversed and remanded to said Circuit Court; that at the Fall Term of said Circuit Court for 1842, the said claim put in as aforesaid by said Dawson and Samuel, was, by the consideration and judgment of said court, dismissed, because of the insufficiency of the said last-mentioned claim bonds; the said Dawson and Samuel declining and refusing to execute other claim bond or bonds as they were required to do by the said Circuit Court; and plaintiff avers that the said last mentioned judgment remains in full force, not reversed, annulled or set aside in any way. All which the said plaintiff is ready to verify; wherefore he prays judgment, and his debt and damages by him sustained, by reason of the facts set out in said 9th, 10th, 11th and 12th breaches, to be adjudged to him.

December Term, 1851. The defendants demurred to this replication of the plaintiff to the seventh amended plea.

The court then pronounced its final judgment, as follows:

This day came the parties, by their attorneys, 120* and thereupon *came on to be heard the demurrer of the plaintiff to the amended 7th plea of the defendants to the 9th, 10th, 11th and 12th breaches of the plaintiffs; and after argument had, it seems to the court that the said plea is sufficient in law, &c.; it is therefore considered by the court that the said demurrer be overruled. And thereupon the plaintiff filed his replication to the said amended 7th plea, and the defendants filed their demurrer to the said replication, and after argument, it seems to the court that the said replication is insufficient, &c.; it is therefore considered by the court that the said demurrer be sustained, and that the said defendants go hence without day, &c., and recover of the said John W. and Rufus Leavitt,

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the persons for whose use this suit is brought, their costs in this behalf expended, for which execution may issue, &c.

The plaintiffs sued out a writ of error, and brought the case up to this court. It came up upon the correctness of the judgment of the court below in sustaining the defendant's demurrer to the replication of the plaintiff to the plea upon the 1st, 2d and 3d breaches, and also in sustaining the demurrer of the defendants to plaintiff's replication to the 7th amended plea.

It was submitted on a printed brief by Mr. Prior for the plaintiffs in error, and argued by Mr. Badger for the defendants in error.

Mr. Prior: The replication to the plea No. 2 to the first three breaches is good. The matter of the plea is a summary proceeding under a statute. (Clay's Digest, 218, sec. 85.)

The jurisdiction in summary proceedings under a statute, in derogation of the common law, is strictly construed and limited to cases within the letter of the statute. (*Smith v. Leavitt*, 10 Ala., 92; *Leavitt v. Smith*, 14 Ala., 279.)

The 2d and 3d breaches are for neglecting to sell the goods. This replication is an answer to the plea as to these breaches, unless it be held that the jurisdiction of the court, in the summary proceeding set out in the plea, is co-extensive with the common law jurisdiction, in the present action, so far as the jurisdiction embraces the matters of these two breaches. For the summary proceeding to operate as an estoppel, in the present action, the subject matter in the two proceedings must be identical; and this court must take judicial notice of the identity, notwithstanding their identity is denied by the replication. If any question can be determined by the court under these breaches, which could not have been determined in the summary proceeding, then the replication is good. The proceeding embraced the neglect to make the money only. Other questions may be tried under these breaches. (*People v. Ten Eyck*, 13 Wend., 448; *Atreton v. Davis*, 9 Bing., 740.)

*The 4th, 5th, 6th and 7th breaches [*121 are for a false return. The plea, that the truth of the return had been tried and determined in a summary proceeding is bad. The sheriff's return can be contradicted by a party to the writ in an action for a false return, only. (46 Law Library, 288, 327.)

The return was competent evidence in the trial of the summary proceeding, and as it could not be contradicted by the plaintiffs, who were parties to the writ, it was conclusive of the facts set out in the return. The return of the claim, on the trial, was a full protection to the sheriff from the liability created by the levy. When the claim was made by Dawson, the sheriff was bound to suspend proceedings on the levy. (Clay's Digest, 211, sec. 52; *Ib.*, 213, sec. 62; so much of the Act of 1812—Clay's Digest, sec. 52,—as requires two bonds, is repealed by the Act of 1829, *Ib.*, 213 sec. 62; *Bradford v. Dawson*, 2 Ala., 203; *Hughes v. Rhea*, 1 Ala., 609.)

But these breaches are for a false return, the only proceeding in which the truth of the return can be tried. The judgment in the summary proceeding is no bar, therefore, to these breaches, and the demurrer to the fourth plea ought to be sustained.

The 8th breach is for neglect to take claim

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bond, when Dawson claimed the goods levied on. The demurrer to this breach ought to be overruled. The breach is a good one. (*Lane v. Harrison*, 6 Munf., 573; ——— v. *Bean*, 5 B. & C., 284; 4 Tyrw., 272; *Clopton v. Hopkin*, 6 Ad. & E., 468, 51 E. C. L.)

The 13th breach is for loss of the bond, and the demurrer ought to be overruled. (See above cases.)

The 9th, 10th, 11th and 12th breaches are for not taking claim bond from Dawson. (Clay's Digest, 211, sec. 52; *Ib.*, 213, sec. 62.)

Neither the amended 7th plea, nor the 8th plea, is a good defense to these breaches; and the demurrer to the 8th plea ought to be sustained; and the demurrer of the defendants to the replication to the amended 7th plea ought to be overruled. The demurrer will reach back to the defect in the plea. The gist of the plea is that the plaintiffs in the claim suit refused to prosecute their levy, and that the goods were restored to the claimants by order of the court. This plea does not, however, aver that the sheriff took a claim bond. These breaches are for not taking a bond. The plea does not answer the breaches. Unless there was a bond conforming to the requisition of the statute, filed with the execution and affidavit, there was no such cause in court as the plaintiffs could be compelled to prosecute. (*Leavitt v. Dawson and Prion*, 4 Ala., 335; *Leavitt v. Smith*, 7 Ala., 179.)

The breach of duty was the neglect to take [*122*] bond before the *return day of the execution. On that day the plaintiff's right of action, for this breach of duty, was perfect. How do the matters of this plea bar this right? It may be that the plaintiffs refused to prosecute their levy in the claim suit, because there was not a good claim bond. They did refuse for this cause. (*Leavitt v. Dawson*, 4 Ala., 335.) How could the refusal of the plaintiffs to prosecute a suit which they did not institute, which they were not bound to prosecute, which was improperly in court, and improperly there by the breach of duty for which the sheriff is now sued, destroy the plaintiffs' right to recover for this act of official misconduct?

But if this plea should be held good, then the replication avers that the judgment set out in this plea was rendered in a claim suit, commenced after the return day of the execution, and therefore after plaintiff's right of action against the sheriff was perfect. The replication concluding with an *absque hoc*, is a full answer to the plea.

The 8th plea sets up, by way of estoppel, the judgment in a summary proceeding. (Clay's Digest, 218, sec. 85.)

The neglect to take a claim bond before the return day of the execution, was a breach of duty for which plaintiffs could maintain an action; but for this breach of duty they could not recover in this summary proceeding. Then how can they be barred by this plea? (*Smith v. Leavitt*, 40 Ala., 92; *Ib.*, 14 Ala., 279.)

The *gravamen* of these breaches is not the loss or waste of the goods, but the neglect to take the bond. The plaintiffs could maintain an action against the sheriff for the loss of the goods by virtue only of the lien created by the execution. When the affidavit was made by Dawson, as alleged in these breaches, it was

the duty of the sheriff to suspend proceedings on the levy. (Clay's Digest, 211, sec. 52, and to prepare a bond for the claimant to sign; *Ib.*, 213, sec. 62.) Until he prepared and tendered the bond, and the claimant refused to execute it, the sheriff could not sell the goods. The lien of the plaintiffs on the goods was put in abeyance at the moment the sheriff's right to proceed on the levy was suspended. Both were suspended by the claim of Dawson, and could not be revived, except by the direct withdrawal of the claim by Dawson, or until, by refusing to execute the bond, he indicated his purpose to abandon the claim. Until the right of the plaintiffs to have the goods sold was revived by the withdrawal or the abandonment of the claim, the plaintiffs had no such interest in the goods as would entitle them to maintain an action against the sheriff for their loss or waste. The claim bond, if one be made, is substituted for the lien on the goods. If the sheriff neglect to prepare the bond, *this [*123 does not destroy the right of the claimant to have a stay of proceedings on the levy. But this neglect is a breach of duty to the plaintiffs, for which they may maintain an action. The loss or waste of the goods is no injury to the plaintiffs when they had no right to have them sold, but is an injury to the true owners, for which they may sue and recover.

Now, as the plaintiff's lien on the goods has been destroyed, and he has not got a claim bond as a substitute for the lien, he has been damaged. The claim destroyed the lien, not by act of the claimant, but by operation of law (Clay's Digest, 211, sec. 52), therefore the claimant is not liable for the destruction of the lien, except upon his bond. If the lien be suspended by the claim, and no bond be tendered to the claimant by the sheriff, the suspension continues until the return of the execution. The injury to the plaintiff is not the suspension of the lien, but the neglect to have the bond as a substitute for the lien.

The demurrer to the 6th plea to 14th breach ought to be sustained.

The 9th plea is no answer to any of the breaches; not to the first three, for the defendant in the execution may have had other goods than those levied on; not to those for false return, for the plaintiff had a right to have a true return; not to those for neglect to take bond, nor to those for loss of the bond, for it was the duty of the sheriff to take the bond and to return it to the court. The neglect to take it, or the loss of it after it was taken, was a clear breach of duty.

Not guilty—not a good plea in debt.

Mr. Badger, after enumerating the breaches assigned in the declaration, proceeded with his argument.

To the 1st, 2d and 3d breaches, the defendants pleaded that the said Leavitts, in the Circuit Court of Coosa County, according to the Statute of Alabama, suggested the issuing of the *fi. fa.*; that it came to the hands of Smith to be executed; that he might, by due diligence, have made the money, and did not, &c.; that an issue was made up whether Smith, by due diligence, could have made the money, &c.; that the issue was tried and found for Smith, for whom judgment passed, &c.

To this plea plaintiff replied that the defaults

in the said plea mentioned were not the same defaults mentioned in the breaches, to which replication the defendants demurred, and the court sustained the demurrer.

It is insisted, for the defendants in error, that the replication was bad in law, and was therefore properly overruled by the court.

[124*] *The plaintiff ought, if he admitted the identity of the defaults, to have replied *nul tiel record*; if he denied that identity, to have new assigned.

Whenever defendant justifies, or in any manner discharges himself from liability for a charge or claim of the plaintiffs, it is the duty of the latter to new assign, if he insists that the matters justified are not the same as those for which he declares. Nothing can be clearer than this, if the reason for a new assignment be considered. That reason is, that the defendant is supposed to mistake the particular instance set forth by the plaintiff for some other of the same class, and therefore plaintiff should correct that mistake by averring, by a new assignment, that he proceeds for another demand than that justified, &c., by the defendant; and this new assignment is in nature of a new declaration, or, in strictness, a particular expression of what the declaration designed, and which has been misunderstood by defendant. Therefore if the plaintiff, under such circumstances, do not new assign, and the defendant in proof supports his justification of any matter of the same general nature, he is entitled to a verdict.

See account of the nature, office and purposes of a new assignment. (1 Chitty, 434, *et seq.*) Manner of new assigning, page 439.

Defendant may plead to the newly assigned matter as to the declaration, page 441.

See, also, Mr. Stephens' account of new assignments. (Stephens on Pl., Amer. ed., page 220 to 227, and note 22, page 226; see, also, *James v. Lingham*, 35 Eng. C. L. R., 225; 5 Bing. N. C., 553; *Branchner v. Molyneux*, 9 Eng. C. L., 615; 1 Man. & Gran, 710; *Moses v. Lery*, in error, 45 Eng. C. L., 213; 4 Adol. & Ellis, N. S.)

In which last case Lord Denman says: "Where the declaration points at one particular transaction, and the plea applies itself to one particular transaction of the same sort, different from that intended by the declaration, or where the plea narrows the declaration contrary to the intention of the declaration, a new assignment is necessary."

This is exactly our case. To allow the traverse, instead of the new assignment, would be directly contrary to authority, and would cause injustice to the defendant by depriving him of his right to plead anew to the true transaction intended by the plaintiff and mistaken by him.

The replication that the defaults are not the same, is bad. No such replication has been sustained by judicial authority in such a case as ours. Where, indeed, the defendant pleads a former recovery against him for the same [125*] cause of action, there *the replication, that it is not for the same cause of action, is good, and may be used instead of a new assignment; but the reason is, that the plea admits a liability as to the cause of action to have once existed, and alleges that it has been satisfied by the recovery, so that, if not so satisfied, it still exists. (See *Seddon v. Tutop*, 6 T. R., 607; Note 22, page 226; 4th Amer. ed. Stephens on Pl.)

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The difference between the two classes of cases is this: in one the defendant avers that there never was a right of action; in the other he admits a right of action and avers payment, that is, extinguishment by the judgment. In the former, a new assignment is necessary; in the latter, not. And by this plain distinction the cases in the books are reconciled.

The defendants demurred to the 8th and 13th breaches, and their demurrer was sustained.

It was rightly sustained. The 8th breach not showing that sureties were offered to sheriff, and without that he was not obliged to prepare a bond. (Clay's Dig., page 213, sec. 62; *Eller v. Wood*, 24 E. C. L., 465; *Mann v. Vick*, 1 Hawks, 427.)

The 13th breach, showing that the amended return stating the taking of the claim bond was made 20th September, 1840, by Smith, late sheriff, and the condition of the bond sued on, as set out in the declaration, showing that his office expired 22d February, preceding, and the said return, as set out in the said breach, showing that the claim bond was given, not to Smith, but to his successor in office, and therefore the custody of the said bond not belonging to Smith, the averment that by his negligence it was lost, is idle, inconsistent and absurd, &c.

To the 4th, 5th, 6th and 7th breaches, the defendants pleaded, that the Leavitts instituted proceedings in the Circuit Court of Coosa County, against Smith, according to the statute, &c., and an issue was made up and tried, upon which issue the truth of the amended return was tried, and the truth thereof found, and judgment rendered for Smith, &c. The plaintiff demurred to the said plea, and the court overruled the demurrer.

It is insisted for defendants in error, that this demurrer was properly overruled, because the verdict and judgment stated in the plea were conclusive of the truth of the amended return set out in the breaches, the falsehood of which is the gist of these breaches—conclusive as to Smith, the sheriff, and in this action whatever concludes the Leavitts as against Smith, concludes the plaintiffs as against him and the other defendants, his sureties. (*Gardner v. Buckbee*, 3 Cow., 126, and cases there cited; *Leavitts v. Smith*, 14 Ala. N. S., 285; *Davidson v. [?]* 126 *Stringfellow*, 6 Ala. N. S., 34; *Smith v. Leavitt*, 10 Ala. N. S., 92, 192; *Cummings v. McGhee*, 9 Porter, 351.)

And because, also, all these breaches show the amended return to have been made after the said Smith was out of office, and hence it does not affect either of the parties in this action. (*Evans v. State Bank*, 13 Ala. N. S., 887.)

The defendants by their 6th plea pleaded to the 9th, 10th, 11th, 12th and 14th breaches, that after the seizure of the goods, a claim was interposed, affidavit made, bond given, and the same returned; that a motion was made to dismiss the claim for insufficiency of the bond; that motion was overruled, and such proceedings had that the court ordered goods, &c., to be delivered up to the claimants, and they were delivered accordingly. And the defendants by their 8th plea further pleaded, as to the 9th, 10th, 11th and 12th breaches, that after the return of the execution, the Leavitts entered a suggestion according to the statute, that the money might have been made, &c., issue there-

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on, verdict for Smith, and judgment averring the identity of the execution and alleged defaults in the breaches with those set out in the suggestion, &c. The defendants, by their 9th plea, also pleaded severally to all the breaches, that the goods and chattels levied upon, as stated in the several breaches, were not the property of the defendant in the execution, nor subject to be taken for the payment, &c.; and also by their 10th plea, that said Smith was not guilty of the several defaults, &c.; and to these pleas plaintiff demurred.

The defendants, by their 7th plea, pleaded to the 9th, 10th, 11th and 12th breaches, that the execution, with the levy and interposition of claim was returned, and the claim suit between the claimants and the said Leavitts was duly entered, and afterwards such proceedings were had that the court ordered the property levied on to be delivered up to the claimants, which was done.

To this 7th plea the plaintiff replied: that claim was interposed; affidavit was made, and a bond made payable to the Leavitts, was made on the 23d March, 1840, being the second day of term, to which execution was returnable; that on the same day another bond was made payable to William J. Campbell (both bonds are stated to have been executed by the claimants, but it is not stated by whom either was taken); that Smith ceased to be sheriff before the 23d March, and then parted with the possession of the goods to some one unknown, and when the affidavit and bond were made, Campbell, the new sheriff, had possession; that a motion to dismiss the claim was made for insufficiency of the bonds; was overruled, and judgment afterwards given for returning goods [127*] to claimants, at Fall *Term, 1840, but not in any claim suit commenced by the affidavit named in the plea. The replication then avers that the affidavit, mentioned in the plea, was never returned, and plaintiff had no notice of its execution until 1847; that the goods levied on were delivered to claimants by Campbell, with a formal traverse that they were delivered by Smith in obedience to any other judgment or order of the court. And the replication alleges that a writ of error was brought to the Supreme Court of Alabama upon the judgment which, in 1842, was reversed, and afterwards, in the Circuit Court of Coosa, the claim was dismissed, &c., and concludes with a verification, &c. To this replication defendants demurred.

As to the 9th, 10th, 11th and 12th breaches, it is insisted, 1st. That the matter contained in the defendant's 6th plea is a good bar, for the order of the court directing the surrender of the goods was one which the law obliged the sheriff to obey, and must, therefore, protect him in obeying (cases before cited from Alabama reports); and that this matter was also a good bar to the 14th breach.

2d. That the verdict and judgment in the suit of the Leavitts, by suggestion, against Smith, set out in the 8th plea, is a good bar, for the matters which are alleged in those breaches were proper to be offered, and would have tended to sustain the suit by suggestion, and therefore the very question here raised by these breaches has been in that suit decided;

and it being found by the verdict and judgment that the goods were not subject to execution, the Leavitts have no interest in the inquiry what became of them, &c. (Cases before cited, particularly *Gardner v. Buckbee*, 3 Cow., and *Cummings v. McGehee*, 9 Port.)

For these reasons, as well as defects in the breaches themselves, it is insisted that their demurrer to the 6th and 8th pleas was properly overruled.

It is further insisted that the 7th plea is a sufficient answer to the 9th, 10th, 11th and 12th breaches; the order in the claim writ being binding on the sheriff, and the replication thereto being insufficient, impertinent and fatally defective. For, First. The replication neither admits nor denies directly the suit alleged in the plea, but is altogether evasive. Second. If replication is to be understood as denying it, it is bad, because it can only be put in issue by *nul tiel record*; if to admit it, then the averments of the other proceedings, in the replication, are idle and immaterial. Third. The replication tenders a formal traverse that Smith delivered up the goods to claimants under any other order or judgment of the court than that set out in the replication, and therefore seems to admit a *delivery by him [*128 under that order, and that order being a justification, the traverse tenders an immaterial issue. Fourth. The plaintiff ought either to have replied *nul tiel record* of the order alleged in the plea, or, admitting the record, have traversed the delivery under it, if he deemed the latter fact material. Fifth. If goods delivered up under the order of the court, as the replication avers, it is immaterial in this suit by which hands the delivery was actually made, the plaintiffs charging the defendants on account of the seizure of the goods, and the order discharging Smith, whether obeyed by himself or his successor. Sixth. The reversal of the order set out in the replication is immaterial, for the reversal cannot by relation make the sheriff a wrongdoer. (*Smith v. Leavitts*, 10 Ala., 92; *Leavitt v. Smith*, 14 Ala., 284.)

It is further insisted, that the 9th plea, that the goods levied upon, &c., were not the property of the defendant in execution, nor liable to be taken, &c., it is a sufficient bar to all the breaches except the first.

The seizure under the execution does not conclude the sheriff as to the property in the goods—it amounts only to affirming his belief of ownership by the defendant in execution and casts the burden of proof on him. He may notwithstanding aver and show that the goods were not subject to the execution, and such averment and proof discharges him from liability to the plaintiffs in execution in respect of such goods. (*Leavitt v. Smith*, 7 Ala. N. S., 184, 185; *Mason v. Watts*, *Id.*, 703.)

This plea being admitted by the demurrer, it is a matter immaterial to the plaintiff whether the goods were kept or lost, surrendered to a claimant with or without a bond, or what became of them. Whoever has or may have a right to call upon the sheriff by reason of his disposition of the goods, the plaintiff has none—his whole right and interest therein being founded upon their supposed liability to the execution.

It is further insisted that the 10th plea—that Smith was not guilty of the defaults, &c.—is a good answer to all the breaches.

Every breach avers a criminal violation of his duty by the sheriff, and, if true and sufficiently laid, would sustain an action on the case against the sheriff. The breaches are exactly equivalent to counts to an action on the case. The action is founded on the bond in order to call on the official sureties to make good the defaults of the sheriff, and no reason can be supposed why the Legislature should design to require special pleading from the sureties and deny them the benefit of a general plea, by which the plaintiff is put to the proof of his whole allegation, while such requisition and denial do not apply to an action against the sheriff for the default. It would be more [129*] reasonable to require such special plea in the latter action, the sheriff being cognizant of all the facts, than in the former, the sureties having no such knowledge. The only ground assumed on the other side is the technical one, that "not guilty" cannot be pleaded to an action of debt—but the position is not true.

In an action of debt on a recognizance for keeping the peace, suggesting an assault as the breach, the defendant may plead not guilty, *son assault demesne*, just as in an action of trespass for the assault. (See form of plea, 7 Went., 401.)

So on debt in penal statute, and in debt against executors, suggesting *devastavit*. (*Coplin v. Carter*, 1 T. R., 462; *Wortley v. Herpinham*, Cro. Eliz., 766; Ch. Pl., 3d Amer. ed., 354; *Langley v. Hayes*, Mo., 302.)

If such a plea is allowed in any action of debt, it should be in this. In action of debt on penal statute, &c., *nil debet* is a general issue, and puts the plaintiff on the proof of his whole case. If, then, the technical idea, that the plea of not guilty should not be allowed to an action of debt, does not prevent allowing the defendant in such action to plead such plea, surely it should not here, where there is no general issue which will put the plaintiff to full proof of his case. This is not an action *stricti juris*, like trespass, and should, in the liberty of pleading, be likened to an action on the case, according to Lord Mansfield's notion of that action. (Ch. Pl., 357.)

It should also be noted that the plaintiff in his first breach alleges a judgment and execution thereon, and in every succeeding breach refers to this one execution and the returns alleged to have been made thereon, and to the one term to which it was returnable. Hence it judicially appears that the whole *gravamen* of all the breaches is one and the same default, and not other and different defaults; from which it would seem to follow that what is an answer to one breach is an answer to every other. Usually when the breaches formally refer to "one other execution," or "a certain other judgment," the court is precluded from connecting one with the other breach, but must consider each as referring to a separate transaction; but here the plaintiff himself refers, in each succeeding breach, to the execution mentioned in the first, and without such reference being had, no valid breach is assigned, except to the first; and therefore, by the form of pleading adopted by the plaintiff, he has not only enabled, but

obliged the court to consider all the breaches as connected together, growing out of one official transaction, and substantially as alleging one and the same default.

Upon the whole, it is insisted for the defendant, that for the reasons above stated, as well as for other defects in the breaches assigned, and in the replications of the plaintiff to the defendants' pleas, the judgment for the [*130] defendant ought to be affirmed.

Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error to the District Court of the United States for the Middle District of Alabama.

The suit was brought upon an official bond given by Alexander Smith, as sheriff of Coosa County, and his sureties, conditioned that he would well and truly perform all and singular the duties of his office as required by the laws of the State.

The declaration sets out a judgment, recovered by J. W. and B. Leavitt at the Fall Term of 1889, in the Circuit Court of the Second Circuit of the State of Alabama, against Jeremiah M. Frion, for the sum of \$3,472; also an execution upon the same, issued to the said Smith, as sheriff.

Fourteen breaches of the condition of the bond are assigned, for the purpose of charging the defendant and his sureties with the payment of the judgment.

In order to understand the purport and legal effect of these breaches, and the pleadings which follow them, it is proper to refer to two provisions in the statutes of Alabama that have a material bearing on the subject. One is, that when the sheriff shall levy an execution on property claimed by a person not a party to the execution, such person may make oath that he is the owner: and thereupon it shall be the duty of the sheriff to postpone the sale until the next term of the court; and such court shall require the parties concerned to make up an issue, under such rules as it may adopt, so as to try the right of property before a jury at the same term; and the sheriff shall make a return on the execution accordingly, provided the person claiming such property, or his attorney, shall give a bond to the sheriff with surety equal to the amount of the execution, conditioned to pay the plaintiff all damages which the jury on the trial of the right of property may assess against him, in case it should appear that such claim was made for the purpose of delay. (Clay's Dig., 211. sec. 52.)

It is further provided, that it shall be the duty of the sheriff to return the property levied on to the person out of whose possession it was taken, upon such person entering into a bond with surety to the plaintiff in the execution in double the amount of the debt and costs, conditioned for delivery of the property to the sheriff whenever the claim of property so made shall be determined by the court. (*Ib.*)

It was subsequently provided that one bond might be taken with a condition embracing substantially the matters contained in the two above mentioned. (*Ib.*, 213, sec. 62.)

*The other provision is, that when- [*131] ever the sheriff shall fail to make the money

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on the execution on or before the first day of the term of the court before which the execution is returnable, the plaintiff or his attorney shall suggest to the court that the money could have been made by the sheriff, with due diligence, and it shall be the duty of the court forthwith to cause an issue to be made up to try the fact; and if it shall be found by the jury that the money could have been made with due diligence, judgment shall be rendered against the sheriff, and his sureties, or any or either of them, for the money specified in the execution, together with ten *per centum* on the amount. (*Ib.*, 213, sec. 85.)

There is, also, a similar provision in the case of the suggestion of a false return on the execution by the sheriff. (*Ib.*, 218, sec. 84.)

We have said there are fourteen breaches assigned of the condition of the bond in question in the declaration.

The first is, that there were divers goods and chattels, lands and tenements of Frion, the defendant in the execution, within its lifetime, out of which the sheriff could have levied the amount of the judgment: but that he had neglected to levy and collect the same.

Second and third, that he had levied upon sufficient goods and chattels of the defendant, but had neglected to sell the same, and collect the amount.

The fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh and twelfth, that the return made upon the execution, namely: that the goods levied on had been claimed by A. B. Dawson and Samuel Frion, assignees of J. W. Frion, defendant in the execution, and claim bond given to W. J. Campbell, now sheriff, and my successor in office, was false, setting out in various of these breaches the grounds of the falsity in the return, namely: either that no claim had been made to the property by Dawson and Frion, or if made, no affidavit, as required by the statute, had been furnished to the sheriff, or no bond had been required or given; or that the proper affidavit had been made, but no bond given according to the requirement of the statute.

The thirteenth and fourteenth breaches admit an affidavit and bond, according to the statute; but charge that the claim bond was lost by the negligence of the sheriff, and was not returned to the court with the execution at the return of the writ.

The defendants plead to the first, second and third breaches, that at the April Term of the court held in and for the County of Coosa, in 1840, the plaintiffs in the execution suggested to the court, according to the statute in such cases made and provided, after setting out the [132*] execution, and issuing of it to the *sheriff, and return of it without having levied the money thereon, that the same might have been collected, if due diligence had been used by the sheriff; that thereupon an issue was formed upon this suggestion; and that upon the trial such proceedings were had that the jury found the same in favor of the defendants. The plea further avers that the alleged neglects, defaults and breaches of duty in the first, second and third breaches assigned, and in said suggestion, are the same, and not different.

To this plea the plaintiffs replied, that the matters, neglects and defaults in the said three
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breaches assigned in the declaration, were not the same identical matters, neglects and defaults as in said plea mentioned, and for and in respect to which the said judgment in said plea mentioned was recovered in manner and form as set forth.

To this replication there was a demurrer and joinder, and judgment for the defendants.

The defendants also plead to all the breaches severally, except the first, that the goods and chattels levied on as stated in said breaches at the time of the said levy, and at the time said execution came to the hands of said Smith, sheriff as aforesaid, were not the property of the said Jeremiah M. Frion, the defendant in the execution, and were not liable to be taken for the payment or satisfaction of the said judgment.

There was a demurrer to this plea, and joinder, and judgment for the defendants.

These two pleas cover all the breaches assigned in the declaration, and if they furnished answers to them, the judgment for the defendants in the court below should be sustained.

The first three breaches, as we have seen, were first, that there were goods of the defendant in the execution, and of which the sheriff could have levied the money; but that not regarding his duty, he neglected and refused so to do. Second and third, that he did make a levy upon the goods, but neglected and refused to sell the same.

The plea sets up that the plaintiffs made a suggestion, under the statute, to the court, at the return of the execution, that the sheriff could have collected the money thereon. If he had exercised due diligence in the execution of the writ; and upon this suggestion or allegation an issue was formed between the parties and tried by a jury, who found a verdict for the defendants, upon which a judgment was rendered.

The replication to this plea is, that the matters, neglects and defaults in the said three breaches in the declaration were not the same matters, neglects and defaults in the said plea mentioned, and in respect to which the judgment was recovered. *We think the [*133 replication is bad, on the ground that it raises an issue of law, rather than one of fact. The matters in all three of the breaches were necessarily involved in the question of due and proper diligence on the part of the sheriff in the execution of the *fi. fa.* The omission to levy upon the goods, or to sell after the levy, fell directly within the issue and inquiry in that proceeding under the statute; and we are bound to presume were the subject of examination before the court and jury, and were passed upon by them. Where the facts in issue appear upon the record, either expressly or by necessary intendment, it is not competent to contradict them, as this would be contradicting the record itself. The judgment is conclusive upon these facts, between the same parties or privies, whenever properly pleaded. If the matters involved in the issue do not appear upon the record, then it is competent to ascertain them by proof *aliunde*. (2 Phil. Ev., 15, 20, 21; C. & H. Notes, p. 13, note 14; also, pp. 163, 164, and cases.)

Here we cannot help seeing, that the matters

sought to be put in issue by the replication are those necessarily involved in the former trial; and to uphold it would be to permit the same facts to be agitated over again. Certainly, neglect to levy the money on the execution out of the defendant's goods within the sheriff's bailiwick, or neglect to sell them, and make the money after the levy, are facts bearing directly on the former issue; and one criterion for trying whether the matters or cause of action be the same as in the former suit, is, that the same evidence will sustain both actions. (2 Phil. Ev., 16; C. & H. Notes, p. 19, note 17.)

The issue upon the suggestion that the sheriff could have levied the money on the execution with the exercise of due diligence, is a very broad one. It is held by the courts of Alabama, that the sheriff may discharge himself from responsibility by showing due diligence; and to enable him to do this nothing more is necessary than to traverse the facts contained in the suggestion. But if the defense consists of new matter, or matters of avoidance, he must then plead it. (3 Ala., 28.)

It is difficult to conceive of a broader issue for the purpose of charging this officer with neglect or default in the course of his duty under the execution.

Then, as to the plea that the goods levied on were not the goods of the defendant in the execution, and not liable to the satisfaction of the judgment. This the demurrer admits. Of course, the sheriff had no authority to make the levy, and stood responsible himself to the owner, as a trespasser, as soon as the seizure took place. In the face of this admission on the record, it is impossible to hold him liable [134*] for the value of the goods. *The plea answers the material allegation in each of the assignments of breaches, and without which the assignment would be substantially defective, namely: the seizure of the goods on the execution. The allegations as to no claim having been made to the property by third persons, and no affidavit taken or bond given, or if given, that it was lost, are matters depending upon the levy. If that is denied or avoided, the several breaches are fully answered.

Now, the seizure of the goods of a third person, on the execution, does not change the title or make them the goods of the defendant on the execution. The only effect is, if after this the sheriff returns the execution *nulla bona*, the burden is thrown upon him in a suit for a false return to show that the goods were not the defendant's, and therefore not liable to the execution. (*Magne v. Seymour*, 5 Wend., 309; 1 B. & C., 514.)

The same principle was held in *Mason et al. v. Watts*, 7 Ala., 703. That was a case arising out of a suggestion against the sheriff and his sureties, under the statute to which we have referred, and in a case where the goods had been seized, and a return upon the execution accordingly. The suggestion was met that the goods were not the property of the defendant in the execution.

The court say that the sheriff may excuse himself by showing that the defendant in the execution had no property in the goods levied upon. That the reason for this is, that the

sheriff, by levying upon the goods of a third person, becomes a trespasser, and being so, the law does not impose on him the duty of holding the goods after he has ascertained their true ownership. Another observation in that case is applicable here. The court says it may be, if a loss results to the plaintiff by being cast in costs, or otherwise, from the neglect of the sheriff to retain the affidavit of claim, or bond executed by the claimant, he may be liable in an action on the case, but not for the value of the property levied on. Although the suit on the bond in this case, according to the practice in the courts of Alabama, may be regarded as a substitute for this action, still no such ground or cause of action is set out in any of the assignments of breaches, and of course no opportunity is given to answer it. We are satisfied, therefore, that the plea is a full answer to all the breaches assigned to which it refers, and has been pleaded.

There are many other pleas, replications and issues of law raised upon them, arising out of the useless number of breaches assigned in the declaration, and which have very much tangled and complicated the pleadings in the record; but we do not propose to examine or express any opinion upon them, as upon the whole record we see a complete defense to all the *causes of action set forth in the [*135 declaration, it would be an idle and profitless waste of time to enter upon their examination, and besides, whatever might be our conclusions, they would not vary the result. (Stephens' Pl., 153, 176.)

The judgment of the court below is affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Middle District of Alabama, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and the same is hereby affirmed, with costs.

IN THE MATTER OF JOSIAH S. STAFFORD
AND JEANNETTE KIRKLAND, HIS
WIFE, *Appellants*,

v.

THE UNION BANK OF LOUISIANA.

Practice—premature motion to dismiss appeal—disposition of—court's views expressed—mode of relief suggested.

Where an appeal was taken from a decree in chancery, which decree was made by the court below during the sitting of this court in term time, the appellant is allowed until the next term to file the record; and a motion to dismiss the appeal, made at the present term, before the case has been regularly entered upon the docket, cannot be entertained, nor can a motion to award a *procedendo*.

This court, however, having a knowledge of the case, will express its views upon an important point of practice.

Where the appeal is intended to operate as a *supersedes*, the security given in the appeal bond must be equal to the amount of the decree, as it is in the case of a judgment at common law.

The two facts, namely: first, that the receiver

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appointed by the court below had given bond to a large amount, and second, that the persons to whom the property had been hired had given security for its safe keeping and delivery, do not affect the above result.

The security must, notwithstanding, be equal to the amount of the decree.

A mode of relief suggested.

THIS was an appeal from the District Court of the United States for the State of Texas.

It will be seen, by a reference to 12 How., 327, that this case was formerly before this court, and that the decree of the court below (dismissing the bill filed by the Union Bank) was reversed.

In the execution of the mandate of this court, the District Court of Texas passed a decree on the 25th of February, 1854, from which Stafford and wife appealed. *Mr. Hale* and *Mr. Coze*, on behalf of the Union Bank, moved to dismiss the appeal, for the following reasons:

136* "This motion is made to dismiss the appeal in this cause, and to award a *procedendo* to the District Court, on the ground that the appeal bond given by the appellants is not sufficient to stay the execution of the decree.

The cause was originally commenced by the Union Bank of Louisiana against Josiah S. Stafford and wife, in the District Court for the District of Texas, for the purpose of foreclosing a mortgage on certain negro slaves. A decree having been rendered by the District Court against the complainant dismissing the bill, an appeal was taken to this court, and at the December Term, 1851, the decree of the District Court was reversed, and the cause remanded, with directions to that court to enter a decree in favor of the complainants. (*Union Bank of Louisiana v. Stafford and wife*, 12 How., 327, 343.) No term of the District Court was held until July, 1853, when some objections being raised by the defendants to the proposed form of the decree, and to the report of the master on the receiver's accounts, the court took the whole matter under consideration until the next term. The objections to the master's reports having been waived, a final decree was rendered on the 25th of February, 1854, by which it was directed that the sums accruing from the hire of the slaves in the custody of the receiver, *pendente lite*, amounting to \$25,379.39, should be paid by the receiver to the complainant, and credited on the total amount due by the defendants; and that in case the defendants failed to pay over the balance remaining due after such credit, amounting to \$39,877.13, on the 1st of July, 1854, they should be foreclosed of their equity of redemption, and the master should seize and sell the mortgaged slaves at public auction, on the 3d of the same month, after giving three months' notice by advertisement of the time, place and terms of sale, and should pay to the complainants out of the proceeds of the sale the foregoing sum of \$39,877.13, in satisfaction of the debt.

It appears, then, as well by the decree as by the report of the master, which was confirmed, that on the 1st of July, 1854, when the foreclosure was to take effect, the debt, interest and costs, due to the complainant, would amount to \$65,256.52.

On the 7th of March, 1854, the tenth day after the entry of the above decree, the de-

fendants prayed an appeal, and the following order was made by the court:

"On this day came the defendants, by their counsel, and prayed an appeal to the next term of the Supreme Court of the United States, to be held in Washington City on the 1st Monday in December next, from the decree of the court rendered in favor of complainants against defendants; and to them it is granted, upon condition that the defendants enter into a good and sufficient bond, with good and suffi- [*137] cient surety in the penal sum of \$19,000, conditioned that they prosecute their appeal with effect, and answer all damages and costs, if they fail to make their plea good. And thereupon the defendants, in open court, tendered a bond with L. C. Stanley, Patrick Perry, and William H. Clark, as sureties in the sum of \$10,000, and the court having inspected the bond, and being satisfied it is in conformity to law, and the order of the court herein, and that the sureties are good and sufficient, it is now ordered that the bond be approved and filed. It is ordered to be entered that the bond of appeal taken and filed in this cause operates as a *superedeas* to the decree of the court."

On the same day the appeal bond referred to in the order was filed. The complainant objected to the bond being received to supersede or stay the decree, because the penalty was much less than the amount of the decree, and was wholly insufficient, but this objection was overruled.

On the 11th of March, 1854, notice was given to the defendants and their counsel that the present motion would be made, and this notice, with the acknowledgment of service, is herewith filed.

This motion is similar to that presented to this court in the case of *Catlett v. Brodie*, 9 Wheat., 553. The Act of March 3, 1803, adopts in appeals the same rules that are applied to writs of error (*The San Pedro*, 2 Wheat., 132), and the 22d section of the Judiciary Act provides that "every justice or judge signing a citation or writ of error as aforesaid, shall take good and sufficient security that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs, if he fails to make his plea good." In the case above cited, it is said: "It has been supposed at the argument that the Act meant only to provide for such damages and costs as the court should adjudge for the delay. But our opinion is, that this is not the true interpretation of the language. The word 'damages' is here used, not as descriptive of the nature of the claim upon which the original judgment is founded, but as descriptive of the indemnity which the defendant is entitled to, if the judgment is affirmed. Whatever losses he may sustain by the judgment's not being satisfied and paid, after the affirmation, these are the damages which he has sustained, and for which the bond ought to give good and sufficient security. Upon any suit brought on such bond, it follows, of course, that the obligors are at liberty to show that no damages have been sustained, or partial damages only, and for such amount only is the obligee entitled to judgment."

This language applies to the present case.

It was, however, urged with success in the District Court, that inasmuch as the [*138] receiver had given two bonds, each in the pen-

alty of \$20,000, for the faithful discharge of his duties, and as the mortgaged slaves were in the possession of hirers, who had also given bonds in the joint penalty of \$80,000, for the safe keeping and delivery of such slaves, the complainant had no right to require any further security from the defendants than sufficient to cover the special damages which might be imposed by this court for delay. This conclusion is directly opposed to the reasoning of the court in *Catlett v. Brodie*. It is evident that, notwithstanding the bonds given by the receiver and the hirers, the complainant is exposed by the appeal to the danger of losing the whole of the debt. The sureties on these bonds may become insolvent; the money in the hands of the receiver may be squandered; the slaves may die or run away. And in the language of the court: whatever losses the complainant may sustain, these are the damages which he has sustained, and for which the bond ought to give good and sufficient security. Indeed, if the construction put upon the Act by this court is applicable in any case, it must be in all, and no special circumstances can constitute an exception.

It may be objected that this motion cannot be entertained, at this time, because the appeal has been taken to the next regular term. But neither the Acts of Congress which regulate practice in the court, nor the rules adopted for its government, imply that a motion of this kind cannot be made before the cause is required to be docketed. On the contrary, it is a well-established principle, that at the moment of the appeal, and by that act alone, the cause is virtually removed to this court; and the jurisdiction thus vested may, of course, be exercised generally. (*Wylie v. Cox*, 14 How., 1.) Every consideration would seem to induce the action of the court on motions of this character—the urgency of the case—the injury sustained by the appellee—the delay of justice—the danger of renewed and vexatious appeals; and in no instance can stronger reasons be offered than in this, where the amount of the appeal bond is but \$10,000, and the debt is \$65,000; and where the decree from which the new appeal is prayed, is in exact conformity with the former mandate of this court.

But if there would be any objection to the dismissal of the appeal at this time, there can be none to the award of a *procedendo* to the court below, to enforce the decree by the issuance of an order of sale. The District Court has directed the stay of all proceedings; and if such a result was not the lawful consequence of the appeal, this court must be competent to require the execution of what is, in fact, nothing but its own decree.

139*] **Mr. Justice M'Lean* delivered the opinion of the court:

This is an appeal from the District Court of Texas, and a motion is made to dismiss it, on the ground that security has been given in the sum of \$10,000 only, when the sum decreed to be paid was \$65,000. And a *procedendo* is prayed, commanding the District Court to execute the decree.

Notice of this motion was acknowledged by the counsel for the appellant the 11th of March, 1854.

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As the appeal was taken since the commencement of the present term, the appellant is not bound to file the record until the next term.

By the decree in the District Court a mortgage on a large number of slaves, to secure the payment of a debt due to the Union Bank of Louisiana, was foreclosed. A receiver having been previously appointed, who hired out the slaves and received the hire, he was directed by the decree to pay to the Bank the sum of \$25,329.39, moneys in his hands, and that the residue of the money due, amounting to the sum of \$39,877.18, should be paid on the first day of July next, and if not so paid, that the slaves should be seized and sold.

On the 7th of March, 1854, the tenth day after the decree was entered, the defendants prayed an appeal, which was granted, and on the same day a bond was given in the penal sum of \$10,000 as required by the court.

As the appeal has not been regularly entered on the docket, and as the appellant is not bound to enter it until next term, a motion to dismiss it cannot be entertained. But as the record is before us, which states the facts on which the motion is founded, the court will suggest their views of the law, in regard to an important point of practice.

The Act of 1803 places appeals in chancery on the same footing as writs of error. And in the case of *Catlett v. Brodie*, 9 Wheat., 553, this court held, that security must be given on a writ of error, to operate as a *supersedeas* for the amount of the judgment. By the Act of 12th December, 1794, when a stay of execution is not desired, security shall be given only to answer costs.

A motion was made, in the District Court, to dismiss the allowance of the appeal, on the ground that security in the amount of the decree had not been given. This was opposed by the counsel for the appellant, and it was alleged, as the receiver had given two bonds, each in the penalty of \$20,000, for the faithful discharge of his duties, and as the *mort- [*140 gaged slaves were in possession of persons who had hired them, who had given bonds in the joint penalty of \$80,000, for the safe keeping and delivery of the slaves, that no further security, under the statute, ought to be required to entitle the appellant to a *supersedeas* against the decree. The court overruled the motion.

The decision of this court, in the case above cited, was, that the words of the Act, "sufficient security that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs, if he fails to make his plea good," do not refer to "the nature of the claim upon which the original judgment is founded, but that they are descriptive of the indemnity which the defendant is entitled to, if the judgment be affirmed." And the court further say, "whatever losses he, the defendant in error, may sustain by the judgment not being satisfied and paid after the affirmance, these are the damages which he has sustained, and for which the bond ought to give good and sufficient security."

If this construction of the statute be adhered to, the amount of the bond given on the appeal must be the amount of the judgment or decree. There is no discretion to be exercised by the judge taking the bond, where the appeal or writ

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of error is to operate as a *supercedens*. This rule was established in 1817, and it has been adhered to ever since.

The hardship of this rule, on the appellant, is more imaginary than real. Suppose the appellant had given ample personal security on the original obligation for the payment of the money, and the sureties were sued with the principal, would they be excused from giving bail on an appeal or writ of error, as the Act requires? And how does such a case differ from the one before us, where mortgage has been given on personal property?

If the receiver has given security, in \$40,000, faithfully to pay over the money in his hands; and if those persons who employed the slaves have given bond in \$80,000, for the safe keeping and delivery of them, and the sureties are good, the appellant can have no difficulty in giving the security on his appeal, to the amount of the decree in the District Court. It is true the property is taken out of his possession and control, but it is in possession of persons who gave bonds for his safe keeping and delivery when required, a part of it in payment of the decree, and the residue to be sold in satisfaction of the balance of the decree. In this condition of the property, if the transaction be *bona fide* (and it must be presumed to be fair, as the arrangement was made under the order of the court), the responsibility on the appeal [41*] bond can be little *more than nominal. The state of the property affords more safety to the security on the appeal bond than if the property and money were in possession of the appellants, and under their control. A double mortgage is on the property, that it shall be faithfully applied to the payment of the decree.

The appeal is for the benefit of the appellant. A decree in the District Court has been entered against him, and there is, in the custody of the law, a sufficient amount of money and property to pay the amount decreed. An appeal suspends the payment some one or two years, and as this is done for the benefit of the appellants, and at their instance, is it not equitable that the risk should be provided for by them? The law has so decided, by requiring security to be given to the amount of the decree, without reference to the nature of the suit. The provision of the Act, as construed by this court, is not a matter over which the court can exercise a discretion. The language is mandatory, and must be complied with. We can know nothing of the responsibility of the receiver or of the hirers of the slaves, nor is it proper that we should inquire into their circumstances and the responsibility of the sureties, with the view of substituting them for the security on the appeal, which the law requires.

For the reasons stated, the court cannot dismiss the appeal, nor award a *procedendo*. A more appropriate remedy would seem to be a rule on the District Judge, to show cause why a *mandamus* should not be issued; but this can be done only on motion.

Mr. Justice Catron :

The case was decided in the District Court, in March last, and during the present term of this court, and an appeal taken to our next term; consequently the cause is not here, nor have we any power to dismiss it. The motion

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to dismiss must therefore be overruled. But I do not agree to the opinion expressed by a majority of my brother judges, advising the appellees what course to pursue against the District Judge. First. Because we have no case before us authorizing such an expression of opinion; and I am opposed to a mere *dictum* attempting to settle so grave a matter of practice. And Second. My opinion is that the statute referred to does not govern a case of equity, where property is pursued under a mortgage, and the mortgaged property, at the complainant's instance, has been taken into the hands of the court, and so remains at the time of the appeal.

If the property, from its perishable nature, had been by interlocutory decree converted into money, and this was in court, *then, I [*142 think, no security to cover its contingent loss should be required; and here \$25,000 has been earned, previous to the suit, by the mortgaged slaves, and is in court.

That this mortgagor is stripped of his property, and cannot give security for so large an amount, is manifest, and to construe the Act of Congress as if this was a simple judgment at law, would operate most harshly.

Motion overruled.

S. C.—17 How., 275.
Cited—17 How., 283; 8 Wall., 701; 7 Wall., 376; 12 Wall., 99; 19 Wall., 423, 430; 21 Wall., 29; 1 Dill., 270; 8 Blatchf., 83; 1 Woods, 54.

CHARLES DAVENPORT ET AL., Heirs of
JOHN DAVENPORT, Deceased,

v.

F. FLETCHER ET AL.

When writ of error will be dismissed.

1. Where the judgment is not properly described in the writ of error;
2. Where the bond is given to a person who is not a party to the judgment;
3. Where the citation issued is issued to a person who is not a party; the writ of error will be dismissed on motion.

THIS case was brought up by writ of error from the Circuit Court of the United States for the Eastern District of Louisiana.

It will be necessary to state only the judgment, and such of the other subsequent proceedings as gave rise to the motion to dismiss, and the judgment of the court thereon.

On the 23d of June, 1848, the Circuit Court pronounced a judgment, which is thus recited in the writ of possession, which was issued on the 21st of July, 1848.

Whereas Felicite Fletcher, Maria Antonio Fletcher, Augustine Cuesta, Javiera Cuesta, and Felicite Cuesta y Fletcher, complainants, against Charles Davenport, Erasmus A. Ellis, Margaret Davenport, wife of Peter McKittrick, John Phellip, Edgar Davenport, and Elizabeth Davenport, wife of Celestine Maxent, deceased, heirs of John Davenport, deceased, defendants, on the 23d day of June, A. D. 1848, by the judgment of the Circuit Court of the United States for the Fifth Circuit and District of Louisiana, &c., &c., &c.

The petition for the writ of error was in the names of the above defendants, and alleged

further, that since said final judgment the original plaintiffs in the petition named, had parted with their interest in the said judgment to Charles McMicken, a citizen of the State of Ohio, and he hath been subrogated to the rights of the plaintiffs in the case, as doth appear by the record in this cause. The petition then prayed that the "original plaintiffs herein, as well also as the said Charles McMicken, may be made parties hereto and duly cited," &c., &c., &c.

143*] *The writ of error began as follows:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you, or some of you, between F. Fletcher *et al.*, and Charles Davenport *et al.*, heirs of John Davenport, deceased, a manifest error hath happened to the great damage of the said Charles Davenport *et al.*, heirs of John Davenport, deceased, as by their complaint appears, &c., &c., &c.

Citations were issued by Felicite Cuesta y Fletcher, wife of Jose Desadario Harravo; to Augustine Cuesta; to Javiera Cuesta; to Maria Antonia Fletcher, otherwise called Maria Antonia Fletcher Hipp; to Felicite Fletcher, otherwise called Felicite Fletcher Hipp; and to Charles McMicken.

The bond was given by a portion only of the plaintiffs in error, and exclusively to Charles McMicken.

On the 12th of December, 1853, *Mr. Perin*, on behalf of the defendants in error, moved to dismiss the writ of error for several reasons, amongst which were the two following, which are the only ones necessary now to be mentioned:

1st. That there is a misjoinder of the defendants in error, in adding Charles McMicken in the petition for writ of error, whereas the name of the said McMicken does not appear as a party in the record.

2d. That there is a variance between the petition for the writ of error and the writ itself, in this, that the writ does not contain the same number of defendants as the petition, omitting all the six names contained in the petition except that of Charles Davenport. And there is also a variance between the petition and citation, and between the writ and citation, in this, that the each citation does not contain the name of but one of the defendants in error.

On the 6th of January, 1854, *Mr. Duncan*, on behalf of the plaintiffs in error, filed an affidavit suggesting a diminution of the record, and obtained a *certiorari*, the return of which was as follows:

"F. FLETCHER ET AL.

v.

JOHN DAVENPORT'S HEIRS.

No. 1820.

On the joint motion of *F. Perin*, of counsel for the plaintiffs in the above suit, and of *S. S. Prentiss*, of counsel for Charles McMicken, and on exhibiting to the court an authentic act of transfer of the judgment rendered in this case, from said plaintiffs to said Charles McMicken, dated October 19th, 1848, and filed in the office of L. T. Caire, notary public of the City of New Orleans; It is ordered by the court, that the said judgment shall stand transferred on the **144*]** records of this court, as it is *in said act of transfer, and that all subsequent proceedings in this case relating to the said judgment,

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shall be conducted and carried on in the name of the original plaintiffs, for the use and benefit of the said Charles McMicken, and at his expense."

All which is now certified to the honorable the Supreme Court of the United States, in obedience to the mandate herewith returned.

Witness my hand, and the seal of said court, at New Orleans, Louisiana, this 1st March, A. D. 1854.

[SEAL.]

J. W. GURLEY, Clerk.

The motion to dismiss was argued by *Mr. Perin* for the defendants in error, and by *Messrs. Duncan* and *Coxe* for the plaintiff in error.

Mr. Justice McLean delivered the opinion of the court:

A motion has been made for a dismissal of this cause.

1. Because the judgment is not properly described in the writ of error.

2. Because the bond is given to a person who is not a party to the judgment.

3. Because the citation issued is issued to a person who is not a party.

The objections are all founded in fact, and upon the authority of *Samuel Smyth v. Strader, Perine & Co.*, 12 How., 827.

The case is dismissed, with leave, however, to the counsel for the plaintiffs to move for its re-statement during the present term.

Cited—6 Wall., 246; 11 Wall., 86; 20 Wall., 156; 3 Sawyer., 470.

JAMES ADAMS, Executor of THOMAS LAW, Deceased, AND HENRY MAY, Administrator of EDMUND and THOMAS LAW, Appellants,

v.

JOSEPH E. LAW, by his next friend, MARY ROBINSON.

Appeal bond as supersedeas—motion for—also to dismiss appeal for want of proper naming of parties—denied.

In order to act as a *supersedeas* upon a decree in chancery, the appeal bond must be filed within ten days after the rendition of the decree. In the present case, where the bond was not filed in time, a motion for a *supersedeas* is not sustained by sufficient reasons, and consequently must be overruled.

So, also, a motion is overruled to dismiss the appeal, upon the ground that the real parties in the case were not made parties to the appeal. The error is a mere clerical omission of certain words.

THIS was an appeal from the Circuit Court of the United States for the District of Columbia.

Two motions were made in respect to it. One by *Mr. Coxe*, *to dismiss the appeal, [*145 and issue a *procedendo*, and the other by *Mr. Lawrence*, on behalf of the appellants, for a writ of *supersedeas*, directed to the court below, for the purpose of staying the execution of the decree.

Mr. Coxe's motion was as follows:

It is now moved by Richard S. Coxe, solicitor of Lloyd N. Rogers, administrator of Elizabeth P. C. Law, deceased, and Edmund Law Rogers and Eleanor A. Rogers, surviv-

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ing children of Lloyd N. Rogers and Elizabeth P. C. Law, his wife, and of the representative of William Blane, deceased, that this appeal be dismissed.

1. There is no case as above entitled, and the real parties interested in the case of which a record is filed, are not made parties to this appeal, namely: the said Lloyd N. Rogers, administrator, &c., Edmund Law Rogers and Eleanor A. Rogers, and the executors of William Blane, in whose favor the decree of the Circuit Court appears to have been made.

2. That it appearing from the certificate of the clerk of said Circuit Court, that an appeal was duly prayed by said appellants, from the decree entered in this cause, and that it was duly allowed, and an appeal bond, in the penal sum of \$200, approved 9th December, 1853, is the only appeal bond filed in the case, and such bond does not appear to have been given to the party defendant, in the above entitled case.

And upon the facts appearing in the certificate of the clerk of said Circuit Court, that no good and sufficient appeal bond has been filed, so as by law to operate as a *supersedeas*.

And whereas it also appears as aforesaid, that the said James Adams, trustee, is and has been in contempt, in consequence of his neglect and omission to perform and obey the order of said Circuit Court made on the 18th December, 1852; and that said circuit Court has omitted and neglected to enforce said order and decree against the said James Adams, trustee as aforesaid; it is now further moved by said solicitor, that a writ of *procedendo* do issue from this court, to be directed to the said Circuit Court, directing and commanding said court to proceed forthwith to enforce, by appropriate process, the said order and decree of said Circuit Court.

Mr. Lawrence's motion was as follows:

The appellants in this case, by their counsel, respectfully submit to this court,

That in consequence of a mistake and surprise, the facts in regard to which fully appear in the affidavits herewith filed, they failed to file a *supersedeas* bond within ten days after the final decree was entered therein in the Circuit 146*) Court; that the fund *in controversy is now in the hands of the trustee appointed by the said court, and securely invested, to the satisfaction of all the parties to said cause; that the said appellants have offered in the said court to give bond in double the amount of the sums decreed to be paid; that the parties to whom the said moneys have been decreed to be paid reside out of the said District of Columbia, and the Circuit Court has refused to grant the *supersedeas* on application formally made in that court for that purpose, and thereupon they move this Honorable Court for a writ of *supersedeas* to the Circuit Court of the District of Columbia, to stay execution of the decree heretofore rendered by the said court in this cause, and from which an appeal hath been prayed to this court, on such terms as to your Honors may seem meet.

These motions were argued by *Messrs. May and Bradley* in support of the motion of *Mr. Lawrence* for a *supersedeas*, and by *Messrs. Coxe and Carlyle* in support of *Mr. Coxe's* motion to dismiss the appeal.

The facts are stated in the opinion of the court.

Messrs. May and Bradley contended—

1. That this court has power to interfere. In *Hardeman v. Anderson*, 4 How., 640, there was a neglect of the clerk. Here there was no neglect, but the hearing below was irregular, and a surprise upon *Mr. May*, who had no solicitor in court. When set down for hearing, the case ought to have been put on the order book.

2. The hearing was irregular. The case ought not to have come on until the next term. (Md. Ch. Pr., 112.)

3. If the money is paid according to the decree, it will go beyond the jurisdiction of the court, and may be lost. In such a case, the court will interfere. (6 Harr. & Johns., 338; 8 Dan. Ch. Pr., 1611.) We offer to submit to any terms which the court may direct.

Messrs. Coxe and Carlyle contended that the appeal should be dismissed. The case arose upon marriage settlements, and was referred to the auditor. It was then set down for hearing by consent. Maryland Chancery Practice had nothing to do with the case. Adams had \$61,000, in his hands since June twelve-month. He has only given bond as executor, and not as trustee. We obtained a rule upon him to show cause why he should not pay over the money, and that question is not decided to this day.

Mr Justice McLean delivered the opinion of the court;

This is an appeal in chancery, from the decree of the Circuit Court for the District of Columbia.

*A motion is made by the appellant's [*147] counsel for a *supersedeas*, on the ground that the hearing of the case in the Circuit Court was brought on irregularly, and the decree entered in the absence of the principal counsel for the defendants below; that by reason of this, an appeal bond was not filed within ten days from the allowance of the appeal.

Mr. May, who makes this motion, states that he is the administrator of the estate of Thomas and Edmund Law, children of John Law, who in their lifetime were parties to the suit; and that he intended to appeal from the decree of the Circuit Court, if against him; that he had no notice of the cause being set for hearing; that he left the United States on public business, and was absent several months; that on his return he learned that a final decree had been entered against him, and that he had authorized no one to consent to the hearing of the cause out of its regular course.

It appears that two other counsel who appeared for other defendants, consented to the hearing in order that the cause might be taken to the Supreme Court, for ultimate decision; and these counsel understood the cause was to be appealed to the Supreme Court by consent, and that security for the money decreed to be paid would not be required. But both of these gentlemen state, in giving their assent to the hearing, they did not represent *Mr. May*, not being authorized to do so.

The suit in the Circuit Court was entitled, "*Joseph E. Law, by his next friend, Mary Robinson, v. Thomas Law et al., and James Adams executor of Thomas Law.*" The controversy

arose under the will of Thomas Law, deceased, and among other things the court decreed that James Adams, the trustee in the cause, who had sold certain property under the order of the court and had the proceeds in his hands, exceeding the sum of \$61,000, should pay over the money to the persons named in the decree, as entitled to the same. This decree was entered the 18th day of December, 1852; and an appeal to the Supreme Court of the United States was prayed on the same day. An appeal bond, in the sum of \$200, was filed the 9th of December, 1853.

The twenty-third section of the Act of 1789 provides, "that a writ of error shall be a *supersedeas*, and stay execution in cases only where the writ of error is served by a copy thereof being lodged for the adverse party in the clerk's office where the record remains, within ten days, Sundays exclusive, after rendering the judgment or passing the decree complained of, until the expiration of which term of ten days the execution shall not issue in any case where a writ of error may be a *supersedeas*. By the second section of the Act of March 3, 1803, [48] appeals are *declared to be "subject to the same rules, regulations and restrictions as are prescribed in law in case of writs of error."

Under this provision an appeal in chancery must be perfected, by giving an appeal bond within the ten days, to act as a *supersedeas*. In *Wallen v. Williams*, 7 Cranch, 278, the court refused to quash an execution issued by the court below to enforce its decree, pending a writ of error, as the writ was not a *supersedeas* to the decree. In *The Dos Hermanos*, 10 Wheat., 311, where the appeal was prayed within the five years limitation, the appeal bond being accepted by the court after that period, was held good, as having relation to the time of the appeal. "The mode of taking security and the time of perfecting it," the court say, "are matters of discretion, to be regulated by the court." But this cannot apply to a case where the appeal operates as a *supersedeas*. It must be brought strictly within the provisions of the law.

The appeal, in this case, was prayed on the same day the decree was entered; but the bond was not given until nearly a year afterwards. The appeal must be perfected within the ten days after the decree was entered, to operate as a *supersedeas*. To supersede a judgment at law the writ of error must be filed and bond given within the ten days. And the same rule is applied by the Act of 1803, to appeals in chancery.

The case of *Hardeman & Perkins v. Anderson*, 4 How., 642, is relied on as an authority under which a *supersedeas* may be issued in this case. In that case it appeared from the record, that the writ of error was issued and bond given within ten days after the judgment, and that the clerk of the District Court promised to transmit the record to the Supreme Court. It was transmitted, but by some delay was not received until a few days after the adjournment of the court, at the ensuing term. Before the adjournment, a certificate of the judgment having been obtained by the plaintiff's counsel, in the judgment, on motion, the cause was, under the rule of the court, docketed and dismissed. At the next term, on motion sustained by an

affidavit, showing that the defendant in the judgment had not been negligent in the cause, it was ordered to be docketed, and a writ of *supersedeas* was issued, not on the second writ of error which had been issued, but to give effect to the first writ. After the dismissal of the cause at the previous term, execution was issued on the judgment, and it was necessary, after the cause was entered upon the docket, to supersede that execution.

It does not appear from the facts in the case now before us, that it can be brought within any decision of this court. Whatever may have been the understanding of the counsel who appeared *in the defense, in the Circuit [*149] Court, as to an appeal of the case to the Supreme Court, by consent and without security, it is not made to appear that the counsel of the complainants assented to such an arrangement.

By the order of the Circuit Court, a copy of the decree was served on James Adams, the trustee; and also a rule to show cause why an attachment should not issue against him for not paying over to the parties the sums of money as required by the decree. His answer to the rule was filed, and a motion being made for an attachment, it was taken under consideration, and has not yet been decided.

This court cannot presume that the Circuit Court, in the exercise of their discretion, will take any step in regard to the decree, which shall place the fund at hazard or beyond the exercise of the appellate powers of this court.

The motion for a *supersedeas*, by the counsel for the plaintiffs in error, is overruled.

The court also overrule, under the circumstances, the motion of the defendant's counsel in error, for a *procedendo*.

A motion is also made by defendant's counsel to dismiss the appeal on the ground "that there is no case, as entitled on the record; and that the real parties interested in the case, of which a record is filed, are not made parties to the appeal."

After the decree was pronounced in the Circuit Court, the record states: "From which decree an appeal was prayed to the Supreme Court of the United States, on the 18th December, 1852, and to them it was granted." The word "defendants" is omitted in this prayer, but that must have been a clerical omission, as it appears the appeal was "granted to them," that is to the defendants.

The title of the case, if incorrectly entered on the docket of this court, may and should be corrected by the record filed. There is nothing in the record to show that the appeal by the defendants was not prayed by all of them.

The motion to dismiss is therefore overruled.

Order upon the motion to dismiss.

On consideration of the motion to dismiss this case, and for a writ of *procedendo*, filed by Mr. Cox in this case on the 16th ultimo, and of the arguments of counsel thereupon had, as well against as in support of said motion. It is now here ordered by the court that said motion be, and the same is hereby overruled.

Order upon the motion for a supersedeas.

On consideration of the motion for a *supersedeas*, filed by *Mr. Lawrence in this [*150] case on the 16th ultimo, and of the arguments

of counsel thereupon had, as well against as in support of the motion, it is now here ordered by the court, that said motion be, and the same is hereby overruled.

S. C.—17 How., 417.
Cited—19 How., 359; 22 How., 2; 10 Wall., 291; 19 Wall., 427, 430; 3 Otto, 88.

JOHN STUART, JOSEPH STUART,
JAMES STUART, AND WILLIAM H.
SCOTT, *Plaintiffs in Error*,

v.

HUGH MAXWELL.

Tariff Act—duty on manufactures.

The twentieth section of the Tariff Act of 1842 provides, that on all articles manufactured from two or more materials, the duty shall be assessed at the highest rates at which any of its component parts may be chargeable. (5 Stat. at L., 566.)

This section was not repealed by the general clause in the Tariff Act of 1846, by which all Acts, and parts of Acts, repugnant to the provisions of that Act (1846), were repealed.

Consequently, where goods were entered as being manufactures of linen and cotton, it was proper to impose upon them a duty of twenty-five per cent. *ad valorem*, such being the duty imposed upon cotton articles, in Schedule D, by the Tariff Act of 1846. (5 Stat. at L., 48.)

THIS case was brought up by writ of error from the Circuit Court of the United States for the Southern District of New York.

The plaintiffs in error, who were plaintiffs below, sued the collector to recover moneys for duties, paid under protest, alleged to have been overcharged at the port of New York, in July, 1849. Verdict and judgment for defendant.

The plaintiffs made entry at the custom house of goods as being "manufactures of linen and cotton." The appraisers reported them to be manufactures of cotton and flax.

Upon such goods Collector Maxwell charged duties at the rate of 25 per cent. *ad valorem*, according to the 20th section of the Act of 30th August, 1842, which enacted, " * * And on all articles manufactured from two or more materials, the duty shall be assessed at the highest rates at which any of its component parts may be chargeable." (5 Stat. at Large, by Little & Brown, p. 566, ch. 270.)

The collector applied this 20th section to schedule D, of the Act of 30th July, 1846 (9 Stat. at Large, by Little & Brown, p. 46, ch. 4), by which a duty of twenty-five per cent. *ad valorem* was imposed on "cotton laces, cotton insertings, cotton trimming laces, cotton lace and braids, * * ; manufactures composed wholly of cotton, not otherwise provided for;" being so instructed by the acting secretary of the Treasury, by circular of May 2, 1849.

"The plaintiffs, in their protest, contended, 'that under existing laws, said goods are liable to a duty of twenty per cent. as a non-enumerated article.' * * 'under the 20th section of the Tariff of 30th of July, 1842,' dated 25th July, 1849, and 8th January, 1850."

The plaintiffs proved by witnesses, that the goods were entered at the customs in schedule A,

were reported by the appraisers as manufactures of cotton and flax; that he paid the duties thereon at the rate of twenty-five per cent. *ad valorem*; that they were manufactures composed of cotton and flax; "that the proportion of flax in the goods varies considerably, being in some about a half, in others about a third or a fourth; but that the flax is the material of chief value in the goods; that the appraisers' report of the goods as 'manufactures of flax and cotton,' means that the fabrics were composed of linen and cotton combined. None of them were manufactures of cotton or flax alone."

The plaintiffs' counsel prayed the court to instruct, "that if the jury shall find from the evidence that the goods in question were manufactures of 'linen and cotton combined,' and not 'manufactures composed wholly of cotton,' then that duty was exacted at the rate of twenty-five per cent. *ad valorem*, when the goods were subject only to twenty per cent. *ad valorem*, as a non-enumerated article, under the 3d section of the Tariff of 1846." That instruction the court refused:

And charged the jury, that if they believe the goods in question are manufactures of flax and cotton combined, then, inasmuch as the 20th section of the Tariff of 1842, directs that "on all articles from two or more materials the duty shall be assessed at the highest rate at which any of its component parts may be chargeable, the goods in question are subject to the same charge as articles enumerated under schedule D, as if manufactures composed wholly of cotton not otherwise provided for, and that they are therefore not articles subject to the duty of twenty per cent. only under 3d section of the Tariff of 1846."

To the refusal to charge as moved by plaintiffs, and to the charge as given to the jury, the plaintiffs excepted.

Upon this exception the case came up to this court.

It was argued by *Mr. John S. McCulloch* for the plaintiffs in error, and by *Mr. Cushing* (Attorney-General) for the defendant.

Mr. McCulloch filed a voluminous brief, from which the reporter can only make an extract, and selects that point upon which the decision of the court appeared chiefly to turn, namely: the 4th point in the brief; and upon this point he is obliged to omit the arguments [*152 and illustrations under the heads B and C.

The points made by *Mr. McCulloch*, were the following:

The court erred in refusing to rule, as prayed by the plaintiffs, that the goods being "manufactures of cotton and linen combined," and not "manufactures composed wholly of cotton," were subject to only twenty per cent. *ad valorem*, as "non-enumerated articles," under section 3d of the Tariff of 1816; and also in charging the jury that "the goods were liable to twenty-five per cent. duty under schedule D, as if they were manufactures composed wholly of cotton, because the 20th section of the Tariff of 1842 directed that in all articles manufactured from two or more materials, the duty shall be assessed at the highest rate at which any of the component parts may be chargeable." for the following reasons, to wit:

1st. The Tariff of 1846, by its first section,

substitutes the rates of duty thereby assessed upon the merchandise specifically enumerated in its schedules from A to H, in lieu of the duties theretofore imposed by all previous laws on the articles therein enumerated, and on such articles as were then exempt from duty.

2d The Tariff of 1846 specially enumerates, in its schedule I, all articles that should be exempt from duty.

3d. All articles not specially enumerated in the schedules from A to I of the Tariff of 1846, pay a duty of twenty per cent. only, and no more.

4th. The provisions of the 20th section, Tariff of 1842, which require that "on all articles manufactured from two or more materials, the duty shall be assessed at the highest rates at which any of its component parts may be chargeable," are inconsistent with and repugnant to, (a.) The object and policy of the Tariff of 1846; (b.) The provisions of section 1 and schedules D and E of the Tariff of 1846; (c.) The 3d section of the Tariff of 1846.

5th. But the 20th section of the Tariff of 1843 is not merely a principle or rule of construction, and it cannot, when applied to the Act of 1846, bring any article not specially named within any of the schedules from A to I, of 1846, nor take any article out of the provision of section 3, which imposes twenty per cent. on all articles not enumerated in said Act of 1846.

(a.) The object and policy of the Act of 1846 do not permit the 20th sec. of the Tariff of 1842 to operate on the 3d sec. of 1846.

The Act of 1841, ch. 24 (5 L. U. S., 463, 464), is the first act in which this clause occurs; and the Act of 1841 had for its object the carrying out of the policy of the Compromise Act of 1838, ch. 55 (4 L. U. S., 629), and by its first section provides, that "on articles then (11th Sept., 1841) exempt from duty," or "then paying *less than twenty per cent. *ad valorem*," there should be levied and paid (after the 30th September, 1841) a duty of twenty per cent. *ad valorem*," except on the articles thereby exempted by name, &c. Then by its 2d section, 1841, ch. 24, directs, "That on every enumerated article, similar in material, quality, texture or use, to any enumerated article chargeable with duty, there shall be levied the same rate of duty which is levied on the enumerated article which it most resembles, &c.; and if it resembles equally two or more enumerated articles on which different rates of duty are now chargeable, there shall be levied the same rate of duty as is chargeable on the articles which it resembles, paying the highest duty; and on all articles manufactured from two or more materials, the duty shall be assessed at the highest rates at which any of its component parts may be chargeable;" this is followed by two provisos, namely: 1st. That if a duty higher than twenty per cent. shall be levied under the section, it shall not affect the disposition of the proceeds of the public lands. 2d. That no higher rate than twenty per cent. shall be charged on any unmanufactured article.

The Act of 1841 does not profess to change the object of the Compromise Act, but aims at the levying of an uniform rate of twenty per cent. *ad valorem*, which was the uniform

rate which the biennial reductions under the Compromise Act intended to effect. (See 1838, ch. 55, 4 L. U. S., 629.)

The 20th section of Tariff 1842, is identical in words with the Act of 1841, sec. 2, except that the "now" and the two provisos are dropped.

The terms "non-enumerated articles," used in the Act of 1841, then mean "articles" not specially named in the Tariffs of 1832, July 14th, and 1833, ch. 55.

The same terms, "non-enumerated articles," used in sec. 20, Tariff of 1842, have necessarily relation to sec. 10 of the Act of 1842, which declares, "That on all articles not herein enumerated or provided for, there shall be levied, collected, and paid a duty of twenty per cent. *ad valorem*." The Act of 1842, ch. 270, by its sections from 1 to 9, inclusive, had substituted the duties ther. in specified on the articles thereby enumerated in lieu of the rates theretofore existing; and by its sections 10 and 20, prescribed twenty per cent. for articles not specially named or enumerated in said Act, with the direction, that if higher duties could be exacted by reason of the material, texture, quality, use or fabric of articles not enumerated in said Act, such higher rates of duty should be taken.

The words of the 20th section are in the present tense. They are "the same rate of duty which is levied and charged," and the terms *therein of "may be chargeable," can [*154 only relate to the charging by said Act, because: 1st, it repealed all other rates theretofore laid, secs. 1 and 26; and 2d, all Revenue Acts in fixing rates of duty speak of the rates established in said Acts, or in former Acts; and 3d, to make provisions prospective rules for finding rates, express words of future efficacy must be employed. (See *Mills v. St. Clair Co. et al.*, 8 How., 569; *Amer. Fur Co. v. U. S.* 2 Pet., 358.)

And in sec. 20 of Tariff of 1842, no prospective words to control the rates that might thereafter be levied exist.

There never were any rules established by Acts of Congress, nor by judicial decisions, by which it was laid down as a principle, "that if any article were composed of two or more materials it should, to favor commerce, be rated according to that component which was subject to the lowest rate of duty." The whole of the Tariff Acts of the United States proceed upon this plan: 1st, enumerating the articles subjected to given rates of duty; 2d, enumerating those exempted; and 3d, fixing an uniform rate or rates on articles not specially enumerated.

The courts have as uniformly held, that the only rules for finding the rates of duty were to look for the article: "1st. Among those named by species or class. 2d. Among those exempted. And 3d. If not there found, it was non-enumerated." Such have been the decisions in *Elliot v. Swartwout*, 10 Pet., 137; *Hardy v. Hoyt*, 18 Pet., 292. The rules have been by the courts recognized to be these: 1st. The commercial name or class is to govern, and if the article belong equally well to two classes, the lowest tax shall be taken (ex. flax seed and linseed, schedules E and G, Tariff, 1846). 2d. That a slight difference in the make of the ar-

article shall not exclude it from its class. (See *Hall v. Hoyt*, Ex. Doc., No. 49, 26th Cong., sec. 18, p. 33; *Elliot v. Swartwout*, 10 Pet., 137; 4 Cranch, 1; 5 Cranch, 284.)

3d. That an article must have its entire fabric composed of hemp or flax to fall within the description of a manufacture of flax or hemp. (See *Hoyt v. Haight*, Ex. Doc., No. 49, 26th Cong., sec. 1, p. 36.)

4th. That an article composed of two materials, such as hemp and flax, if manufactures of hemp or flax be not specially enumerated as a class, is a non-enumerated article. (See *Hoyt v. Haight*, Ex. Doc., No. 49, 26th Cong., sec. 1, p. 36.)

5th. That if an article is not, at the time of the passage of the Tariff Act, known by the name or class used in the tariff, then it is a non-enumerated article; and the use to which it may be put makes no difference. (See *Curtis v. Martin*, 3 How., 106, article Cotton Bagging.)

A comparison of the rates of duty assessed [155*] by the Tariff of 1842, with those assessed by the Tariff of 1846, has been authentically made, and is contained in Ex. Senate Doc., No. 227, 29 Cong., 1 sess., pp. 78 to 100. And by an attentive examination of that document, it will be perceived that in the Tariffs from 1789 to 1816 the rates were laid very uniformly; that from 1816 to 1833 they gradually increased; that the Tariff of 1842 is the most discriminative in favor of American manufactures, and laid higher duties than any other tariff of the United States.

The Act of 1846, then, from this comparison, merits the title which it bears, namely: "An Act reducing the duty on imports and for other purposes." The object and design of the Act of 1846 was, then,

1st. To reduce the duties on imports.

2d. Thereby to increase the revenue, in view of the Mexican war, &c.

3d. To specify all articles by name, and subject them to duty thereby; to exempt some few from duty, and to provide an uniform rate for all not enumerated.

The title of a revenue act guides in its interpretation. (*Stradling v. Morgan*, Plow., 208; *King v. Cartwright*, 4 T. R., 490; *The King v. G. Marks et al.*, 3 East, 160; *Rez v. Inhabitants of Guenop*, 3 T. R., 133.)

So the preamble is also a guide to the interpretation of such an act. (*Salkeld v. Johnson*, 1 Hare, 207; *Emanuel v. Constable*, 3 Russ., 436; *Foster v. Banbury*, 3 Sim., 40; *U. S. v. Palmer*, 3 Wheat., 610; *State v. Stephenson*, 2 Bail., 334; *Burgett v. Burgett*, 1 Ham., 469.)

Looking back over the statute book at the Act of 1841, it was evidently framed upon the idea of the Compromise Act of 1833, and its second section enacts the rules of similitude and highest duty paying the component only with reference to articles which were then not enumerated by the then existing Tariff Acts.

And the Act of 1842 was intended to levy the highest possible rates on all manufactures, with the view of protecting domestic manufactures, and hence it enacted by section 20 that similitude and highest duty paying component, as by that Act assessed, should be grafted upon the 10th section, which assessed twenty per cent, *ad valorem* "on all articles not therein enumerated or provided for." This is con-

clusively shown when the 10th and 20th sections are read as one section, according to the rule that requires one clause to be read with other clauses, in order to determine the sense of the words used. (*Crespigny v. Wittenoom*, 4 T. R., 791; 4 Bing, 196; *The Emily and The Caroline*, 9 Wheat., 384; 1 Inst., 381; *Stowell v. Zouch*, Plow., 365; 1 Show., 108; *Rez v. Burchett*, Hard., 344.)

**Mr. Cushing* (Attorney-General) con- [*156 tended that there was no error in the instructions of the Circuit Court.

Linen is itself a manufacture, a thing made by art, a cloth made of flax or hemp, not a material for manufacture. The entry made by the plaintiffs at the custom house of their goods, as "manufactures of linen and cotton," was an absurd description, a vulgarity which could not change the materials of which the goods were manufactured, a stratagem which could not elude the revenue laws, nor stop the official appraisers from reporting the truth, that the goods so entered, were manufactures of cotton and flax. So the appraisers reported; so the plaintiff's own witness proved.

The 20th section of the Act of 30th August, 1842, is in force. It is not repealed by the Act of 30th July, 1846.

The 11th section of the Act of 30th July, 1846, enacts, "That all Acts and parts of Acts repugnant to the provisions of this Act be, and the same are hereby repealed." There is nothing in this Act of 1846 repugnant to the provisions of the 20th section of the Act of 30th August, 1842. They can stand together with consistency.

In *Wood v. United States*, 16 Pet., 362, 363, this court stated the rule, that, "It is not sufficient to establish that subsequent laws cover some, or even all of the cases provided for by it: for they may be merely affirmative, or cumulative or auxiliary. But there must be a positive repugnancy between the provisions of the new law and those of the old, and even then the old law is repealed by implication only, *pro tanto*, to the extent of the repugnancy. And it may be added, that in the interpretation of all laws for the collection of revenue, whose provisions are often very complicated and numerous, to guard against frauds by importers, it would be a strong ground to assert that the main provisions of any such laws sedulously introduced to meet the case of a palpable fraud, should be deemed repealed, merely because in subsequent laws other powers and authorities are given to custom house officers, and other modes of proceeding are allowed to be had by them, before the goods have passed from their custody, in order to ascertain whether there has been any fraud attempted upon the government. The more natural, if not the necessary inference in all such cases is, that the Legislature intend the new laws to be auxiliary to and in aid of the purposes of the old law, even when some of the cases provided for may be equally within the reach of each. There certainly, under such circumstances, ought to be a manifest total repugnancy in the provisions to lead to the conclusion that the latter laws abrogated, and were designed to abrogate, the former."

*The law does not favor repeals by [*157 implication; nor is it to be allowed, unless the

repugnancy be quite plain; and although the Acts be seemingly repugnant, yet they should, if possible, have such construction that the latter may not be a repeal of the former by implication. (Bac. Abr., Stat. D: *Poster's* case, 11 Coke, 63; *Weston's* case, 1 Dyer, 347; *Snell v. Bridgewater Cotton Gin Man. Co.*, 24 Pick., 296, 298; *Dwarris* on Statutes, ed. 1848, p. 531, 533; *Smith's* Com., ch. 19.)

"A later statute on a given subject, not repealing an earlier one in terms, is not to be taken as a repeal by implication, unless it is plainly repugnant to the former, or unless it fully embraces the whole subject matter." (Per *Shaw, Ch. J.*, *Goddard v. Barton*, 20 Pick., 407, 410.)

"Acts *in pari materia* are to be taken together as one law, and are to be so construed that every provision in them may, if possible, stand. Courts, therefore, should be scrupulous how they give sanction to supposed repeals by implication." (Per *Wilde, J.*, *Haynes v. Jenks*, 2 Pick., 172, 176.)

Therefore it seems clear that the 20th section of the Act of 1842 is in force.

"The correct rule of interpretation is, that if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them, and it is an established rule of law, that all acts *in pari materia* are to be taken together, as if they were one law." (*United States v. Freeman*, 3 Pow., 564; *Ailesbury v. Pattison*, 1 Doug., 90; *Rez v. Lordale, et al.*, 1 Burr., 447; Bac. Abr., Stat. I., pl. 21, 22, 23, 24.)

From these authorities, the 20th section of the Act of 1842, and the Act of 1846, July 30th, relating to duties on imports, "are to be taken together, as if they were one law." By the law, a duty of twenty-five per cent. *ad valorem* is imposed on goods mentioned in schedule D, which comprises manufactures of cotton; and a duty of twenty per cent. *ad valorem* is imposed on goods mentioned in schedule E, which comprises manufactures of flax, and manufactures of hemp. But the goods entered by the plaintiff at the custom house, which are the subjects of this suit, were manufactures composed of cotton and flax, partly of the one material and partly of the other. None of them were composed wholly of flax, nor wholly of cotton, but compounded of both. Therefore, by the said 20th section, the duties upon such articles, manufactured from the two materials of cotton and flax were chargeable with the duty "assessed at the highest rates at which any of its component parts may be chargeable."

The 3d section of the Act of 1846 (Vol. IX., 158*) p. 46, ch. 74), *which imposes "On all goods, wares and merchandise, imported from foreign countries, and not specially provided for in this Act, a duty of twenty per cent. *ad valorem*," must be understood as comprehending only such articles, whether simple or compound, manufactured or not manufactured, as are not of any of the materials charged with duties by the Act of 1846.

If that 3d section be not so limited, and the said 20th section of the Act of 1842 be not applied to all articles manufactured from two or more of the materials charged with duty in the several schedules of the Act of 1846, then rates of duty above twenty per cent. may, in a

great variety of articles, be evaded and reduced to twenty per cent. by manufacturers, entered under new names, composed of two or more materials, one or more of them chargeable with a duty of one hundred, or of forty, or of thirty, or of twenty-five per cent. *ad valorem*, and mixed with a material or materials chargeable with the lower rates of duty.

It is the necessary and proper understanding of this 3d section, that it be confined and limited as above mentioned, and that the 20th section of the Act of 1842 be applied to all articles manufactured from two or more articles chargeable with duty. If the decision of the Circuit Court in this case is not sustained, we may expect a swarm of entries to be made at the custom houses, of manufactures under new names, in evasion of the duties above the rate of twenty per cent. *ad valorem* intended by the Act of 1846. This suit to recover back duties above twenty per cent. *ad valorem* upon goods manufactured of cotton and flax, entered at the custom house as "manufactures of linen and cotton," and subject only to a duty of twenty per cent., as nondescripts in the several schedules, A, B, C, D, E, F and G, is the beginning of a stratagem to elude the revenue laws, which, if successful, may be continued and accompanied by others of the kind.

Mr. Justice Curtis delivered the opinion of the court:

The plaintiff in error brought this action in the Circuit Court of the United States for the Southern District of New York, against the defendant, who was formerly collector of the customs of the port of New York, to recover moneys alleged to have been illegally exacted as duties. The plaintiffs entered at the custom house certain goods as "manufactures of linen and cotton," and claimed to have them admitted on payment of the duty of twenty per cent. levied on unenumerated articles under the 3d section of the Tariff Act of 1846. The defendant insisted that the 20th section of the Tariff Act of 1842 was in force, and that by force of it these goods, being manufactured *part-[*159 ly of cotton, must be assessed twenty-five per cent., that being the duty imposed by the Act of 1846 upon manufactures of cotton not otherwise provided for. If these articles are, for the purpose of fixing the amount of duty, deemed by law to be manufactures of cotton, it is not denied that the duty was rightly assessed. And whether they are to be so reckoned and treated, depends upon the question whether the 20th section of the Act of 1842 was repealed by the Tariff Act of 1846.

The 20th section is as follows: "That there shall be levied, collected and paid on each and every non-enumerated article which bears a similitude either in material, quality, texture, or the use to which it may be applied, to any enumerated article chargeable with duty, the same rate of duty which is levied and charged on the enumerated article which it most resembles in any of the particulars before mentioned; and if any non-enumerated article equally resembles two or more enumerated articles on which different rates of duty are chargeable, there shall be levied, collected and paid on such non-enumerated article the same rate of duty as is chargeable on the article it

resembles paying the highest rate of duty; and on all articles manufactured from two or more materials, the duty shall be assessed at the highest rates at which any of its component parts may be chargeable."

This section is a re-enactment of the 2d section of the Tariff Act of 1841. (5 Stat. at Large, 464.)

The repealing clause in the Act of 1846 is "that all Acts and parts of Acts repugnant to the provisions of this Act be, and the same is hereby repealed. It is alleged by the plaintiffs that repugnance exists between the 20th section of the Act of 1842 and the Act of 1846. The argument is, that the Act of 1846 divides all imports into three classes; first, those specified which are to be free of duty; second, those specified which are required to pay different but specific rates of duty; third, those not specially provided for in the Act, which are required to pay a duty of twenty per cent. *ad valorem*; that a manufacture of cotton and flax not being included, *nominatim*, among the imports which are to be exempted from, or subject to duty, is necessarily embraced within the class of non-enumerated articles, and so are liable to a duty of twenty per cent. only; and that this argument is strengthened by the fact that, in Schedule D, manufactures composed wholly of cotton are taxed twenty-five per cent.; and that if it had been intended to tax manufactures composed partly of cotton and partly of flax with a duty of twenty-five per cent., they would have been specifically mentioned in this schedule; and that it is not [160*] admissible, under an act which, in terms, levies a tax of only twenty per cent. upon all imports not specially provided for, to levy a tax of twenty-five per cent upon an import not named or described in the Act as liable to that rate of duty.

The force of this argument is admitted. It is drawn from sound principles of interpretation. But on a careful consideration of this case, we are of opinion that it ought not to prevail in the construction of this law.

The Act of 1846 is a revenue law of the United States, and must be construed with reference to acts *in pari materia*, of which it forms only one part. This observance of a settled principle for the construction of statutes is absolutely necessary in the present state of the legislation of Congress on the subject of revenue. Without it, the public revenue could not be collected, and inextricable embarrassments and difficulties must constantly occur. We are obliged to look at the whole existing system, and consider the nature of the subject matter of the enactment under consideration, in its relations to that system, in order to pronounce with safety upon its repugnancy to, or consistency with, any particular Act of Congress.

In the first place, then, it must be observed, that the 20th section of the Act of 1842 does not impose any particular rate of duty upon imports. It was designed to afford rules to guide those employed in the collection of the revenue, in certain cases likely to occur, not within the letter, but within the real intent and meaning of the laws imposing duties, and thus to prevent evasions of those laws. Manufacturing ingenuity and skill have become very

great; and diversities may be expected to be made in fabrics adapted to the same rules, and designed to take the same places as those specifically described by some distinctive marks, for the mere purpose of escaping from the duty imposed thereon. And it would probably be impossible for Congress by legislation to keep pace with the results of these efforts of interested ingenuity. To obviate in part at least, the necessity of attempting to do so, this section was enacted.

It does not seem to be any more repugnant to the provisions of the Act of 1846 than the great number and variety of provisions of the revenue laws, whose object was to cause the revenue to be regularly and uniformly collected without evasion or escape. If this Act of 1846 had in terms enacted the 20th section of the Act of 1842, its provisions would not thereby have been rendered repugnant or conflicting. This section would then only have afforded a rule by which it could be determined that certain articles did substantially belong to and were to be reckoned as coming under a particular schedule. This is apparent, not only from a consideration of the subject matter of the 20th section, when compared [*161] with the Act of 1846, but from the fact that this 20th section actually made part of an act whose subject matter, and the outline of whose provisions, were the same as those of the Act of 1846. The Act of 1842 levied duties on certain imports specifically named. It declared certain other articles, also specifically named, to be exempt from duty, and it provided that a duty of twenty per cent. *ad valorem* should be levied on all articles not therein provided for. Yet this 20th section made a consistent part of that Act. The 26th section of the Act of 1842 provides, "that the laws existing on the first day of June, 1842, shall extend to and be in force for the collection of the duties imposed by this Act on goods, wares and merchandise imported into the United States, and for the recovery, collection, distribution and remission of all fines, penalties and forfeitures, and for the allowance of the drawbacks by this Act authorized, as fully and effectually as if every regulation, restriction, penalty, forfeiture, provision, clause, matter and thing in the said laws contained had been inserted in and re-enacted by this Act.

The Act of 1846 contains no corresponding provision. So that unless we construe the Act of 1846 substantially as an amendment of the Act of 1842, merely altering its provisions so far as the latter enactment is inconsistent with the former, the entire instrumentalities for the collection of the revenue under the Act of 1846 would be wanting, and the duties which it requires to be paid could not be collected. It is quite apparent, therefore, that a great number and variety of provisions designed to protect the revenue against mistakes, evasions and frauds, and to guard against doubts and questions, and to secure uniformity of rates in its collection, owe their present operation upon the duties levied by the law of 1846, to the vitality given to them by the law of 1842, and must be considered now to be the law because the Act of 1842 made them, in effect, a part of its enactments, and because the Act of 1846 does not interfere with that enactment by

which they were made so. And it must be further observed that these provisions of the 20th section of the Act of 1842 are of the same nature as those thus left in force under the 26th section of the Act of 1842, having been designed to remove doubts, to promote uniformity, and to check evasions and frauds.

There is nothing, therefore, in the general scope of the Act of 1846 repugnant to the rules prescribed in this 20th section of the Act of 1842. Is there in its particular phraseology?

It is strongly urged that there is; that the terms of the 3d section are wholly inconsistent with the attempt to bring any article under either of the schedules, by operation of any law [162*] *outside of the Act of 1846. That this 3d section enacts, in clear terms, that a duty of twenty per cent. *ad valorem* shall be levied on all goods "not specially provided for in this Act;" and that to levy a higher rate of duty, by force of a provision of some other act, is directly in conflict with the express words of the law. It must be admitted there is great force in this argument. It has received due consideration, and the result is, that in our opinion it is not decisive. In the first place, it may be justly said that if the Act of 1846 has specially provided for manufactures of cotton, and has at the same time left in force a rule of law which enacts that all manufactures of which cotton is a component part shall be deemed to be manufactures of cotton, if not otherwise provided for, it has, in effect, provided for the latter. By providing for the principal thing, it has provided for all other things which the law declares to be the same. It is only upon this ground that sheer and manifest evasions can be reached. Suppose an article is designedly made to serve the uses and take the place of some article described, but some trifling and colorable change is made in the fabric or some of its incidents. It is new in the market. No man can say he has ever seen it before, or known it under any commercial name. But it is substantially like a known article which is provided for. The law of 1842 then declares that it is to be deemed the same, and to be charged accordingly; that the Act of 1846 has provided for it under the name of what it resembles. Besides, if the words "provided for in this Act" were to have the restricted interpretation contended for, a like interpretation must be given to the same words in other revenue laws, and the most prejudicial consequences would follow; such consequences as clearly show it was not the intention of Congress to have these words so interpreted.

Thus the 26th section of the Act of 1842, already cited, adopts existing laws for the collection of duties "imposed by this Act," for the collection of penalties and remission of forfeitures, and the allowance of drawbacks "by this Act authorized." Yet, as has already been said, it is by force of this adoption that the duties and penalties under the Act of 1846 are collected. It is manifest that the structure of the revenue system of the United States is not such as to admit of this exact and rigid interpretation; that the real intention of the Legislature cannot thus be reached. The true interpretation we consider to be this: the 26th section

of the Act of 1842 having re-enacted the then existing laws, and applied them to the collection of duties levied by that Act when Congress, by the Act of 1846, merely changed the rates of duty, without legislating concerning their collection, the laws in force on that subject are to be applied; *and this application is not [*163] restrained by the fact, that, when re-enacted by the Act of 1842, they were declared to be so for the purpose of collecting the duties by that Act imposed. The new duties merely take the place of the old, and are to be acted on by existing laws as the former duties were acted on; and among these existing laws is that which affords a rule of denomination, so to speak; which determines under what designation in certain cases a manufacture shall come, and how it shall be ranked; when this has been determined, the Act of 1846 levies the duty.

It is urged, that in the Act of 1846, special provision is made for certain manufactures composed partly of cotton, and that this shows no general rule was in operation imposing a particular rate of duty on articles made partly of cotton. But that this would not be a safe inference is evident from the fact that the Act of 1842 imposes the same rate of duty on manufactures of wool and of manufactures of which wool is a component part, worsted and worsted and silk; cotton, or of which cotton shall be a component part; yet this Act of 1842 contained the section now under consideration. It may be observed, also, that schedule D, in the Act of 1846, after manufactures composed wholly of cotton, goes on to specify cotton laces, cotton insertings, trimming laces and braids, &c.

It would not be safe for the court to draw any inference from the apparent tautology of those parts of a revenue law describing the subjects of duty. In most cases, the terms used being addressed to merchants, are to be understood in their mercantile sense, the ascertainment of which is matter of fact, depending on evidence; and that which may seem merely tautologous might turn out to be truly descriptive of different subjects.

On the whole, our opinion is, that there is no necessary repugnance between the Act of 1846 and the 20th section of the Act of 1842, and consequently the former did not repeal the latter, and the duty in question was rightly assessed.

The judgment of the Circuit Court is therefore affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of New York, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

Mr. Justice Grier dissented.

Cited—17 How., 93; 23 Wall., 331; 6 Otto, 117, 120; 18 Otto, 433; 2 Sawy., 532, 534; 5 Blatch., 4.

164*] *ALEXANDER CROSS, WILLIAM L. HOBSON, AND WILLIAM HOOPER, trading under the Name and Style of **CROSS, HOBSON & COMPANY, Plaintiffs in Error,**

v.

EDWARD H. HARRISON.

When in the formation of military and civil governments in California, tonnage and import duties might be levied.

In the war with Mexico, the port of San Francisco was conquered by the arms of the United States, in the year 1846, and shortly afterwards the United States had military possession of all of Upper California. Early in 1847 the President of the United States, as Constitutional Commander-in-chief of the Army and Navy, authorized the military and naval commanders of the United States forces in California to exercise the belligerent rights of a conqueror, and to form a civil and military government for the conquered territory, with power to impose duties on imports and tonnage for the support of such government, and of the army, which had the conquest in possession.

This was done, and tonnage and import duties were levied under a war tariff, which had been established by the civil government for that purpose, until official notice was received by the civil and military Governor of California, that a Treaty of Peace had been made with Mexico, by which Upper California had been ceded to the United States.

Upon receiving this intelligence the governor directed that import and tonnage duties should thereafter be levied in conformity with such as were to be paid in the other ports of the United States, by the Acts of Congress; and for such purpose he appointed the defendant in this suit, collector of the port of San Francisco.

The plaintiffs now seek to recover from him certain tonnage duties and imports upon foreign merchandise paid by them to the defendant as collector between the 3d of February, 1848 (the date of the Treaty of Peace), and the 12th of November, 1849, (when the collector appointed by the President, according to law, entered upon the duties of his office), upon the ground that they had been illegally exacted.

The formation of the civil government in California, when it was done, was the lawful exercise of a belligerent right over a conquered territory. It was the existing government when the territory was ceded to the United States, as a conquest, and did not cease as a matter of course, or as a consequence of the restoration of peace; and was rightfully continued after peace was made with Mexico, until Congress legislated otherwise, under its constitutional power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.

The tonnage duties, and duties upon foreign goods imported into San Francisco, were legally demanded and lawfully collected by the civil governor, whilst the war continued, and afterwards, from the ratification of the Treaty of Peace until the revenue system of the United States was put into practical operation in California, under the Acts of Congress passed for that purpose.

THIS came up by writ of error from the Circuit Court of the United States for the Southern District of New York.

Cross, Hobson & Co., brought an action of *assumpsit* to recover back from Harrison, moneys paid to him while acting as Collector of Customs at the port of San Francisco, in California, for tonnage on vessels and duties on merchandise, not of the growth, produce or manufacture of the United States, imported by the plaintiffs from foreign places into California, and there landed, between February 3, 1848, and November 12, 1849.

The plea was *non assumpsit*, and the verdict and judgment were for Harrison, in January, 1852.

HOWARD 16.

The bill of exceptions contained the substance of much testimony *offered by [*165 the plaintiff (which it is not necessary to recite), and also the whole of the Senate Document, No. 18, of the first session of the thirty-first Congress. The opinion of the court contains a statement of the material parts of this evidence.

The case was argued by *Messrs. Richard T. Merrick and James W. McCulloch*, upon a brief filed by himself and *Mr. John S. McCulloch*, for the plaintiffs in error, upon which side there was also filed a brief by *Messrs. Rockwell and Lawrence*; and by *Mr. Cushing* (Attorney-General) for the defendant in error.

The briefs on both sides were so elaborate that only a portion of each can be inserted; and those parts are selected which relate to the legality of continuing, after the peace, the government which had been established during the war.

The points for the plaintiffs in error, as stated by the *Messrs. McCulloch*, were the following points.

1st. That on foreign goods or vessels brought into California, between the 3d of February, 1848, and the 3d of March, 1849, and between the 3d of March, 1849, and the 12th of November, 1849, duties did not accrue to the United States, and their exaction was therefore illegal.

2d. That on foreign goods and vessels brought into California between the 3d of February, 1848, and the 12th of November, 1849, the defendant had no authority by any treaty or law of the United States to collect duties, and their exaction was therefore illegal.

3d. Between the 3d of February, 1848, and the 12th of November, 1849, the defendant was not authorized, by any law of the United States, to require the plaintiffs to go with or send to a port within a collection district of the United States, foreign goods and vessels, and there pay duties, before the plaintiffs should bring the same into California; nor to put plaintiffs to elect between so doing and the paying of duties to the defendant.

4th. That after the 23d of February, 1849, when the plaintiffs protested against the exactions made, or to be made, the defendant was not justified in paying over the moneys therefore or thereafter exacted to the use of the United States, or any other person.

5th. That the plaintiffs are entitled to the customary interest of California, on all sums exacted by defendant by duress, and against protest, on goods and vessels brought into California between the 3d of February, 1848, and the 12th of November, 1849.

6th. That on the whole evidence, no part of the duties claimed were paid voluntarily, but each and every of them were exacted by compulsion and duress.

*Under the foregoing points, the [*166 plaintiffs in error will rely upon the following authorities:

1st. Between the 3d of February, 1848, and the 12th of November, 1849, duties did not accrue to the United States in California.

(a.) The wisdom, goodness and power necessary for the protection of the general welfare and peace of the people, are the only source from which is derived the authority to exercise

the sovereignty of the nation. (1 Burlamaqui Nat. Law, ch. 9. pp. 83, 89.) And on these the power to reward and punish rests. (*Id.*, 93.) The powers which the sovereign exercises are those which relate to internal administration. (2 Burlamaqui, Pt. 3, ch. 1, p. 152. And next, those which regulate foreign or external administrations. (3 *Id.*, Pt. 4, ch. 1, p. 220.) Among this last class are the powers of making offensive or defensive war, of concluding treaties and alliances, of controlling the immigration of foreigners, and of regulating commerce. By the laws of war, the sovereign acquires the right to spoil, plunder and destroy the goods of his enemy, and possess his lands. (2 Burlamaqui, Pt. 4, ch. 7, p. 290, &c.) In order to indemnify for the expenses of war out of his enemies' goods and lands, and while the conqueror continues in possession of the lands, he is sovereign over them, and of all within them; and may either admit the vanquished to the rights of subjects, or banish them as enemies from the country, for the sovereignty thus acquired is absolute. (2 Burlamaqui, Pt. 4, ch. 8, sec. 12, p. 309.) And from these rights of war flows the sovereign power of making treaties, equal or unequal. (2 Burlamaqui, Pt. 4, ch. 9, pp. 314, 317, 319), and whether in war or in peace—such treaties being unequal whenever they limit the powers of the foreign sovereign; as by stipulating that the conqueror's consent shall be had before the foreign sovereign can act in any given way. (*Id.*, sec. 13, p. 319.)

The power to regulate foreign commerce necessarily includes, as one of its incidents, the power to lay imposts on foreign goods, or even to prohibit them entry (Vattel's Law of Nations, bk. 1, ch. 8, p. 39), whenever the welfare of the State demands it. The right to trade with a foreign nation is therefore conventional, and the treaty that cedes the right is the measure or limit thereof—dependent on the will of the foreign sovereign, and not a right of prescription. And a foreign nation may limit its foreign trade to itself, or to its own vessels, by treaty or otherwise. (Vattel, bk. 2, ch. 2, p. 121.)

During the flame of war, a nation may sell or abandon part of its public property (Vattel, bk. 1, ch. 21, p. 105), though, if the sovereign be not absolute, this may require the concurrence [167*] of his co-ordinates, the people. The empire of sovereignty, and the domain of property, are not inseparable—for the nation may have its sovereignty but not its domain—which may be held in the possession of a foreign nation, either by war or treaty. (Vattel, bk. 1, ch. 23, p. 118.)

(b.) The sovereign who acquires a country by conquest or treaty, has the exclusive right to legislate in regard to it, and may impart this right to another; and the country so acquired may be retained in a subject condition, or be erected into a colony.

The laws of the conquered or ceded country main, until changed by the sovereign conqueror, who may change the political form of government; but the laws of trade remain. (Dwarr. on Stat., 907; *Hall v. Campbell*, Cowp., 204; *Calvin's case*, 7 Rep., 176.) And where the power to legislate therein has been granted by charter or statute to another, there the laws of the conqueror do not extend into such territories. (Dwarr., 526, 527; 3 and 4 William

IV., ch. 93, relating to the Governor and Council of India.)

But where the country is acquired by the right of occupancy and discovery, and peopled by the subjects of the sovereign who makes the discovery, the colonists carry with them such laws of their sovereign as may be applicable to their condition. (Dwar. on Stat., 905; *Attorney-General v. Stuart*, 2 Merriw., 143.)

All laws, beneficial to such colonies, go with the colonists; but penal laws, inflicting forfeitures and disabilities, never extend to colonies not in *esse* (*Davies v. Painter*, Freeman, 175; Dwarr., 527), nor do laws of tithes, bankruptcy, mortmain or police.

The laws of the sovereign, passed after the settlement of a country, whether ceded, conquered or discovered, do not affect such colony unless specifically named; or, unless they relate to the exercise of foreign powers of the sovereign, in regard to navigation, trade, revenue and shipping. (Dwarr. on Stat., 527, 906; 1st Report of Commr's West Indies, Legal Inquiry, 2, 6; Parl. in Ireland, 12th Rep., 112.)

Thus we find that, after the discovery of the North American Colonies, till the Revolution, Great Britain regulated the foreign trade of these her colonies, by various Acts of Parliament, passed to limit it to the vessels of British subjects and to British ports, and to encourage it. She controlled the tobacco trade by statutes. (1670, 22 and 23 Car. II., ch. 10; 1685, 1 James II., ch. 4; 1695, 7 William III., ch. 10; 1699, 10 and 11 William III., ch. 21; 1704, 3 and 4 Anne, ch. 5; 1709, 8 Anne, ch. 18; 1713, 12 Anne, ch. 8.) She restrained all imports and exports to and *from America [* 168 to British ports and British ships. (12 Car. II., ch. 12, secs. 1, 2, 3, 4, 19; 7 and 8 Wm. III., ch. 22, sec. 13; 8 Anne, ch. 13, sec. 23; *The Recovery*, 6 Rob., 346; *Wilson v. Marriatt*, 8 T. R., 31; 1 Bos. & P., 432; 2 Evans' British Stat., 51; 15 Car. II., ch. 7; 2 Evans' Stats., 58, 62; *Grant v. Lloyd*, 4 Taunt., 136.) She regulated the import of prize goods into and from America. (1711, 10 Anne, ch. 22; 1742, 15 George II., ch. 31; and 1744, 17 George II., ch., 34.) She encouraged and controlled all the trade to her colonies, by statutes. (1695, 7 William III., ch. 22; 1707, 6 Anne, ch. 37; 1710, 8 Anne, ch. 27; 1733, 6 George II., ch. 13; 1740, 13 George II., ch. 31.) She forbade exports from her colonies to certain foreign countries. (1731, 4 George II., ch., 15; 1752, 5 George II., ch. 22; 1757, 30 George II., ch. 9.) She regulated the import of coffee, tea, and other goods into these colonies; appointed commissioners of the revenue, and provided penalties for the violations of such laws. (1763, 4 George III., ch. 15; 1765, 5 George III., ch. 45; 1766, 6 George III., ch. 49 and 52; 1767, 7 George III., ch. 41, 46, 56; 1768, 8 George III., ch. 22; 1772, 12 George III., ch. 7 and 60; 1773, 13 George III., ch. 44.) And following up her legislation in regard to these colonies, Great Britain in 1772 (12 George III., ch. 60), allowed a drawback on tea, exported to her British North American colonies; and until the Revolution, entirely controlled the trade and duties laid in the colonies. (Journals of Congress, Vol. I., pp. 27, 31, 33 to 39, 47, 394 to 396; Gales & Seaton's Debates in Congress, 216.)

The oppression of these laws of Great Britain upon her colonies having resulted in the destruction at Boston, on the 31st December, 1773, of teas imported there by the East India Company, on which they had paid duties; in the meeting of the Congress of the Colonies on the 5th of September, 1774, at Philadelphia; in Great Britain's denouncing them out of her protection on the 20th of December, 1775; in the Declaration of Independence of 4th of July, 1776; in the acknowledgment of the Independence of the United States by Great Britain, on 30th November, 1782; and in the Treaty of Peace, signed at Paris on the 2d of September, 1783, the United States became independent and absolute sovereignties.

(c.) From the 2d of September, 1783, until the adoption of the Constitution by the States, respectively, each had, and several of them exercised, the power of regulating its foreign commerce, and laying imposts and tonnage duties. (Journals of Congress of the Confederation, Vol. II., 298, 301; Gales & Seaton's History of Debates in Congress, 111.) Georgia laid 1s. 8d. sterling on tonnage; and South Carolina laid 1s. 3d. sterling (*Id.*, 300); Pennsylvania laid a tonnage on vessels of nations in 169[*] treaty; *Maryland laid 1s. 8d. per ton on vessels in treaty, and 2s. 8d. on others, except British, which paid 6s. 8d. and two per cent. on goods therein; Virginia laid a tonnage of 3s. 6d. on vessels in treaty, and 6s. 6d. on non-treaty vessels, and two per cent. *ad valorem* on goods therein; and South Carolina laid 2s. 9d. sterling on British sugars, and 1s. 8d. on those of other nations. (*Id.*, 275.)

By the Confederation of 17th November, 1777, the States still reserved to themselves the right to regulate their foreign commerce, and to lay duties. (See article 6th, Vol. II., Journals of Congress of the Confederation, 398, 301, 330.) There were, however, secured to the citizens of different states certain rights by the Confederation in regard to imports and exports of goods from state to state. (Arts. 4, 6, 2 volume Journals of Confederation, 330.)

It is true that the Congress of the Confederation, on the 22d September, 1774 (see Journal of Congress, Vol. I., 14), requested the merchants and others in the colonies to recall all orders for goods from Great Britain, and on the 27th September, 1774 (*Id.*, Vol. I., 15), resolved, that after 1st December, 1774, there should be no importation of goods from Great Britain or Ireland, nor purchase of goods if imported thence; and that on 20th October, 1774 (*Id.*, Vol. I., 23 to 26), the Non-importation, Non-consumption, and Non-exportation agreement was signed by the members of Congress, yet the Congress did not, in fact, execute these resolves; and on 6th April, 1776 (*Id.*, Vol. I., 307, 308), a resolve was passed allowing importations and exportations to the citizens of the colonies, and of all nations, except to and from those under the dominion of Great Britain, subject to the duties laid or to be laid by the colonies.

Yet, before the Revolution, a commercial combination regulated the importations between America and Great Britain. If any man was suspected of an infraction of the Non-importation agreement, his conduct was strictly watched, and if his guilt was discovered he was published and held up to the world as an enemy to

his country. (Gales & Seaton's History of Debates in Congress, Vol. I., 320, speech of Mr. White.)

The means to defray the expenses of government, under the Confederation, for common defense and general welfare, were obtained by requisitions on the several States, for such sums of money as should be in proportion to the value of the lands and improvements in possession, or in grant to the citizens of the State (Journals of Congress of Confederation, October 14th, 1777, Vol. II., 288), to be estimated in such way as Congress should appoint. (See Confederation, article 8, Vol. II., Journal of Congress, 330, November 15th, 1777.) These *quota* were fixed *by Congress, from time to time, accord- [*170 ing to the number of the white inhabitants in each State. (Art. 9, Confederation; see Vol. II. of Journals of Confederation, 336, 337; also *Id.*, 346, November 23d, 1777, and the Report of the Committee of the Board of Treasury, *Id.*, 332.)

From those authorities it will appear that the States, individually, regulated their foreign commerce and duties, and were in this respect foreign sovereigns to each other, and they maintained this relation until the adoption of the Constitution of the United States. Thus we find that by the 7th Article of the Constitution, the ratification thereof by the conventions of nine of the original thirteen States was to be sufficient for the establishment of the Constitution, and that on 26th July, 1788, eleven of the thirteen had adopted it, and that North Carolina and Rhode Island stood aloof; the first until 2d November, 1789, and the last till 29th May, 1790. (See Mr. Hickey's Book, published in 1847, p. 24.)

Between the 26th July, 1788, and 29th May, 1790, Rhode Island was therefore in the position of a foreign State, regulating her own commerce, and laying her own duties, and she did not send deputies to the convention at Philadelphia to form a constitution. (See Gales & Seaton's History of Debates in Congress from 1789 to 1791, Vol. I., p. 4 of Introduction.) Rhode Island was thus in a position to force British goods into the United States by Long Island and Connecticut. (*Id.*, p. 124, Mr. Boudinot's speech.) She did, in fact, enter into the neighboring States linen and barley that had not paid duty to the United States. (*Id.*, p. 164.)

(d.) The position of North Carolina and of Rhode Island was that of foreign States, as to the United States, and they were so treated by the Congress of the United States, under the Constitution. Thus (Gales & Seaton's History of Debates in Congress from 3d March, 1787, to 3d March, 1791, Vol. I., pp. 1011, 1012), a bill passed the Senate to prevent goods from being brought from Rhode Island into the United States; and (History of Congress from March 4, 1789, to March 31, 1793, by Carey, Lea & Blanchard, p. 609, 2d sess. 1 Cong., Senate Journal, p. 184) on 28th April, 1790, a committee was appointed to consider what provisions would be proper for Congress to make respecting Rhode Island; and on 11th May, 1790, their report was considered (same Journal, pp. 188, 189), and a resolution was passed, that all commercial intercourse between the United States and Rhode Island from 1st July next be prohibited; and on 18th May, 1790, the com-

mittee reported a bill for that purpose; on 14th May it was ordered to a third reading, and on the 18th May it was passed by the Senate, 13 17 1*] ayes to 7 noes. *In the House, it passed first and second readings; and on 1st June, 1790, the President communicated, by a message to both houses, that Rhode Island had acceded to the Constitution. (See House Journal, p. 219, 232; also, Gales & Seaton's History of Debates in Congress, Vol. II., p. 1009, 11th May, 1790.) When Rhode Island came into the Union, Acts of Congress were passed to extend to this State the laws of Congress relative to the judiciary, the census, &c. (Vol. I. Gales & Seaton's History of Debates in Congress, pp. 1020, 1023, 1026; *Id.*, 1711; also, *Id.*, 1006.)

The State of Vermont was admitted by 1 Stat. at L., 191, ch. 7, February, 1791, and laws extended over her by ch. 12, March, 1791, 1 Stat. at L., 197, 198.

Rhode Island and North Carolina were, therefore, until they adopted the Constitution of the United States, foreign to the United States, and to the laws of Congress, and were outside of all provisions in regard to commerce and duties unless expressly named in the statutes of Congress. The General Collection Act of 31st July, 1789, ch. 5 (1 Stat. at Large, p. 29), by section 1, establishes collection districts, in each of the eleven States that had adopted the Constitution; and by section 59, 1 L. U. S., 48, recites that North Carolina and Rhode Island had not adopted the Constitution, and "lays duties on goods not the produce of those States, when imported from either of them into the United States." The Act of 16th September, 1789, ch. 15 (1 Stat. at L., 69), section 2, gives to vessels of North Carolina and Rhode Island the same privileges, when registered, as to vessels of the United States; section 3 lays on rum, loaf-sugar and chocolate made in North Carolina and Rhode Island, the same duties as when imported from other foreign countries; neither North Carolina nor Rhode Island were embraced in the Act of 23d September, 1789, ch. 18, to compensate the judges of the Supreme Court (1 Stat. at L., 72), and of 24th September, 1789, ch. 20, establishing the judiciary of the United States (1 Stat. at L., 73). North Carolina was brought within the revenue laws by the Act of 8th February, 1790, sec. 1, ch. 1 (1 Stat. at L., 99); and the Judiciary Act was extended to North Carolina 4th June, 1790, ch. 17 (1 Stat. at L., 126). And the second section of Act of 16th September, 1789, was revived against Rhode Island by the first section of the Act of 8th of February, 1790 (1 Stat. at L., 100). The Census Act of the 1st March, 1790, ch. 2, did not embrace her. (1 Stat. at L., 102.) And on the 4th June, 1790, ch. 19 (1 Stat. at L., 127), the Revenue Acts were extended to Rhode Island, and by reason thereof, the thirty-ninth section of the Act 1789, ch. 5, ceased to operate, when she came into the Union; and on 23d 172*] *June, 1790, ch. 21, extended the Judiciary Act to Rhode Island; and the law of 5th July, 1790, extended to her the Census Act.

The power lodged in the Congress of the United States by Constitution, art. 1, sec. 8, "to regulate commerce with foreign nations," includes all power over navigation. (*Gibbons v. Ogden*, 9 Wheat., 191; *The North River Steamboat Company v. Livingston*, 3 Cow., 718;

United States v. The Brigantine William, 2 Hall's Law Journal, 265; 3 Story's Com. Const., 161; 1 Kent's Com., 405, Lec. 19.) The power to regulate it "among the several States" was demanded because, during the confederacy, the States had pursued a local and selfish policy, suicidal in its tendency; and temporarily sought to gain advantages over one another in trade, by favors and restrictions. (Federalist, No. 42, 1 Tuck. Black. Com., App., 247 to 252; President Monroe's Message, 4th May, 1822, pp. 31, 32; 2 Story's Com. Const., sec. 1062, p. 511.) And the power to regulate it "with the Indian tribes" having been prior to the Revolution vested in the British sovereign, and having at the Revolution naturally flowed, subject to some restrictions, to the government under the confederacy (*Worcester v. State of Georgia*, 6 Pet., 515; *Johnson v. McIntosh*, 8 Wheat., 543), was finally vested, unreservedly in the United States, under the Constitution. (2 Story's Com. Const., sec. 1094, p. 540, 541.)

(e) The power to admit new states under the Confederation was limited to Canada (art. 11); no other British colony was to be admitted except by consent of nine states. The Congress of the Confederation at length induced the States to cede the Western Territory (3 Story's Com. Const., 1311), and the ordinance of 13th July, 1787, as to this territory, is the model hitherto used for our territorial governments. (3 Story's Com., sec. 1312; Webster's Speeches, January, 1830, pp. 360, 364.) Missouri came into the Union by force of this ordinance, with a limit of 36° 30' N. lat., as that, by which all territories ceded by France shall exclude slavery. (Act of Congress, 6th March, 1820, 3d L. U. S., 548.) See *Green v. Biddle*, 8 Wheat., 1, 87, 88, as to the compact between Virginia and Kentucky. Now, under the Constitution (sec. 3, art. 4, 3 Story's Com. Const., sec. 1308, p. 184), the United States have power to admit new states, and their power can only be exercised by the Congress.

The power of Congress to admit new states does not include, as its incident, any power to acquire new territory by treaty, purchase or otherwise (the power to admit new states had reference only to the territory then belonging to the United States, 3 Story's Com. Const., sec. 1280), was designed for the admission of the states which, under the ordinance of 1787, were to be formed within its old boundaries. The purchase of Louisiana *cannot be [*173 justified as incident to the power of Congress as to common defense and general welfare. This purchase from France, by Treaty of 1803, by which the United States were to pay \$11,000,000 and to admit the inhabitants into the Union as soon as possible, was justified by President Jefferson, on the ground of the necessity to protect the commerce of the West and have the passage of the Gulf (President's Message, pp. 105, 106, &c., 17th October, 1803), and the power to make this purchase depends solely on its being an incident of the national sovereign power of the United States, to make war and conclude treaties (4 Elliott's Debates, 257 to 260; *American Insurance Company v. Canter*, 1 Pet. S. C., 511, 542, Story's Com. Const., sec. 1281), and the United States have incidentally the power to create corporations and territorial governments. (*McCulloch*

v. *Maryland*, 4 Wheat., 409, 422, 3 Story's Com. Const., 132.)

The power, then, of the United States to acquire new territory does not depend upon any specific grant in the Constitution to do so, but flows from its sovereignty over foreign commerce, war, treaties, and imposts. (3 Story's Com. Const., sec. 1281; 4 Elliott's Debates, 257-260; *American Insurance Company v. Canter*, 1 Pet., 511-542.) The power of the United States over conquered and ceded territory is sovereign and exclusive of state control or power. (3 Story's Com. Const., sec. 1251; p. 124; Hamilton's Works, Vol. I., p. 115; 4 Wheat., 420; 9 Wheat., 36, 5, 7; 3 Story's Com. Const., sec. 1322; except so far as the Treaty, or the ordinance of 1787, may limit it. (Rawle on Const., ch. 27, p. 237; 1 Kent's Com., sec. 12, p. 243; *Id.*, sec. 17, pp. 359, 360.) By sec. 3, art. 4 Constitution, "The Congress is empowered to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States, and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state."

Territory acquired by the United States, by conquest or by treaty, does not, by force of our Constitution, become entitled to self-government, nor can it be subject to the jurisdiction of any state. (3 Story's Com. Const., 1318.) It would be without any government at all, if it were not under the dominion and jurisdiction of the United States. (*American Insurance Company v. Canter*, 1 Pet. S. C., 511, 542; *Id.*, 516.) During military occupation, it is governed by military law; but when ceded by treaty, it is under the civil government of the United States; and the terms of the treaty, or statutes of the United States, are the only law that can bind it. The rights and relations of persons *inter se* remain, but the allegiance is transferred, al-174*] though the "people do not share in the powers of general government, until they become a state, and are admitted as such. (*American Insurance Company v. Canter*, 4 Pet. S. C., 511-543.) With the transfer of the domain, the inhabitants cease to be inhabitants of the state or country that cedes the lands in question. (*People v. Godfrey*, 17 Johns., 225; *Commonwealth v. Young*, 1 Hall's Jour. of Jurisprudence, 47.) The power of the United States lodged in the Congress is supreme over all cessions, even from the several States—and no state can limit, defeat or modify the action of the United States over such cessions (*Cohens v. Virginia*, 6 Wheat., 264, 424-428; *Loughborough v. Blake*, 5 Wheat., 322-324), both as to the property and as to the inhabitants; and the domain and sovereignty are distinct, and may be one or both exercised or not; hence Congress may lay a direct tax on lands in its ceded territories. (5 Wheat., 317.) Congress may omit to extend a direct tax to the territories or districts owned by her, whenever a direct tax is laid on the States. (5 Wheat., 317; 3 Story's Com. Const., sec. 996, p. 463.) The words of art. 1, sec. 9, Constitution United States, do not require that such tax shall extend to the territories. (2 Story's Com. Const., sec. 1005.) Sec. 2, art. 1, Const. regulates how a direct tax shall be apportioned among the States, but this does

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not require the territories to be taxed, although no state could be exempted.

(f.) These authorities show clearly that the domain and the sovereignty of the United States always must be distinct; and may or may not be both in full exercise at once, as is ever the case with all nations. The sovereignty of the United States is operative in foreign countries—both in war and peace her domain is local. In war, we taxed the goods brought into Tampico, in Mexico, while in our military occupancy; and also laid imposts on goods brought thence into the collection districts of the United States. (*Fleming v. Page*, 9 How. S. C., 615-619; see *Benner v. Porter*, *Id.*, 235.) In war, Great Britain, by force of arms, occupied Castine, a port within a collection district of the United States, and foreign goods were there imported during such hostile occupancy; hence, upon the abandonment of that port by the foe, the United States had no right to lay imposts on said goods, then and there found; because her sovereignty was, as to that port, in her domain, suspended by the hostile occupancy.

(*United States v. Rice*, 4 Wheat., 246; *United States v. Hayward*, 2 Gall., 501; Grotius de Jure, B. & P., 2, ch. 6, sec. 5; *Id.*, lib. 3, ch. 6, sec. 4; *Id.*, ch. 9, secs. 9, 14; Puffendorf, lib. 7, sec. 5, n. 4; lib. 8, ch. 11, sec. 8; Bynk. Quest. Jur. Pub., lib. 1, ch. 6; 33 *hds.* *Sugar v. United States*, 9 Cranch, 195; *The Fama*, 5 Rob., 114, 117; Reeves' Law of Shipping, 108; *Hall v. Campbell*, Cowp., 204; see Journal H. Rep., *15th Cong., 1st sess., p. 165; Report, [*175 dated the 23d March, 18, 1815; also Journal 15th Cong., 2d sess., p. 61; 16th Cong., 2d sess.; Journal, p. 140, 197; Act. Cong. 19th May, 1824, 19th Cong., 1st sess.; Report Com. of Senate, No. 23, January 23, 1826.)

The sovereignty may be in full force; but the actual possession of the domain may not be enjoyed in such way as to put the power of collecting imports, &c., in force—thus Louisiana was acquired by cession, under Treaty with France of 30th April, 1803, and until the Act of Congress of 24th February, 1804, took effect, no duties were taken on foreign goods imported into Louisiana. (Ch. 18, 2 L. U. S., 251.)

So Florida was ceded to the United States by Treaty of 22d February, 1819; and on 3d March, 1821 (16th Cong., 2d sess., ch. 39, sec. 2, 3 Stat. at L., 639), the revenue laws were extended over Florida; and in the interval no duties accrued to the United States on foreign goods imported into Florida. (See *The Fama*, 5 Rob., 97; 2 Rob., 361; Jacobsen's Sea Laws, 455; 5 Rob., 349; Opinion of Attorney-General, 359, 365, 395, case of *The Olive Branch*.)

Under the Louisiana cession the United States claimed to 54° 40' north latitude, embracing Oregon, and it was not until August 14th, 1848, when the revenue laws were extended to Oregon, and a port of entry established therein. (See 9 Stat. at L., ch. 177, p. 331, 1st sess., 30th Congress.)

The Territory of Washington was created, out of the same cession, a territory by Act of 32d Cong., 2d sess., ch. 90 (Session Laws, 1852-3, 173), but the revenue laws do not yet extend to it.

The inland and lake districts were created by Acts of 1799, ch. 22, 1 Stat. at L., 637, and 2 Stat. at L., 181.

The District of Minnesota, by Act of 1850, ch. 79, sec. 89, Stat. at L., 510.

Texas collected her own duties until the Act of 31st December, 1845, took effect, and created collection districts therein. (See 9 L. U. S., p. 2, ch. 2, p. 128; *Id.*, 108; *Calkin v. Cooke*, 14 How., 285, 286.)

The taxes laid by Great Britain on her colonies, without representation or consent, formed part of the injuries and wrongs which led to our independence. (Declaration of Independence, 1 Stat. at L., 2.)

Finally, duties have never been held to accrue to the United States in her newly acquired territories, until provision was made by an Act of Congress for their collection; and the Revenue Acts always have been held to speak only as to the United States, and her territories, existing [176*] at the time when the several Acts were passed; and the decision of the courts and Acts of the executive have conformed to these views. (See Letter of Gen. Jones from R. B. Mason, 19th Aug., 1848; see Walker's Circular, 7th October, 1848; President's Annual Message, Dec., 1848; *Fleming & Marshall v. Page*, 9 How., 603; *Ripley v. Gelston*, 9 Johns., 202.)

And the right to exclusive power of taxation through the Congress formed one of the strongest inducements to the adoption of the Constitution of the United States. (See Madison Papers, 171, 217, 224, 475, 481, 493, 540; *Id.*, 146, 297; *Id.*, 109, 218, 488; *Id.*, 403; *Id.*, 730; see, also, Elliott's Debates in Convention on Adoption of Federal Constitution, Vol. I., pp. 72, 76, 82, 83, 86 to 88, 95 to 106; *Id.*, 298, 304, 320; Vol. II., pp. 189, 461, 441, 183 to 150, 118 to 125; 2 Story's Com. Const., sec. 977.)

And, as if more fully to evince the intention of the Congress to confine its revenue laws to the States and Territories, at the times when the respective laws are passed, and not to seem, by prospective legislation, in regard to territories not yet acquired, to hold forth the character of a conqueror, the United States have passed two Acts regulating the entering of merchandise into the United States from foreign adjacent territories. (See Act 1821, ch. 14, 3 Stat. at L., 616; and Act 3d March, 1823, ch. 58, 3 Stat. at L., 781.)

(The argument upon the other points is omitted for want of room.)

The brief of *Mr. Cushing* (Attorney-General) occupied thirty printed pages. From it there will be extracted so much as relates to the first instruction asked for by the plaintiffs below.

III. First and second instructions. The bill of exceptions begins on page 8, and ends on on page 138 (as before stated), and includes the instructions moved by the plaintiffs and refused by the court, and the charge to the jury as given, pp. 186, 187.

1. As to both instructions. The first instruction, moved by the plaintiffs and refused, comprises the period from the 3d of February, 1848, the day on which the Treaty of Peace and cession to the United States of California was signed, to the 3d of March, 1849, the day on which the Act of Congress was approved for making California a collection district and San Francisco a port of entry.

The second instruction, moved by the plaintiffs and refused by the court, comprehends the period from the 3d of March, 1849, when

the Act of Congress passed for making California a *collection district, to the 18th [*177 of November 1849, when the Collector, Collier, appointed under that Act, arrived at San Francisco and entered upon the duties of his office.

These two instructions may be considered together; they assert, in substance, that the collections of duties by the defendant, Harrison, were illegal exactions, for which the defendant is responsible to the plaintiffs in this action; for that, during the first period, "no duties accrued to the United States on merchandise not the production of the United States, nor on vessels not of the United States, which arrived within the limits of California; and during the second period, that nobody but Collier was authorized to collect duties in California until "Collector Collier entered upon his duties as Collector of the Customs at the port of San Francisco."

The instructions must be considered as having been asked of the court in reference to the evidence given, and must be pertinent to that evidence, and must be the deductions of law properly arising out of the facts which the evidence conduces to prove; if not so, the court ought to refuse the instructions.

The court is not bound to entertain abstract propositions, nor should the judge bewilder the jury with instructions couched in language to lead them astray.

The plaintiffs' own evidence (for the defendant adduced none) proved—

1. That the foreign merchandise, and foreign vessels laden with the merchandise in question, were not only imported into California with the intent to be there unladen, but were actually unladen and landed at the port of San Francisco.

2. That the plaintiffs were warned that if the merchandise was unladen at San Francisco without the payment of duties, they would be liable to seizure and forfeiture; were left at liberty to carry the goods, wares and merchandise to some other port in the United States, and there make entry and payment of the duties, or to pay the proper duties at San Francisco, and save the expense of going elsewhere and the forfeiture; that the plaintiffs elected to pay the duties, and did pay them voluntarily, without compulsion, without force, and for no other cause than the warning and election so given them.

3. That no other or higher duties were paid by plaintiffs and received by the defendant than were imposed by the laws of the United States.

4. That the defendant was lawfully appointed and acting under the government of California, instituted during the war between the United States and Mexico, and continued in being, operation and effect, after the Treaty of Peace and cession of *the conquered [*178 Territory of California to the United States, and so continued, and solely existing in fact, and in operation, during the whole period of time comprised in the instructions asked by the plaintiffs.

5. That the defendant received the duties to the use of the United States, and had "disbursed and paid out to and for the use of the United States" all the moneys received

from the plaintiffs except the sums repaid to the plaintiffs for drawbacks on goods re-exported.

Upon such proof as to the mild alternative given, and the election thereupon made by the plaintiffs, and the voluntary payments of duties according to their election, no cause of action can arise to the plaintiffs unless the defendant falsely affirmed to the plaintiffs that their goods would be liable to seizure and forfeiture if landed in California without permit, and without having paid the duties accruing to the United States.

2. As to the first instruction separately. The first instruction asked by plaintiffs, therefore, asserts, "that during the period from the 2d day of February, 1848, the date of the Treaty of Peace and Limits with the Republic of Mexico, and the 8d of March, 1849, the date of the Act of Congress which erected the State of California into a collection district of the United States, no duties accrued to the United States on merchandise not the production of the United States, which arrived within the limits of California ceded by said Treaty," and applying that instruction to the facts that the goods, and vessels wherein they were laden, were imported into California with intent to be unladen, and were actually there landed, it asserts that the said goods, and the vessels from which they were so unladen, were not liable to seizure and forfeiture if the duties were unpaid.

The error of those propositions of the plaintiffs is proved by inspection of the following Statutes:

Act of July 30, 1847, 9 Statutes at Large, 42, ch. 74; Act of July 20, 1790, 1 Statutes at Large, 135, ch. 30, for imposing duties of tonnage on ships and vessels; and of January 14, 1817; 3 *Ib.*, 345, ch. 3, supplementary to an Act to regulate the collection of duties on imports and tonnage. Act of March 2, 1799: "An Act to regulate the collection of duties on imports and tonnage;" 1 Statutes at Large, 639, ch. 22, secs. 18, 92.

The first Act above mentioned, of July 30, 1846 enacts, "That from and after the first day of December next, in lieu of the duties heretofore imposed by law on the articles hereinafter mentioned, and on such as may be now exempt from duty, there shall be levied and collected and paid on the goods, wares and 179*] *merchandise herein enumerated and provided for, imported from foreign countries the following rates of duty—that is to say, &c."

This is the tariff of duties by which the plaintiffs paid the moneys to the defendant.

The second and third Acts before cited, imposing duties of tonnage on ships and vessels, need not be recited.

The 18th section of the Act of March 2d, 1799—to regulate the collection on imports and tonnage, before cited (Vol. 1., 639)—enacts, "That it shall not be lawful to make entry of any ship or vessel which shall arrive from any foreign port or place within the United States, or of the cargo on board such ship or vessel, elsewhere than at one of the ports of entry, * * nor to unlade the said cargo or any part thereof elsewhere than at one of the ports of delivery" established by law: "Provided always, that every port of entry shall also be a port of delivery."

Section 62 prohibits any permit for the land-

ing of goods to be granted until the duties thereon are paid or secured to be paid.

Section 63 prohibits any permit to be granted for unlading a vessel until the tonnage duty thereon is paid.

"Section 92. That except into the districts hereinbefore described on the northern, northwestern and western boundaries of the United States, adjoining to the dominions of Great Britain in Upper and Lower Canada, and the districts on the Rivers Ohio and Mississippi, no goods, wares or merchandise of foreign growth or manufacture, subject to the payment of duties, shall be brought into the United States from any foreign port or place in any other manner than by sea, nor in any ship or vessel of less than thirty tonsburden, agreeably to the admeasurement hereb directed for ascertaining the tonnage of ships or vessels; nor shall be landed or unladed at any other port than is directed by this Act, under the penalty of seizure and forfeiture of all such ships or vessels, and of the goods, wares or merchandise imported therein, landed or unladed in any other manner. And no drawback of any duties on goods, wares or merchandise, of foreign growth or manufacture, shall be allowed on the exportation thereof from any district of the United States, otherwise than by sea and in vessels not less than thirty tons burden."

This Act of 1799, in its various sections, and particularly in sections 18, 62, 63 and 92, taken together, protect the revenue from being evaded or defrauded by importing and landing goods in the United States at ports or places where the United States have not established a port of entry or delivery, "and likewise from [*180 the landing of goods even at a port of entry or of delivery without a permit, which permit cannot be granted until the duties on imports and tonnage have been paid or secured to be paid.

The defendant therefore truly informed the plaintiffs that their goods, if landed at San Francisco without permit and payment of duties, would be liable to seizure and forfeiture, and the vessel also from which such unlawful lading was effected. The first instruction asked is totally erroneous in supposing that no duties would accrue to the United States upon foreign goods nor upon foreign vessels arriving in California, and there unlading their cargoes between February 2, 1848, and March 8, 1849. It is a most egregious blunder to assert, that after the United States had acquired California by treaty, and before they had provided by after-law for a collection district, and a collector in that district, and a collector in that country, the citizens of the United States and foreigners might lawfully inundate the country with foreign goods, wares and merchandise, without incurring any liabilities for duties on imports and tonnage; that the former laws and government ceased *eo instante* upon the Treaty of Peace and Cession, and that there was no law, no government, no order there until the Congress of the United States had legislated, and the Executive Department had acted in pursuance of such new legislation upon the new state of things growing out of the war and the ensuing peace.

In so far as the revenue from duties on imports and tonnage was concerned, in the ac-

quisition of Upper California, the Act of 1799 had effectually provided against the importation of foreign dutiable goods into that country, and landing them there free of duty. And the existing government and its laws and officers provided the means of causing these revenue laws to be respected and obeyed until the Congress of the United States had provided the proper officers of the customs adapted to the new state of things.

Before the Treaty, and under the government instituted and existing in fact in Upper California, duties of import and tonnage were levied and collected, and a system for the collection of those duties was in full, actual, effective operation, sanctioned by the President of the United States, the civil and military Governor of the Territory, supported by the naval force of the United States in the Pacific Ocean, and by the Army of the United States then in California. The defendant Harrison was the collector of customs appointed by the then existing government, and acted in obedience to the laws and instructions of that government.

Upon the cession of California to the United States, "the laws, whether in writing or evidenced by the usage and customs of the ceded country," continued in force until altered by the new sovereign. (*Strother v. Lucas*, 12 Pet., 436; *Mitchell v. United States*, 9 Pet., 749.)

Such is the law of nations. (Vattel, edition 1853, 358.) So it is by the common law.

Lord Mansfield lays it down as the doctrine of the common law, that conquered (and, of course, also ceded) states retain their old laws until the conqueror thinks fit to alter them. (*Rez v. Vaughan*, 4 Burr., 2500; see, also, *Calvin's case*, 7 Coke, 176; *Blankard v. Galdy*, 2 Salk., 411; S. C., 2 Mod., 222; *Attorney-General v. Stewart*, 2 Meriv., 154; *Hall v. Campbell*, Cowp., 209; *Gardiner v. Fell*, 1 Jac. & W., 27; *Anon.*, 2 P. Williams, 76; *Spragge v. Stone*, cited, Doug., 38; *Ex-parte Prosser*, 2 Br. C. C., 325; *Ex-parte Anderson*, 5 Ves., 240; *Evelyn v. Forster*, 8 Ves., 96; *Sheddon v. Goodrich*, 8 Ves., 482; *Elphinstone v. Bedreechund*, Knapp's P. C., 338; *Mostyn v. Fabrigas*, Cowp., 165; 4 Com., Dig., Ley., C.)

The first instruction, so moved by the plaintiffs, was an improper deduction of law from the facts proved by the plaintiffs' own evidence, oral and documentary, conducing, if given, to confuse and mislead the jury, and was therefore properly overruled.

Mr. Justice Wayne delivered the opinion of the court:

This case comes up by writ of error from the Circuit Court of the United States for the Southern District of New York.

It was an action brought by Cross, Hobson & Company against Harrison, for the return of duties alleged to be illegally exacted by Harrison whilst he was acting as Collector of the Customs at the port of San Francisco, in California. The claim covered various amounts of money which were paid at intervals between the 3d day of February, 1848, and the 18th of November, 1849. The first of these dates was that of the Treaty of Peace between the United States and Mexico, and the latter when Mr. Collier, a person who had been regularly appointed Collector at that port, entered upon the

performance of the duties of his office. During the whole of this period it was alleged by the plaintiffs that there existed no legal authority to receive or collect any duty whatever accruing upon goods imported from foreign countries.

The period of time above mentioned was subdivided by the plaintiffs in the prayers which they made to the court below, into two portions, to each of which they supposed that different rules of law attached. The three periods may be stated as follows:

*3d of February, 1848, the date of the [*182 Treaty of Peace between the United States and Mexico. (9 Sat. at Large, 922 to 943.)

8d of March, 1849, when the Act of Congress was passed, including San Francisco within one of the collection districts of the United States. And,

18th of November, 1849, when Collector Collier entered upon the duties of his office.

In order to show what was the state of things on the 3d of February, 1848, it is necessary to refer to some of the public documents which were offered in evidence by the plaintiffs, being Senate Document No. 18 of the first session of the 31st Congress.

On the 19th of August, 1847, H. W. Halleck, signing himself "Lieutenant of Engineers and Secretary of State for the Territory of California," issued a circular to certain persons who had been appointed Collectors of the Customs, in which he recited that the Commander-in-Chief of the naval forces had been authorized by the President of the United States to establish port regulations, to prescribe the conditions under which American and foreign vessels might be admitted into the ports of California, and also to regulate the import duties. The circular then prescribed certain rules which were to be observed.

On the 15th of September, 1847, Commodore Shubrick prescribed certain rates, or scales of duties, which were confirmed on the 14th of the ensuing October, by R. B. Mason, who signed himself Colonel of the 1st dragoons and Governor of California.

On the 20th of October, 1847, Colonel Mason, still styling himself Governor of California, issued an order saying that "recent instructions from the President of the United States made the officers of the army and navy the collectors of the Customs in California." The arrangement was made accordingly.

This was the state of things up to the 3d of February, 1848, the first epoch mentioned by the plaintiffs in their prayers to the court. The war tariff was collected by officers of the army and navy.

On the 3d of February, 1848, a Treaty of Peace was signed between the United States and Mexico, the ratifications of which were exchanged on the 80th of May ensuing. Some alterations were made in the mode of collecting the revenue during this second period of time, namely: between the 3d of February, 1848, and 3d of March, 1849, which it is necessary to notice.

On the 26th of July, 1848, Colonel Mason, still calling himself Governor of California, issued a number of regulations for "the [*183 government of the custom house, amongst which the following two may be mentioned:

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"7. If any master of a vessel shall be detected in landing, or attempting to land, anywhere in California, any goods or merchandise, without permit from a collector, he shall be fined for every such offense in the sum of five hundred dollars, and the goods or merchandise so landed, or attempted to be landed, and the boat or boats through which such landing is effected or attempted, shall be seized, forfeited, and sold by the nearest collector.

8. If any person or persons other than the master of a vessel shall be detected in landing, or attempting to land, anywhere in California, any goods or merchandise, without permit from a collector, he or they shall be fined in the sum of one hundred dollars, and the goods or merchandise so landed, or attempted to be landed, and the boat or boats through which such landing is effected or attempted, shall be seized, forfeited, and sold by the nearest collector."

On the 7th of August, 1848, a proclamation was issued to the people of California, by R. B. Mason, the Governor, announcing the ratification of the Treaty of Peace, by which Upper California was ceded to the United States.

On the 9th of August, H. W. Halleck, Lieutenant of Engineers and Secretary of State, wrote to Captain Folsom, the Collector of the Customs at San Francisco, directing him to perform the duties until further orders, but announcing that he would be relieved as soon as some suitable citizen could be found to be appointed his successor. In the meantime he was told "the tariff of duties for the collection of military contributions will immediately cease, and the revenue laws and tariff of the United States will be substituted in its place."

In order to illustrate the view which Colonel Mason took of his position, it may be proper to insert the following extract from a letter written by him to the War Department on the 14th of August, 1848:

"In like manner, if all customs were withdrawn, and the ports thrown open free to the world, San Francisco would be made the depot of all the foreign goods in the north Pacific, to the injury of our revenue and the interests of our own merchants. To prevent this great influx of foreign goods into the country duty free, I feel it my duty to attempt the collection of duties according to the United States Tariff of 1846. This will render it necessary for me to appoint temporary collectors, &c., in the several ports of entry, for the military force is too much reduced to attend to those duties.

I am fully aware, that in taking these steps, 184*) I have no further "authority than that the existing government must necessarily continue until some other is organized to take its place, for I have been left without any definite instructions in reference to the existing state of affairs. But the calamities and disorders which would surely follow the absolute withdrawal of even a show of authority, impose on me, in my opinion, the imperative duty to pursue the course I have indicated, until the arrival of dispatches from Washington (which I hope are already on their way) relative to the organization of a regular civil government. In the meantime, however, should the people refuse to obey the existing authorities, or the merchants refuse to pay any duties, my force is inadequate to compel obedience."

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On the 8d of September, 1848, Governor Mason appointed Edward H. Harrison temporary collector of the port of San Francisco, with a salary of \$2,000 per annum, provided that so much was collected over and above the expenses of the custom house.

In order further to illustrate the view which was taken by the Executive branch of the government, of the existing condition of things in California, it is proper to insert an extract from a dispatch written by Mr. Buchanan, Secretary of State, to Mr. Voorhees, on the 7th of October, 1848. It is as follows:

"The President, in his annual message, at the commencement of the next session, will recommend all these great measures to Congress in the strongest terms, and will use every effort, consistent with his duty, to insure their accomplishment.

In the meantime, the condition of the people of California is anomalous, and will require, on their part, the exercise of great prudence and discretion. By the conclusion of the Treaty of Peace, the military government which was established over them under the laws of war, as recognized by the practice of all civilized nations, has ceased to derive its authority from this source of power. But is there, for this reason, no government in California? Are life, liberty and property under the protection of no existing authorities? This would be a singular phenomenon in the face of the world, and especially among American citizens, distinguished as they are above all other people for their law-abiding character. Fortunately, they are not reduced to this sad condition. The termination of the war left an existing government, a government *de facto*, in full operation, and this will continue, with the presumed consent of the people, until Congress shall provide for them a territorial government. The great law of necessity justifies this conclusion. The consent of the people is irresistibly inferred from the fact that no civilized community could possibly desire to abrogate "an existing [*185 government, when the alternative presented would be to place themselves in a state of anarchy, beyond the protection of all laws, and reduce them to the unhappy necessity of submitting to the dominion of the strongest.

This government *de facto* will, of course, exercise no power inconsistent with the provisions of the Constitution of the United States, which is the supreme law of the land. For this reason no import duties can be levied in California on articles the growth, produce or manufacture of the United States, as no such duties can be imposed in any other part of our Union on the productions of California. Nor can new duties be charged in California upon such foreign productions as have already paid duties in any of our ports of entry, for the obvious reason that California is within the territory of the United States. I shall not enlarge upon this subject, however, as the Secretary of the Treasury will perform that duty."

At the same time, dispatches were issued by the War and Treasury Departments to their respective officers, of similar import to the above. Mr. Walker, the Secretary of the Treasury, after providing for the reciprocal admission of goods which were the growth, &c., of California and the United States, free of duty, into

the ports of each, thus provided for the case under consideration, so as to protect the revenue. "Third. Although the Constitution of the United States extends to California, and Congress have recognized it by law as a part of the Union, and legislated for it as such, yet it is not brought by law within the limits of any collection district, nor has Congress authorized the appointment of any officers to collect the revenue accruing on the import of foreign dutiable goods into that territory. Under these circumstances, although this department may be unable to collect the duties accruing on importations from foreign countries into California, yet, if foreign dutiable goods should be introduced there, and shipped thence to any port or place of the United States, they will be subject to duty, as also to all the penalties prescribed by law when such importation is attempted without the payment of duties.

R. J. WALKER,
Secretary of the Treasury."

When these papers reached California, some doubt was entertained whether or not the revenue laws would be enforced, and application was made to Commodore Jones, then commanding the naval forces in the Pacific, to know whether he would use the forces under his command to aid the Collector in seizing and confiscating goods, &c.; to which the commodore replied that he would so employ the force under his command.

On the 23d of February, 1849, Cross, Hobson 186*] & Company *protested against the payment of \$105.62, duties which accrued upon an importation by the French bark Staonele, and also protested against the payment of duties upon all other importations, past, present or to come.

In order still further to explain the views of those who administered the government in California, it may be proper to introduce another extract from instructions which were issued on the 2d of February, 1849, by H. W. Halleck, Secretary of State, to Mr. Harrison, the Collector, namely:

"This view of the subject presents a ready reply to the questions proposed in your letter. No vessel can demand as a right to enter any foreign dutiable goods here, and you will not be liable to prosecution for refusing such entry; and by a voluntary payment of her duties here, in preference to going to a regularly established port of entry, such vessel binds herself to abide by the revenue laws of the United States, in the absence of all instructions to the contrary."

On the 3d of March, 1849 (another of the periods of time mentioned in the prayers to the court), Congress passed an Act (9 Stat. at Large, 400) making the port of San Francisco a collection district.

On the 13th of November, 1849, Collector Collier, who had been regularly appointed, entered upon the execution of his duty at San Francisco. This was the third period referred to in the prayers to the court.

In April, 1851, Cross, Hobson & Company brought an action of trespass on the case in the Circuit Court of the United States for the Southern District of New York, against Edward H. Harrison, to recover sundry sums of money paid, under the above protest, for duties upon goods imported into San Francisco, during the

period between the 3d of February, 1848, and the 12th of November, 1849.

Upon the trial, the jury, under the instructions of the court, found a verdict for the defendant.

The bill of exceptions contained the deposition of sundry persons as to the payment and other facts in the case, and also the whole of the Senate Document above mentioned.

The counsel for the plaintiffs then rested; and the counsel for the plaintiffs thereupon prayed the court to charge and instruct the jury, as matter of law, as follows:

1. That during the period from the 3d day of February, 1848, the date of the Treaty of Peace and Limits with the Republic of Mexico, and the 3d of March, 1849, the date of the Act of Congress which erected the State of California into a collection district of the United States, no duties accrue to the United States on merchandise not the production of the United States; nor of *vessels not of the United [*187 States which arrived within the limits of California, ceded by said Treaty to the United States; and that the exaction by the defendant of such alleged duties on such goods imported into California by the plaintiffs within said period was not authorized by any law of the United States, and was therefore illegal.

2. That during the period from the 3d of March, 1849, when the Act of Congress erected the State of California into a collection district, and the 13th of November, 1849, when Collector Collier entered upon his duties as Collector of Customs at the port of San Francisco, in said district, the exaction of alleged duties to the United States, by the defendant, was not authorized by any law of the United States, and was therefore illegal, unless the jury shall find that the defendant was legally appointed and qualified to act as collector of the customs at San Francisco.

3. That if the jury shall find that on the 23d of February, 1849, the plaintiffs made their written protest against all exactions that then were or thereafter should be made by said defendant, as unauthorized by any Act of Congress and illegal, and that moneys then and thenceforward were demanded as alleged duties to the United States by said defendant, and were paid under coercion of military power and duress, and not in pursuance of any law of the United States, that then such exactions were unauthorized and illegal, and the jury must find for the plaintiffs.

4. That if the jury shall find from the evidence that alleged duties were exacted by the defendant from the plaintiffs between the 3d February, 1848, and the 12th November, 1849, by coercion and duress, and against their remonstrance and protest, that then the plaintiffs are entitled to the customary interest of California upon such exactions.

Whereupon the court, *pro forma*, then and there charged and instructed the jury in conformity with the following prayers, in conformity with which the defendant's counsel insisted and prayed the court to instruct the jury as matters of law:

1. That between the 3d February, 1848, and the 3d March, 1849, duties did accrue to the United States, on foreign merchandise, not the production of the United States, and on foreign

vessels not of the United States, which were imported into and arrived within the limits of California, as ceded to the United States by the Treaty of Peace and Limits with the Republic of Mexico, signed at Guadalupe Hidalgo.

2. That after the Act of 3d March, 1849, erecting the State of California into a collection district of the United States, took effect, duties accrued to the United States, both on foreign [188*] merchandise, *not the production of the United States, and on foreign vessels not of the United States, imported and brought within the limits of such collection district.

3. That if, from the evidence in the cause, the jury shall find that between the 3d February, 1848, and 12th November, 1849, the plaintiffs were allowed by the defendant to enter their said foreign goods and vessels at another port of the United States within a collection district, and thereafter to land the same at San Francisco without further exaction of duties; and that the plaintiffs neglected so to do, and elected to enter and land the same at San Francisco, and pay duties thereon; and that the duties were paid by defendant to the use of the United States, that then the said payment of duties was voluntary and not coercive, and the jury must find for the defendant.

That if the jury shall find that the plaintiffs paid duties to the defendant on foreign merchandise, and on foreign vessels, not of the United States, between the 3d February, 1848, and 12th November, 1849, and that such payments were illegal but voluntary, and made through mistake of law, then the plaintiffs are not entitled to interest upon such exactions, and that upon the whole evidence the payments aforesaid were voluntary and not coercive.

And the court further, *pro forma*, refused to instruct and charge the jury in conformity with the points insisted upon by the plaintiffs' counsel, and in conformity with which he had prayed the court to charge and instruct the jury as aforesaid.

Upon this exception, the case came up to this court.

This statement presents the case of the plaintiffs as strongly as it can be made from the record, and that contains every fact and document having any connection with the subject. The cause has been argued here with much research. Every argument has been brought to bear upon it by counsel on both sides, which can enter into its consideration. It seems, from the institution of the suit, until now, to have been conducted with the wish upon the part of the United States to give to the plaintiffs every opportunity to establish their claim judicially, if that could be done; and with a desire upon its part to obtain from this court a decision as to what are the rights of the United States in respect to tonnage and impost duties, in such a conjuncture as that was, when California was ceded by Treaty to the United States, before Congress had authorized such duties to be collected there by a special act. We have received much assistance from the argument, and make the acknowledgment the more readily because it has enabled us to come to conclusions which we believe will be satisfactory, though adverse from the claim of the plaintiffs.

[189*] *The purpose of the suit is to recover

from the defendant certain tonnage duties and imposts which were paid to him by the plaintiffs upon ships which had arrived in San Francisco, and upon foreign merchandise landed there from them, between the 3d February, 1848, and the 12th November, 1849. Harrison had been appointed Collector for the port of San Francisco by Colonel Mason, Military Governor of California. He told the plaintiffs, officially, that he would not permit them to land their goods without the payment of duties; stating, if they attempted to do so, without having made an entry of them, that they would be seized and forfeited. He placed an inspector of the customs on board of the vessels of the plaintiffs, to prevent any merchandise from being landed from them without permits and entries; and when they complained that the duties which they were required to pay were illegal exactions, which they protested against, the collector refused to receive the duties under protest, and told the plaintiffs that they might enter their ships at some other port in the United States, and then discharge their goods at San Francisco. That he considered San Francisco a port in the United States at which foreign goods could not be landed without the payment of duties. It is as well to remark here, though the same fact appears in our statement of the case already given, that the duties for which the plaintiffs sue were paid by them between the 3d February, 1858, and the 12th November, 1849. They were paid, however, until sometime in the fall of 1848, at the rate of the war tariff; which had been established early in the year before by the direction of the President of the United States.

The authority for that purpose given to the Commander-in-Chief of our naval force on that station, was, to establish port regulations, to prescribe the conditions upon which American and foreign vessels were to be admitted into the ports of California, and to regulate import duties. That war tariff, however, was abandoned as soon as the military governor had received from Washington information of the exchange and ratification of the Treaty with Mexico, and duties were afterwards levied in conformity with such as Congress had imposed upon foreign merchandise imported into the other ports of the United States, Upper California having been ceded by the Treaty to the United States. This last was done with the assent of the Executive of the United States, or without any interference to prevent it. Indeed, from the letter of the then Secretary of State, and from that of the Secretary of the Treasury, we cannot doubt that the action of the Military Governor of California was recognized as allowable and lawful by Mr. Polk and his Cabinet. We think it was a rightful and correct recognition *under all the circumstances, [*190] and when we say rightful, we mean that it was constitutional, although Congress had not passed an act to extend the collection of tonnage and import duties to the ports of California.

California, or the port of San Francisco, had been conquered by the arms of the United States as early as 1846. Shortly afterward the United States had military possession of all of Upper California. Early in 1847 the President, as Constitutional Commander-in-Chief of the

Army and Navy, authorized the military and naval commander of our forces in California to exercise the belligerent rights of a conqueror, and to form a civil government for the conquered country, and to impose duties on imports and tonnage as military contributions for the support of the government, and of the army which had the conquest in possession. We will add, by way of note to this opinion, references to all of the correspondence of the government upon this subject; now only referring to the letter of the Secretary of War to General Kearney, of the 10th of May, 1847, which was accompanied with a tariff of duties on imports and tonnage, which had been prepared by the Secretary of the Treasury, with forms of entry and permits for landing goods, all of which was reported by the Secretary to the President on the 30th of March, 1847. (Senate Doc., No. 1, 1st session, 30th Congress, 1847, pp. 567, 583.) No one can doubt that these orders of the President, and the action of our army and navy commander in California, in conformity with them, was according to the law of arms and the right of conquest, or that they were operative until the ratification and exchange of a Treaty of Peace. Such would be the case upon general principles in respect to war and peace between nations. In this instance it is recognized by the Treaty itself. Nothing is stipulated in that Treaty to be binding upon the parties to it, or from the date of the signature of the Treaty, but that commissioners should be appointed by the General-in-Chief of the forces of the United States, with such as might be appointed by the Mexican government, to make a provisional suspension of hostilities, that, in the places occupied by our arms, constitutional order might be re-established as regards the political, administrative and judicial branches in those places, so far as that might be permitted by the circumstances of military occupation. All else was contingent until the ratifications of the Treaty were exchanged, which was done on the 30th of May, 1848, at Queretaro; and there is in the 3d article of the Treaty a full recognition by Mexico of the belligerent rights exercised by the United States during the war in its ports which had been conquered. In that article, besides other things [191*] provided for, it was stipulated that "the United States, upon the ratifications of the Treaty by the two Republics, should dispatch orders to all persons in charge of the custom houses at all ports occupied by the forces of the United States, to deliver possession of the same to persons authorized by Mexico to receive them, together with all bonds and evidences of debts for duties on importations and exportations not yet fallen due, and that an exact account should be made out, showing the entire amount of all duties on imports and exports collected at such custom houses or elsewhere in Mexico by the authority of the United States after the ratification of the Treaty by Mexico, with the cost of collection, all of which was to be paid to the Mexican government, at the City of Mexico, within three months after the exchange of ratifications, subject to a deduction of what had been the cost of collection.

The plaintiffs, therefore, can have no right to the return of any moneys paid by them as duties on foreign merchandise in San Francisco

up to that date. Until that time California had not been ceded, in fact, to the United States, but it was a conquered Territory, within which the United States were exercising belligerent rights, and whatever sums were received for duties upon foreign merchandises, they were paid under them.

But after the ratification of the Treaty, California became a part of the United States, or a ceded, conquered Territory. Our inquiry here is to be, whether or not the cession gave any right to the plaintiffs to have the duties restored to them, which they may have paid between the ratifications and exchange of the Treaty and the notification of that fact by our government to the Military Governor of California. It was not received by him until two months after the ratification, and not then with any instructions or even remote intimation from the President that the civil and military government, which had been instituted during the war, was discontinued. Up to that time, whether such an intimation had or had not been given, duties had been collected under the war tariff, strictly in conformity with the instructions which had been received from Washington.

It will certainly not be denied that those instructions were binding upon those who administered the civil government in California, until they had notice from their own government that a peace had been finally concluded. Or that those who were locally within its jurisdiction, or who had property there, were not bound to comply with those regulations of the government, which its functionaries were ordered to execute. Or that anyone could claim a right to introduce into the territory of that government foreign merchandise, without the payment of duties which had been originally imposed under belligerent *rights, be- [*192] cause the territory had been ceded by the original possessor and enemy to the conqueror. Or that the mere fact of a Territory having been ceded by one sovereignty to another, opens it to a free commercial intercourse with all the world, as a matter of course, until the new possessor has legislated some terms upon which that may be done. There is no such commercial liberty known among nations, and the attempt to introduce it in this instance is resisted by all of those considerations which have made foreign commerce between nations conventional. "The treaty that gives the right of commerce, is the measure and rule of that right." (Vattel, ch. 8, sec. 98.) The plaintiffs in this case could claim no privilege for the introduction of their goods into San Francisco between the ratifications of the Treaty with Mexico and the official announcement of it to the civil government in California, other than such as that government permitted under the instructions of the government of the United States.

We must consider them as having paid the duties upon their importations voluntarily, notwithstanding that they protested against the right of the collector to exact them. Their protest was made from a misconception of the principles applicable to the circumstances under which those duties were claimed, and from their misapprehension of what were the commercial consequences resulting from the Treaty

of Peace with Mexico and the cession of California to the United States. That Treaty gave them no right to carry foreign goods there upon which duties had not been paid in one of our ports of entry. The best test of the correctness of what has just been said is this: that if such goods had been landed there duty free, they could not have been shipped to any other port in the United States without being liable to pay duty.

Having considered and denied the claim of the plaintiffs to a restoration of the duties paid by them from the date of the Treaty up to the time when official notice of its ratification and exchange were received in California, we pass on to the examination of their claim from that time until the revenue system in respect to tonnage and import duties had been put into practical operation in California, under the Act of Congress passed for that purpose. The ratification of the Treaty of Peace was proclaimed in California, by Colonel Mason, on the 7th of August, 1848. Up to this time it must be remembered that Captain Folsom, of the quartermaster's department of the army, had been the collector of duties under the war tariff. On the 9th of August, he was informed by Lieutenant Halleck, of the engineer corps, who was the Secretary of State of the civil government of California, that he would be relieved [193*] as soon as *a suitable citizen could be found for his successor. He was also told that "the tariff of duties for the collection of military contributions was immediately to cease, and that the revenue laws and tariff of the United States will be substituted in its place." The view taken by Governor Mason, of his position, has been given in our statement. The result was to continue the existing government, as he had not received from Washington definite instructions in reference to the existing state of things in California.

His position was unlike anything that had preceded it in the history of our country. The view taken of it by himself has been given in the statement in the beginning of this opinion. It was not without its difficulties, both as regards the principle upon which he should act, and the actual state of affairs in California. He knew that the Mexican inhabitants of it had been remitted by the Treaty of Peace to those municipal laws and usages which prevailed among them before the Territory had been ceded to the United States, but that a state of things and population had grown up during the war, and after the Treaty of Peace, which made some other authority necessary to maintain the rights of the ceded inhabitants and of immigrants, from misrule and violence. He may not have comprehended fully the principle applicable to what he might rightly do in such a case, but he felt rightly, and acted accordingly. He determined, in the absence of all instruction, to maintain the existing government. The Territory had been ceded as a conquest, and was to be preserved and governed as such until the sovereignty to which it had passed had legislated for it. That sovereignty was the United States, under the Constitution, by which power had been given to Congress to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, with the

power also to admit new States into this Union, with only such limitations as are expressed in the section in which this power is given. The government, of which Colonel Mason was the executive, had its origin in the lawful exercise of a belligerent right over a conquered Territory. It had been instituted during the war by the command of the President of the United States. It was the government when the Territory was ceded as a conquest, and it did not cease, as a matter of course, or as a necessary consequence of the restoration of peace. The President might have dissolved it by withdrawing the army and navy officers who administered it, but he did not do so. Congress could have put an end to it, but that was not done. The right inference from the inaction of both is, that it was meant to be continued until it had been legislatively changed. No presumption *of a contrary intention [*194 can be made. Whatever may have been the causes of delay, it must be presumed that the delay was consistent with the true policy of the government. And the more so as it was continued until the people of the territory met in convention to form a state government, which was subsequently recognized by Congress under its power to admit new states into the Union.

In confirmation of what has been said in respect to the power of Congress over this Territory, and the continuance of the civil government established as a war right, until Congress acted upon the subject, we refer to two of the decisions of this court, in one of which it is said in respect to the Treaty by which Florida was ceded to the United States: "This Treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights and immunities of the citizens of the United States. It is unnecessary to inquire whether this is not their condition, independently of stipulations. They do not, however, participate in political power—they do not share in the government until Florida shall become a State. In the mean time Florida continues to be a territory of the United States, guarded by virtue of that clause in the Constitution which empowers Congress to make all needful rules and regulations respecting the territory or other property belonging to the United States. Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a state, acquired the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular state, and is within the power and jurisdiction of the United States. The right to govern may be the natural consequences of the right to acquire territory." (*American Insurance Co. v. Canter*, 1 Pet., 542, 543.)

The court, afterwards, in the case of *The United States v. Gratiot*, 14 Pet., 526, repeats what it said in the case of *Canter* in respect to that clause of the Constitution giving to Congress the power to make all needful rules and regulations respecting the territory or other property of the United States.

Colonel Mason was fortunate in having his determination to continue the existing government sustained by the President of the United States and the secretaries of his cabinet. And

nothing but an almost willing misunderstanding of the circular of the Secretary of the Treasury, Mr. Walker, could have caused a doubt as to the liability of the importers of foreign goods into California to pay duties upon them. That part of the Secretary's circular relating to duties is in our statement of the case. It will show that the Secretary says no more than this: that as Congress had not brought California by law within the limits [195*] of any collection district, or authorized the appointment of officers to collect the revenue accruing upon the importation of foreign dutiable goods into that Territory, that his department may be unable to collect them. Revenue accruing upon the importation into California of foreign dutiable goods, means that the goods were liable to pay the duty. There is nothing uncertain in the Secretary's circular. It does not warrant in any way the declaration that it was his opinion that the goods were not dutiable, or that they might not be legally collected, though that could not be done by the instrumentality of officers of a collection district. Our conclusion, from what has been said, is, that the civil government of California, organized as it was from a right of conquest, did not cease or become defunct in consequence of the signature of the Treaty or from its ratification. We think it was continued over a ceded conquest, without any violation of the Constitution or laws of the United States, and that until Congress legislated for it, the duties upon foreign good imported into San Francisco were legally demanded and lawfully received by Mr. Harrison, the Collector of the port, who received his appointment, according to instructions from Washington, from Governor Mason.

But it was assumed in the argument, and not without force and ingenuity, and with some appearance of authority, that duties did not accrue to the United States upon foreign goods brought into California between the 3d of February, 1848, and the 3d of March, 1849, and from the last date until the 12th of November, 1849; and that the exaction of them was illegal. The first two dates mentioned, comprehend the time between the date of the Treaty and the date of the Act of Congress which included California within one of the collection districts of the United States, and the other date comprehends the time from the date of the Act of Congress until Mr. Collier, the Collector, entered upon the duties of his office. It was also said by counsel, that as there was no treaty or law enjoining or permitting the collection of the duties, that the exaction of them by the defendant was illegal. It was said that the duties were illegally exacted, because the laws of a ceded country, including those of trade, remained unchanged until the new sovereignty of it changed them, and that this Congress had not done. That the practice of the United States had been, not to collect duties upon importations upon goods brought into a ceded territory, until Congress passed an Act for it to be done. Louisiana and Florida were the instances cited; and the ratification by North Carolina and Rhode Island of the Constitution of the United States, were also mentioned as having been the subjects of special legislation to bring them within the operation

of the revenue laws which had been passed by Congress.

*And it was said that as Congress [*196 has the constitutional power to regulate commerce, and had not done so specifically in respect to tonnage and import duties in California, that none of the existing Acts of Congress, for such purposes, could be applied there until Congress had passed an Act giving to them operation, and had legislated California into a collection district, with denominated ports of entry.

This last being the most important of the objections which were made, we will examine it first, and afterwards notice those which precede it. The objection assumes, that under the laws then in force, duties could not be collected in California after the war with Mexico had been concluded by a Treaty of Peace; and that the President had no legal authority to order the collection of duties there upon foreign goods, or power to enforce any revenue regulations, or to prevent the landing of goods prior to the passage of the Act by which our revenue laws were extended to California, and before proper officers had been appointed to execute those laws. It has already been shown, that for seven months of the time the duties received were paid under the war tariff, and that the Treaty, though signed in 1848, did not become operative until the ratifications and exchanges of it. And further, that it could not have any effect upon the existing government of California, until official information of those ratifications had been received there. The belligerent right of the United States to make a civil government in California when it was done, and to authorize it to collect tonnage and impost duties whilst the war continued, is admitted.

It was urged that our revenue laws covered only so much of the territory of the United States as had been divided into collection districts, and that out of them no authority had been given to prevent the landing of foreign goods, or to charge duties upon them, though such landing had been made within the territorial limits of the United States. To this it may be successfully replied, that collection districts and ports of entry are no more than designated localities within and at which Congress had extended a liberty of commerce in the United States, and that so much of its territory as was not within any collection district, must be considered as having been withheld from that liberty. It is very well understood to be a part of the laws of nations, that each nation may designate, upon its own terms, the ports and places within its territory for foreign commerce, and that any attempt to introduce foreign goods elsewhere, within its jurisdiction, is a violation of its sovereignty. It is not necessary that such should be declared in terms, or by any decree or enactment, the expressed allowances being the limit of the liberty given to foreigners to trade with such nation. *Upon this principle, [*197 the plaintiffs had no right of trade with California with foreign goods, excepting from the permission given by the United States under the civil government and war tariff which had been established there. And when the country was ceded as a conquest, by a Treaty of

Peace, no larger liberty to trade resulted. By the ratifications of the Treaty, California became a part of the United States. And as there is nothing differently stipulated in the Treaty with respect to commerce, it became instantly bound and privileged by the laws which Congress had passed to raise a revenue from duties on imports and tonnage. It was bound by the eighteenth section of the Act of 2d of March, 1799. The fair interpretation of the second member of the first sentence of that section is, that ships coming from foreign ports into the United States were not to be permitted to land any part of their cargoes in any other than in a port of delivery, confined then to the ports mentioned in the Act; afterward applicable to all other places which might be made ports of entry and delivery, and excluding all right to unlade in any part of the United States which had not been made a collection district with ports of entry or delivery. The ninety-second section of that Act had four objects in view. First, to exclude foreign goods subject to the payment of duties from being brought into the United States, except in the localities stated, otherwise than by sea. Next, that they were not to be brought by sea in vessels of less than thirty tons burden. And third, to subject to forfeiture any foreign goods which might be landed at any other port or place in the United States than such as were designated by law. Fourth, to exclude the allowances of drawback of any duties on foreign goods exported from any district in the United States otherwise than by sea, and in vessels less than thirty tons burden. The sixty-third section also of that Act, directing when tonnage duties were to be paid, became as operative in California after its cession to the United States, as it was in any collection district.

The Acts of the 20th July, 1790 (1 Stat. at Large, 130, ch. 30), and that of 2d March, 1799 (1 Stat. at Large, 627, ch. 22), were also of force in California without other special legislation declaring them to be so. It cannot very well be contended that the words "entered in the United States" give an exemption from them on account of the word "entered," because a ship has been brought into a port in the United States where an entry cannot be made, as it may be done in a collection district. The goods must be entered before a permit for delivery can be given. Shall one then be permitted to land goods in any part of the United States not in a collection district, because he has voluntarily gone there with his vessel where [198*] an entry of his *goods cannot be made; or to say, I know that my goods cannot be entered where I am, and therefore claim the right to land them for sale and consumption free of duty?

It has been sufficiently shown that the plaintiffs had no right to land their foreign goods in California at the times when their ships arrived with them, except by a compliance with the regulations which the civil government was authorized to enforce—first, under a war tariff, and afterwards under the existing Tariff Act of the United States. By the last, foreign goods, as they are enumerated, are made dutiable—they are not so because they are brought into a collection district, but because they are imported into the United States. The Tariff Act

of 1846 prescribes what that duty shall be. Can any reason be given for the exemption of foreign goods from duty because they have not been entered and collected at a port of delivery? The last become a part of the consumption of the country, as well as the others. They may be carried from the point of landing into collection districts within which duties have been paid upon the same kinds of goods; thus entering, by the retail sale of them, into competition with such goods, and with our own manufactures, and the products of our own farmers and planters. The right claimed to land foreign goods within the United States at any place out of a collection district, if allowed, would be a violation of that provision in the Constitution which enjoins that all duties, imposts and excises, shall be uniform throughout the United States. Indeed, it must be very clear that no such right exists, and that there was nothing in the condition of California to exempt importers of foreign goods into it from the payment of the same duties which were chargeable in the other ports of the United States. As to the denial of the authority of the President to prevent the landing of foreign goods in the United States out of a collection district, it can only be necessary to say, if he did not do so, it would be a neglect of his constitutional obligation "to take care that the laws be faithfully executed."

We will here briefly notice those objections which preceded that which has been discussed. The first of them, rather an assertion than an argument—that there was neither treaty nor law permitting the collection of duties—has been answered, it having been shown that the ratification of the Treaty, made California a part of the United States, and that as soon as it became so, the territory became subject to the Acts which were in force to regulate foreign commerce with the United States, after those had ceased which had been instituted for its regulation as a belligerent right.

The second objection states a proposition larger than the case *admits, and more [*199 so than the principle is, which secures to the inhabitants of a ceded conquest the enjoyment of what had been their laws before, until they have been changed by the new sovereignty to which it has been transferred. In this case, foreign trade had been changed in virtue of a belligerent right before the territory was ceded as a conquest, and after that had been done by a Treaty of Peace, the inhabitants were not re-mitted to those regulations of trade under which it was carried on whilst they were under Mexican rule; because they had passed from that sovereignty to another, whose privilege it was to permit the existing regulations of trade to continue, and by which only they could be changed. We have said in a previous part of this opinion, that he sovereignty of a nation regulated trade with foreign nations, and that none could be carried on except as the sovereignty permits it to be done. In our situation, that sovereignty is the constitutional delegation to Congress of the power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

In respect to the suggestion that it has not been the practice of the United States to collect duties upon importations of foreign goods into a

ceded Territory until Congress had passed an act for that purpose, counsel cited the cases of Louisiana and Florida. The reply is, that the facts in respect to both have not been recollected. There was no forbearance in either instance, in respect to duties upon imports, until Congress had acted. Louisiana was ceded by a Treaty bearing the date of the 30th of April, 1803, but the possession of it by the United States depended upon the terms of final ratifications by the parties to it, and upon the delivery of it by a commissioner to be appointed by the French government to receive the transfer from Spain to France, and by him to be immediately transferred to the United States. (Articles 1, 2, 4, 5.)

The surrender from Spain to France was formally made on the 30th of November, 1803, and that to the United States was done on the 20th of December, 1803. 'It was known in Washington, by a letter from the commissioner appointed to receive it, early in January. It is said, that from that time until the Act of the 24th of February, or as was provided for in the Act, until thirty days after, Louisiana was not considered, in a fiscal sense, as a part of the United States; and that duties were not only not collected by the United States on importations into Louisiana, but that duties were charged on goods brought from Louisiana into the United States. It seems to have been forgotten that our commercial intercourse with Louisiana had been the subject of legislation by Congress in 200*] several particulars from the year 1800; and that before the revenue system could be applied, it was necessary to repeal that special legislation. Mr. Gallatin, in his report of the 25th of October, 1803 (American State Papers, Finance, Vol. II., 48), suggested that it should be done. Congress, however, did not do so until the Act of the 24th of February, 1804, was passed, by the third section of which the repeal was effected. The postponement of the operation of the Act for thirty days longer, was with the view to prevent any conflict of rights or interests between what would be the new regulations of commerce under the Act, and those which had preceded them.

It is only necessary to say as to Florida, that the Treaty of the 22d February, 1819, was not ratified by the United States until the 19th February, 1821. In a few days afterward the Act was passed extending our revenue system to it, subject to the stipulation in the 15th article of the Treaty in favor of Spanish vessels and their cargoes. There was, then, no interval in either instance where duties were not collected upon foreign importations, because Congress had not legislated for it to be done.

The application of the Revenue Acts to North Carolina and Rhode Island, when those States had ratified the Constitution of the United States, though that was not done until the Constitution had been ratified by eleven of the States, does not support the position taken by the counsel for the plaintiff in error. Those States had been parties to the Confederation, and North Carolina was represented in the convention which formed the Constitution. It was to become the government of the Union when ratified by nine States. It had been ratified by eleven States, and Congress declared that it should go into operation on the 4th

of March, 1789. The subsequent ratifications by North Carolina and Rhode Island made them parties in the government. It brought them in without new forms or legislation, and their senators and representatives were admitted into Congress upon the presentation of their ratifications. Special Acts were passed to apply to them the previous legislation of Congress, and that of the Revenue Acts, as a matter of course, because, previously to the ratification, those States had not been attached to any collection district. But it was not supposed by anyone that after those States had ratified the Constitution, that foreign goods could have been imported into them without being subject to duty, or that it was necessary to make them collection districts to make such importations dutiable.

But we do not hesitate to say, if the reasons given for our conclusions in this case were not sound, that other considerations *would [*201 bring us to the same results. The plaintiffs carried these goods voluntarily into California, knowing the state of things there. They knew that there was an existing civil government instituted by the authority of the President, as Commander-in-Chief of the Army and Naval Forces of the United States, by the right of conquest; that it had not ceased when these first importations were made; that it was afterwards continued, and rightfully, as we have said, until California became a State; that they were not coerced to land their goods, however they may have been to pay duties upon them; that such duties were demanded by those who claimed the right to represent the United States—who did so, in fact, with most commendable integrity and intelligence; that the money collected has been faithfully accounted for, and the unspent residue of it received into the Treasury of the United States; and that the Congress has by two Acts adopted and ratified all the Acts of the government established in California upon the conquest of that Territory, relative to the collection of imposts and tonnage from the commencement of the late war with Mexico to the 12th November, 1849, expressly including in such adoption the moneys raised and expended during that period for the support of the actual government of California after the ratification of the Treaty of Peace with Mexico. This adoption sanctions what the defendant did. It does more—it affirms that he had legal authority for his acts. It coincides with the views which we have expressed in respect to the legal liability of the plaintiffs for the duties paid by them, and the authority of the defendant to receive them as Collector of the port of San Francisco.

From these circumstances the law will not imply an *assumpsit* upon the part of the defendant to repay the money received by him from them for duties; the plaintiffs knew, when they paid him, that the defendant received them for the United States. The plaintiffs have no claim for damages against the defendant in justice or equity. They paid duties to which the United States had a rightful claim, and no more than the law required. The plaintiffs have paid no excess. The moneys were paid under no deceit, no mistake; the defendant has honestly paid them over to the United States, has been recognized as their agent when he acted

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as Collector, and is not responsible to the plaintiffs *in foro conscientia*. The moneys were paid from a portion of the funds in the Treasury of the United States, subject to the constitutional restriction that no money shall be drawn from the Treasury but in consequence of appropriation made by law for such purposes as the Constitution permits. Our conclusion is, that the **202*** rulings made in this case in *the Circuit Court are correct.

We shall direct the judgment to be affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of New York, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

NOTE.

The following are the documents referred to in the above opinion:

1847, October 13. Mr. Marcy to Colonel Mason.

1848, July 26. Colonel Mason's Custom House Regulations.

1848, August 7. Colonel Mason's Proclamation, announcing the ratification of the Treaty of Peace.

1848, October 7. Mr. Buchanan to W. B. Voorhees.

1848, October 7. Mr. Walker's Circular.

1848, October 9. Mr. Marcy to Colonel Mason.

1849, March 15. Persifor F. Smith to Adjutant-General Jones.

1849, April 1. Persifor F. Smith's Circular to Consuls.

1849, April 3. Mr. Clayton to Thomas Butler King.

1849, April 3. Mr. Meredith to James Collier, Collector.

1849, April 5. Persifor F. Smith to Adjutant-General Jones.

1849, June 20. Persifor F. Smith to Mr. Crawford, Secretary of War.

1849, June 30. General Riley to Adjutant-General Jones.

1849, August 30. General Riley to Adjutant-General Jones.

1849, October 1. General Riley to Adjutant-General Jones.

1849, October 20. Carr, Acting Deputy-Collector, to Mr. Meredith.

1849, October 31. General Riley to Adjutant-General Jones.

1849, November 13. Mr. Collier, Collector, to Mr. Meredith.

Cited—19 How., 501, 523; 9 Wall., 133; 20 Wall., 394; 21 Wall., 87; 7 Otto, 536; 10 Otto, 183; 2 Sprague, 134; 1 Abb. U. S., 43; 3 Blatchf., 341.

203* *HENRY CHOUTEAU, Plaintiff in Error,*

v.

PATRICK MOLONY.

Spanish grant of lands where Dubuque is located.
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On the 22d of September, 1783, the tribe of Indians called the Foxes, situated on the west bank of the Mississippi, sold to Julien Dubuque a permit to work at the mine as long as he should please; and also sold and abandoned to him all the coast and the contents of the mine discovered by the wife of Peosta, so that no white man or Indian should make any pretension to it without the consent of Dubuque.

On the 22d of October, 1786, Dubuque presented a petition to Baron de Carondelet for a grant of the land, which he alleged that he had bought from the Fox Indians, who had subsequently assented to the erection of certain monuments for the purpose of designating the boundaries of the land.

The Governor referred the petition to Andrew Todd, an Indian trader, who had received a license for the monopoly of the Indian trade, who reported that as to the land nothing occurred to him why the Governor should not grant it, if he deemed it advisable to do so, provided Dubuque should be prohibited from trading with the Indians, unless with Todd's consent, in writing.

Upon this report the Governor made an order, granted as asked, under the restrictions expressed in the information given by the merchant, Andrew Todd.

This grant was not a complete title, making the land private property, and therefore excepting it from what was conveyed to the United States by the Treaty of Paris of April 30, 1803.

The words of the grant from the Indians do not show any intention to sell more than a mining privilege; and even if the words were ambiguous, there are no extrinsic circumstances in the case to justify the belief that they intended to sell the land.

The Governor, in his subsequent grant, intended only to confirm such rights as Dubuque had previously received from the Indians. The usual mode of granting land was not pursued. Dubuque obtained no order for a survey from Carondelet, nor could he have obtained one from his successor, Gayoso.

By the laws of Spain, the Indians had a right of occupancy; but they could not part with this right except in the mode pointed out by Spanish laws, and these laws and usages did not sanction such a grant as this from Carondelet to Dubuque.

Moreover, the grant included a large Indian village, which it is unreasonable to suppose that the Indians intended to sell.

THIS case was brought up by writ of error from the District Court of the United States for the District of Iowa.

It was an action brought by petition, in the nature of an ejectment, by Chouteau, a citizen of Missouri, to recover seven undivided eighteenth parts of a large body of land, containing nearly 150 arpents; and including the whole City of Dubuque. Molony claimed under a patent from the United States. The documents upon which Chouteau's claim was founded are set forth in *extenso* in the opinion of the court; and as that opinion refers to Mr. Gallatin's report, it may be proper to give a history of the claim so that his report may be introduced. A large portion of the argument, in behalf of the plaintiff in error, consisted of reasons to show that Mr. Gallatin was mistaken. The following is the history of the case, as given by Mr. Cormick:

History of the claim. In a case so free from doubt, the question arises, why did Congress assume that Dubuque's titles were worthless, and sell the land.

*The answer to this question is, Mr. [***204** Gallatin, while Secretary of the Treasury, became prejudiced against the land titles of Upper Louisiana, and so much prejudiced against this particular title, that he construed it with reference, not to the grant itself, but to his pre-existing prejudices; that he made a report adverse to the claim, and utterly misdescribed the document upon which that claim

is based; that congressmen, when the question came up before them, referred, as was natural, to Mr. Gallatin's report, to see what it said about the title, and finding it there described as the grant of a mere personal permission of occupancy, revocable at will, they naturally concluded it was a fraudulent effort to obtain property, which the claimants knew they had no right to.

On the 8d of November, 1804, a Treaty was made by General William Henry Harrison, Governor of the Indiana Territory (of which the present States of Missouri and Iowa were then a part), with the Sac and Fox Indians. An additional article was inserted to prevent the land granted to Dubuque from being considered as receded by the Treaty. The Indians then acknowledged the validity of the grant. (See p. 22 of Senate Doc., 850, of 1st sess., 28th Cong.)

On the 17th of May 1805, Julien Dubuque and Auguste Chouteau, as his assignee of a portion of the land, jointly filed their claim.

On the 20th of September, 1806, a majority of the Board of Commissioners, John B. C. Lucas, dissenting, pronounced the claim to be a complete Spanish grant, made and completed prior to the 1st of October, 1800.

In 8 Green's Public Lands, 588, will be found the translation of the title, which seems to have been the translation relied on by the Board as well as by Mr. Gallatin. It is in the following words, namely:

(These documents are inserted in the opinion of the court with some change of phraseology. There was much controversy during the argument as to the proper translation.)

On the 11th of April, 1810, the United States agent laid before the Board of Commissioners, in pursuance of section 6 of Act of 2d March, 1805 (2 Statutes at Large, 828), a list of documents, which list embraces this claim, pertaining to lead mines and salt springs in the Territory of Louisiana. (3 Green's P. L., 603.)

In 1810, Mr. Gallatin, instead of reporting to Congress the action of the Board relative to the claim, himself made an *ex-parte* official report against it. (1 Clark's Land Laws, 958.)

On the 19th of December, 1811, the following entry was made on the minutes of the Board of Commissioners, namely:

"December 19th, 1811. Present, a full 205* board. On a question *being put by John B. C. Lucas, commissioner, Clement B. Penrose, and Frederick Bates, Commissioners, declined giving an opinion. It is the opinion of John B. C. Lucas, Commissioner, that the claim ought not to be confirmed. (2 Green's P. L., 552.)

The claimants were not parties to this last proceeding. It seems to have originated between the dissenting Commissioner and the Secretary of the Treasury, who were under the impression that the sixth section of Act of 2d March, 1805, which required the government agent "to examine into and investigate the titles and claims, if any there be, to the lead mines within the said district, to collect all the evidence within his power, with respect to the claims and value of the said mines, and to lay the same before the Commissioners, who shall make a special report thereof, with their opinions thereon, to the Secretary of the Treasury,

to be by him laid before Congress," &c., thereby authorized the Board by an *ex-parte* proceeding, to reversing their own decision made more than five years before.

Dubuque continued in possession of the land till his death, in 1810. During his life, he had exercised great influence over the neighboring Indians. But that influence had been much enhanced by the liberal presents he had made them. He died insolvent. That portion of the tract which he had not sold to Auguste Chouteau, was sold after his death by order of court, to pay his debts. In the mean while the last war with England was approaching, and English emissaries were on the frontiers, inciting the savages to hostilities against our people. Our government was not then, as it now is, sufficiently strong to protect the frontiers.

In the latter part of 1832, the claimants thought the time had come when they might safely attempt the enjoyment of their rights, as the assignees of Dubuque, to the profits which might be realized from the lead mineral contained in the land. They accordingly employed an agent to lease to miners the right to dig on the land for lead. On the 5th of January, 1833, the following order was issued by the Major-General of the United States army:

(This was an order to remove the settlers by force.) See p. 28, Sen., Doc. 850, 1st sess., 28th Cong.

In pursuance of this order, a military detachment was sent from Fort Crawford, and the claimants' tenants were driven off at the point of the bayonet, and their dwellings burnt.

The claimants at that time all lived in the State of Missouri, mostly at St. Louis. One of them, on his own behalf, and as agent for the others, went to Galena, in Illinois, to institute legal proceedings. He could not sue for the land, because after "Missouri had come" [*206 into the Union as a State, there was no court which had jurisdiction of a suit brought for the recovery of the land. The federal government had in the mean while leased much of the land to lead diggers, and a considerable portion of the mineral dug on the land was taken to smelting furnaces at Galena, to be converted into lead. But much of the mineral then smelted at Galena was from land not embraced in this grant. The agent for the claimants, in order to test the question of title, brought suit for a lot of mineral, which had been brought to Galena. But he was not at the trial able to identify it, and a nonsuit was taken. The agent then came to Washington, and petitioned for redress during many successive sessions of Congress. Certain citizens of Kentucky had in the mean while, by intermarriage and by inheritance, become interested in the claim, and on their own account, presented a memorial in January, 1837. Several memorials were also presented to the executive. Various bills were reported for the relief of the claimants, some of which passed in one house, and were never reached in the other, and others were voted down in the house in which they originated.

An Act of Congress was passed the 2d of July, 1836, for the laying off the towns of Fort Madison and Burlington, in the County of Des Moines, and the towns of Belleview, Dubuque, and Peru, in the County of Dubuque, Terri-

tory of Wisconsin, and for other purposes. The towns of Dubuque and Peru, the lots of which were required by this Act to be sold, are situated on the land embraced by the grant on which this suit is based. What is now the State of Iowa, constituted, on the 2d of July, 1836, a part of the Territory of Wisconsin.

On the 3d of March, 1837, an Act, amendatory of the foregoing, was passed. The manner in which the town lots are to be sold is somewhat varied from the manner specified in Act of 2d of July, 1836, 5 Stat. at Large, 178, 179.

(Then followed an enumeration of the reports of committees in each branch of Congress, and the Acts passed, under one of which Molony claimed title.)

Mr. Gallatin's report was a succinct statement of the facts in the case, upon which he made the following remarks:

I. Governor Harrison's Treaty adds no sanction to the claim; it is only a saving clause in favor of a claim, without deciding on its merits, a question which indeed he had no authority to decide.

II. The form of the concession, if it shall be so called, is not that of a patent, or final grant; and that it was not considered as such, the Commissioners knew, as they had previously received a list procured from the records at 207*] New Orleans, and *transmitted by the Secretary of the Treasury, of all the patents issued under the French and Spanish governments, in which this was not included, and which also showed the distinction between concession and patent, or complete title.

III. The form of the concession is not even that used when it was intended ultimately to grant the land; for it is then uniformly accompanied with an order to the proper officer to survey the land, on which survey being returned the patent issues.

IV. The governor only grants as is asked; and nothing is asked but the peaceful possession of a tract of land on which the Indians had given a personal permission to work the lead mines as long as he should remain.

Upon the whole, this appears to have been a mere permission to work certain distant mines without any alienation of, or intention to alienate the domain. Such permission might be revoked at will; and how it came to be considered as transferring the fee simple, or even as an incipient and incomplete title to the fee simple, cannot be understood.

It seems, also, that the Commissioners ought not to have given to any person certificates of their proceeding, tending to give a color of title to claimants. They were by law directed to transmit to the Treasury a transcript of their decisions, in order that the same might be laid before Congress for approbation or rejection.

On the trial of the cause in the District Court, the plaintiff admitted that the defendant was a purchaser under the government of the United States, and that patents had been regularly issued to him for the land in question.

The defendant demurred, and specified the three following causes of demurrer, namely:

1. That, admitting all the facts stated in the petition to be true, the plaintiff is not entitled to recover.

2. That, as appears by the exhibits to said

petition, the plaintiff claims under an unconfirmed Spanish title.

3. That it appears, from the plaintiff's own showing, that he rests his title on an incomplete Spanish grant, and that defendant is in possession under a complete title from the United States.

A judgment final was rendered by the court below, in favor of the defendant on this demurrer. The assignments of error were:

1. The said District Court erred in deciding that the said petition of the said Henry Chouteau, and the matters therein contained, were not sufficient in law to maintain the said action of the said Henry Chouteau.

*2. The said District Court erred in [*208 rendering judgment in favor of the said Patrick Molony against the said Henry Chouteau.

Upon these points of demurrer the case came up to this court, and was argued by *Messrs. Cornick and Johnson* for the plaintiff in error, and by *Messrs. Platt Smith, T. S. Wilson, and Cushing* (Attorney-general), for the defendant in error.

The points which were made on behalf of the plaintiff in error are thus stated by *Mr. Cornick*:

The record presents but one question, namely: was the grant which the Baron de Carondelet made to Julien Dubuque on the 10th of November, 1796, a complete title.

If it constituted a complete title, the judgment of the court below is erroneous; if it did not constitute a complete title, there is no error in the record.

The decisions of this court which established the doctrine that a grant of land of specific locality, by the Spanish land-granting officer, vested in the grantee a complete title, are so numerous and so uniform that it would be considered unnecessary to cite authorities to sustain this grant, but for the fact that the United States government has, by selling the land, assumed it to be a part of the public domain. For this reason many authorities will be cited in support of propositions of law, which would otherwise be regarded as self-evident. And an explanation will be submitted of the causes which probably induced Congress to disregard a grant, the validity of which is wholly free from doubt the moment it is viewed from the proper point of view.

I. The Baron de Carondelet had power to make the grant. That interest which the Governor-General intended to grant, whether fee simple or a tenancy at will, whether limited or unlimited in the duration of the estate, was the interest which, by virtue of the grant, vested in Dubuque. (See *United States v. Arredondo*, 6 Pet., 691; *Percheman v. United States*, 7 Pet., 51; *Delassus v. United States*, 9 Pet., 134.)

In *The United States v. Moore*, 12 How., 217, this court recognized Carondelet's power as extending from January 1, 1792, to the beginning of 1797. It was within this period that this grant was made.

In *Delassus v. United States*, 9 Pet., 117, the court say: "The regulations of Governor O'Reilly were intended for the general government of subordinate officers, and not to control and limit the power of the person from whose will they emanated. The Baron de Carondelet must be supposed to have had all the powers

which had been vested in Don O'Reilly." In 209*] *Smith v. United States*, 4 Pet., 511, the same principle is established. (See the printed record.)

In *United States v. Arredondo*, 6 Pet., 728, it is said that the actual exercise of the power of granting land, by a colonial governor, without any evidence of disavowal, revocation, or denial by the King, and his consequent acquiescence and presumed ratification are sufficient proof—in the absence of any to the contrary—(subsequent to the grant) of the royal assent to the exercise of his prerogative by his local governors.

According to the principle here established, the King of Spain must be considered as having acquiesced in, and assented to the grant by the Baron de Carondelet to Dubuque, unless his dissent be proved by the defendant.

In *United States v. Arredondo*, 6 Pet., 729, the court say: "It is an universal principle, that when power or jurisdiction is delegated to any public officer or tribunal, over a subject matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject matter; and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion, within the authority and power conferred. The only questions which can arise between an individual claiming a right under the acts done, and the public or anyone denying its validity, are power in the officer and fraud in the party. All other questions are settled by the decision made, or the act done by the tribunal or officer, whether executive, legislative, judicial or special, unless an appeal is provided for, or other revision, by some appellate or supervisory tribunal, is prescribed by law."

This court, in *Strother v. Lucas*, 12 Pet., 410, say: "Where the act of an officer, to pass the title to land, according to Spanish law, is done contrary to the written order of the King produced at the trial, without any explanation, it shall be presumed that the power has not been exceeded; that the act was done on the motive set out therein, and according to some order known to the King and his officers, though not to his subjects; and courts ought to require very full proof that he had transcended his powers, before they so determine it."

II. The description of the land by Dubuque, in his petition, completely fixed its locality, and dispensed with the necessity of a survey.

(The argument upon this point is omitted.)

III. The assent of the Baron de Carondelet to the petition establishes the truth of its statements, and the moment he assented, the sale by the Indians, to Dubuque, thereby ceased to be a link in the chain of title.

210*] IV. Our government cannot grant or sell land which does not belong to it.

But the principal part of the argument of the counsel for the plaintiff in error was directed to show that Mr. Gallatin had erred in the report which he made and the four conclusions to which he came, which have been already stated in this report. These errors were said to be the following:

Mr. Gallatin's first error. The language near the close of the report—"Upon the whole, this appears to have been a mere permission to work certain distant mines, without any alienation

of, or intention to alienate the domain. Such permission might be revoked at will; and how it came to be considered as transferring the fee simple, or even as an incipient and incomplete title to the fee simple, cannot be understood."

Following what the Secretary had already said about Todd's report ("The governor refers the application for information to A. Todd, who had the monopoly of the Indian trade on the Mississippi. A. Todd reports that no objection occurs to him, if the governor thinks it convenient to grant the application, provided that Dubuque shall not trade with the Indians without his permission") necessarily impressed congressmen, who relied on Mr. Gallatin's report for their views of the grant, with the belief, not only that the claim set up by Dubuque and Chouteau, before the Commissioners, was a fraudulent pretense to what they knew they had no right to, but also, that A. Todd recommended the granting to Dubuque of a mere personal permission of occupancy. Mr. Gallatin professes to describe the grant; yet no one from his description could even suspect that Todd had in his report used the language, "As to the land for which he asks, nothing occurs to me why it should not be granted, if you deem it advisable to do so; with the condition, nevertheless, that the grantee shall," &c.

Here we find a most material variance between the grant itself and Mr. Gallatin's description of it. Congress did really cause the land, covered by the grant, to be sold; but we here see, very clearly, that Congress passed no judgment against the validity of the title on which this suit is based, but that it only decided against the title which Mr. Gallatin's violently excited prejudices fancied to exist. If a man had been indicted for the larceny of this document, and it was as much misdescribed in the bill of indictment as it is in this report of Mr. Gallatin, surely no court would hesitate to decide, on objection properly made, that the grant of Dubuque, represented by any one of the translations ever made of it, could not be given in evidence in support of the indictment.

Mr. Gallatin's second error. In the first sentence of his report *he speaks of the [*211 claim as containing upwards of 140,000 acres of land.

Whatever may have been Mr. Gallatin's opinion of his knowledge of the law of Spanish grants, it is now very certain that neither he, nor any other American citizen, understood the subject at that time. But we must suppose that so able a Secretary of the Treasury understood arithmetic. Yet he so exaggerated the amount embraced by this claim as to demonstrate, that if he knew how to calculate quantities, he was so prejudiced against the claim that he was unable, in this particular case, to make such calculation. Even if the distance from the little Makoketa to the Mesquabysenque, which Dubuque states to be about seven leagues along the bank, were a straight line, so as to give a front of exactly seven leagues, so as to make the claim embrace exactly twenty-one leagues of superficies, there would only be 125,060 acres. But as in fact the river bank curves there, as it does everywhere else, and curves very much—and as what Dubuque calls

about seven leagues along the bank, is really less than seven, though upwards of six—the real quantity embraced by the claim is a little over 97,000 acres. Mr. Gallatin committed an error of about 47,000 acres in fact. But, when he made his report, he did not have the *data* by which accurately to calculate the number of acres. Yet he then had *data* enough to show that he was exaggerating, at least to the extent of 14,960 acres.

Mr. Gallatin's third error. He contradicts himself in describing the sale by the Indians to Dubuque. In the commencement of his report, he describes it as a purchase "from the Indians, of an extent of seven leagues front on the Mississippi, by three leagues in depth, containing upwards of 140,000 acres." He afterwards speaks of it as a sale of the "hill and contents of the land (or mine) found by Peosta's wife." He afterwards speaks of the right acquired by Dubuque as a "personal permission to work the lead mines as long as he should remain."

Mr. Gallatin's fourth error. Remark No. 2 of the report involves the proposition, that concession and patent are two things entirely distinct. And at the same time, he uses such language as shows he considered that patent and final grant were synonymous, and that a grant was not final unless it was evidenced by a patent.

(The argument upon this head, and also that under the head of the eighth error, are omitted for want of room, as they were both very elaborate.

212*] Mr. Gallatin's fifth error. In his remark No. 3, he considers a survey an essential prerequisite to a complete grant. But we have seen that many decisions of this court have established that a description which fixes the boundaries, dispenses with the necessity of a survey.

He seems to have had a confused idea that this grant to Dubuque was vicious, because it was not made in accordance with the regulations of O'Reilly, Gayoso, or Morales. But a very slight examination of those regulations would have shown him the impossibility of surveying the land in the manner there required; as in the wilderness country where Dubuque made his settlement, there was no neighbor, no syndic, no officer of any description. He would then have seen that to make an actual survey, a prerequisite would amount to denying the power to the Baron de Carondelet to grant the land.

Mr. Gallatin's sixth error. In remark No. 3, he advances the proposition, that after the grant of an inchoate title, the execution of the order of survey was the only prerequisite to the issuance of a patent. He advances this as a universal proposition. But in the great majority of cases this is untrue. Observe, for example, the order of the Governor-General in the inchoate grant to Owen Sullivan. This error of the Secretary is material; for it shows he was extremely ignorant of the laws he usurped the power to pass judgment on.

Mr. Gallatin's seventh error. He adopted as a fundamental principle of Spanish law, to guide his decision, the erroneous hypothesis that all grants, whether in the wild Indian country or not, must completely correspond with the forms usually observed when the land

granted was situated in the settled parts of the province, and that the Governor-General had no power to grant by any other form.

Mr. Gallatin's eighth error. In remark No. 4, he considers peaceable possession as synonymous with personal permission of occupancy, revocable at will.

We have seen that the four translations of the grant heretofore made, differed, in some respects materially, one from another. The translation averred in the record differs from the preceding four. Those four all agree in rendering the word "possession" into the English word "possession," and three of them render "paisible" into "peaceable," while the remaining one renders it into "peaceful." The main difference between those four translations and the translation averred in the record is, that the latter represents the word "*paysibles possessions*" by English words, which indicate ownership enjoyed free from adverse claim.

This new version was made for the following reasons: The French phrase, "*paisible possession*," is an idiomatic expression, and it would, as used in this petition, raise directly in the mind of a Frenchman the idea of an ownership and quiet enjoyment, free from adverse claim, without any reasoning whatever on the subject. It was attempted, in shaping this new translation, not only to raise in the mind of the reader the same ideas which were raised in the mind of the Baron de Carondelet, when he read the original, but to raise them in the same direct manner.

The most usual signification of the French word "*possession*" is enjoyment of a thing in the character of its owner. In the same way "*possessionneur*" most usually signifies a person enjoying a thing as its owner. In the French language "*le possesseur*" is the person who has *la possession*; just as in English, "possessor" is the person who has the possession.

On the part of the defendant in error, the points were thus stated by Mr. Wilson, which were sustained also by Mr. Smith:

The land in controversy is in what was called the Louisiana territory acquired by the Treaty of 1803.

The United States extinguished the Indian title to it by the Treaty of 1832, made by General Scott and Governor Reynolds. (See Indian Treaties, 7 Stat. at Large, 374.)

The sale, by the United States, to the defendant, was under the Act of Congress, 9 Stat. at Large, 37.

The plaintiff admits that defendant holds the land by patent from the United States.

This is the defendant's title.

It is manifest from the plaintiff's petition and exhibits that he has no title, and,

1st. From the permit from the Indians. They did not and could not sell the land, and they did not profess to do so. It was but a permit to mine.

2d. From the permit or license from Carondelet. This permit or license is improperly translated in plaintiff's petition. The words "*paysibles possessions*" and "*paysibles possessions*" in the original, which should be translated "peaceable possession," are rendered in the plaintiff's petition "full proprietorship."

The petition of Dubuque is again improperly translated in the plaintiff's petition, namely:

what should be rendered "from the coast above the little river Makoketa to the coast of the Mabysenque," has been rendered "from the margin of the waters of the Maquotais, &c.

The permit from Carondelet was a mere license to work the mines, and was not intended by him as anything more. See the permit, and also the construction put upon it by Albert [214*] Gallatin, "in his report on this claim in Senate Document No. 20, Vol. II., 28th Cong., 2d sess.

The United States government took possession of this land immediately after the Rock Island Treaty. See the letter of General Macomb in the same document, p. 28.

That the permit from Carondelet was a mere license to work the mines, is evident from the fact that the petition of Dubuque is in the precise words required by the ordinances of Spain in reference to petitions for working the mines. (See Rockwell on mines, p. 173, secs. 2, 4.) "No mines shall be worked without permission from the crown." If it had been intended as a grant, the *proces verbal* and order of survey would have been issued.

3d. Carondelet had no legal authority to make such a grant, or to divest the crown of the title in this summary manner, because—

(a.) It was in violation of the regulations of O'Reilly. (See the 1st, 3d, 8d, and 12th articles, in 2 White's Compilation, 228, *et seq.*)

(b.) There was no compliance with the regulations of Morales. (See those regulations, 2 White's Compilation, 472, 477, 235.)

4th. If Carondelet even had the power to make a grant of this land, and if the paper is more than a license, it was only an inchoate and imperfect title, and not such a title as will avail anything in a court of law. This is manifest from the numerous decisions of this court on the subject of Spanish claims. In these decisions four great principles or landmarks are well settled, namely:

First. That there must be a compliance with the ordinances and regulations of Spain, to sever the land from the public domain. (2 How., 372.)

Antoine Soulard was, at the time, and both before and after, Surveyor-General of Upper Louisiana. (See Amer. St. Papers, Vol. V., p. 700.) Why was no order or survey issued to him?

Second. In order to constitute a valid claim, there must be clear words of grant. (*United States v. Percheman*, 7 Pet., 81; *New Orleans v. The United States*, 10 Pet., 727; *United States v. Arredondo*, 6 Pet., 691; *United States v. King*, 3 How., 773.) There are no words of grant in the case, and no compliance with the usual and necessary forms.

Third. There must be a definite description of the land granted. (*United States v. Boisdorè*, 11 How., 92; *Chouteau v. Eckhart*, 2 How., 372.) The description in this case is indefinite and uncertain.

Conclusion. If it should be decided that the papers exhibited by the plaintiff exhibit a full [215*] and perfect title, without any act of Congress confirming this grant, or authorizing another tribunal to confirm it, it would be a reversal of all principles established by the previous decisions of this court on this subject.

Mr. Cushing (Attorney-General), after refer-

ring to the action of the Executive and Legislative Departments of the government upon this subject, laid down the two following propositions, namely:

I. That the political power of the government, to which this court conforms its judgment in such matters, has decided against the validity of the pretended title in Dubuque.

II. That the decision of the political power of the government was a rightful one, as well on the true tenor of the alleged grant, as upon the collateral facts set forth in the printed record.

(The discussion under the first head and also the arguments under many subdivisions of the second head, must be omitted for want of room.)

II. The action of the Executive and Legislative Departments of the government, in refusing to recognize this claim, and in disposing of the land as public domain, was right; because the documents produced by the plaintiff do not show a perfect and complete title, nor a full property and ownership in Julien Dubuque.

1. The cession by the Indians, the petition to the Baron de Carondelet, and the Baron's concession thereupon, must all be taken together as one instrument, because they are all connected by reference in the writings themselves; and so they serve to explain each other. (*United States v. King*, How., 833.)

The cession by the Foxes to Dubuque appears on the face of the instrument to be a mere personal permission to occupy and work at the mine discovered by the woman Peosta, "and in case he shall find nothing within he shall be free to search wherever it shall seem good to him." That which is sold is the contents of the mine found by the woman Peosta, with the privilege of searching elsewhere.

There is no quantity, no boundary, no estate of inheritance, no location of land except the mine found. It is impossible to make of this any conveyance of land. It is a personal privilege to work the mine found, and if that should prove unproductive, to search at pleasure for another mine.

Independently of the question as to what is the nature of the Indian document, it could of course, according to the general rules established by all European governments in America, not convey any title of itself. (*United States v. Clarke*, 9 Pet., 168.)

*2. The petition to Carondelet alludes [*216 to the Indian cession and Dubuque's working of the mines, and asks only to be confirmed in the peaceable possession of that which he was in possession of under the permission of the Foxes, which is appended to the petition. No quality or duration of estate other than that contained in the Indian permission, is asked for. Sensible of this, the petitioner in this case has endeavored to eke out the petition by interpolation, and to supply defects by parol testimony, as before remarked.

3. In Carondelet's indorsement of the petition there is no order of survey, none of the usual words of a patent or complete title, no reference to the authority of the king, no grant in his royal name. It is unlike the complete titles usually granted. (*United States v. King*, 7 How., 852.)

To a complete title, to a full property in fee

under the Spanish law, a survey, a formal investiture of possession by the proper officer, and a title thereupon in form, were indispensable. Until then the title was but incipient, inchoate, equitable only, not full and complete.

An example of a complete Spanish grant is given in the case of *Menard's Heirs v. Massey*, 8 How., 298, 314.

The difference between an incomplete, and a full, complete title, is well known. To the former a survey is not a prerequisite; a description reasonable to a common intent, which may be thereafter perfected by a survey, is sufficient. To the latter a survey and a formal title thereupon, duly made and duly recorded, are indispensable. (*O'Hara v. United States*, 15 Pet., 282, 283; *United States v. Forbes*, 15 Pet., 173, 185; *Buyck v. United States*, 15 Pet., 215; *United States v. Miranda*, 16 Pet., 159, 160; *United States v. Powers' Heirs*, 11 How., 577; *Heirs of Vilemont v. United States*, 18 How., 266; 2 White's Recopilacion, 288, arts. 15, 16.)

The question here is not whether Dubuque acquired an incipient property, an equitable title which might have been perfected into a complete title, by a survey and title in form thereupon, but whether the instrument, produced by the plaintiff, is of itself such a complete Spanish grant of a perfect title severed an identical tract from the public domain, and conveyed it to Dubuque, so that nothing passed to the United States.

Such a complete conveyance, such a perfect title, the plaintiff has alleged, and must prove; such only can sustain his action; an incipient interest, a mere equity will not do.

To divest the sovereign of his public domain and convey it to a subject, certainty, identity, precise locality is essential. If something yet remains to be done, if a survey be yet necessary to ascertain and fix the identity of the land, the [217*] severance is not *complete, the conveyance is not perfect, the prince is not denuded of his domain, the subject is not completely invested with a private right; the prince yet holds, and the subject must look to the prince to do, by his officers, the farther acts to complete the severance, and perfect the inchoate private right into a complete title.

As in our own system land titles are progressive from an incipient, inchoate right, to a perfect title by patent, as when the purchaser at public sale has paid the price and obtained the certificate thereof of the receiver and register, or when the pre-emptioner has proved his settlement, cultivation, building and habitation, paid the price, and received the certificate of the register and receiver, he is yet invested only with an inchoate title, and must obtain thereon an affirmance of his right and a patent in due form from the General Land Office—so, also, under the Spanish dominion of Louisiana, land titles were progressive from an incipient, inchoate right, from a petition admitted or conceded, an order of survey to fix the identity of the tract of land, the formal delivery of possession thereof, the return of the *proces verbal* and figurative plat, up to the approval thereof by the governor, or the intendant-general, and the issue of the title in form thereupon.

Upon Dubuque's petition to Carondelet there was no order of survey, no survey, no severance of a precise quantity by defined limits
HOWARD 16.

from the public domain. Being only a permission to work the mines which he had opened, and not intended as a grant of the land in fee, the preliminary steps necessary to obtain such a title were not ordered nor taken.

The king, the government, the prince, cannot be disseised. Therefore a former delivery of possession by a competent officer was required by the law of Spain.

Until a subject has acquired a legal private right to the land, his occupancy is not a disseisin of the prince; the occupant is tenant at will, his occupancy is not adverse but in subordination to the public title of the prince.

7. But the words "granted as asked" (*concedido como se solicita*) are relied upon.

The name of an instrument does not change the body and effect of the writing, no more than the title of a statute can change the purview and body of the enactment. (See *United States v. King*, 7 How., 883.)

The word "granted," is not of itself sufficient to make a complete title an ownership in fee. It may include a mere privilege to work the mines, or a tenancy at will, or an estate for a term of years, or for life, or an estate in fee, just as the words with which it is connected will authorize according to the *re. [218] requirements of law. "Granted," or "grant," has no such technical meaning and effect as to convey an absolute complete title in fee. It may apply to a personal favor, a mere privilege, to anything which is solicited.

The verbal argument, so much elaborated by plaintiff's counsel, has no force.

The petition prays of Carondelet "accorder." This French word is not a word of title. It means to grant, to allow, to accord, to give, to concede, as "*accorder une grâce*," "*accorder sa fille en mariage*." Fleming and Tibbitts, *sub voc.*

The indorsement of Carondelet is, "*concedido*;" but "*concedido*" has no force as a word of title. It is to give, grant, bestow, a loan or gift, or to grant or admit a proposition. (Salvá, Dic. Castel. *sub. voc.*)

Even in English the word "granted" has not of itself any intrinsic efficiency to make a complete title, an ownership in fee. It may include a mere privilege to work the mines; or a tenancy at will, or an estate for a term of years, or for life, or an estate in fee, just as the words with which it is connected will authorize, according to the requirements of law. "Granted" or "grant," has no such technical or all-sufficient meaning and effect as to convey an absolute, complete title in fee. It may apply to a personal favor, a mere privilege, to anything which is solicited.

In the seventh section of the Act of the 3d of March, 1807 (2 Stat. at Large, by Little & B., 441), we have the words, "That the tracts of land thus granted by the Commissioners." Here "granted" is applied to the certificates of the Commissioners. But such granting by the commissioners did not invest the party to whom such a grant was made with a complete title, but the land was to be surveyed and a patent would issue thereupon in due form from the General Land Office.

So when Carondelet indorsed the petition of Dubuque, even if it had contained the interpolated words, "and to grant him the full proprietorship thereof," the petition and indorse-

ment, "granted as asked," would have amounted to no more than an incipient, imperfect right, which could have been perfected only by a survey officially made and returned, and a title in form issued thereon in the name of the king.

8. The great question in the case is, whether the document, on which the plaintiff relies, is a complete legal title on which an action of ejectment can be sustained. This is a question, first of Spanish law, and second of that of the United States.

O'Reilly, under whom the Spanish power in Louisiana, after the cession by France to her was secured and established, made regulations respecting the grant of lands by virtue of the **219*** powers given to him by the king. These regulations are dated at New Orleans, the 18th of February, 1770.

The 12th article states "that all grants shall be made in the name of the king by the Governor-General of the province." (2 White, 230.)

By a communication of the Marquis de Grimaldi to Unzaga, the successor of O'Reilly, of the 24th of August, 1770 (2 White, 460), in which he states that O'Reilly had recommended that the Governor alone should be authorized by his Majesty to make grants, and that orders should be given in conformity with the instructions drawn up and printed in the distribution of the royal lands, he says: "The king having examined these dispositions and propositions of the said lieutenant-general, approves them, and also that it should be you and your successors in that government only who are to have the right to distribute (*repartir*) the royal lands, conforming in all points as long as his Majesty does not otherwise dispose, to the said instruction, the date of which is February 18th, of this present year." This, be it observed, is the date of O'Reilly's regulations.

The formula observed by the Spanish governors, in making complete grants, always stated that they were made in the name of the king, and in virtue of the authority vested in them by the king.

The regulations of O'Reilly were, it is to be observed, to be the land law of Louisiana until the king should otherwise dispose. The laws of the Indies had nothing to do with the subject.

The Council of the Indies approved of the regulations of O'Reilly. (2 White, 463, 464.) Unzaga succeeded O'Reilly; Galvez succeeded him, 1779; Miro succeeded him, 1786; Carondelet, him, 1791; Gayoso, him, 1796, who made new regulations in 1797. (2 White, 231.)

It was during Gayoso's administration that the granting of lands was taken away from the governor and vested in the intendant, at the instigation of Morales, who became vested with power, and issued his regulations in 1799.

The regulations of O'Reilly, approved as they were by the king, were the regulations in force at the time of the alleged grant by Carondelet to Dubuque.

The regulations of Hita, made long afterwards, and in Florida, have nothing to [do] with the case.

But the court has already decided that an order or instrument, like that in the present case, "granted," &c., is an incomplete title, and not a perfect grant.

The Act of 1824, with respect to land titles

in Missouri, it will be remembered, applies, and gives the court jurisdiction only in the cases of incomplete titles.

*Under this Act a petition was filed [***220** by John Smith, T., claiming a tract of land under a petition to Carondelet, at the bottom of which were these words: "New Orleans, 10 February, 1796, Granted. The Baron de Carondelet."

The court acted on this as an incomplete title and confirmed it. (*Smith v. United States*, 10 Pet., 328.)

So it was held in the case of *The Florida Land Cases*. By the Act of 1828 (4 Stat. at Large, 285), these claims were to be adjudicated according to the forms, rules, regulations, conditions, restrictions and limitations prescribed to the District Judge, for claimants in the State of Missouri, by the Act of 26th May, 1824. The Florida courts had, therefore, only jurisdiction in the cases of incomplete titles. In the case of *The United States v. Wiggins*, the alleged grant by Governor Estrada was: "The tract which the interested party solicits is granted to her, without prejudice to a third party, &c." The court took jurisdiction of this as an incomplete grant, but dismissed the petition on the merits. (14 Pet., 345.)

These cases show that the word "granted" does not make a complete title, and is not used exclusively in relation to complete titles to land.

The title is complete or incomplete according to the body of the writings, whether the word "granted" be or be not used.

The document relied upon by the plaintiff bears no resemblance to a Spanish complete title, made in pursuance of the regulations of O'Reilly, approved and ordained by the King as irrevocable, except by his own order. (See the letter of the Marquis of Grimaldi to Unzaga, of 24th August, 1770; 2 White's *Recopilacion*, p. 460.)

It was only a permit to Dubuque to work the mines, that he might avoid a violation of the law of Spain, which ordained that no mine shall be worked without permission from the crown. (Rockwell on Spanish Mines, pp. 170, 173, ch. 5.)

Being but a concession to Julien Dubuque to work the mines, it was revocable at will, and died with him if not previously revoked.

Had Carondelet intended to grant a title in fee to such a body of land and the mines, he would not have neglected his duty so far as not even to have preserved the evidence thereof in the public archives. Neither would Dubuque have neglected the matter so important to the security of such an estate. But viewing the instrument as personal permit to work the mines, the conduct of Carondelet and Dubuque is consistent with the law.

Mr. Justice Wayne delivered the opinion of the court:

It is necessary to make a statement of the facts of the case from the pleadings, [***221** in order that the opinion which we shall give may be fully understood.

It is a suit for the recovery of land, but not according to the form of the proceedings in ejectment. It is a petition according to the course of pleading allowed in the courts of Iowa (which has been adopted by the District

Court of the United States), setting forth in detail the facts upon which the petitioner claims the ownership of the land.

The petitioner, Henry Chouteau, states that he is the owner of several tracts of land, and that they are wrongfully withheld from him by the defendant, Patrick Molony. It is admitted that Molony purchased the lands from the United States, and that he has a patent for them. But the validity of the patent is denied, upon the ground that the land had been granted to Julien Dubuque by the authorities of Spain, before Louisiana had been transferred by France to the United States.

Dubuque's claim is said, by the petitioner, to be a purchase from the Fox Indians of a large tract of land situated in what is now the Dubuque Land District.

It is described as bordering on the Mississippi River, extending from the Little Makoketa River to the mouth of the Mesquabysenque Creek, now called Tête des Morts. The purchase, it is said, was made at Prairie du Chien, from the chiefs of the Fox Indians, on the 22d September, 1788. In proof of it, an instrument in writing, in French, is produced, with a translation into English.

It is further stated that Dubuque paid the Indians for the lands in goods when the writing was executed. The petitioner then states, that the chiefs of the Fox Indians, a few days afterwards, assented to the erection of monuments, and that they were erected at the mouths of the rivers just mentioned, as evidence of the upper and lower boundaries of the tract of land.

It is also said that Dubuque occupied the land from the time it was sold to him; that he made improvements on it, cleared an extensive farm, constructed upon it houses and a horse-mill; that he cultivated the farm and dug lead ore from the land, which he smelted in a furnace constructed for that purpose. This land was in the Spanish Province of Louisiana; Dubuque resided on this land from 1788 to his death in 1810. Upon his first settlement there, he employed ten white men as laborers, who removed from Prairie du Chien to enter his service; that the white inhabitants who resided on the land were almost entirely persons who had been inhabitants of Prairie du Chien before Dubuque made his settlement, and that other persons from that town entered into his service in the interval between the date of his contract with the Indians and the time when [222*] be applied *to the Governor of Louisiana, the Baron de Carondelet, for the confirmation of the sale of the Indians to him. It also appears that Dubuque, from the time he made his settlement until the Province of Louisiana was transferred to the United States, did not permit anyone to carry on business on the land without having first obtained his consent, and that he drove forcibly from it a person named Guérien, who came there with goods to trade.

It seems, too, that Dubuque was a man of enterprise; that, during his residence upon this land, he exercised great influence over the Indians on both sides of the Mississippi River; and that the Winnebagoes on the east of it, and the Foxes on the west of it, were in the habit of consulting with him upon their more important concerns.

It will be remembered that Dubuque's settle-

ment on the land began with the date of his bargain with the Fox Indians, which was the 22d of September, 1788. Eight years afterwards, or to be precise, on the 22d of October, 1796, Dubuque presented to the Baron de Carondelet, at the City of New Orleans, his petition for a grant to him of the land which he alleges he bought from the Fox Indians, by his contract with them of the 22d of September, 1788, and their subsequent assent to the erection of the monuments upon the Makoketa and Tête des Morts, as designations of the boundary of the land on the Mississippi River. The governor referred his petition to Andrew Todd, an Indian trader, who had received a license for the monopoly of that trade, for Todd to give to him information of the nature of Dubuque's demand. Todd replied, that he had acted upon the reference of the memorial, saying, that as to the land for which he asked, nothing occurred to him why it should not be granted, if you deem it advisable to do so; with the condition, nevertheless, that Dubuque should observe his Majesty's provisions relating to the trade with the Indians, and that he should be absolutely prohibited from doing so unless he shall have Todd's consent in writing.

Upon this answer of Todd, Governor Carondelet makes this order: Granted as asked, under the restrictions expressed in the information given by the merchant, Andrew Todd.

The contract the Indians, Dubuque's petition to the governor, the reference of it to Todd, Todd's return of it with his written opinion, and the governor's final order, are here annexed.

The exhibit referred to in the petition, and filed therewith, and marked A, is in the words and figures following, to wit:

Exhibit A.—Conveyance from Foxes to Dubuque.

Copie de conseil tenu par Messrs. les Renards, c'est à dire, le *chef et le brave de cinque [*223 villages avec l'approbation du reste de leur gens, expliqué par Mr. Quinantotaye, député par eux, en leur presence et en la notre, nous sous-signés, sçavoir, que les Renards permette à Julien Dubuc, appelé par eux la petit nuit, de travailler à la mine jusqu'à qui lui plaira, des s'en retirer sans lui spécifier aucun terme; de plus, qu'il lui vende et abandonne tout la côté et contenu de la mine trouve par le femme Peosta, que sans qu'aucuns blanc ni sauvages, ni puissent prétendre sans le consentement du Sr. Julien Dubuc; et si en cas ne trouve rien dedans, il sera mètre de cherche où bon lui semblera, et de travailler tranquillement, sans qu'aucun ne puisse le nuire, ni portez aucune prejudice dans ses travaux; ainsi nous, chef et brave, par la vole de tous nos villages, nous sommes convenu avec Julien Dubuque, lui vendant et livrant de ce jour d'hui comme il est mentionné ci-dessus, en presence de François qui nous attende, qui sont les temoins de cette pièce, à la Prairie du Chien, en plein conseil le 22 7br., 1788.

BLONDEAU,

ALA X AUSTIN,
marque.
AUTAQUE.

BASIL X TEREN, temoin,
marque.

BLONDEAU X DE QUIRNEAU,
tobague.

JOSEPH FONTIGNY, temoin.

The exhibit referred to in the petition, and filed therewith, and marked B, is in the words and figures following, to wit:

Exhibit B.—A Translation of A.

Copy of the council held by the Foxes, that is to say, of the branch of five villages, with the approbation of the rest of their people, explained by Mr. Quinantotaye, deputed by them in their presence, and in the presence of us, the undersigned, that is to say, the Foxes permit Mr. Julien Dubuque, called by them the Little Cloud, to work at the mine as long as he shall please, and to withdraw from it, without specifying any term to him; moreover, that they sell and abandon to him all the coast and the contents of the mine discovered by the wife of Peosta, so that no white man or Indian shall make any pretension to it without the consent of Mr. Julien Dubuque; and in case he shall find nothing within, he shall be free to search wherever he may think proper to do so, and to work peaceably without any one hurting him, or doing him any prejudice in his [224*] labors. *Thus we, chief and braves, by the voice of all our villages, have agreed with Julien Dubuque, selling and delivering to him this day, as above mentioned, in presence of the Frenchmen who attend us, who are witnesses to this writing.

At the Prairie du Chien, in full council, the 22d of September, 1788.

BLONDEAU,
ALA AUSTIN, his x mark,
AUTAQUE.

BAZIL TEREH, his x mark,
marque

BLONDEAU DE X QUIRNEAU, } Witnesses.
tobague.

JOSEPH FONTIGNY.

The exhibit referred to in the petition, and filed therewith, and marked H H., is in the words and figures following, to wit:

Exhibit H. H.—Petition of Dubuc to Carondelet, &c.

A son excellence le BARON DE CARONDELAIS:

Le tres humble suplyent de votres excellence, nommé Julien Dubuque, aiant faites une abitation sur les frontier de votres gouvernements, au millieux de peuples sauvages, qu'il sont les âbiteurs du pays a achetée une partye de terre de ces indients avec les mines qu'il quotient, et par sa parsaverances a surmonter tous les optacles tous contenzes que densgeren- zes est parvenue approi bien de travences à être payables possesseures d'unes partye de terre sur la rives occidentale du Mississypi, à quil il a donnée le nom de mines d'Espagnes. en mémoir du gouvernements aqui il appartenais. Comme le lieux de l'abitation n'est qu'un point, et les diferentes mines qu'il travailles sont et parts et à plus de trois lieux de distences les unes des autres, le très humbles suppliant prit votres excellences de vouilloir bien lui accorder la payables possessions des mines et des terres, qui ai à dire, depuis les cautes d'eau aux de la petites rivier Maquanquitois jusque au quantes de Mesquabysnanques, ce qu'il formes environ sept lieux sur la rives occidentale du Mississippye, sur trois lieux de profondeur, que le très humbles suppliant *anzes* esperer que vos bontée vousdrats bien lui accorder sa demandes et prit settes même bonti qu'il fait le bonneur de

tous de sugaits, de me pardonner mon stille, et de vouloir bien approuver la pure simplicité de mon cœur au defaux de mon elloquence. Je prie de ciel de tous mon pouvoir possibles qu'il vous conservez et qu'il vous combless de tous ses bienfait; et je suit et serez toutes ma vie, de votres excellences le très humbles et très auxbeissents, et très soumis serviteur.

J. DUBUQUE.

*Order to Todd. [*225

NUEVA ORLEANS, 22 de October de 1796.

Informe el comerciante Dn. Andres Todd, sobre la naturaleza de esta demanda:

EL BARON DE CARONDELET.

Information of Todd.

S'OR GOS'OR: Compliendo con el superior decreto de V. S. en que me manda informar sobre la solicitud del individuo interesado en el antecedente memorial, debo decir, que en quanto á la tierra que pide, nada se me ofrece, en que V. S. se la conceda, si lo halla por conveniente, con la condicion sin embargo de observara el concesionario lo prevenido por S. M. acerca de la treta con los Indios, y que esta se le prohibira absolutamente á menos que notenga mi consentimiento por escrito.

Na. Orleans, 29 de Octubre de 1796.

ANDRES TODD.

Order of Carondelet to Dubuc.

NUEVA OREANS, de Noviembre de 1796.

Concedido como se solicita baxo las restricciones que el comerciante Dn. Andres Todd expresa en su informe.

EL BARON DE CARONDELET.

Certificate that H H is a true copy of the original paper withdrawn by plaintiff by leave of court.

The foregoing two pages have been prepared by me in pursuance of an order of court to that effect, and is a true copy of Dubuque's petition, the interlocutory orders of the Baron de Carondelet and Andrew Todd, and the final order of the Baron de Carondelet.

Witness my hand, this 9th January, 1852.

T. S. PARVIN, Clerk.

The exhibit referred to in the petition, and filed therewith, and marked C, is in the figures and words following, to wit:

Translation of H H.

To his excellency, the BARON DE CARONDELET:

Your excellency's very humble petitioner, named Julien Dubuque, having made a settlement on the frontiers of your government, in the midst of the Indian nations, who are the inhabitants of the country, has bought a tract of land from these Indians, with the mines it contains, and by his perseverance has surmounted all the obstacles, as expensive as they were dangerous, and after many voyages, has come to be the peaceable possessor of a tract of land on the western bank of the Mississippi, to which [tract] he has given the name of the "Mines of Spain," in memory of the [*226] government to which he belonged. As the place of settlement is but a point, and the different mines which he works are apart, and at a distance of more than three leagues from each other the very humble petitioner prays your Excellency to have the goodness to assure him the quiet enjoyment of the mines and

lands, that is to say, from the margin of the waters of the little river Maquanquitois to the margin of the Mesquabysnonques, which forms about seven leagues on the west bank of the Mississippi, by three leagues in depth, and to grant him the full proprietorship thereof, which the very humble petitioner ventures to hope that your goodness will be pleased to grant him his request. I beseech that same goodness which makes the happiness of so many subjects, to pardon me my style, and be pleased to accept the pure simplicity of my heart in default of my eloquence. I pray Heaven, with all my power, that it preserve you, and that it load you with all its benefits; and I am and shall be all my life, your Excellency's very humble, and very obedient, and very submissive servant.

J. DUBUQUE.

NEW ORLEANS, October 22, 1796.

Let information be given by the merchant, Don Andrew Todd, on the nature of this demand.

THE BARON DE CARONDELET.

SEÑOR GOVERNOR: In compliance with your superior order, in which you command me to give information on the solicitation of the individual interested in the foregoing memorial, I have to say, that as to the land for which he asks, nothing occurs to me why it should not be granted, if you deem it advisable to do so; with the condition, nevertheless, that the grantee shall observe the provisions of his Majesty relating to the trade with the Indians; and that this be absolutely prohibited to him, unless he shall have my consent in writing.

ANDREW TODD.

New Orleans, October 29, 1796.

NEW ORLEANS, November 10, 1796.

Granted as asked, under the restrictions expressed in the information given by the merchant, Don Andrew Todd.

THE BARON DE CARONDELET.

The defendant in this suit demurred, and for causes of demurrer says:

1. Admitting all the facts of the petition to be true, the plaintiff is not entitled to recover. 227*]

*2. As it appears by the exhibits to the petition that the plaintiff claims under an unconfirmed Spanish title, he has no standing in a court of law.

3. That it appears, from the plaintiff's own showing, that he rests his title upon an incomplete Spanish grant, and that the defendant is in possession under a complete title from the United States.

It appears, then, that the petitioner claims under the Indian instrument of writing, termed by him a sale, and in virtue of a confirmation of it into a grant by the Governor of Louisiana, the Baron de Carondelet, dated the 10th November, 1796. We shall consider the case, as it was argued by all of the counsel, as presenting but one question.

Was the grant which the Baron de Carondelet made to Julien Dubuque, a complete title, making the land private property, and therefore excepted from what was conveyed to the United States by the Treaty of Paris of the 30th April, 1803?

Our inquiry begins with the examination of

1.—"Peaceable possession" is the proper translation of the original.

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that paper introduced by the petitioner as the Indian contract of sale to Dubuque.

After reciting that the paper is a copy of the council held by the Foxes and the braves of the five villages, with the approbation of the rest of their people, these words are found in that paper: "The Foxes permit Mr. Julien Dubuque, called by them the Little Cloud, to work at the mine as long he shall please, and to withdraw from it without specifying any time to him; moreover, that they sell and abandon to him all of the coast or hills and contents of the mine discovered by the wife of Peosta, so that no white man or Indian shall make any pretension to it without the consent of Mr. Julien Dubuque; and in case he shall find nothing within, he shall be free to search wherever he may think proper to do so, and to work peaceably, without anyone hurting him or doing any prejudice in his labors." From these terms it is plain that Dubuque was treating with the Indian council for a mine, the mine of Peosta, with all the coast or hill, and the contents of that mine, with the privilege to open other mines, protected in doing so from all interferences in the event that he should not find ore in the Peosta mine. The words, that they sell and abandon to him all the coast and the contents of the mine discovered by the wife of Peosta, are the only words from which it can be implied that they were selling land. Admitting that they do so, the words, "all the coast" of the mine of Peosta cannot be enlarged to mean more than the land which covered its ramifications and the land contiguous to them, which was necessary for the operations of the miners and for their support. We say so because such were *the allow- [*228] ances under the mining ordinances of Spain. We shall see hereafter how that was determined by the Spanish ordinances regulating the mines. But to make it more certain that the Indians meant to sell a mine, and that Dubuque was bargaining for a mine, the contract of sale conveying it to him, with the extended privilege to open other mines if that bought should turn out to be deficient in ore, the council conclude their paper thus: "We, the chiefs and braves, by the voice of all of our villages, have agreed with Julien Dubuque, selling and delivering to him this day, as above mentioned, in the prence of the Frenchmen who attend us, who are witnesses of this writing." There are no words in this paper, except the words "all the coast" of the mine of Peosta, conveying any other land, either as to locality, quantity, or boundary. When it is remembered, too, that this paper or contract was written by Frenchmen, and that one of them explained to the Indians what it meant or what the paper contained, and that it was witnessed by other Frenchmen, some of whom could read and write, it is hard for us to suppose that they meant by it to convey to Dubuque the large tract of land which he afterwards claimed, or that they did not honestly, fairly and fully write only that which the Indians meant to do. At all events, if the words of the paper are doubtful as to what the Indians meant to sell, as the copy of the council is written in a language which they could neither read nor fully understand, it will be but right to hold it as an uncertainty, and not to permit their grantee,

Dubuque, or his alienees, to give it a fixed meaning in their own favor.

But let it be admitted that the words of the copy of this Indian council are obscure and ambiguous, so as to express its meaning imperfectly, and that a resort may be made to exterior circumstances connected with the transaction to ascertain its intention. There are no such proofs in the case—nothing of the kind to guide us to a different conclusion than that which the paper expresses. Dubuque, the interested party, is made to say, in the plaintiff's petition, that a few days after the Indian sale was executed, the chief, in the presence of Dubuque, assented to the erection of monuments at the mouth of the Little Makoketa, and at the mouth of the Tête des Morts, as evidence that the former was the upper, and the latter the lower end of the Mississippi boundary line of the large tract, and that the monuments were actually erected. With the exception of the erected monuments, the same is repeated in Dubuque's memorial to Governor Carondelet for a grant; but with this remarkable addition for the first time, that the tract from the points mentioned on the river was to a depth of three leagues. This depth is not in the copy of the 220th Indian council. It was not stipulated for by Dubuque, nor in any way mentioned by or to the chiefs when they assented to the erection of monuments. It will be seen at once that it was necessary for him to give depth to the tract when he applied to the governor for a grant, in order to give certainty to his previous declaration that he had bought the land from the Indians. Without having a given depth, the tract could not have been surveyed as to quantity or boundaries. On that account it would, under the Spanish law, as well as our own, have been void for its uncertainty. Indeed, we cannot think otherwise than that the statement in the petition in this case is contradictory to Dubuque's petition for a grant of the land, and that the first must be taken as the fullest extent of any arrangement between Dubuque and the Indians subsequent to their sale to him of the Peosta mine, with a privilege to search elsewhere if that mine should fail. The erection of monuments within certain distances upon the river was consistent with the privilege to search for other mines. In the absence of all words from which it can be inferred that a sale of land was meant, the monuments, as points mentioned on the river, can have no other reference than to the privilege to search for mines. This, in our view, is the sound interpretation of the Indian contract, and the statement made of it in the petition in this suit.

It would certainly be a novelty, even in the looseness with which grants of land were made in Louisiana, if a grantee, or one claiming under him, was permitted by his own declaration to amend and enlarge a specification defective in the particulars of quantity and boundaries.

Our interpretation of the paper given by the Fox Indians to Dubuque, will be much strengthened, if it needs it, by a brief statement of what were the rights of the Indians in those lands and to the mines.

Spain, at all times, or from a very early date, acknowledged the Indians' right of occupancy

in these lands, but at no time were they permitted to sell them without the consent of the king. That was given either directly under the king's sign-manual, or by confirmation of the governors representing him. As to the mines, whether they were on public or private lands, and whether they were of the precious or baser ores, they formed a part of what was termed the royal patrimony. They were regulated and worked by ordinances from the king. These ordinances were very many, differing and contradictory. It is very difficult, though aided by the best commentaries upon them, to determine in all instances how far the older ordinances were repealed by those subsequently made, or how much of both of them remained in force. As to the rights of the crown, however, there can be no uncertainty. By the law of the Partida, law 5, title 15, Partida 2, Rock., 126, the property of the mines was so vested in the king that they were held not to pass in a grant of the land, although not excepted out of the grant; and though included in it, the grant was valid as to them only during the life of the king who made it, and required confirmation by his successors.

The law 11, title 28, Partida, 3:

"The returns from the port, salt-works, fisheries, and iron-works, and from the other metals, belong to the emperors and kings, and all these things were granted to them that they might have wherewith an honorable establishment to defend their lands and kingdoms, and to carry on war against the enemies of the faith, and that they might have no need to load their people with great or grievous burdens." (Rock. 126.) Rockwell also says, by the law 8, title 1, book 6, of the *Ordenamiento Real* (we have not seen the original), copied in law 2, title 13, book 6, Collection of Castile, that all mines of gold, silver, or any other metal whatsoever, and the produce of the same, were declared to be the property of the crown, and no one was to presume to work them except under some especial license or grant previously obtained, or unless authorized by immemorial prescription. This rule was afterwards moderated by law 1, title 13, book 6, Collection of Castile, so far as to permit any person to dig or work mines in his own land or inheritance, or with the permission of the proprietor in that of any other individual; the miner retaining for himself, after deducting expenses, one third of the produce, rendering the other two thirds to the king. (Rock., 126.) Subsequently the profitless return of the mines in the Spanish dominions induced Philip II., acting with the council and chief accountants of the mines, to reserve all grants which had been made of them, whether they were in private or in public ground. The object of this proceeding was to throw open to all of his subjects the right to search for mines both in public and private grounds, giving to the owner of the latter a compensation for damages and a third part of the produce. (Law 4, title 13, book 6, Collection of Castile, Rock., 126.) By a second ordinance of Philip, all persons, natives and foreigners, were permitted to search for mines. It was declared that the finders of them should have a right of possession and property to them, with a right to dispose of them as of anything

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of their own, provided they complied with the rules of the ordinance, and paid to the crown the seignorage required. These privileges were afterwards extended to the Indians by name, as may be seen by law 1, title 19, book 4, Collection of the Indies. (Rock., 128-387.) Such 231*] were *the regulations of Spain in respect to the rights of the Indians in lands and mines before Louisiana became a part of her dominions, from the cession of it by France in 1763.

What were the regulations of France in respect to mines in her colonies, we need not inquire into, as the transaction we have before us happened after France had parted with the province, and after Spain had legislated new ordinances upon the subject of mines, which were applicable to all of her dominions, as well those in North as in South America. We mean the ordinances entered in the General Land Office of the Indies, at Madrid, the 25th of May, 1783. In chapter 5 of these ordinances, the king declares that mines are the property of his royal crown; that without separating them from his royal patrimony, he grants them to his subjects in property and possession, in such manner that they may sell, exchange, pass by will, either in the way of inheritance or legacy, or in any other manner to dispose of all their property in them, upon the terms they themselves possess them, to persons legally capable of acquiring. The grant depended upon two conditions: that the proportions of metal reserved were paid into the royal treasury, and that the mines were worked subject to the ordinances. To all the subjects of the king's dominions, "both in Spain and the Indies, of whatever condition or rank they may be," were granted the mines of every species of metals, but foreigners were not permitted to acquire or work mines as their own property, unless they were naturalized, or did so expressly under a license. The right of the Indians to work the mines, upon their own account, was at one time questioned. It was determined that they could do so. (Law 14, title 19, book 4, Collection of the Indies, Rock., 187.) And the mines discovered by Indians were declared to be, in respect to boundaries, on the same footing, without any distinction, as those worked or discovered by Spaniards. Besides the other privileges secured by this ordinance to the owners of mines upon the public lands, they had the right to use the woods on mountains in the neighborhood of them, to get timber for their machines, and wood and charcoal for the reduction of the ores. (Rock., 82, sec. 12, ch. 13.) Besides the privileges just stated, they were exempted from a strict compliance with the ordinance in respect to the registry of their mines. Indeed, every indulgence was given to them. Much care was to be taken to preserve for them their property in mines, and to give them the means of working them. With these rights and privileges it is much more natural to construe the contract of the Foxes with Dubuque, into a sale and purchase of mines than into a transfer of lands.

We will now consider Dubuque's petition to 232*] Governor Carondelet; *the reference of it to Todd for information on the nature of the demand; Todd's reply, and the governor's final order.—Dubuque makes his purchase from the

Indians the foundation of his prayer for a grant, and the inducement for the governor to give it. He asks the governor to accord to him the peaceable possession of the mines and lands, which is to say, from the hills above the little river Maquanguitois as far as the hills of Musquabinkenque, which forms seven leagues on the western bank of the Mississippi, by three leagues in depth. We do not doubt that Dubuque meant to ask for lands as well as mines, and that his object was to get a grant for this large body of land. But the true point here is not what he meant to ask for, but what he had a right to ask for under his contract with the Indians and what the governor meant to grant, and could grant under that contract. Mining was the motive which induced Dubuque to make his settlement among the Indians. It had been his pursuit and occupation for eight years before he petitioned the governor; the governor referred the petition to Andrew Todd for information on the nature of the demand. Todd replies, "I have to say, that as to the land for which he asks, nothing occurs to me why it should not be granted by your lordship, if you find it convenient, with the condition, nevertheless, that the *cessionario* shall observe the provisions of his Majesty as to the trade with the Indians, and that this be absolutely prohibited to him, unless he have my consent in writing." The governor's order is granted as asked, or conceded as petitioned for, under the restrictions which the merchant, Mr. Andrew Todd, expresses in his report.

We have here, then, three things to note. First, land is described out of the contract of the Indians with Dubuque; next, that it is to be granted upon a condition; and third, that it is conceded as asked, under the restrictions expressed in the report of Todd. "Granted as asked," is the governor's order. It cannot be said that this is referable alone to the quantity of land asked for by Dubuque, and not to his statement that he had bought that quantity from the Indians, and that its boundaries were coincident with his description of them. There is no such description in the Indian sale to Dubuque. It is a misstatement of a fact. Admitting that the chiefs of the Fox Indians assented to the erection of monuments at the mouth of the Little Makoketa and at the mouth of the Tête des Morts, and that it was done to mark a boundary; when it is found that nothing was said by them or by Dubuque at that time descriptive of a tract of land which could be surveyed, the inference is that the monuments were marks within which and from which Dubuque was permitted to search for mines, and to *work them in the event [*233 that the mine of Peosta did not yield ore.

It cannot be presumed that the governor had not read the petition before he gave his order upon Todd's information; or that when giving, it was not his intention to confer upon Dubuque the benefit of his purchase from the Indians.

He referred the petition to Todd for information. It was a reference out of the usual course of proceeding when applications were made for grants of land. Todd had neither agency nor office, or knowledge in such matters. The officials of the Land Office were not called upon. In every other grant made by the Baron Carondelet, the applications for them were so referred.

Notwithstanding the very large grants which were made by him, under all the circumstances of each case, whether pressing or otherwise, gratuitous or for a consideration, he scrupulously adhered to all the forms and the essentials which custom, usage, and the law had imposed upon the granting of lands. The cause for his reference of Dubuque's petition to Todd is obvious. We find it in the petition in this suit. Dubuque had undertaken to interfere with others who attempted to trade with the Indians. It is said that he had not permitted anyone to carry on that trade on the land from the time he had made his purchase from the Indians, and that he had driven from it forcibly a person who had, without his consent, landed goods upon it with an intention to sell them to the Indians. This, it appears from Todd's report, he had no right to do. The Indian trade was regulated by ordinances from the king. Todd had obtained the privilege to carry it on, and to exclude others from doing so without his consent. From his report it may be inferred that Dubuque had done so, its language being "that this (trade) be absolutely prohibited to him, unless he shall have my consent in writing." The governor recognizes Todd's right to give that consent. His order is, "granted as asked," under the restrictions expressed in the information given by the merchant, Andrew Todd. This is a very novel condition to be annexed to a grant of land in full proprietorship, if the governor meant to give such a grant. Does it not rather imply that the governor meant to permit him to continue in the quiet enjoyment of the mines, and to work them, with the use of the lands, as the Indians had permitted him to do for eight years, notwithstanding what had been Dubuque's irregular interference and appropriation of the trade with the Indians. With such a condition it was revocable by the governor upon any imputation that he had violated it. It would not have been right to recall the order without proof of the transgression of it; but if that could be a subject of inquiry at all, it shows that though Dubuque asked for lands and 234*) *mines, that the governor had not made an unconditional grant of lands.

It is scarcely possible that such a reference of Dubuque's petition would have been made; that the subject of Indian trade should have been introduced into the affair by Todd; and that the governor should have recognized it as a cause for qualifying the terms in which grants of land were made; and that every official agency in making grants of land should have been disregarded, if it had been the intention of the governor to make to Dubuque a grant of the land as property, without any reference to his declaration that he had bought it from the Indians, and to the fact stated in the petition, that he was then working the mines "three leagues apart from each other."

The law for granting lands was, that the grants were to be made with formality, in the name of the king, by the governor-general of the province; that when the order to grant was given, that a surveyor should be appointed to fix the boundaries, and that the order itself should be registered in the Land Office, with the memorials and other papers, whatsoever they might be, which had induced the governor to

make the grant. The practice of the governors, including the Baron de Carondelet, corresponded with all of the requirements just mentioned. Nothing of the kind was done in this case. The whole proceeding was kept from the proper office in New Orleans, where, by law and usage, an entry of it should have been made. Dubuque did not ask for a survey; he took with him the papers. The first notice given of the existence of them came from Dubuque himself, after the transfer of Louisiana to the United States, when the richness of the lead mines on the upper part of the Mississippi had attracted the attention of the public and of Congress. Rumors had reached the government at Washington that Dubuque claimed the richest of them, and that speculators were trying to get from him an interest in them. At that time it became necessary to explore the upper Mississippi and its sources, with the view of obtaining general information for military and legislative purposes, and more definite knowledge of what were the boundaries of Louisiana. Lieutenant, afterwards our distinguished General, Pike, was detailed, with a sufficient exploring force, for that purpose. Among other things he was charged, when he arrived at what were called the Dubuque mines, to make particular inquiries about them, and into Dubuque's claim. He had an interview with Dubuque at his residence, some six or seven miles from the mines, but did not make an inspection of them, as Dubuque could not furnish him with transportation to their locality, and he then had been attacked with fever. He proposed, however, to Dubuque, several questions *In writing, and we have the paper, [*235 with the answers, signed by both of them. They are curious and reserved upon the part of Dubuque, and may find a place here without interfering with the part of the argument which we are now upon: "What is the date of your grant of the mines from the savages? Answer. The copy of the grant is in Mr. Soulard's office at St. Louis. What is the date of the confirmation by the Spaniards? The same answer as to query first. What is the extent of your grant? The copy of the grant is at Mr. Soulard's office at St. Louis. What is the extent of the mines? Twenty-eight or twenty-seven leagues long, and from one to three broad. Lead made per annum? From 20 to 40,000 pounds. The answers to the other questions are equally indefinite, and all were so excepting as to the place where the grant could be found. (1 Appendix to Pike's Expedition, 5.) These answers, however, were communicated to Mr. Gallatin before the commissioners for adjusting land claims had made their report, and they serve to show that when he made his report to the President upon the Dubuque claim, that he had done so with his usual care and caution. Whatever was then in Mr. Soulard's office at St. Louis, connected with it, he had obtained. His report is not liable to the censure which was cast upon it in the argument; for if it be defective in clerical particulars, his conclusion is sustained both by knowledge and principle.

We return to the point which we left to give the extract from Pike. It was, that there were not upon Dubuque's petition any of the customary forms, or required proceedings, which had always been observed by the Spanish gov-

errors in making grants of lands. They were not only omitted by the governor, but were not asked for by Dubuque; or if he did ask, there was not a compliance with the request. The papers were kept by him without any action upon them until after the United States had acquired Louisiana.

This conduct varies so much from the ordinary action of persons under like circumstances, that it may very properly be mentioned with the other incidents of this case, which have led us to the conclusion that the governor's order was not meant to concede to him more than the quiet enjoyment and peaceable possession of the mines, and such land as the mining ordinances permitted to be used for working them. The objection with us is not that Dubuque had not caused a survey to be made, but that he had not obtained, that the governor had not given, an order for such purpose. We think it could not have been done by Soulard or any other official Spanish surveyor. No one of them would have ventured to stretch a chain upon the land with **236*** a view of separating it from the "public domain, without special authority to do so from the governor. Such an order was the uniform accompaniment of a grant, and without it a concession was incomplete: though, when given, if circumstances such as were mentioned in the argument of this case interfered with its execution, it did not lessen the completeness of the title, if the description of the land was such that it could be carried into a survey. There ought not to have been in this case, any apprehension of Indian interference with a survey, after Dubuque's residence of more than eight years among them, if their understanding had been for all of that time that they had sold to him the land. His relations with them are represented to have been friendly and influential in their more important concerns; and if, as is stated, he kept all intruders from the land in its whole extent, claiming it as his property, and not permitting anyone to come upon it to trade with the Indians, and keeping that trade for himself—all of this with the acquiescence of the Indians—it is not probable that fears of their opposition to it prevented him from getting an order of survey, or from having run from the monuments the three lines which would have comprehended his description of the land. It is certain that he had no order for a survey. It is equally certain, as it had not been given by Governor Carondelet, that he could not have obtained it from his successor, Gayoso de Lemos. It will not do in such cases to indulge conjecturally, as to the motives of Dubuque for such conduct, but sometimes historical facts clear up difficulties which cannot be explained in any other way. Governor Carondelet's commission had been recalled, and his successor, Gayoso, appointed, before the former had given his order upon Dubuque's petition. He was then only holding over until the arrival of his successor from Natchez. Gayoso lost no time; perhaps urged to it by very recent larger grants which his predecessor had made, and which were complained of, in announcing that in respect to the quantity to be granted, he would enforce the regulations of O'Reilly, not only in Opelousas, Attacapa, and Nachitoches, but throughout the province. From that moment, Dubuque's claim was, at all events, if he had any rightful claim

for land from his Indian contract, reduced to a league square, unless it could be shown that it had been already confirmed by Governor Carondelet; and this course was preferred in the assertion of title to it before the tribunals of the United States.

In our construction of the muniments of title of this case, we have considered them, as he does, as one instrument, and so they were treated in the argument—that each might aid to explain the other, and that the truth might be obtained from "the whole of them in [**237** regard to this transaction. Our conclusion is, Dubuque's contract with the Fox Indians was a sale to him of the Peosta mine, with its allowed mining appendages, with the privilege to search for other mines in the event that ore was not found in that mine; and that the order of Governor Carondelet, upon his petition, was not meant to secure to him the ownership of the lands described in his petition.

The real importance of this case, the interests involved, and the notoriety which has been given to the Dubuque claim for more than forty years, in Congress and out of it, do not permit us to stop this opinion with the conclusion just announced. Hitherto the case has been considered in connection with the documents upon which the plaintiff relies, and as if Governor Carondelet had official authority to make a grant of the land upon the petition of Dubuque. We will now present another view of it. Dubuque prays for a concession of what was then Indian land, which had been in the occupancy of the Indians during the whole time of the dominion of Spain in Louisiana, and which was not yielded by them until it was bought from them by treaties with the United States. It is a fact in the case, that the Indian title to the country had not been extinguished by Spain, and that Spain had not the right of occupancy. The Indians had the right to continue it as long as they pleased, or to sell out parts of it—the sale being made conformably to the laws of Spain, and being afterwards confirmed by the king or his representative, the Governor of Louisiana. Without such conformity and confirmation no one could, lawfully, take possession of lands under an Indian sale. We know it was frequently done, but always with the expectation that the sale would be confirmed, and that until it was, the purchaser would have the benefit of the forbearance of the government. We are now speaking of Indian lands, such as these were, and not of those portions of land which were assigned to the Christian Indians for villages and residences, where the Indian occupancy had been abandoned by them, or where it had been yielded to the king by treaty. Such sales did not need ratification by the governor, if they were passed before the proper Spanish officer, and put upon record.

The Indians within the Spanish dominions, whether christianized or not, were considered in a state of tutelage. In the *Recopilacion de las Leyes de las Indias*, a part of the official oath of the Spanish governors was, that they would look to the welfare, augmentation and preservation of the Indians. (Book 5, ch. 2.) Again: Indians, although of age, continue to enjoy the rights of minors, to avoid contracts or other sales of their property—particularly real—

made without authority of the judiciary or 238*] *the intervention of their legal protectors. (*Solerzanos Política Indiana*, 1,209, secs. 24, 42.) Indians are considered as persons under legal disability, and their protectors stand in the light of guardians. (46, 51.) The fiscal in the *audiencia* were their protectors, but in some cases they had special protectors. When Indians dispose of their landed property or other thing of value, the sale is void unless made by the intervention of the authorities, or of the protector general, or person designated for the purpose. (C. 29, 42.) Many other citations of a like kind might be given from the king's ordinances for the protection of the Indians. They were protected very much by similar laws when Louisiana was a French province, excepting in this: that the power to confirm an Indian sale of land as to the whole or a part of it, or to reject it altogether, was exercised by the French governors of the province.

Nor were these laws of protection disregarded. They were brought into operation very soon after General O'Reilly took possession of the province, in 1769. He acted not only upon Indian sales of land made after the cession of the province by France, but upon such as had been made before. Considering himself as representing the king, when called upon to relinquish the title of the crown in favor of such purchasers, he rejected them altogether when not made in compliance with the laws for the protection of Indians, and diminished the quantities of such sales when the purchasers could show from any cause whatever that they had an equitable claim upon the Indians for remuneration. The first sale of the kind to which his attention was called was one from Rimeno, the chief of the Attacapas Village, as early as 1760, to Fuselien de la Clare, afterwards claimed by Morgan & Clark. O'Reilly did not think that the sale had been completed so as to pass the title to it under the French law, though it had been executed before the governor. De la Clare then petitioned for a grant of one league to front upon the Teche, by a league in depth, making the sale to him from the Indians, of two leagues in front, from north to south, limited on the west by the River Vermillion, and on the east by the River Teche, the foundation of the equity of his claim for a grant. Governor O'Reilly received the application and granted a league in front by a league in depth. In the same manner all other larger purchases from the Indians were afterwards reduced to one league square. It became the common understanding that no larger confirmation of an Indian sale of land would be made, and no one of them was ever confirmed for more, by either of the Spanish governors of Louisiana, including Salcedo, the last of them. This of Dubuque is the only case in which it is claimed to have been done. In Florida, 239*] larger Indian sales *of land were confirmed, upon the ground that the governors of that province acted in such a matter upon a different authority from the king. But both in Florida and Louisiana it was so well understood that an Indian sale of land, before it could take effect at all, needed the ratification of the governor, that it was frequently inserted in the act of sale. See claims of purchasers

of Indian lands by Stephen Lynch, Joseph and John Lyon. Such had been the law of Louisiana, or rather the administration of it by the governors, for more than eighteen years, when Dubuque alleges that he bought the land from the Fox Indians. Such it had been for twenty-six years when he presented his petition to the Baron Carondelet. It is true that the governors had the same powers to grant the public lands of the crown, to which a title and instant possession could be given to the grantee; but it is also true, in their action upon the sales of Indian lands still in their occupancy, that they were bound by the same laws, usages and customs, and by those laws especially which had been made for the protection of the Indians, and by the oath which they took to look to the welfare, augmentation and preservation of the Indians.

Such are our views of the law relating to the powers of the governor in respect to sales of land by the Indians. If we thought, then, as we do not, that the order of Governor Carondelet upon the petition of Dubuque was a grant of the ownership of the land, we should be obliged to decide that it was an unaccountable and capricious exercise of official power, contrary to the uniform usage of his predecessors in respect to the sales of Indian lands, and that it could give no property to the grantee. It is not meant, by what has just been said, that the Spanish governors could not relinquish the interest or title of the Crown in Indian lands and for more than a mile square; but when that was done, the grants were made subject to the rights of Indian occupancy. They did not take effect until that occupancy had ceased, and whilst it continued it was not in the power of the Spanish Governor to authorize anyone to interfere with it.

It has been intimated that the action of the governors of Louisiana upon the sales of Indian lands, especially in the reduction of them to a league square, was the consequence of O'Reilly's regulation, limiting grants of land in particular districts to a league square. This may have been so as regards quantity, but the principle upon which they acted upon Indian sales of land is to be found in those laws of Spain which made them officially the protectors of the Indians.

But it will be said at this point of the case, as it was said in the argument, if the governor's order was not a grant for lands, that *it [*240 gives to Dubuque nothing, as he had already the occupancy under the Indian purchase. The error in the statement is, the assertion that he had the right to occupancy, and in the supposition that the opposers of the grant contend that the governor meant to give him that right. Not so. The last, we have just said, the governor could not give, and that the Indian sale could not give it to a purchaser until the sale had been ratified. But the privilege to work the mines in lands still in the occupancy of the Indians, he could give, because the mines were a part of the royal patrimony of the crown, and the king had directed that they might be searched for and worked in all of his dominions by his subjects, both Spaniards and Indians. When, then, Dubuque represented to him that he had bought mines and lands from the Fox Indians, and asked for the enjoyment and

peaceable possession of them, and the governor wrote "granted as asked for," he meant no more than this: as you say that you have bought the mines, with the permission of the Indians to work them, you shall also have mine.

The view taken of this case relieves us from the consideration of several points which were made in the argument of it; particularly from that of the effect of the words "peaceable possession," found in the petition of Dubuque to Governor Carondelet, to which it was contended his final order had a direct reference. We admit with pleasure, that it was shown by a learned and discriminating appreciation of those word in grants for land, that they were more frequently than otherwise a grant of ownership; but they cannot do so in a case where the order or grant is given with direct reference to a fact in the petition for it which does not exist, or where a grant is given upon an Indian sale of land contrary to what we think the laws of Spain permitted to be done. The order given upon the petition of Dubuque, had it been intended to be a grant of ownership, would not have been binding upon the conscience of the King of Spain; and only such as are so, are conclusive against the United States under the treaty transferring Louisiana.

Nor is it necessary for us to notice the reference which was made in the argument to the treaty made by General Harrison with the Fox Indians, further than to state that it is no more than a declaration that the Indians, in selling to the United States their land, did not mean to sell parts of it which they had sold before to others. It may have had a reference to this claim of Dubuque, but not having been so expressed, it cannot be inferred.

We cannot leave this case without a reflection occurring from our investigation of it, and which is not favorable to the statement made by Dubuque that he had bought the land from the Fox Indians.

241*] *Dubuque's mines, as they were called, are on the west bank of the Mississippi, a little more or less than seventy miles below Prairie du Chien, where he made his contract with the Indians. They are so near to the City of Dubuque that they may be said to be contiguous. In the year 1780 the wife of Peosta, a warrior of the Kettle chief's village, discovered a lead mine on these lands, and other mines were found soon afterwards. The principal mines are situated upon a tract of one league square, immediately at the Fox village of the Kettle chief, extending westward. This was the seat of the mining operations of Dubuque. The Kettle chief's village was on the bank of the Mississippi River, below the little river Makoketa, and was at the time when Dubuque settled there, a village of many lodges. (Schoolcraft.)

If it was not the largest of the Fox or Outagami Indians, it was not inferior to any other village than that of the Foxes and Sacs on the bank of the Mississippi River, near Rock Island. It had been for a long time an Indian village when Dubuque settled there. It continued as such all the time that Dubuque resided there until his death; that is, from 1788 to 1810; and its chief survived Dubuque for ten years. Can it be presumed that, under the contract with Dubuque, the Indians meant to

sell him that village, and all the lands for miles above and below it, with all of the mines upon the lands directly adjoining it? And yet such must be the result if that were so; for, carry Dubuque's description of his purchase into a survey, and it takes in the Kettle chief's village. We cannot believe that the Indians did make such a sale, or that they were so ignorant of their topography as not to know that a line extended from the monuments on the Makoketa and the Tête des Morts for three leagues west, with a base equal to the Mississippi boundary, would not have included their village. We make no other commentary than this—that time, if it does not obliterate the offenses and weaknesses of men, disposes us to recollect them in connection with their merits; and if we speak of them at all, to do so forbearingly.

We now close the case with an additional remark. This claim was presented to Congress in the year 1812. It had been before the commissioners for adjusting land claims in the Territory of Louisiana, as early as 1806. It has been repeatedly before both houses of Congress, but with such differing opinions concerning it, that no confirmation of it could be obtained, although the commissioners had returned it as a valid claim. It was before the Senate again in 1845. It was then reported upon, and again in 1846. (Doc. March 30, 1846.) That is an able paper; but besides conclusions drawn from the decisions *of this court which we [*242 do not think applicable, and others which were made without reference to the laws of Spain, which prevailed in Louisiana, we think it remarkable that the report, though containing frequent allusions to Dubuque's contract with the Indians, and extracts from it, does not set it out entire as one of the papers upon which the claim was rested. The petition of Dubuque to the governor, his reference of it to Todd, Todd's reply, and the governor's order, are the papers upon which the report was made. The same documents were placed before the commissioners in 1806, without the Indian contract. (See Public Lands, American State Papers, Vol. III., p. 550.) It does no surprise us that a correct view was not taken of it then, or that the committee of public land claims in the Senate should have viewed it differently in 1846 from that now taken by this court. The petitioner in this suit has the merit of having put his case upon everything in any way connected with the claim of Dubuque fairly, fully and openly. Still if success does not follow his expectation, he cannot complain of it, for the purchase from Dubuque was an adventure to buy the half of the land, with a full knowledge of all the papers and the circumstances under which Dubuque claimed.

The judgment of the District Court is affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Iowa, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and the same is hereby affirmed, with costs.

AUGUSTINE ANNE LOUISE DENISE,
HYACINTH ADDA MAYNEAUD DE
PAUCEMONT, COUNTESS DE TOUR-
NON, SERAPHINE CARPENTIER, Wid-
ow of OLIVIER LOUIS MARTIN; CHARLES
ALEXANDER MARTIN, JANE MARA-
RIE SERAPHINA MARTIN, AND
JAQUES FRANCOIS, JUSTINIAN
FRANCOIS, AND ANTIONE JOSEPH
SERVAIS, *Plaintiffs in Error*,

v.

BENJAMIN RUGGLES.

French grants in Missouri without metes and bounds.

Where a grant issued in 1722, by the French authorities of Louisiana, cannot be located by metes and bounds, it cannot serve as a title in an action of ejectment; and it was proper for the Circuit Court to instruct the jury to this effect.

THIS case was brought up by a writ of error from the Circuit Court of the United States for the District of Missouri.

243*] *The case depended on the construction of an old French grant, which is stated in the opinion of the court. It would not be possible to explain the nature of the dispute to the reader, without the introduction of maps; and as the decision in this case cannot possibly serve to illustrate any that may hereafter occur, it is not deemed expedient to increase the size of this volume by their introduction, or the arguments of counsel to show that the grant could or could not be located.

It was argued by *Messrs. Garland and Johnson* for the plaintiffs in error, and by *Mr. Bibb and Mr. Cushing* (Attorney-General) for the defendant in error.

Mr. Justice Catron delivered the opinion of the court:

This suit was brought in 1844 in the Circuit Court for the Missouri District, to recover sections nine and ten, and the half of sections numbers fifteen and sixteen, adjoining to nine and ten, in township thirty-eight north, range two east of the principal meridian; making 1920 acres, of which it is alleged the defendant Ruggles was possession. The cause was tried before a jury in 1851, and a verdict rendered for the defendant.

The object of the suit is to establish a claim of Renault's heirs to a tract of land containing upwards of 50,000 acres. The claim depends on a grant, a translation of which, from the French, was given in evidence in the Circuit Court, and is as follows:

"In the year one thousand seven hundred and twenty-three, and on the fourteenth of June, granted to Mr. Renault, in freehold, for the purpose of forming his establishment on the mines.

One league and a half of ground fronting on the Little Maramecq on the River Maramecq, at the place of the first arm (branch or fork), which leads to the collection of cabins called the *Cabanage de la Renaudiere*, by six leagues (eighteen miles) in depth; the river forming the middle of the point of compass, and the streamlet being perpendicular, as far as where Mr.

Renault has his furnace; and thence straight to the place called the Great Mine."

A copy of the original, in French, being in the record also, it is here insisted for the plaintiffs, that the foregoing translation is erroneous and does not truly describe the boundaries of the land granted; that it should be one and a half leagues fronting on the Little Maramecq in the River Maramecq, at the place of the first branch which leads to the collection of cabins, called the *Cabanage de la Renaudiere*, by six leagues in depth, "the *river forming [*244 the middle of the Rhumb line, and the lead stream, as far as where Mr. Renault has his furnace, and thence a direct line to the spot named the "Great Mine."

The fork of Little Maramecq called for, and the old furnace on it, were proved to exist on the trial, by Mr. Cozzens, who was sent to survey the grant, by order of court, at the instance of the plaintiffs. He says, the Grand Mine is marked on the map; that is, on a copy of the map of public surveys of the United States, obtained from the Land Office at St. Louis. He furnished no plot, because, as he reported and deposed, he could not make a survey of the land claimed; the description in the grant being too vague and unmeaning for him to lay down the land corresponding to the objects called for on the ground. He further deposed, that he understood the French, and was governed by both the English and French copies. On the question whether the tract of land claimed could be ascertained, and the true boundaries identified by survey, the jury was instructed as follows:

"The court is of opinion that the grant to Renault, unaided by a survey under the French or Spanish government, did not separate the land from the public domain: That it cannot now, from its uncertainty, be located; it is not therefore a grant for any specific lands, and does not entitle the plaintiffs to the *locus in quo*."

Thus the Circuit Court held, that notwithstanding the Little Maramecq River, the lead stream, the smelting furnace, and the Grand Mine, existed as indicated on the public surveys, and as claimed to exist by the plaintiffs, still the grant was void for uncertainty, and the impossibility of locating the same.

As the first instruction took the case from the jury, and put an end to the suit on legal grounds, we will proceed to examine this instruction.

The land is to front on the river. When the point of beginning is established on the river, then it is to be meandered up or down, until a straight line will reach a league and a half from the first to the second corner.

It is insisted that the mouth of the streamlet is to be the place of beginning, and that the first line is to run up the river; and that the north western side line is to meander the streamlet to the old furnace, called for in the grant.

Why the beginning point should be at the mouth of the lead stream, it is difficult to comprehend. The grant was intended to cover Renault's mining establishment; but if surveyed, as contended for, the second line would run through the center of his smelting furnace, and also through the center of the mine where the ore was obtained. By such construction the

245*] main *object of the grant, when it was made, would have been defeated. We suppose the following would be a more plausible construction: take the streamlet, from its mouth to the furnace, to be the perpendicular of the front line on the river; then draw a straight line from its mouth to the furnace to give the course of the side lines; they being drawn parallel on each side of the foregoing middle line and a league and a half apart. By such survey the smelting furnace would have been included. But where these side lines were to begin or end (treating each as a unit), no one could tell; nor was it possible to reach the Grand Mine, or include it, by this mode of survey, and therefore this construction could not be relied on.

The jury was bound to find the lines of the grant from its calls, and the objects proved to exist on the ground corresponding to the calls. Nor could this be done by conjecture; lines and corners must be established by the finding, so as to close the survey.

If, after admitting all the verbal evidence to be true, as to objects on the ground, to the extent insisted on for the plaintiffs, and disregarding the defendant's evidence, it was still plainly impossible to locate the grant by its words of description; then, the instruction given by the Circuit Court was proper.

The argument assumes that the second corner is four and a half miles above the mouth of the lead stream on the Maramecq, and the beginning corner at the mouth of the streamlet; that this is the front; that the northwestern side line meanders the lead stream to the furnace; and then runs straight through the Great Mine, extending to a point beyond eighteen miles in depth from the mouth of the streamlet; that, from this last point, a line must be drawn four and a half miles long, and corresponding in its course to the front line on the river; and from the termination of his line, one must be drawn to close on the upper corner on the river. This is the theory of a survey predicated of the translation relied on in this court. No mode of survey is here claimed, as being indicated by the translation furnished to the Circuit Court, and on which the instruction is founded.

As the court below was influenced, in its construction of the grant, by the objects claimed by the plaintiffs, and admitted to exist on the ground, so this court must look to the same source of information for aid, in coming to a practical result. Renault's furnace is not found on the map presented to us, but the Great Mine is. We must assume, however, for the purposes of this action, that the furnace lies so high upon the Mineral Fork as that a straight line run from it to the Great Mine would include the **246*]** land sued for. A survey, made on this assumption, would require a line so acute to the Mineral Fork, as to strike the Little Maramecq River not far above the upper corner on the river, and give the grant the form of a triangle. Place the furnace on any part of the Mineral Fork where probable conjecture can locate it, and still the second line, as here claimed (running through the furnace, and the Great Mine), would have an acute angle in it, so that no depth could be obtained by this mode of survey. Nor could a corresponding line to the front on the river be obtained; nor a line be laid down corresponding to the northwestern side line: as

this hypothetical line would vary so much in its courses as not to afford space for the two other lines. We can say, with entire confidence, that no such theory of survey can be carried out, taking the objects called for and found as the governing rule; and it is equally certain, in our opinion, that no specific boundaries were contemplated as having been given to Renault's grant when it was made, but that the lines were to be afterwards established by survey, as in cases of Spanish concessions covering improvements where the exterior boundaries were left to the discretion of the surveyor.

We are therefore of opinion that the Circuit Court properly held that the grant did not separate any specific tract of land from the public domain, and that the jury could not locate it.

The court having held that the plaintiffs had no title to support their action, it was useless to give any further instructions; nor does it matter whether those given in addition to the first one were right or wrong.

We therefore order that the judgment be affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Missouri, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

CORNELIUS D. THORP, Plaintiff** [247**
in Error.

v.

ARDEL B. RAYMOND.

New York Statute of Limitations—Cumulative disabilities of heirs not allowed for.

The Statute of Limitations of New York allows ten years within which an action must be brought by the heirs of a person under disability, after that disability is removed.

But the right of entry would be barred if an adverse possession, including those ten years, had then continued twenty years; and the right of title would be barred, if the adverse possession had continued twenty-five years, including those ten years.

Cumulative disabilities are not allowed in the one case or in the other.

Therefore, where a right of entry accrued to a person who was in a state of insanity, the limitation did not begin to run until the death of that person; but began to run then, although the heir was under coverture.

THIS case was brought up by writ of error from the Circuit Court of the United States for the Southern District of New York.

The circumstances of the case are fully stated in the opinion of the court.

It was argued by **Mr. Lawrence** for the plaintiff in error, and by **Mr. Shell** for the defendant.

NOTE.—State decisions and laws in regard to Statute of Limitations, govern U. S. courts. See note to *Elmendorf v. Taylor*, 10 Wheat., 152. *Limitations, what statute governs. Effect of new statutes. Lex fortis and not lex loci governs.* See note to *Townsend v. Jemison*, 9 How., 407.

The points made for the plaintiff in error were the following:

First. The plaintiff having shown a valid legal title in his ancestor, Nicholas Brouwer, and having proved that the said Nicholas Brouwer, died seised and possessed of the premises in question, the inheritance therein passed, on his death, to his granddaughter and sole heir at law, Hannah Brouwer, the plaintiff's grandmother.

Second. There is no evidence that Pine held adversely to the heir at law of Nicholas Brouwer, and therefore it must be presumed that he held in subordination to the Brouwer title. (2 R. S., 892, sec. 8.)

Third. The adverse possession commenced with Oliver DeLancey, in 1801, at which time the owner, Hannah Turner, was under the disability of coverture as well as of insanity. These disabilities continued till her death, in 1822, and were continued in her heir at law, Jemima, by reason of her coverture, until 1832.

The Statute provides in substance (N. Y. R. L., of 1801, Vol. I., p. 562), that action may be brought within twenty-five or twenty years (as the case may be) after descent cast; and that the time during which the disability of coverture or insanity shall continue, shall form no part of the period of limitation.

In this case, the disability existed when the adverse possession commenced (Hannah Turner having the title, and being under disability from 1749 to 1822, while the adverse possession commenced in 1801), and it continued uninterruptedly to exist, in the persons of her and her daughter, Jemima Thorp, until the 24th* death of the husband of the latter, in 1842. The Statute of Limitations, therefore, did not commence to run against the original and lawful title until the last-named year, and consequently the right of action continued unimpaired until 1852.

The judgment should therefore be set aside, and a new trial ordered.

Defendant's points.

I. The adverse possession by the defendant, and those under whom he claimed from the 1st of May, 1801, to the time of the commencement of this suit, in 1850, was perfect, and barred and extinguished the title and right of the plaintiff. (24 Wend., 603, 604, 614; 16 Pet., 455; 2 R. L. N. Y., ch. 185, p. 183.; 2 R. S. N. Y., p. 222, sec. 11.)

II. Hannah Turner, being under the disability of mental incapacity from the time the adverse possession commenced, to wit: 1st of May, 1801, until her death, in 1822, her heirs at law had ten years after her death within which to bring their action. (2 R. L. N. Y., ch. 185, p. 183, secs. 2, 3.)

III. Hannah Turner having died in 1822, Jemima Thorp, her heir at law, and the mother of the plaintiff, should have brought her action within ten years after her death; as the ten years, with the time which elapsed after the adverse possession commenced exceeded twenty years, which would bar ejectment, and exceeded twenty-five years, which would bar a writ of right. (*Smith v. Burtis*, 9 Johns., 174; *Demarest and Wife v. Wynkoop*, 3 Johns. Ch., 129, 135; *Jackson, ex dem., v. Johnson*, 5 Cow., 74.) As to the rule in England, under Statute 21 James, ch. 16, *Doe, ex dem., v. Jesson*, 6 East,

80. Also in Pennsylvania, under Statute 26th March, 1785, *Wendle v. Robertson*, 6 Watts, 486.

IV. The plaintiff, and those under whom he claims, not having brought their action within the time allowed by law, are barred by the Statute from recovering said premises, or any interest therein. (2 R. L. N. Y., ch. 185, p. 183.)

Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the Southern District of New York.

The plaintiff brought an action of ejectment in the court below against the defendant to recover the one twentieth part of a mill seat and the erections thereon, together with some eighteen acres of land, situate on the River Bronx in the Town and County of Westchester in said State; and on the trial, gave evidence tending to prove that the premises were owned in fee in 1726 by one Nicholas Brouwer, and that he continued seised of the same as owner down to his death, in 1749; that his heir at law was a grandchild Hannah, then the wife of Edmund *Turner; that said Turner died in [*249 1805, leaving his wife surviving, but who had been for some years previously, and then was, insane, and so continued till her death, in 1822; that at her death she left, as heirs at law surviving her, several children and grandchildren; that one of her surviving children was Jemima Thorp, the mother of the present plaintiff, who was married to Peter Thorp when nineteen years of age: the said Peter died in 1832, and said Jemima, who survived him, died in 1842, leaving the plaintiff and other children surviving. The plaintiff also proved the defendant in possession of the premises, and rested.

The defendant then proved, that before the year 1801, the premises in question were in the actual possession of one Oliver DeLancey claiming as owner, who in the same year by indenture of lease demised the same to one James Bathgate, for the term of fourteen years; that the said Bathgate entered into possession, and continued to hold and occupy the premises under this lease till 1804, when one David Lydig entered, claiming to be the owner in fee; that said Bathgate attorneyed to, and held and occupied under him, as tenant, down to 1840, when the defendant succeeded as tenant of the premises under the said Lydig; that David Lydig died in 1840, leaving Philip, his only child and heir at law, surviving; and that from the date of the lease to Bathgate, 1st May 1801, down to the commencement of this suit, the premises had been continually held and possessed by DeLancey and the Lydigs, father and son, by their several tenants, claiming to be the owners in fee, and exclusive of any other right or title: and occupied and enjoyed the same in all respects as such owners.

Both parties having rested, the court charged the jury that Hannah Turner took the title to the premises on the death of her grandfather, Nicholas Brouwer, in 1749, as his heir at law; but, that as she was then a *feme covert*, the Statute of Limitations did not begin to run against her till 1805, on the death of Edmund Turner, her husband; and as she was also under the disability of insanity, in 1801, when the

HOWARD 16.

adverse possession commenced, the Statute did not begin to run against her estate until her death, this latter disability having continued till then; and that her heirs had ten years after this period to bring the action. But, that the right of entry would be barred if the adverse possession, including these ten years, had continued twenty years; and the right of title would also be barred if the adverse possession had continued twenty-five years, including these ten years. That the ten years having expired in 1832, and the action not having been brought by the plaintiff till 1850, it was barred by the Statute of Limitations in both respects **250*** as *an ejectment or writ of right; and that, upon the law of the case, the defendant was entitled to their verdict.

We think the ruling of the court below was right, and that the judgment should be affirmed.

It is admitted, that if this suit should be regarded in the light of an action of ejectment to recover possession of the premises, the right of entry would have been barred by the Statute of New York, the twenty years bar having elapsed since the right accrued, before suit brought. (1 R. Laws of 1813, p. 185, sec. 3.)

The right of entry of Hannah Turner accrued in 1801, but at that time she was laboring under the disability of coverture, and also of insanity, which latter survived the former, and continued till her death, in 1822. By the saving clause in the third section of the Act, the heirs had ten years from the time of her death within which to bring the ejectment, and no longer, notwithstanding they may have been minors, or were laboring under other disabilities, as it is admitted, successive or cumulative disabilities are not allowable under this section. (6 Cow., 74; 8 Johns. Ch., 129, 135.) The ten years expired in 1832, which, with the time that had elapsed after the adverse possession commenced, exceeded the twenty years given by the Statute. The suit was brought in 1850.

But it is supposed that the saving clause in the second section of this Act, which prescribes a limitation of twenty-five years as a bar to a writ of right, is different, and allows cumulative disabilities; and as ejectment is a substituted remedy in the court below for the writ of right, it is claimed the defendant is bound to make out an adverse possession of twenty-five years, deducting successive or cumulative disabilities. This, however, is a mistake. The saving clause in this second section, though somewhat different in phraseology, has received the same construction in the courts of New York as that given to the third section. (12 Wend., 602, 619, 620, 635, 636, 656, 676.)

The judgment of the court below is therefore affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of New York, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

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*THIRION MAILLARD, EARNEST [*251
CAYLERS, AND HAMILLE C. ROUMAGE, Plaintiffs in Error,

v.

CORNELIUS W. LAWRENCE.

Tariff Act applied to private and social transactions—popular use of words furnishes rule for construction—import by manufacturer.

By the Tariff Act of 1846, a duty of thirty per cent. *ad valorem* is imposed upon articles included within schedule C; amongst which are "clothing ready made and wearing apparel of every description; of whatever material composed, made up or manufactured, wholly or in part by the tailor, sempstress or manufacturer.

By schedule D a duty of twenty-five per cent. only is imposed on manufactures of silk, or of which silk shall be component material, not otherwise provided for; manufactures of worsted, or of which worsted is a component material not otherwise provided for.

Shawls, whether worsted shawls, worsted and cotton shawls, silk and worsted shawls, barge shawls, merino shawls, silk shawls, worsted scarfs, silk scarfs, and mousseline de laine shawls, are wearing apparel, and therefore subject to a duty of thirty per cent. under schedule C.

The popular or received import of words furnishes the general rule for the interpretation of public laws as well as of private and social transactions.

THIS case was brought up by writ of error, from the Circuit Court of the United States for the Southern District of New York.

It was an action brought by the plaintiffs in error against Lawrence, the Collector of the port of New York, for a return of duties alleged to have been improperly exacted upon certain importations of shawls.

The circumstances of the case and the various prayers to the Circuit Court, both on behalf of the plaintiffs and defendant, are fully stated in the opinion of the court.

It was argued by *Messrs. McCulloch and Cutting* for the plaintiffs in error, and *Mr. Cushing* (Attorney General,) for the defendant.

The points made by the counsel for the plaintiffs in error, were the following:

1st. The first, second, third and fourth instructions asked for by the defendant, and granted by the court, are erroneous, each of them—

(a.) Because the terms, "clothing ready made and wearing apparel of every description, made up or manufactured by the tailor, sempstress or manufacturer," used in schedule C, of Tariff of 1846, do not include by their own force all articles which can be used as personal dress either for the adornment, protection or comfort of the person; and,

(b.) Because, where in said Tariff of 1846 the use to which an article may be usually put is intended to govern the rate of duty to be exacted, the statute expressly so declares.

NOTE.—Popular and received import of words, furnishes rule of interpretation in laws, as well as in public and social transactions; exceptions and qualifications; accustomed sense and usage.

Laws are to be construed by interpreting their words in their plain and actual meaning, ordinary and grammatical sense of their language, when the terms are clear and precise. *Wigg v. United States*, Dev., 157; *Beatty v. United States*, Dev., 157; *Chase v. United States*, Dev., 158; *United States v. Warner*, 4 McLean, 423; 6 West. Law. J., 255; *Parsons v. Hunter*, 2 Sumn., 419, 423; *Levy v. McCarter*, 6

(c.) Because, by all the proofs, said terms, "wearing apparel," as used in trade and commerce in July, 1846, did not embrace such shawls and scarfs.

252*] (d.) Because, the terms "wearing apparel," as used in said Act of 1846, are either synonymous with "ready made clothing," or too indefinite to assess any other article than ready made clothing with duty.

(e.) Because the tariff should be construed according to the commercial sense and meaning of the terms employed. The charge is, in this respect, opposed to the settled law of this court.

2. The fifth and sixth instructions asked by the defendant, and granted by the court, were erroneous.

(a.) Because the fifth assumes that in commerce the addition of fringes by hand to some of said shawls and scarfs, after they come from the loom, necessarily brings them within the terms, "articles worn by women or children, made up, or made wholly, or in part, by hand," which are employed in said schedule C.

(b.) Because the sixth assumes that the making of knots in the fringes, or the twisting of said fringes by hand in some of said shawls, after the shawls came from the loom, necessarily brings the shawls within the clause, "articles worn by women and children, made up or made wholly, or in part, by hand."

The court erred in refusing the plaintiff's prayers, because—

3d. The shawls and scarfs in question being in trade and commerce known as "manufactures of silk" or "worsted," and not being known in commerce as "clothing ready made," nor as "articles worn by women and children," the adding of fringes by hand, or the knotting and twisting these fringes by hand, does not take them out of the classes of "manufactures of silk, or of which silk shall be a component material, not otherwise provided," and of "manufactures of worsted, or of which worsted shall be a component material, not otherwise provided for," specified by schedule D.

4th. The proof shows that in trade and commerce the term "made," or "made up," used in schedule C, does not embrace goods to which fringes, borders, knots, or tassels are added after the fabric is made in the loom; nor force goods with such additions to be rated or known as "articles worn by women, made up, or made wholly, or part by hand."

5th. The use to which goods may be put, in fact, does not exclude them from the commercial class to which they belong.

6th. The goods cannot be classed under schedule C, because the proof shows that in the language of trade and commerce they are not either, (a.) "Articles worn by men, women, or children, made up, or made wholly or in part by hand." (b.) Nor "clothing ready made, and wearing apparel made up, or manufactured wholly or in part by the tailor, sempstress, or manufacturer. (c.) Nor "manufactures of cotton, linen, silk, wool or worsted, embroidered or tamboured, in the loom or otherwise by machinery, or with the needle or other process."

*7th. The opinions of the officers of [*253 the customs detailed in the proof, and the arguments attempted to be drawn by them from the exemption from duty, under schedule 1, "of wearing apparel in actual use, and other personal effects of persons arriving in the United States," do not establish any fact, nor furnish any guide in construing the Tariff of 1846, so as to charge the shawls and scarfs in question with thirty per cent. duty, under schedule C.

8th. To charge the goods in question with thirty per cent. duty, by schedule C, instead of twenty-five per cent. by schedule D, it is essential that they should have been distinctly well known in commerce by the term "clothing ready made, and wearing apparel," and as the term "clothing ready made, and wearing apparel," by the testimony does not embrace such shawls and scarfs, the greater rate of thirty per cent. is not to be imposed.

9th. The terms employed in schedule C of the Tariff of 1846, by which the exaction of

Pet., 102; United States v. Fisher, 2 Cranch, 358; Smith v. Bell, 2 Eng. Railw. Cas., 877; 10 Mees. & W., 378; Stephenson v. Higginson, 3 H. L. Cas., 638; Fordyce v. Bridges, 1 H. L. Cas., 1; 11 Jur., 157; Logan v. Courtown, 13 Beav., 22; 20 L. J. Chan., 347; Philpot v. St. George's Hospital, 6 H. L. Cas., 338; 3 Jur. N. S., 1209; Jackson v. Lewis, 17 Johns., 475; 13 Johns., 504; Waterford & Whitehall Turnpike Co. v. People, 9 Barb., 181; People v. N. Y. C. Railroad Co., 13 N. Y., 78; 25 Barb., 199; Walter v. Harris, 20 Wend., 555, 582; McClusky v. Cromwell, 11 N. Y., 503; Lieber's Leg. Herm., 87; 2 Ruth Inst., ch. 7, sec. 2; Story Const., sec. 202; 4 Hill, 384; 20 Wend., 561; 7 N. Y., 97.

Statutes are to be interpreted to give effect to all their words, when such interpretation is reasonable, and consistent with their provisions and objects. United States v. Bassett, 2 Story C. C., 389; 6 Law Rep., 201.

Words well known in the English law must be understood in the sense of the English law. McCool v. Smith, 1 Black., 459; Kirkpatrick v. Gibson, 2 Brock. Marsh., 388; Waterford & Whitehall Turnpike Co. v. People, 9 Barb., 181, 187.

General words are controlled by specifications, but not by influence or limitations or implication, unless necessary and irresistible. United States v. Weiss, 2 Wall., Jr., C. C., 72; 4 Law Rep. N. S., 280; 8 West. Law J., 529; Gelpcke v. City of Dubuque, 1 Wall., 220; Faro v. Martindale, 2 Cranch, 10, 337; Cook v. Hamilton County, 6 McLean, 112; United States v. Hughes, Crabbe, 307; 2 Law Rep., 329; 1 Liv. Law Mag., 545; United States v. Combs, 12 Pet., 72.

Doubtful words in a general statute may be expounded with reference to a general usage. Statute applicable to a particular place may be construed by usage at that place. Love v. Hinckley, Abb. Adm., 436.

Contemporaneous understanding of a statute, corroborated by an undeviating usage of thirty years, must govern its judicial construction. United States v. The Recorder, 1 Blatchf., 218; 5 N. Y. Leg. Obs., 286; Dwar. on Stat., 603; 3 Pick., 517; 1 Cranch, 209; 5 Cranch, 22; 17 Mass., 144; 2 Mass., 477; 2 Op. Att.-Gen., 558; 10 Op. Att.-Gen., 52.

Where words have been long used in a technical sense, and their meaning judicially construed, and have been adopted by the Legislature in that sense, they should be so construed, although varying from their strict literal meaning. Ruckmaboyer v. Mottichund, 8 Moore, P. C. C., 4; 5 Moore, Ind. App., 234.

Where a word in a statute would make the clause in which it occurs unintelligible, the word may be eliminated and the clause read without it. Stone v. Yeovil, 34 L. T. N. S., 574; 1 L. R. C. P. Div., 691; 45 L. J. C. P. Div., 657; 24 W. R., 1073.

Custom and usage are to be considered in the construction of statutes, as statutes in regard to proof and acknowledgment of deeds, and form of certificate. Meriam v. Harsen, 2 Barb. Ch., 283; Bank of Utica v. Mersereau, 3 Barb. Ch., 523, 577; 4 Inst., 75; 2 Edw., 74; 5 Cranch, 32; 1 Serg. & R., 186; 2 Cow., 567; Hopk., 287.

A long and uninterrupted practice under a statute regarded as good evidence of its construction. Fort v. Burch, 6 Barb., 60, 73.

thirty per cent. is claimed, are similar in substance with the terms of the Act of 1842, and the practical construction and action of the government, in regard to shawls and scarfs, under that Act, should be followed under the Tariff of 1846.

10th. The exaction of thirty per cent. under schedule C, is not justified by any treasury instructions which are contrary to the commercial understanding, and to the rules of construction of the statute in regard to duties.

11th. The first, second, third and fourth prayers of the plaintiffs were, and each of them was in accordance with the settled law of this court, and the refusal of the court to instruct the jury upon any of the said propositions as prayed for, was erroneous.

The following is a part of the argument of the *Attorney-General*:

The question raised by the plaintiff in his action is simply this: are "shawls" wearing apparel?

The Act of 1846 has not charged duties upon "shawls" by that name. But if it be found that "shawls" are wearing apparel, then the Collector has charged the true legal rate of duty, without any excess; and the plaintiff's suit is without foundation in law.

For the signification of the word "shawls," as used in the plaintiff's invoices and entries at the custom house, and of the words "wearing apparel," as used in the Statute of 1846, we must resort to the established use of that and of correspondent phrases in our own and in cognate languages, and to critical examination of their legal intent and import.

254*] *In McCulloch's Dictionary of Commerce we have this definition: "Shawls (German—Schalen; French—Châles; Italian—Scauali; Spanish—Chevalos); articles of fine wool, silk, or wool and silk, manufactured after the fashion of a large handkerchief, used in female dresses. The finest shawls are imported from India, &c. . . . Shawls are made of various forms, sizes and borders, which are wrought separately with the view of adapting them to the different markets."

In the Dictionary of French and English by Professors Flemming and Tibbitts, we have this definition and explanation: "Shawl" (English), "*Grand mouchoir de cou*," (French)—signifying a great handkerchief for the neck.

In the Dictionary of Commerce, published in Paris, in 1839, under the direction of Guillauman, we have this definition: "*Châle, grande pièce d'étoffe, dont les femmes se couvrent les épaules, et qui est ordinairement fabriqué dans le goût des châles de l'Orient.*" (Shawl—a large piece of cloth with which the women cover their shoulders, usually manufactured in the fashion of the shawls from the east.)

In Landais' French Dictionary (which has gone through eleven editions), we have this definition: "Schall"—*longue pièce d'étoffe de soie, ou de laine, dont les habitants de l'Égypte s'entourent la tête. Le schall est adopté depuis longtemps par les dames Françaises, qui le portent sur les épaules—ou écrit aussi châle.* (Shawl—a long piece of cloth of silk or wool with which the inhabitants of Egypt surround the head. The shawl has been long since adopted by the women of France, who wear it on their shoulders—it is also written "châle.")

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In the Dictionary of the French Academy, this definition is given: "*Châle—longue pièce d'étoffe dont les orientaux s'enveloppent la tête, et qui entre aussi de diverses manières dans leur vêtement.*" (Shawl—a long piece of cloth with which the orientals environ the head, and which, in divers ways, makes a part of their apparel.)

Consulting English lexicons, we find these definitions: "Shawl, a part of modern female dress."—Worcester.

"Shawl, a cloth of wool, cotton, silk or hair, used by females as a loose covering for the neck and shoulders."—Webster.

Craig's Dictionary of the English Language (which is considered the best present standard work) gives us this definition:

"Shawl, a kind of large kerchief, originally from India, which forms a part of modern female dress, being worn as a loose covering for the shoulders and back."

These various lexicographers all agree that shawls are wearing apparel.

The plaintiffs, to evade the definitions in commercial dictionaries *and other lexi- [*255 cons, and the descriptive words in the statute, (schedule C), and the mass of testimony given in this cause, and the invoices and entries at the customhouse by themselves, offer the oaths of men, "that in trade and commerce, articles of this description are not considered wearing apparel;" that shawls of this description "are not known among merchants as wearing apparel;" that, "in a commercial sense, none of these shawls are made up, nor are they known among merchants as wearing apparel; that these shawls 'commercially speaking,' are not wearing apparel."

Declarations of this nature by witnesses avail nothing. Shawls are known in commerce as wearing apparel, these witnesses to the contrary notwithstanding. These witnesses say, in one breath, shawls are not, "in a commercial sense, wearing apparel;" are not, "commercially speaking, made up, nor known among merchants as wearing apparel;" and in the next breath tell us they are worn by women, and come from the manufacturer "in a complete state to be worn," with their fringes tied by hand, with separately woven borders united to them, ready for use; yet they say, "commercially speaking," and "in a commercial sense," they are neither "made up" nor "wearing apparel!"

Such contrariant absurdities the plaintiffs propose to dispose of by the oaths of the two tailors, Raymond and Beaumont, who swear that they have "purchased shawls of this description to make up into gentlemen's garments; into waistcoats and dressing-gowns;" and who think "that shawls are not wearing apparel till they are made up in this way."

According to their mode of thinking, the cashmere, and other fine shawls imported from India, were not known among merchants as wearing apparel, and were not wearing apparel unless they were made up into gentlemen's garments, waistcoats and dressing-gowns, or such like; that is, "commercially speaking," and "in a commercial sense!"

Such evidence, in favor of the plaintiffs, made "commercially," and "in a commercial sense," cannot outweigh commercial diction-

aries and other lexicons; cannot do away long-established usages, and make us disbelieve what our eyes see day after day; that is, shawls in actual use, as parts of the wearing apparel of females.

The statute, in schedule C, uses plain language to describe two great general classes of merchandise: the first, "clothing ready made," the second, "wearing apparel of every description, of whatever material composed, made up or manufactured wholly or in part by the tailor, sempstress or manufacturer." The witnesses for the plaintiffs confound the two classes, omit 256*] parts of the descriptions of the second class, endeavor to confuse the plain meaning of the statute by introducing a sophistical sense, called by them "a commercial sense;" and even in that they put away the established significations of words, contradict standard writers on commerce, and repudiate common sense and common usage.

Wearing apparel is a general description or genus comprehending many species, and shawls are undoubtedly a species of wearing apparel. Common use, the definitions and explanations of learned writers of commercial dictionaries, and of other lexicons, the daily experience of our own eyesight, all concur to convince our understandings, beyond a doubt, that shawls are a species of apparel worn by females. If shawls are not "made up or manufactured wholly or in part by the tailor, sempstress or manufacturer," how or by whom are they made? Certain it is they are not a raw material, but are the products of art and labor.

Congress, in legislating the system of duties on imports in the Act of 1846 (schedule C), has given a description for revenue purposes, which clearly comprises these shawls; the words of description employed in the statute must have their known signification as established by standard writers, use, and general acceptance. The sophistications attempted by the witnesses for plaintiffs about a "commercial understanding," and "in a commercial sense," are foreign to the case, and are overruled by this court in *De Forest v. Lawrence* 13 How., 282.

Mr. Justice Daniel delivered the opinion of the court:

The plaintiffs in error instituted in the court aforesaid against the defendant an action of trespass on the case for the recovery of an alleged excess of duties charged by the defendant as Collector of the port of New York, and paid to him under protest by the plaintiffs, upon certain goods imported by them from Havre in France, and described by them in the invoices and entries thereof as "worsted shawls, worsted and cotton shawls, silk and worsted shawls, barege shawls, merino shawls, silk shawls, worsted scarfs, silk scarfs, and *mousseline de laine* shawls." There appear to have been nineteen different importations by the plaintiffs, comprised within the description just given, but a particular or separate enumeration of them is not necessary, it being admitted that the protest of the plaintiffs embraced the whole of them, and that the correctness or incorrectness of the proceeding in reference to each of them depends upon the construction of the same statute. Upon the articles thus described, the Collector

charged the duty of thirty per centum *ad valorem* as being wearing apparel within the meaning of schedule C, in the Act of Congress of the 30th of July, 1846. (*Vide 9th Stat. at L., ch. 74, p. 44.*) The plaintiffs insist that according to Schedule D, in the same statute, they were bound to pay at the rate of twenty-five per centum *ad valorem* only, and for a recovery of the difference between this last rate and that at which they have made payment, their action has been brought.

Upon issue joined on the plea of *non assumpsit* and under instructions from the court as to the import of the provisions of the Statute of July 30th, 1846, a verdict was found for the defendant, and a judgment entered in accordance therewith. This case is comprehended within narrow limits, and its decision must depend entirely upon the interpretation of those portions of the Statute of 1846, designated as schedules C and D, as to the description and enumeration of the articles subjected to duties and the rate of import prescribed by these schedules.

In schedule C, which imposes a duty of thirty per centum *ad valorem*, are comprised the following articles, in the literal terms of the law, "clothing ready made, and wearing apparel of every description, of whatever material composed, made up or manufactured, wholly or in part by the tailor, sempstress or manufacturer."

By schedule D, of the same Act, it is declared that an import of twenty five per centum only shall be levied on "manufactures of silk, or of which silk shall be a component material, not otherwise provided for; manufactures of worsted, or of which worsted is a component material, not otherwise provided for."

Several witnesses were examined by the plaintiffs, with the view of showing that in a mercantile sense the term "shawls," under which descriptive name the goods of the plaintiffs were entered, did not include "wearing apparel," and *a fortiori* not wearing apparel, either made up or manufactured wholly or in part by the tailor, sempstress or manufacturer; and that therefore under the provision of schedule D they were subject to an import of twenty five per centum only as manufactures of silk or worsted, "not otherwise provided for." Countervailing evidence was adduced on the part of the defendant to show that, in a mercantile sense, and by generally received and notorious acceptance, and by the plain and even imperative language of the statute, shawls were established to be wearing apparel; and consequently came within the rates imposed by schedule C, and could not be brought within the description in schedule D, as articles "not otherwise provided for." The character of the evidence, or more properly the points it was designed to bear upon, most plainly appear from the several prayers submitted at the trial, and by the rulings of the court upon those prayers.

*The counsel for the plaintiffs moved [*258 the court to charge and instruct the jury,

1st. That if the jury shall find from the evidence that the shawls in question were known at the date of the passage of the said Act of 30th July, 1846, in trade and commerce as "manufactures of worsted," or of which worsted was a component material, that then they are em-

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braced in schedule D, and are only liable to a duty of twenty-five per centum *ad valorem*, and no more.

Second. That if the jury shall find from the evidence that the shawls in question were not, at the date of the said last-mentioned Act, in a commercial sense, and according to the meaning of the term among merchants, either—

1st. Articles worn by men, women or children, "made up," or made wholly or in part by hand. 2d. Nor clothing ready made, or wearing apparel "made up," or manufactured wholly or in part by the tailor, sempstress or manufacturer. 3d. Nor manufactures of cotton, linen, silk, wool or worsted, embroidered or tamboured in the loom, or otherwise by machinery, or with the needle or other process; then in either of said cases the articles in question are liable only to a duty of twenty-five per centum *ad valorem*.

Third. That if the jury shall find from the evidence that the articles in question were charged, under the Act of 1842, with duty as "manufactures of combed wool or worsted," "manufactures of worsted, and manufactures of worsted and silk combined," under section 1, subdivision 1 of said Act, and as "manufactures of cotton," or of which cotton shall be a component part under section 2, subdivision 2 of said Act, then the articles in question are, under the Act of 1846, liable to a duty of twenty-five per cent. *ad valorem*, and no more.

Fourth. That if the jury shall find from the evidence that at the date of the passage of the said Act of the 30th of July, 1846, the shawls in question were commercially known as "manufactures of worsted," or of which worsted was a component material, and that they were not known in trade and commerce as clothing ready made, or as "wearing apparel" made up, or manufactured wholly or in part by the tailor, sempstress or manufacturer, nor as articles worn by men, women and children, made up, or made wholly or in part by hand, then they are chargeable with a duty of twenty-five per cent. *ad valorem*, and no more.

Whereupon His Honor, the presiding judge, refused so to instruct the jury in accordance with all or any of the said several prayers, whereby the plaintiffs, by their counsel, had prayed the court to instruct the jury.

And thereupon the counsel for the plaintiffs 259*] then and there *excepted to the refusal of the said judge to instruct the jury in conformity with the said several prayers of the said plaintiffs, and also to the charge and instructing the jury by the said judge, in conformity with all, any, and every of the several prayers wherein the defendant's counsel had so prayed the court to instruct the jury as matter of law.

The counsel for the defendant insisted, as matter of law, and prayed the court to charge and instruct the jury as follows:

First. That shawls and scarfs suitable and adapted in the state they are imported, to be worn by women on the person, as an article of dress, and usually so worn by women in the United States, are "wearing apparel," "made up" or manufactured wholly or in part, by the tailor, seamstress or manufacturer, within the true meaning of schedule C, of the Tariff Act of the 30th of July, 1846, and are properly chargeable with the duty of thirty per centum

ad valorem, prescribed by said schedule C.

Second. That shawls and scarfs of the description above named are not the less wearing apparel, made up or manufactured wholly or in part by the tailor, seamstress or manufacturer, within the true meaning of the said schedule, though sometimes purchased by clothiers and tailors to be made up into vests, dressing gowns and other garments, as testified to by the witnesses for the plaintiffs in this case.

Third. That shawls and scarfs of the description above named are wearing apparel, made up or manufactured wholly or in part by the tailor, sempstress or manufacturer, within the true meaning of the said schedule C, notwithstanding, at the date of the passage of the said Act of July, 1846, they may not have been called or known by commercial men in trade and commerce by the name of wearing apparel.

Fourth. That whatever may have been, at the date of the said Act, the definition given by commercial men to the term "wearing apparel," shawls and scarfs of the description above named are nevertheless wearing apparel, made up in whole or in part by the tailor, sempstress or manufacturer, within the true meaning of the said schedule C.

Fifth. That shawls or scarfs suitable and adapted in their state as imported, to be worn by women and children, of whatever material composed, having fringes added by hand to the body of the shawls after the same has come from the loom, with sticks or needles, or other such implements, although according to commercial usage and understanding that said articles are not thereby charged in their commercial sense or acceptance, are articles worn by women and children made up or made wholly or in part by hand within the true meaning of said schedule C, and are therefore chargeable with the duty of thirty per centum *ad valorem*, prescribed by said schedule C.

*Sixth. That shawls and scarfs of [*260 the description above named, in the fringes of which, after the body of the shawls has come from the loom, knots are made by hand as a part of such fringes, or the fringes of which are twisted or otherwise completed by hand, although according to commercial usage and understanding the said articles are not hereby changed in their commercial sense or acceptance, are, nevertheless, articles worn by women and children, made up or made wholly or in part by hand, within the true meaning of the said schedule C, and are therefore chargeable with the duty of thirty per centum *ad valorem*, prescribed by the said schedule C.

And thereupon His Honor, the presiding judge, charged the jury in accordance with the several prayers in conformity with which the defendant's counsel had insisted as matter of law.

And thereupon the counsel for the plaintiffs excepted to said ruling of the court upon each of the said prayers.

In construing the provision of schedule C, we think that its meaning cannot be easily misconceived, if the rule of interpretation be drawn from the ordinary and received acceptance of its language, or from any regard to the sensible and consistent application of its words. It is obvious, that by the phrase "clothing ready-made, and wearing apparel of every descrip-

tion," the Legislature did not mean to limit the enumeration to such habiliments as were either by necessity or by a regard to comfort or utility required to be changed from their original shape or fashion, and reshaped, reconstructed in order to adapt them to the human body, or to the purposes of life. Such a construction would render the member of the sentence immediately following and connected with the former by the copulative conjunction, and designing to introduce a new class of subjects, altogether absurd, and wholly inoperative. It must be understood as being the intention of the Legislature to add to "clothing ready-made," in the acceptation above given, every article which in its design and completion and received uses, is an article of wearing apparel, and to comprise such article within schedule C of the Act of 1846, no matter of what material composed, either in whole or in part, or by whom composed or made up, whether by the tailor, sempstress, or manufacturer. The question to be determined has no relation either to material or process, or agent, but exclusively to the origin and purposes of the subject of the duty imposed as being in its design and in its finished condition "wearing apparel." Simply, in other words, whether shawls are wearing apparel.

By the several prayers pressed upon the Circuit Court for instructions to the jury, the object to which they are all directed has been the diversion of the jury from this the only legitimate inquiry before them. The effort has been to substitute for the literal and lexicographical and popular meaning of the phrase "wearing apparel," some supposed mercantile or commercial signification of these words, and to render subservient to that signification what was clearly accordant with the etymology of the language of the statute, with the essential purposes and action of the government, and with the widespread, if not the universal understanding, of all who may not happen to fall within the range of a limited and interested class. In instances in which words or phrases are novel or obscure, as in terms of art, where they are peculiar or exclusive in their signification, it may be proper to explain or elucidate them by reference to the art or science to which they are appropriate; but if language which is familiar to all classes and grades and occupations—language, the meaning of which is impressed upon all by the daily habits and necessities of all—may be wrested from its established and popular import in reference to the common concerns of life, there can be little stability or safety in the regulations of society. Perhaps within the compass of the English language, and certainly within the popular comprehension of the inhabitants of this country, there can scarcely be found terms the import of which is better understood than is that of the words "shawl" and "wearing apparel," or of "shawl" as a familiar, every day and indispensable part of wearing apparel. And it would seem to be a most extravagant supposition which could hold that, in the enactment of a law affecting the interests of the nation at large, the Legislature should select for that purpose language by which the nation or the mass of the people must necessarily be misled. The popular or received import

of words furnishes the general rule for the interpretation of public laws as well as of private and social transactions; and wherever the Legislature adopts such language in order to define and promulge their action or their will, the just conclusion from such a course must be, that they not only themselves comprehended the meaning of the language they have selected, but have chosen it with reference to the known apprehension of those to whom the legislative language is addressed, and for whom it is designed to constitute a rule of conduct, namely: the community at large. If, therefore, the strange concession were admissible that, in the opinion of a portion of the mercantile men, shawls were not considered wearing apparel, it would still remain to be proved that this opinion was sustained by the judgment of the community generally, or that the Legislature designed a departure from the natural and popular acceptation of language.

Another position pressed upon the Circuit Court in behalf of the plaintiffs in error, as is shown by the evidence and by one *of [*262 the prayers to the court, was this: that shawls, in the form in which they are fashioned and finished by the manufacturer, could not properly be termed wearing apparel, because they are by tailors and clothiers frequently purchased to be worked up into vests and other garments. This position might, with equal propriety, be urged with reference to any article of wearing apparel whatsoever which should be diverted from its primal and regular use and design. The consistency and force of this argument, if such it deserves to be called, may be aptly illustrated by the account of the varied uses of a familiar article of wearing apparel found in a poetical description of the privations and expedients of a needy author, in which we read that,

"A stocking decked his brow instead of bay,
A cap by night, a stocking all the day."

According to the logic of the position last referred to, a stocking transferred into a night-cap is shown never to have been a stocking, and therefore never wearing apparel, notwithstanding its primitive denomination, the design for which it was knit or woven; or the offices to which it may have been usually applied.

To the rulings of the Circuit Court upon the prayers presented on behalf of the plaintiffs and defendants respectively, we deem it unnecessary to apply a separate comment. It is sufficient here to remark, that upon a deliberate examination of those rulings, in reference to the facts and features of the case, we accord to the former our entire sanction, as being coincident with the principles laid down in this opinion, and with a just interpretation of those clauses of the statute under color of which this action was instituted.

We therefore adjudge that the decision of the Circuit Court be, and the same is hereby affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of New York, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the

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said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

Att'g—1 Blatchf., 504.
Cited—6 Otto, 111; 11 Otto, 284; 2 Cliff., 605; 13 Blatchf., 199.

263*] **EDWIN BARTLETT, Plaintiff in Error,*

v.
GEORGE P. KANE.

Duties on imports—appraisement of amount of quinine in quantity of Peruvian bark—good where appeal withdrawn—additional not refunded as drawback.

By the Tariff Act of 1842, the custom house appraisers are directed to ascertain, estimate and appraise, by all reasonable ways and means in their power, the true and actual market value of goods, &c., and have power to require the production, on oath, of all letters, accounts or invoices relating to the same. If the importer shall be dissatisfied with the appraisement, he may appeal to two merchant appraisers.

Where there was an importation of Peruvian bark, and the appraisers directed a chemical examination to be made of the quantity of quinine which it contained, although the rule may have been inaccurate, yet it did not destroy the validity of the appraisement.

The importer having appealed, and the appraisers having then called for copies of letters, &c., the importer withdrew his appeal without complying with the requisition. The appraisement then stands good.

The appraisers having reported the value of the goods to be more than ten per cent. above that declared in the invoice, the collector assessed an additional duty of twenty per cent. under the eighth section of the Act of 1846 (9 Stat. at Large, 48). This additional duty was not entitled to be refunded, as drawback, upon re-exportation.

THIS case came up by writ of error from the Circuit Court of the United States for the District of Maryland.

It was an action brought by Bartlett against Kane, who was the Collector of the port of Baltimore, for the refunding of certain duties alleged to be illegally exacted upon the importation of Peruvian bark.

The circumstances of the case are fully stated in the opinion of the court.

It was argued by *Messrs. Brune and Brown* for the plaintiff in error, and by *Mr. Cushing* (Attorney-General), for the defendant.

The points and authorities relied upon by the counsel for the plaintiff in error were as follows:

1st. That the true dutiable value of the goods imported by the plaintiff in error, which were the production of Bolivia, and exported from that country by *Messrs. Pinto & Co.*, to whom they belonged, was their market value in Bolivia, at the time of their procurement by *Messrs. Pinto & Co.*

2d. That if said goods are to be considered as exported from Peru, their true dutiable value was their market value in Bolivia at the date of their exportation from Peru; and the court below, which seems to consider them as exported from Peru, then erred in declaring that the law in such case fixes the duties upon the market value at the place of exportation.

3d. That as Bolivia was not an open market in which bark could be purchased during the continuance of the contracts between *Pinto & Co.* and the Bolivian government, the cost price

*to *Messrs. Pinto & Co.* of the said goods, [*264 under their contracts of monopoly with the Bolivian government, must be esteemed the market value of said goods in Bolivia, for the purpose of fixing the dutiable value of said goods, whether considered as exports from Bolivia or Peru.

4th. That the invoice value of said goods which was declared on the entry, and upon which duty was then paid by the agents of the plaintiff in error, is clearly shown, by the evidence, not only to have been greater than the cost price to *Messrs. Pinto & Co.* under their said contracts, but was also fully equal to the value of such goods in the markets of Peru up to the period of their shipment from that country.

5th. That whatever may be the rule of law establishing the true dutiable value of said goods, their dutiable value as mentioned in the invoice, duly verified and declared on the entry, must be deemed their true dutiable value until superseded by a valid appraisement, fixing a different value.

6th. That the appraisement by which the dutiable value of the said goods was raised, and the importer was subjected to the additional duty prescribed by the eighth section of the Act of 1846, was illegal and void, and the duties thus claimed and paid under said appraisement, were illegally exacted.

7th. That the court below erred in refusing the plaintiff's second prayer, and in the opinion which was given to the jury, by which it decided as a matter of law, and without submitting any facts to be found by the jury that said appraisement was valid.

8th. That the non-compliance of the plaintiff in error with the requirements of the appraisers, contained in their letter of the 6th of October, 1849, did not make valid the illegal appraisement of his goods, previously made, and then still appealed from.

9th. That the court below erred in refusing to grant the plaintiff's third and fourth prayers; and also in the opinion which it gave, by which it instructed the jury absolutely, and without submitting any facts to be found by them, that the plaintiff, by his conduct, had fixed the correctness of the said appraisement.

10th. That the court erred in rejecting the plaintiff's fifth prayer, and in instructing the jury that the plaintiff was not entitled to recover any part of the sum exacted by the defendant in error, as additional duty under the eighth section of the Act of 1846, upon the goods entered by the plaintiff for warehousing and subsequently exported.

To maintain the first seven points, having reference to the true dutiable value of the goods, and the invalidity of the appraisement *by which this value was raised, the [*265 plaintiff in error relies on the following Acts of Congress: 1818, ch. 79, 3 Stat. at Large, 433, and particularly to secs. 8, 4, 5, 9, 11, 12, 15, 16 and 17; 1823, ch. 21, 3 Stat. at Large, 729, secs. 4, 5, 7, 8, 13, 14, 15, 16, 18, 19, 21; 1828, ch. 55, 4 Stat. at Large, 270, secs. 8, 9; 1830, ch. 147, 4 Stat. at Large, 409, secs. 1, 2, 8, 4; 1832, ch. 227, 4 Stat. at Large, 583, secs. 7, 8, 15; 1833, ch. 55, 4 Stat. at Large, 629, sec. 3; 1842, ch. 270, 5 Stat. at Large, 584, secs. 16, 17, 21, 22, 23, 24; 1846, ch. 74, 9 Stat. at Large, 42, secs. 1, 8, 11, schedule F.

And by way of illustration, to the Act of 1851, ch. 38, 9 Stat. at Large, 629. And the Treasury Circular of the 27th of March, 1851, construing the same.

And the following authorities: *Tappan v. The United States*, 2 Mas., 396; *Tappan v. The United States*, 11 Wheat., 420 to 427; *Tracy v. Swartwout*, 10 Pet., 94, 95; *Elliott v. Swartwout*, *Id.*, 153-157; *Marriott v. Brune*, 9 How., 634, 635; *Greely v. Thompson*, 10 How., 225-241; *Maxwell v. Grinnold*, *Id.*, 247 to 254; *Reggio v. Greely*, MSS. Mass. Circuit, June, 1851; *Grinnell v. Lawrence*, 1 Blatchf., 384, 350.

To maintain his 8th and 9th points, the plaintiff in error refers to 1823, ch. 21, 3 Stat. at Large, 729, secs. 16, 17; 1830, ch. 147, 4 Stat. at Large, 409, sec. 3; 1832, ch. 227, 4 Stat. at Large, 593, secs. 7, 8; 142, ch. 270, 5 Stat. at Large, 548, secs. 16, 17; 1848, ch. 70, 9 Stat. at Large, 237.

And to *Tappan v. The United States*, 2 Mas., 408; *Grinnell v. Lawrence*, 1 Blatchf., 350; *Tucker v. Kane*, MSS. Md. Circuit; *Reggio v. Greely*, MSS. Mass. Circuit, June, 1851; *Watson on Arbitrations*, 59 Law Library, 36; *Russell on Arbitrations*, 63, *Id.*, 151; *Tracy v. Swartwout*, 10 Pet., 95, 96; *Marriott v. Brune*, 9 How., 634; *Greely v. Thompson*, 10 How., 229-238.

To maintain his 10th point he refers to the Acts of 1799, ch. 22, 1 Stat. at Large, 627, particularly secs. 56, 75, 76, 77, 78, 80, 81, 84; 1816, ch. 107, 3 Stat. at Large, 310, sec. 4; 1818, ch. 129, 3 Stat. at Large, 467; 1823, ch. 21, 3 Stat. at Large, 729, secs. 28-37; 1830, ch. 147, 4 Stat. at Large, 409, sec. 5; 1842, ch. 270, 5 Stat. at Large, 548, secs. 12, 13, 15; 1846, ch. 7, 9 Stat. at Large, 3, sec. 3; 1846, ch. 84, 9 Stat. at Large, 53, secs. 1, 2; Treasury Circular of 12th June, 1847; *Tremlett v. Adams*, 18 How., 308.

The *Attorney-General* contended:

The said appraisement was final and conclusive upon the withdrawal of the appeal.

After enumerating the statutory provisions upon the subject, he said:

From the enactments of the statute, it is clear **266**] that the appraisement "by the custom house appraisers becomes final and conclusive upon either of these events; by the failure of the owner, importer or consignee, to ask an appeal to merchant appraisers, or by withdrawing that appeal after taken, or by refusing to produce the letters or accounts relating to the goods imported.

The statute cannot be evaded by taking an appeal and then withdrawing it, with notice of an intent to bring the question of the true market value before the judicial tribunals; nor by taking an appeal, refusing to produce the letters and accounts required, and withdrawing the appeal under protest against the appraisement appealed from, with notice that the appellant means to contest the appraisement and present his documents, called for by the appraisers, before a tribunal other than the merchant appraisers.

The statute has provided the appellate tribunal to settle finally the question of the true market value of the goods when the importer, owner or consignee is dissatisfied with the appraisement, by the custom house appraisers. That final appellate tribunal is to consist of mer-

chants, "two discreet and experienced merchants, citizens of the United States, familiar with the character and value of the goods in question." The ingenuity of the plaintiff cannot draw this question *ad aliud examen*.

The plaintiff says: "In looking more carefully to the requisition of your appraisers of bark per St. Joseph, I find that I shall have to have copied and translated a mass of correspondence from January last, when it was shipped, to August (for reference to it is made in all my letters from Pinto & Co., and Alsop & Co.); and in order the more fully to explain Pinto & Co's mode of invoicing their bark, I shall have to present a series of documents, commencing in 1847, with their contract with the Bolivian government, proving its actual cost to be about \$60 per quintal: all these are necessary to make out my own case, and I am unwilling to present less than all the documents. I do not see, however, of what use they can be at present to the appraisers, who have already made up their valuation of the bark, and made a return to the Collector. I shall therefore defer the presentation of my documents for another tribunal, and not lose more time in delivering the bark to the purchaser. I wish you to inform the Collector that by my instructions your appeal is withdrawn, and that you are prepared to pay, under protest, whatever duties may be exacted on the bark. . . . At leisure we can then test the question of this exaction."

In plaintiff's second letter to his agents, he says: "One reason I have for taking the course directed in my letter of this date is, that my counsel informs me that I can more easily get the bark case into court before the appeal appraisement be resorted *to than after. [*267 wards. Some of our judges have held that an appeal appraisement is final and conclusive."

The plaintiff professed not to see what use could be made of the letters and correspondence called for after the appraisement by the custom house appraisers had been reported to the Collector. It would have been useful evidence before the merchant appraisers if the plaintiff had not withdrawn his appeal rather than to produce those letters, accounts and correspondence. They might have enlightened the merchant appraisers. They might have enlightened the custom house appraisers to amend or correct their report to the Collector, for the duties were not then fixed and imposed. Did the plaintiff conjecture that the merchant appraisers, to whom he had appealed, were to decide without hearing any evidence? That the government was debarred from introducing evidence to sustain the appraisement appealed from?

The pretenses in the plaintiff's letter of inability to see the use to be made of the letters and correspondence called for; that he would "defer the presentation of the documents for another tribunal" than the merchant appraisers, and that he could "more easily get the bark case into court before the appeal appraisement be restored to than afterwards," cannot enable the plaintiff to evade the force and effect of the seventeenth section of the Act of 1842.

The "actual market value or wholesale price," at the time when the article was purchased, in the principal markets of the country from which the same shall have been imported into the United States, is a question of fact, not of law.

The sixteenth and seventeenth sections of the Act quoted plainly make the ascertainment of that fact an executive function; an administrative, not a judicial process. The particular executive and administrative jurisdiction and process are carefully specified in the law in a manner to exclude all other jurisdictions, and to make the ascertainment of the fact, by that particular jurisdiction, "final and conclusive."

The statute, if the owner, importer, or consignee be dissatisfied with the appraisement of the goods, has given a remedy by an appeal, "forthwith," to merchant appraisers: *Expressio unius est exclusio alterius*. The express mention of the one remedy is the exclusion of another. (Co. Litt., 210; Broom's Legal Maxims, 515, 516; *The King v. Cunningham*, 5 East, 478, 480; *The King v. The Justices of Surrey*, 2 Durn. & E., 510; *Cates v. Knight*, and *Same v. Mellish*, 3 Durn. & E., 444.)

The fact to be thus ascertained is of vital importance to the revenue. The means given are necessary to protect the revenue from diminution by evasions and frauds requiring **268*** promptitude. "Congress have intended that the fact shall be speedily ascertained and adjusted, finally and conclusively fixed 'forthwith,' as quickly as may be after the master of the vessel shall have made entry of the cargo, as it were *velis levatis*; for it is a fact preceding the computation and payment of the duties; in its nature, purpose and effect, an executive and administrative business. The views and ends intended in this respect cannot be answered by the dilatory proceedings of the courts.

II. No drawback is recoverable of the penal duty of twenty per cent. in addition to the regular duty inflicted by law, and paid on one hundred and twenty-five seroons of bark afterwards re-exported from the port of Baltimore to foreign parts.

The duty of fifteen per cent. *ad valorem* has been refunded upon the seroons of bark so re-exported to foreign parts.

This question as to the penal duty is so plain, as to afford little room for argument. The twenty per cent. is a rated penalty, inflicted for an attempt to defraud the revenue by an invoice and entry of the goods at the custom house at an undervalue.

After the fact committed, the fraud detected, and the penalty paid, the party cannot demolish the fact, wipe out the fraud, and claim that the penalty shall be remitted because he has found it for his interest to re-export the merchandise to a foreign country. By such a construction of the statute, the law would be stripped of its sanction, and terror to offenders.

The construction given by the Secretary of the Treasury (Mr. Walker), in his circular of the 12th of June, 1847, to the collectors, pp. 36, 37, is, that this is a "penal duty." * * "This penal duty is not a subject of drawback, and cannot be returned on debenture." * * "such penalty is never returned on exportation of such goods."

On October 25, 1849, plaintiff applied to the Secretary of the Treasury (Mr. Meredith) for instructions to the Collector to return the "excess of duty above that which would have accrued on the original and true invoice of the bark," pp. 18 to 15. To this the Secretary

wrote to the Collector the letter of February 14, 1850, p. 15, and to the plaintiff the letter of same date, p. 16, in which he instructed the collector, and answered the plaintiff, "that the 'additional duty' imposed in all cases of undervaluation, to a certain extent, was intended, and must be considered as entirely distinct in character and object from the regular tariff rates of duty exclusively in view when the law regulating the drawback of duties was enacted; and that consequently no return of such 'additional duty' could be legally made as debenture. It is thought proper to add, that the practice heretofore pursued, under the instructions of the department, has been uniformly governed by these views."

*The views above quoted are not bind-[***269** ing on this court. As contemporaneous constructions of the department charged by law with superintending the collection of the revenue from customs, however, they will draw forth the serious deliberations of this court, and will be suffered to stand unless some good cause can be found to the contrary.

Mr. Justice Campbell delivered the opinion of the court:

This suit was commenced by the plaintiff as consignee of six hundred and fourteen seroons of Peruvian bark imported into the port of Baltimore, and entered at the custom house, for an excess of duties charged by the defendant as Collector, and paid under protest. Two hundred seroons of the first quality were entered for consumption, and the remainder for warehousing. On the 4th of October, 1849, the appraisers of the custom house reported the value of the invoice to be ten per cent., and more, above the value declared by the agents of the plaintiff who made the entry, and in consequence the Collector, besides the legal duty of fifteen per cent. *ad valorem*, assessed an additional duty of twenty per cent. under the eighth section of the Act of 1846, 9 Stat. at Large, 43, ch. 74, for undervaluation. On the 6th of October, 1849, the plaintiff duly protested against the appraisement, and requested that the case might be submitted to merchant appraisers, as provided by law. After notice of the appeal, the same day, the permanent appraisers required the plaintiff "to produce all their correspondence, letters and accounts, relative to the shipment and to make a deposition that the documents furnished were all that he had concerning the shipment."

In reply to this, some five days after, the plaintiff instructed his agents that it would be tedious and difficult to comply with the requisition, in consequence of the volume of the correspondence, says he cannot understand what use the appraisers could make of them, as they had made their report; that he should defer their presentation for another tribunal, and that he withdraws his appeal, and will pay the duties under protest. He still insists upon the overvaluation, but offers to settle at that rate, provided the additional duty is not charged. He says that this exaction is illegal, and they can test it at their leisure. That he had been advised that an appeal appraisement might interfere with his rights in a court of justice.

These letters of the plaintiff were submitted

to the permanent appraisers, who replied they could make no alteration of their estimate, and the appeal of the plaintiff was withdrawn. The plaintiff paid the entire duties exacted upon the appraised value of the entire import, including those entered for consumption as 270*] *well as warehousing, and an additional duty of twenty per cent. for undervaluation. These sums were paid under protest. A portion of the bark was exported, and upon this the plaintiff became entitled to drawback; which was paid to the extent of the regular duty, but the additional duty was not refunded.

The complaint of the plaintiff is, that the appraisers, instead of estimating the value of the Peruvian bark, according to the cost price in the markets of its production, under the directions of the Secretary of the Treasury, caused a chemical analysis of samples to be made to ascertain the quantity of sulphate of quinine it contained, and having ascertained its relative intrinsic value with other imports of the same article, regulated its appraised value by a comparison with the cost of such imports. The facts and the complaint were submitted to the Secretary of the Treasury, who replied as follows:

"It appears from the report of the United States appraisers, dated 20th October last, that the dutiable value of the article in question having been estimated and sustained by them in conformity with law, it was found that the appraised value exceeded, by ten per cent. or more, the value declared in the entry, and that an appeal from this appraisement, entered by the importer, was subsequently withdrawn by him. Under these circumstances it necessarily follows that the original appraisement, made by the United States appraisers, is to be taken as final and conclusive in determining the dutiable value, and that such value, exceeding by ten per cent. or more the value declared in the invoice and entry, the 'additional duty' of twenty per cent. as provided in the eighth section of the Tariff Act of 1840, is chargeable under the law in addition to the regular tariff rate of fifteen per cent. *ad valorem*, levied on the enhanced value of the article in question. A supplemental question in reference to this importation having been submitted to the department, under date of 7th instant, namely: whether the importer is not entitled to the return of that portion of the 'additional duty' paid on that part of the importation withdrawn from warehouse by the importer, and exported from the United States, I have to advise you that, upon a careful examination of the subject, it is the opinion of the department that the 'additional duty' imposed in all cases of undervaluation, to a certain extent, was intended, and must be considered as entirely distinct in character and object from the regular tariff rates of duty exclusively in view when the laws regulating the drawback of duties were enacted; and that, consequently, no return of such 'additional duty' could be legally made as debenture. It is thought proper to add, that the practice heretofore pursued under the instructions of the department has been uniformly governed by these views."

271*] *Much evidence was given at the trial to prove that the value declared by the

agents of the consignee at the time of the entry was strictly accurate, and that the rule of valuation adopted at the custom house was deceptive, and injurious to the importer.

The conclusions of the Secretary of the Treasury, as before set forth, were sustained in the Circuit Court, and form the subject for examination in this court.

By the sixteenth section of the Tariff Act of 1842 (5 Stat. at L., 563, ch. 270), it is prescribed to the appraisers, by all reasonable ways and means in his or their power, to ascertain, estimate and appraise the true and actual market value, and wholesale price, any invoice or affidavit thereto to the contrary notwithstanding, of the said goods, wares and merchandise, at the time purchased, and in the principal markets of the country wherever the same shall have been imported into the United States, with the proviso, that whenever the same shall have been imported into the United States from a country in which the same have not been manufactured and produced, the foreign value shall be appraised and estimated according to the current market value, or wholesale price of similar articles at the principal markets of the country of production or manufacture at the period of the exportation of said merchandise to the United States. The seventeenth section of the Act authorizes the appraisers to call before them, and examine upon oath, the owner, importer, consignee or other person. "touching any matter or thing which they may deem material in ascertaining the true market value or wholesale price of any merchandise imported, and to require the production on oath to the collector, or to any permanent appraiser of any letters, accounts or invoices in his possession relating to the same, for which purpose they are hereby respectively authorized to administer oaths and affirmations; and if any person so called shall neglect or refuse to attend, or shall decline to answer, or shall, if required, refuse to answer in writing any interrogatories, or produce such papers, he shall forfeit and pay to the United States the sum of \$100; and if such person be the owner, importer or consignee, the appraisement which the said appraisers * * * may make of the goods, wares and merchandise, shall be final and conclusive, any Act of Congress to the contrary notwithstanding. *

"Provided, that if the importer, owner, agent or consignee of any such goods shall be dissatisfied with the appraisement, and shall have complied with the foregoing requisitions, he may forthwith give notice to the collector, in writing, of such dissatisfaction, on the receipt of which the collector shall select two discreet and experienced merchants, citizens of the United States, familiar with the character and value of the goods in question, to examine and appraise the same agreeably to the foregoing provisions; and if they shall disagree the collector shall decide between them, and the appraisement thus determined shall be final, and deemed and taken to be the true value of the said goods, and the duties shall be levied thereon accordingly, any Act of Congress to the contrary notwithstanding."

The plaintiff contends that the rule of appraisement by which the dutiable value of the said goods was raised, and the importer was

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subjected to the additional duty prescribed by the eighth section of the Act of 1846, was illegal and void, and the duties thus claimed and paid under said appraisement were illegally exacted. It may be admitted that the rule, if strictly applied, would in many cases lead to erroneous results, and could not be relied upon as a safe guide in any case, but this admission does not establish the nullity of the appraisement. The appraisers are appointed "with powers, by all reasonable ways and means, to ascertain, estimate and appraise the true and actual market value and wholesale price" of the importation. The exercise of these powers involves a knowledge, judgment and discretion. And in the event that the result should prove unsatisfactory, a mode of correction is provided by the Act. It is a general principle, that when power or jurisdiction is delegated to any public officer or tribunal over a subject matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject matter. The only questions which can arise between an individual claiming a right under the acts done, and the public, or any person denying their validity, are power in the officer and fraud in the party; all other questions are settled by the decision made, or the act done by the tribunal or officer, whether executive, legislative, judicial or special, unless an appeal is provided for, or other revision by some appellate or supervisory tribunal is prescribed by law." (*United States v. Arredondo*, 9 Pet., 691.)

The interference of the courts with the performance of the ordinary duties of the executive departments of the government would be productive of nothing but mischief; and we are satisfied that such a power was never intended to be given to them. (*Decatur v. Paulding*, 14 Pet., 499.)

The interposition of the courts, in the appraisement of importations, would involve the collection of the revenue in inextricable confusion and embarrassment. Every importer might feel justified in disputing the accuracy of the judgment of the appraisers, and claim to make proof before a jury, months and even years after the article has been withdrawn from the control of the government, and when the knowledge of the *transaction has faded from the memories of its officers. The consignee, after he has been notified of the appraisement, is authorized to appeal, and pending the appeal we can see no reason why he may not negotiate with the officers of the customs to correct any error in their judgment. We do not perceive a reason for holding that their control of the subject is withdrawn by the fact of the appeal. The appeal is one of the reasonable ways and means allowed to the importer for ascertaining the true and dutiable value, paramount in its operation to any other when actually employed, but until employed not superseding those confided to the officers. We think, therefore, that the permanent appraisers under the sanction of the Collector (which is to be presumed), when informed that their decision was contested, had the right to call for the production of the correspondence, and that the plaintiff could not have prosecuted the appeal without a compliance with the requisition.

In this case the plaintiff neither complied with the requisition nor prosecuted the appeal,

but withdrew it, and settled the duties on the basis of the appraisement of the permanent appraisers. After this, we think he could not dispute the exactness of the appraisement. In *Rankin v. Hoyt*, 4 How., 327, being the case of a disputed appraisement, the jury found the invoice to be correct, and it was urged that the Collector could not be justified in following the higher valuation of the appraisers. The court say "that an appraisal made in a proper case must be followed, or the action of the appraisers would be nugatory, and their appointment and expenses become unnecessary. The propriety of following it, cannot, in such a case, be impaired by the subsequent verdict of the jury, differing from it in amount, as the verdict did not exist to guide the Collector when the duty was levied, but the appraisal did, and must justify him, or not only the whole system of appraisement would become worthless, but a door be opened to a new and numerous class of actions against collectors, entirely destitute of equity. We say destitute of it, because, in case the importer is dissatisfied with the valuation made by the appraisers, he is allowed by the Act of Congress, before paying the duty, an appeal and further hearing before another tribunal."

In the case before us the plaintiff withheld the information which might have satisfied the officers of the government, after a legal requisition upon him. He abandoned the claim for a hearing before "persons familiar with the character and value of the goods in question," "discreet and experienced merchants," and preferred a tedious and vexatious litigation. We think, as was said by the court in the case above cited, "he cannot, with much grace, complain afterwards that any overestimate existed."

*We shall now inquire whether, upon [*274 the re-exportation of the Peruvian bark entered for warehousing, the plaintiff was entitled to a return of the twenty per cent. of additional duty charged upon the portion so exported.

An examination of the revenue laws upon the subject of levying additional duties, in consequence of the fact of an undervaluation by the importer, shows that they were exacted as discouragements to fraud, and to prevent efforts by importers to escape the legal rates of duty. In several of the Acts, this additional duty has been distributed among officers of the customs upon the same conditions as penalties and forfeitures. As between the United States and the importer, and in reference to the subject of drawback and debenture, it must still be regarded in the light of a penal duty.

The provision for the return of the duty upon a re-exportation, formed a part of the system of regulations for importation and revenue from the earliest period of the government, and has always been understood to establish relations between the regular and honest importer and the government.

It does not include, in its purview, any return of the forfeitures or amercements resulting from illegal or fraudulent dealings on the part of the importer or his agents. Those do not fall within the regular administration of the revenue system, nor does the government comprehend them within its regular estimates of supply. They are the compensation for a vio-

lated law, and are designed to operate as checks and restraints upon fraud and injustice. A construction, which would give to the fraudulent importer all the chances of gain from success, and exonerate him from the contingencies of loss, would be a great discouragement to rectitude and fair dealing. We are satisfied that the existing laws relating to exportations, with the benefit of drawback, do not apply to relieve the person who has incurred, by an undervaluation of his import, this additional duty from the payment of any portion of it.

Our conclusion is, there is no error in the record, and the judgment of the Circuit Court is affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Maryland, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

Att'g—Taney, 186.

Cited—18 How., 529; 24 How., 522; 10 Wall., 453; 3 Blatchf., 409, 411, 412; 2 Curt., 240; 2 Cliff., 375, 600; 1 Abb. U. S., 421.

275*] *JANE M. CARROLL, Plaintiff in Error,

v.

LESSEE OF GEORGE W. CARROLL, DE ROSZ CARROLL, ROBERT D. CARROLL, CHARLES W. CARROLL, JOHN M. MARTIN AND AMERICA, HIS WIFE, AND JOHN FORD AND MARY, HIS WIFE.

Will—after-acquired lands did not pass by in Maryland.

By the common law of Maryland, lands of which the testator was not seised at the time of making his will, could not be devised thereby.

In 1850, the Legislature passed the following Act:
Sec. 1. Be it enacted, &c., That every last will and testament executed in due form of law, after the first day of June next, shall be construed with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed on the day of the death of the testator or testatrix, unless a contrary intention shall appear by the will.

Sec. 2. That the provisions of this Act shall not apply to any will executed before the passage of this Act, by any person who may die before the first day of June next, unless in such will the intention of the testator or testatrix shall appear that the real and personal estate which he or she may own at his or her death, should thereby pass.

Sec. 3. That this law shall take effect on the first day of June next.

In 1837, Michael B. Carroll duly executed his will, making his wife Jane his residuary legatee and dev-

isee. After the execution of his will, he acquired the lands in controversy, and died in August, 1851. The lands which he purchased in 1842 did not pass to the devisee, but descended to the heirs.

The cases upon the subject examined.

A distinction is to be made between cases which decide the precise point in question and those in which an opinion is expressed upon it, incidentally.

Evidence that the name of the tract of land, conveyed by a deed, was the same with the name given in an early patent; that it had long been held by the persons under whom the party claimed; and that there was no proof of any adverse claim, was sufficient to warrant the jury in finding that the land mentioned in the deed was the same with that mentioned in the patent.

The lessee of the plaintiffs having claimed, in the declaration, a term of fifteen years in three undivided fourth parts of the land, and the judgment being that the lessee do recover his term aforesaid yet to come and unexpired, this judgment was correct.

THIS case came up by writ of error from the Circuit Court of the United States for the District of Maryland.

It was an action of ejectment brought by the defendants in error, as heirs of Michael B. Carroll, to recover three undivided fourth parts of all of three several tracts or parcels of plantable land, called, for the first of said three tracts, "Black Walnut Thicket" and "Content," contiguous to each other, lying and being in Prince George's County, in the State of Maryland, containing 700 acres, more or less; and called, for the second of said three tracts, "Addition to Brookfield," situate, lying and being in Prince George's County aforesaid, containing 150 acres, more or less; and called, for the third of said three tracts, "Lot No. 1," being part of a tract of land called Brookfield, containing 450 acres, more or less.

*Carroll made a will in 1837, in [*276 which, after some legacies, he devised all the rest of his property, real, personal and mixed, to his wife, Jane M. Carroll.

In 1850 the Legislature of Maryland passed a law, which is recited in the syllabus at the head of his report, and also in the opinion of the court.

In August, 1851, Carroll died, upon which the present action of ejectment was brought by three of the four branches of his heirs, to recover three undivided fourth parts of the lands mentioned in the beginning of his report. The claim of the two latter tracts did not appear to have been prosecuted, but the controversy turned exclusively upon the title of the plaintiffs below to "Black Walnut Thicket" and "Content."

Upon the trial in the Circuit Court the plaintiffs offered, in evidence, to support their title:

1. The patent for "Black Walnut Thicket," dated at the City of St. Mary's on the 29th September, 1680, and the patent for "Content," dated on the 10th of August, 1758.

2. A deed from W. B. Brooks and others, to

NOTE.—Obiter dicta.

An *obiter dictum* is an opinion expressed by the court, but which, not being necessarily involved in the case, lacks the force of an adjudication. 1 Bouv. Law. Dict., 476.

According to the more rigid rule, an expression of opinion, however deliberate, upon a question however fully argued, if not essential to the disposition which was made of the case, may be regarded as a *dictum*, or an *obiter dictum*. But it may be difficult to see why the opinion of the court is not as persuasive on all points which were so involved in a cause that it was the duty of counsel to argue

them, and which were deliberately passed upon by the court, as if the decision had hung upon one controlling point. 1 Abbott, N. Y. Dig., pref. IV.; see 17 Serg. & R., 292; 1 Phill. Eccl., 408; 1 Eng. Eccl., 129; Ram. Judgm., c. s. p. 36; Willes, 606; 1 H. Bl., 53-63; 2 Bos. & P., 375; 7 Penn., 287; 3 Barr. & Ald., 341; 2 Bingh., 90.

[In writing head-notes, and indexes of cases, the decisions would seem to lose much of their value, if the points upon which the court express a deliberate opinion were not noticed, although not *causal* to the disposition of the case, and not the leading and controlling grounds of the decision.—Ed.]

HOWARD 16.

Michael B. Carroll, dated on the 27th of January, 1842, which purported to convey all those tracts, parts of tracts, or parcels of land lying and being in Prince George's County, called "Black Walnut Thicket" and "Content," contiguous to each other, and contained within the following metes and bounds, courses and distances, namely, * * (these were not identical with those of either patent).

8. The plaintiff then proved possession, by Carroll, of the parcel of land described in the deed to him, from the date of that deed until his decease; and also proved possession of the same by those under whom Carroll claimed from 1809.

The defendant, by her counsel, then prayed the court to instruct the jury that there was no sufficient evidence in the cause from which the jury could properly find that the land embraced in said deed, from said Walter B. Brooks and others, to said Michael B. Carroll, offered in evidence by the plaintiffs, is the same land, or parcel of the same lands, embraced in the said patents or in either of said patents. But the court refused said prayer, being of opinion that there was evidence in the cause proper to be left to the jury to determine whether the said land, mentioned in the deed, was the same, or part of the same, granted by the said patents. To which opinion of the court, and to the refusal of said court to grant the aforesaid prayer of the said defendant, the said defendant, by her counsel, prayed leave to except, and that the court would sign and seal this first bill of exceptions, according to the form of the Statute 277*] in such case made and provided; and which is accordingly done this 4th day of December, 1852.

R. B. TANEY. [SEAL.]
JOHN GLENN. [SEAL.]

Defendant's second exception. The defendant then offered in evidence the last will and testament of Michael B. Carroll, dated on the 10th of September, 1837, by which, as has been before mentioned, he made his wife, Jane, his residuary devise. Thereupon, upon the prayer of the plaintiff, the court gave the following instruction to the jury:

If the jury find that the plaintiff, and those under whom he claims, have possessed and held the land called Black Walnut Thicket and Content, described in the deed from Walter B. Brooks and others to Michael B. Carroll, dated — 29, 1842, and that the said Michael B. Carroll died seised thereof August 30, 1851, and the lessors of the plaintiffs are his heirs at law, and that the said land is the same, or part of the same land mentioned in the patents for Black Walnut Thicket and Content, offered in evidence by the plaintiffs, then the plaintiffs are entitled to recover the land mentioned in the said deed, and that the same did not pass to the defendant by the said will of Michael B. Carroll.

To the giving of which said instruction the defendant, by her counsel, prayed leave to except, and that the court would sign and seal this second bill of exceptions, according to the form of the Statute in such case made and provided; and which is accordingly done this 4th day of December, 1852.

R. B. TANEY. [SEAL.]
JOHN GLENN. [SEAL.]

Upon this instruction the jury found the following verdict:

Verdict. Who being impaneled and sworn to say the truth in the premises, upon their oath do say, the defendant is guilty of the trespass and ejectment in the declaration mentioned upon the tracts of the land therein stated, called Black Walnut Thicket and Content, in manner and form as the said lessee, John Doe, complains against her, and which is contained within the metes and bounds, courses and distances, set out and described in the paper hereto annexed, and made for that purpose apart of this verdict, being a deed from Walter B. Brooks, of Prince George's County, and State of Maryland, Alexander Middleton and Elizabeth A. Middleton, his wife, of Charles County, and said State, to Michael B. Carroll, dated the 29th January, eighteen hundred and forty-two; and they assess the damages of said John Doe, lessee, by occasion of the trespass and ejectment aforesaid at \$1.00; and as to the other trespasses and ejectment *upon the [*278 other tracts or parcels of land in said declaration, also mentioned, they find that the said defendant is not guilty. (Then followed the deed.)

Upon which verdict the court entered the following

Judgment: Therefore it is considered by the court here, that the said lessee, as aforesaid, do recover against the said Jane M. Carroll his term aforesaid yet to come and unexpired, of and in the said tracts of land called "Black Walnut Thicket" and "Content," with the appurtenances in the district aforesaid, wherein the said Jane M. Carroll is, by the jurors above, found to be guilty of the trespass and ejectment aforesaid; and the sum of \$1.00 his damages by the said jurors in manner aforesaid assessed; and also the sum of — by the court now here adjudged unto the said lessee for his costs and charges by him about his suit in this behalf expended, and that he have thereof his execution, &c.

The case was argued by Messrs. Schley and Alexander for the plaintiff in error, and by Messrs. Nelson and Johnson for the defendants in error.

Before stating the points made by the counsel for the plaintiff in error, it is proper to mention that at December Term, 1853, of the Court of Appeals of Maryland, a case came before that court, where a bill was filed by the executors of Mrs. Carroll (who died in 1853) against the administrators *de bonis non* of Mr. Carroll and his heirs at law. The question was whether an injunction ought to be granted to prevent the sale of the negroes of Michael B. Carroll, which sale had been ordered by the Orphans' Court of Prince George's County. In the opinion given by the Court of Appeals, in that case, it was held that the will of Mr. Carroll fell within the provisions of the Act of the Legislature of Maryland, and consequently that the land was devised to his wife.

The points on behalf of the plaintiff in error, in this court, upon the construction of the Statute, were,

1. That (apart from the controlling effect of the decision of the Court of Appeals of Maryland upon the said Act, and in relation to this very will) the said Act, upon its true construction, does include the said after-acquired land.

2. That whatever might be the decision of this court, if the question were undecided, yet the decision of the highest tribunal in Maryland, upon a statute of that State, will be respected by this court as a true and binding construction thereof.

On the 1st point, the following authorities were cited: *Broom's Legal Maxims*, 246; *Fowler v. Chatterton*, 19 Eng. C. L., 75; *Culley v. Doe, dem. Taylerson*, 39 *Ib.*, 307; *Freeman v. Moyes*, 28 *Ib.*, 103; *Angell v. Angell*, 58 *Ib.*, 828; *Brooks 279**) v. **Bockett*, *Ib.*, 855; 64 *Ib.*, 121; *Cushing v. Aylwin*, 12 Met., 169; *Pray v. Waterston*, *Ib.*, 262; *Trick & Magruder v. Carroll*, MS. Court of Appeals of Maryland, at December Term, 1853.

On the 2d point: *Green v. Neal*, 6 Pet., 291; and succeeding cases to the same point.

The counsel for the plaintiff in error also referred to the following error:

The plaintiff below only claimed three undivided parts of the land described in the declaration. By inadvertence the court's instruction asserted, upon the hypothesis of the prayer, the plaintiff's right of recovery of the entirety, and the verdict and judgment were conformable to the instruction.

The points on behalf of the defendant in error, were:

First. That the prayer of plaintiffs in error itself conceded that there was evidence from which the jury might find, as they did find, that the lands were the same as were included in the patents, and that it should therefore have been rejected, because where there is any evidence the jury is to decide on its sufficiency and not the court.

Second. That the evidence before the jury not only tended to establish the facts, but was conclusive.

Third. That the will of Michael B. Carroll did not embrace the lands recovered, because they were acquired after its date; that this was the settled law of Maryland at that date, and was, at the time of his death, also the law as far as wills executed at such a time, when the testator died when this testator died—such a will not being included within the Act of Maryland of 1849, ch. 229, passed the 22d of February, 1850.

Before that statute, after-acquired real estate did not pass. (*Kemp's Executors v. McPherson*, 7 Harr. & J., 320.)

Statutes are not to be construed to have a retrospective operation. (*Prince v. United States*, 2 Gall., 204; *United States v. Schooner Peggy*, 1 Cranch, 103; *Butler v. Boardman*, 1 H. & McH., 371.)

Mr. Justice Curtis delivered the opinion of the court:

This action of ejectment was brought in the Circuit Court of the United States for the District of Maryland, to require three undivided fourth parts of three tracts of land lying in Prince George's County, in that State. Both parties claimed under Michael B. Carroll; the plaintiffs as heirs at law, the defendant as devisee. It appeared at the trial, in the court below, which was had at the November Term, 1852, that on the 10th day of September, 1837, Michael B. Carroll duly executed his last will, the material parts of which are as follows:

***To my dear wife, Jane, I give and [*280 bequeath all my slaves, and do request that none of them may be sold or disposed of for the payment of my debts, but that provision shall be made for discharging the same out of the other personal property and effects which I shall leave at the time of my death.

All the rest and residue of my property, both real, personal and mixed, I give, devise and bequeath to my said wife, Jane, who I do hereby constitute and appoint sole executrix of this my last will and testament, enjoining it upon her nevertheless to consult and advise with the said John B. Brooks, as occasion may require, respecting the settlement of estate, and make him a reasonable compensation for the same out of the funds hereinbefore bequeathed to her; and I do hereby revoke and annul all former wills by me heretofore made, declaring this, and none other, to be my last will and testament."

It further appeared, that after the execution of this will, Michael B. Carroll acquired other lands, and the plaintiffs, as heirs at law, claimed to recover three undivided fourth parts thereof as undivided land. The defendant insisted that these, together with all the other lands of the testator, passed to her under the residuary clause of the will. She admitted that, by the common law of Maryland, lands of which the testator was not seised at the time of making his will, could not be devised thereby, but insisted that an Act passed by the Legislature of Maryland, on the 22d day of February, 1850, so operated as to cause this will to devise the lands to her. That Act is as follows:

"Section 1. Be it enacted by the General Assembly of Maryland, That every last will and testament, executed in due form of law, after the first day of June next, shall be construed with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed on the day of the death of the testator or testatrix, unless a contrary intention shall appear by the will.

Section 2. And be it enacted, That the provisions of this Act shall not apply to any will executed before the passage of this Act, by any person who may die before the first day of June next, unless in such will the intention of the testator or testatrix shall appear that the real or personal estate which he or she may own at his or her death, should thereby pass.

Section 3. And be it enacted, That this law shall take effect on the first day of June next."

It is argued by the counsel for the devisee, that the first section of this Act was intended to prescribe a new rule of construction of wills, and to fix the time when the courts should begin to apply that rule; that new rule being, that wills of the *realty should be [*281 deemed to speak at the time of the death of the testator; and the time when the courts should begin so to construe them, being the 2d day of June, 1850; and that the law should be so read as to mean, that after the 1st day of June, 1850, wills should be deemed to speak as if executed on the day of the testator's death, unless a contrary intention should appear.

To this construction there are insuperable objections. It would change the legal operation not only of existing wills, but of those which had already taken effect by the death of testa-

tors. It would make the same will, if offered in evidence on the 2d day of June, operative to pass after-acquired lands to a devisee, though if offered in evidence on the next preceding day it would be inoperative for that purpose. The object of the whole law concerning wills, is to enable the owners of property reasonably to control its disposition at their decease. To cause their real intentions and wishes to be so expressed, and their expression to be so preserved and manifested that they can be ascertained and carried into effect, are the chief purposes of legislation on this subject. So to interpret an Act concerning wills as to cause those instruments to operate without regard to the intent of the testator, having one effect to-day and another to-morrow, would not only be arbitrary and a violation of the principles of natural justice, but in conflict with what must be presumed to have been the leading purpose of the Legislature in passing the law, the better to give effect to the intent of the testator. To induce the court to believe the Legislature intended to make this law retroactive upon a will then in existence, and cause it to pass after-acquired lands without any evidence that the testator desired or believed that it would do so, and to fix a particular day, before which the will should not so operate, and on and after which it should so operate, such intention of the Legislature must be expressed with irresistible clearness. (*Battis v. Speight*, 9 Ired., 288.) It is very far from being so expressed in the first section of this Act. On the contrary, its natural and obvious meaning is, that wills executed after the 1st day of June, 1850, are the only subjects of its provisions.

The words "after the 1st day of June next" refer to and qualify the words "executed in due form of law," which they follow, just as in the same section the words "on the day of the death of the testator" refer to and qualify the word "executed." In the former case they indicate the time when the will shall be deemed to have been executed; in the latter, the period of time when it was actually executed.

In our opinion, the first section of this law is **282*** free from ambiguity, "and applies only to wills executed after the first day of June, 1850; and as this will was executed before that day, it is not within this section.

Nor is it within the second section of the Act; because that applies only to cases in which the testator having executed his will before the passage of the Act, might die before the first day of June then next, and this testator survived till after that day.

It has been supposed, however, that although the first section of this Act is free from ambiguity standing by itself, and ought to be so construed as to apply only to wills executed after the 1st day of June, 1850, yet that the second section shows that wills executed before that day were intended to be included in the first section. The argument is that the second section excepts out of the operation of the first section certain wills executed before the 1st day of June, 1850, and thus proved that the first section embraces wills executed before that day. This argument requires a careful examination. To appreciate it, we must see clearly what are the nature and objects, as well as the form of the two enactments. The first prescribes a new rule

of construction of wills. They are to be deemed to speak as of the time of the death of the testator; but power is reserved to him to set aside this rule by manifesting in his will an intention not to have it applied. The real substance and effect of the second section is to enable certain testators to pass their after-acquired lands by expressing an intention to pass them.

By force of the first section, the law prescribes a rule of construction, which a testator may set aside. By force of the second section, a testator may manifest an intention to have his will speak as of the time of his decease, and so adopt that rule of construction. It thus appears that the office of the second section is not to take certain cases out of the operation of the first section, but to prescribe another and substantially different rule of law for those cases. It is true, negative language is used, which leaves the law open to the suggestion that the provision of the Act would have applied to such wills if the negative words had not been used.

But it must be remembered that this is only an inference, the strength of which must depend upon the subject matter of the provisions and the language employed in making them.

If every part of the law can have its natural meaning and appropriate effect by construing this second section as an additional enactment, and if to construe it as an exception would affix to the first section a meaning which would be inconsistent with the great and leading purpose of the Legislature, and at the same time be arbitrary and unjust; and if, when viewed as an exception, *the case can, on no just prin- [**283** ciple, be distinguished from those left unexcepted, then manifestly it should not be construed as an exception, but as a substantive enactment, prescribing for the particular cases a new rule of law not provided for in the first section. We have already pointed out the consequence of holding the first section applicable to all wills. In addition to this it is worth while to inquire if the second section was designed to except certain cases out of the first section, what those cases were, and how they are so distinguished from the cases left unexcepted as to be proper subjects of exception. The proposition is, that the first section includes all wills whenever executed, and the second excepts only wills executed before the passage of the Act by persons dying after the passage of the Act, and before the 1st of June, 1851. Can any reason be imagined why a will executed before the passage of the Act should be within the first section if the testator died the day before the passage of the Act, and out of it if he died the day after its passage? If there is any distinction between the two cases, it would seem the first case had the stronger claim to exemption from the effect of the new rule.

Nor do we perceive any difficulty in so construing the two sections as to allow to each its appropriate effect, while neither of them violates any principle of natural right; the effect of the first section being to prescribe a new rule of interpretation for wills executed after the 1st of June, and the effect of the second being, to enable testators who had executed their wills before the passage of the Act, and who might die before the 1st of June, to pass after-acquired lands if they manifested an intention so to do. Cases of testators who should execute

wills after the passage of the Act and before the 1st of June, or who should die after that day, having previous to that day executed their wills, are left unprovided for, either because it was thought that they would have sufficient time to conform their wills to this change of the law, or because their cases escaped the attention of the Legislature, as happened in *Barnitz's Lessee v. Carey*, 7 Cranch, 468; and *Brewer's Lessee v. Blougher*, 14 Pet., 178.

We have been referred to two decisions in the Supreme Court of Massachusetts, in which a retroactive effect was allowed to a statute of that State upon existing wills. They are *Cushing v. Aylwin*, 12 Met., 169; *Pray v. Waterston*, 12 Met., 262. But an examination of those cases will show that the interpretation put by that court on that statute was attended with none of the difficulties which beset the construction of the Statute of Maryland contended for by the counsel for the devisee. The law of Massachusetts did not enact a new rule of construction. *It simply enabled testators to devise after-acquired lands by plainly and manifestly declaring an intention to do so. The law could only operate in furtherance of the intention of the testator, and could never defeat that intent by applying to wills an arbitrary rule of construction.

This distinction was pointed out by this court in *Smith et al. v. Edrington*, 8 Cranch, 66, in reference to a similar statute in Virginia; respecting which *Mr. Justice Washington* said, "the law creates no new or different rule of construction, but merely gave a power to the testator to devise lands which he might possess or be entitled to at the time of his death, if it should be his pleasure to do so." Moreover the language of the Act of Massachusetts was broad, and general enough to include in its terms all wills which should take effect after the law went into operation. There was therefore nothing in the words, or the subject matter of the Act, to lead the court to a more restricted construction. Still that court thought the retroactive effect of even such a law required some notice, and they vindicate the departure from an important principle in that case with some effort; and the reluctance with which it should be departed from, is well expressed by the Supreme Court of North Carolina, in *Battle v. Speight*, 9 Ired., 288, in construing a similar statute of that State.

We have also been referred to a manuscript opinion of the Court of Appeal of the State of Maryland upon the effect of this will. It appears that in November last the executors of Mrs. Carroll, the devisee, who is deceased, filed their bill in the Circuit Court of Prince George's County, praying that the administrators *de bonis non* of Michael B. Carroll might be enjoined from making sale of his negro slaves. The heirs at law and the administrators *de bonis non* of Michael B. Carroll were made parties. The Circuit Court refused the injunction, the complainants appealed, the Court of Appeals affirmed the decree of the Circuit Court, and dismissed the bill. The grounds upon which the court rested its decree will best appear from the following extracts from the opinion:

"The bill is filed by the executors of Mrs. Carroll against the administrators *de bonis non*

of Mr. Carroll and his heirs at law. The *graves* of it is, that he specifically bequeathed his negroes to his wife, and desired they should not be sold, and that his debts should be paid out of his other estate; that she manumitted them, and that there is other personal and real estate enough to pay the debts due by his estate. Injunction is asked to prevent the sale of the negroes under an order of the Orphans' Court of Prince George's County, which, it is alleged, is about to be done. It is also claimed in the bill, that at the time of *the will [*285 of Mrs. Carroll she must be considered as holding the negroes as legatee, and not as executrix, the time specified by law for winding up the estate of her husband having elapsed.

This last ground cannot avail. There is no allegation in the bill that a final account had been settled by her, and the bill shows that a large amount of debts remained unpaid, and that the creditors of the estate of her husband had commenced proceedings to secure their payment, which proceedings are still pending. In this claim of the bill we suppose but little confidence was, or is reposed by those who framed it; at all events, there is nothing in it. There is nothing in the facts of the case to justify the presumption that there had been a final settlement of the estate of Michael B. Carroll, and all his debts paid off; the truth is, the bill directly contradicts the facts out of which such a presumption could arise.

It is contended on the part of the complainants, that the real estate and personal property, other than the negroes of Michael B. Carroll, ought to be applied to the payment of his debts before the negroes are resorted to. This may or may not be so; and in regard to it we pass no opinion, because the question is not before us in this case. This is not a bill filed on behalf of the negroes, but by the executors of Mrs. Carroll, and they must occupy the same position in regard to the creditors of Michael B. Carroll, who are represented by the administrators *de bonis non*, as she would have done had the bill been filed by her instead of by them. And if she were the party complainant, how would the case stand? Why, thus: Michael B. Carroll died in debt, leaving a will by which his real and personal estate is specifically devised and bequeathed to his wife. His creditors would have the right to proceed against his entire estate for payment; first, however, against the personal as the primary fund. Their rights could not be affected by anything he might request in his will; their claims would attach to his entire estate. He did not manumit his slaves; and, moreover, this is not the case of contribution and marshaling of assets between different devisees and legatees, because here Mrs. Carroll was specific devisee and legatee, and residuary devisee and legatee; she in fact, with but trifling exception, took under the will the whole estate. Had she, immediately on obtaining letters of administration, manumitted the negroes, it could not be pretended such manumission could have affected the rights of the creditors of her testator; and it must be obvious, if she could not do it by her act as executrix, that she could not accomplish it by her will.

For these reasons we affirm the order of the Circuit Court refusing the injunction.

286*] *It is apparent that the question whether some of the lands of the testator were undivided could not enter into or affect the decision of this case. The negroes not being parties, no question could arise whether they were entitled to have the debts paid out of the land of the testator, and the court declares the question is not before them. As between Mrs. Carroll, the executrix of her husband's will or her representatives and the creditors of her husband, the right of the latter was complete to resort to the personal property, including the negroes, and it was therefore wholly immaterial who owned the land. The only prayer in the bill was that the creditors, through the administrators, might be restrained from making their debts out of the negroes. The only question in the case was whether they could be so restrained. And when it was decided that their legal right was, to have all the personalty, including the negroes, applied to their debts, it was immaterial what other rights they or others might have.

We do not consider, therefore, that a comparison of the titles of the heirs at law and the devisee of Michael B. Carroll to his lands was brought into judgment by this injunction bill.

If the Court of Appeals had found it necessary to construe a statute of that State in order to decide upon the rights of parties subject to its judicial control, such a decision, deliberately made, might have been taken by this court as a basis on which to rest our judgment. But it must be remembered that we are bound to decide a question of local law, upon which the rights of parties depend, as well as every other question, as we find it ought to be decided. In making the examination preparatory to this finding, this court has followed two rules, one of which belongs to the common law, and the other is a part of our peculiar judicial system. The first is the maxim of the common law, *stare decisis*. The second grows out of the thirty-fourth section of the Judiciary Act (1 Statutes at Large, 92), which makes the laws of the several States the rules of decision in trials at the common law; and inasmuch as the States have committed to their respective judiciaries the power to construe and fix the meaning of the statutes passed by their Legislatures, this court has taken such constructions as part of the law of the State, and has administered the law as thus construed. But this rule has grown up and been held with constant reference to the other rule, *stare decisis*; and it is only so far and in such cases as this latter rule can operate, that the other has any effect.

If the construction put by the court of a state upon one of its statutes was not a matter of judgment, if it might have been decided either way without affecting any right brought into **287*]** *question, then, according to the principles of the common law, an opinion on such a question is not a decision. To make it so, there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties and decide to whom the property in contestation belongs.

And therefore this court and other courts organized under the common law, has never held

itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties. In *Cohens v. The State of Virginia*, 6 Wheat., 399, this court was much pressed with some portion of its opinion in the case of *Marbury v. Madison*. And Mr. Chief Justice Marshall said: "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent; other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." The cases of *Ex parte Christy*, 3 How., 292, and *Jenness et al. v. Peck*, 7 How., 612, are an illustration of the rule that any opinion given here or elsewhere cannot be relied on as a binding authority, unless the case called for its expression. Its weight of reason must depend on what it contains.

With these views we cannot regard the opinion of the Court of Appeals as an authority on which we have a right to rest our judgment. We have already stated the reasons which have brought us to a different construction of the Statute; reasons which do not seem to us to be shaken by the opinion of the Court of Appeals.

Our conclusion is that the will of Michael B. Carroll was not within the Statute, and the lands in question were consequently undivided.

One other exception was taken at the trial, respecting which it is only necessary to say that we think the identity of name of the two tracts of land in the same county, taken in connection with the long possession of those under whom the plaintiffs claimed, and the absence of all evidence of any adverse claim or outstanding title, was sufficient to warrant the jury in finding that the land was embraced in the patents from the State.

We are also of opinion that the judgment is correct in form, being for the term which the declaration alleges was created by *the [**288** plaintiffs as owners of three undivided fourth parts of the land.

The judgment of the Circuit Court is affirmed, with costs.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Maryland, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

Cited—19 How., 590; 10 Bank. Reg., 229; 18 Bank. Reg., 485; 1 Abb. U. S., 42.

WILLIAM A. SMITH ET AL.,

v.

LEROY SWORMSTEDT ET AL.

Methodist Church—power of General Conference to divide church in 1844—property in Book Concern divided by decree in equity.

In 1844 the Methodist Episcopal Church of the United States, at a General Conference, passed sundry resolutions providing for a distinct, ecclesiastical organization in the slaveholding States, in case the annual conferences of those States should deem the measure expedient.

In 1845 these conferences did deem it expedient and organized a separate ecclesiastical community, under the appellation of the Methodist Episcopal Church South.

At this time there existed property, known as the Book Concern, belonging to the General Church, which was the result of the labors and accumulation of all the ministers.

Commissioners appointed by the Methodist Episcopal Church South, may file a bill in chancery, in behalf of themselves and those whom they represent, against the trustees of the Book Concern, for a division of the property.

The rule is well established that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others; and a bill may also be maintained against a portion of a numerous body of defendants, representing a common interest.

The Methodist Church was divided. It was not a case of the secession of a part from the main body. Neither division lost its interest in the common property.

The General Conference of 1844 had the legitimate power thus to divide the church. In 1808 the General Conference was made a representative body, with six restrictive articles upon its powers. But none of these articles deprived it of the power of dividing the church.

The sixth restrictive article provided that the General Conference should not appropriate the profits of the Book Concern to any other purpose than for the benefit of the traveling ministers, their widows, &c.; and one of the resolutions of 1844 recommended to all the annual conferences to authorize a change in the sixth restrictive article. This was not imposed as a condition of separation, but merely a plan to enable the General Conference itself to carry out its purposes.

The separation of the church into two parts being legally accomplished, a division of the joint property by a court of equity follows, as a matter of course.

THIS was an appeal from the Circuit Court of the United States for the District of Ohio, which dismissed the bill.

The bill was originally filed in the names of 289*] Henry B. Bascom, *a citizen of Lexing-

ton, in the State of Kentucky; Alexander L. P. Green, a citizen of Nashville, in the State of Tennessee; Charles B. Parsons, a citizen of Louisville, in the State of Kentucky; John Kelley, a citizen of Wilson County, in the State of Tennessee; James W. Allen, a citizen of Limestone County, in the State of Alabama; and John Tevis, a citizen of Shelby County, in the State of Kentucky—

Against Leroy Swormstedt and John H. Power, agents of the "Book Concern" at Cincinnati, and James B. Findley, all of whom are citizens of the State of Ohio; and George Peck and Nathan Bangs, who are citizens of the State of New York; who are made defendants to this bill.

Bascom, Green, and Parsons were Commissioners appointed by the Methodist Episcopal Church South, to demand and sue for the proportion belonging to it of certain property, and especially of a fund called the "Book Concern." Bascom having died whilst the suit was pending, William A. Smith, a citizen of Virginia, was substituted in his place. The other plaintiffs were supernumerary and superannuated preachers belonging to the traveling connection of the said Church South; and all the plaintiffs were citizens of other states than Ohio, and sued not only for themselves, but also in behalf of all the preachers in the traveling connection of the Church South, amounting to about fifteen hundred.

The defendants were Swormstedt and Power, agents of the Book Concern at Cincinnati, and Findley, all traveling preachers of the Methodist Episcopal Church, and citizens of Ohio; and the Methodist Book Concern a body politic incorporated by an Act of the General Assembly of Ohio, and having its principal office at Cincinnati, in that State.

The nature of the dispute and the circumstances of the case are set forth in the opinion of the court.

It was argued by **Mr. Stanberry** for the appellants, and by **Messrs. Badger and Ewing** for the appellees.

The following extract from the brief of **Mr. Stanberry** explains the points which he made:

We claim, in the first place, that the division of the church was a valid act, and thereby the original church was divided into two churches equally legitimate, and that the members and beneficiaries in each have equal rights to their

NOTE.—Where parties interested are numerous, part may maintain a bill in equity for benefit of all. Where the parties interested in relief sought in equity are very numerous, or not all of them known, and the rigorous application of the general rule would impede the purposes of justice, a court of equity will not require them all to unite in the bill, but will allow one or more of them to sue for themselves and for the benefit of the rest. *Mandeville v. Riggs*, 2 Pet., 482; *West v. Randall*, 2 Mas., 181; *Hart v. Oliver*, 2 McLean, 267; *Bacon v. Roberts*, 6, 18 How., 480.

In Equity, where parties are exceedingly numerous, and it would be impracticable to join them without almost interminable delays, and other inconveniences, which would obstruct and probably defeat the purposes of justice, the court will not insist upon their being made parties; but will dispense with them and proceed to a decree, if it can be done without injury to the persons actually before the court. *Mittf. Eq. Pl.*, by Jeremy, 165-167; *Coop. Eq. Pl.*, 30-41; *Carey v. Hoxie*, 11 Ga., 651; *Story, Eq. Pl.*, sec. 94; *Adair v. New River Co.*, 11 Ves., 426; *Cockburn v. Thompson*, 16 Ves., 321;

Wendell v. Van Rensselaer, 1 Johns. Ch., 349; 1 Mont. Eq. Pl., 57-59; *Taylor v. Salmon*, 4 Myne & Cr., 184; *Male v. Malachy*, 1 Myne & Cr., 550; *Hawkins v. Hawkins*, 1 Har. 543, 546; *Weatherby v. St. George*, 2 Har. 624, 626; *Harvey v. Harvey*, 4 Beav., 215, 220, 221.

Court will usually require bill to be filed, not only in behalf of plaintiff, but also in behalf of all other persons interested who are not directly made parties. *Adair v. New River Company*, 11 Ves., 444; *Cockburn v. Thompson*, 16 Ves., 320-323; *Good v. Blewitt*, 19 Ves., 336; 13 Ves., 387; *Angel v. Haddon*, 1 Madd., 529; *Story, Eq. Pl.*, sec. 96.

Where the question is one of a common or general interest, one or more may sue or defend for the benefit of the whole. 1 Mont. Eq. Pl., 61; *Cooper, Eq. Pl.*, 40, 186; *Mittf. Eq. Pl.*, by Jeremy, 166, 167; *Story, Eq. Pl.*, sec. 97.

Suits may be brought by part of a crew of a vessel, in behalf of themselves, and the rest, where all the crew have interests in the same subject matter, as the distribution of prize money, &c. *Leigh v. Thomas*, 2 Ves., 512; *Good v. Blewitt*, 13 Ves., 387; 19 Ves., 336; *West v. Randall*, 2 Mas., 183, 184; *Story, Eq.*

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distributive share of all the property and funds.

Second. That if there was no valid division of the original church, but only a separation of the southern portion from the original church, yet, under the circumstances in which it was 290* made, the beneficiaries of this charity have not lost that character by adhering to the Church South, because the separation was authorized by the highest official and legislative authority of the church, and the beneficiaries living in the south had no choice or alternative but adherence to that church or the total loss of all church membership and privileges.

We will discuss these propositions in the order in which they are stated, and as they are elaborated under the following points:

The plaintiffs' points. 1. Prior to 1844 the Methodist Episcopal Church in the United States was one church in doctrine and organization. It was one in doctrine as a Methodist Church, and one in organization as a Methodist Church in the United States, with jurisdiction co-extensive with the territorial limits of the United States.

2. At the present time there is no such church *de facto* as to unity of organization, as the Methodist Episcopal Church of 1844. There is no longer one Methodist Episcopal Church with territorial jurisdiction co-extensive with the United States, but there are two churches instead, divided in territorial jurisdiction by a fixed line, each existing by an independent organization, exclusive of the other.

3. This dissolution of the unity of organization not only exists *de facto* but *de jure*; not by unauthorized secession of a part from the original body, but by a valid division of the original body into two parts equally legitimate, which division was authorized by competent authority, in the plan of 1844, and has since been consummated in accordance with its provisions.

4. The Book Concern is a charitable fund connected with the Methodist Episcopal Church, the capital being devoted to the publication and dissemination of religious books and papers, and the profits to the support of the traveling, superannuated, superannuated and deficient preachers of the church, and the wives, widows, children and orphans of traveling preachers.

5. This fund was founded by the traveling preachers, and chiefly accumulated by their

labor. It never belonged to the church in absolute right, but was simply intrusted to its management.

6. Before the division of the church the founders and the beneficiaries of this fund were scattered over its entire territory, as then constituted, and equally labored in its accumulation, and were equally entitled to its dividends, without reference to particular territorial location.

7. The lawful division of the church, territorially, into two distinct churches, did not destroy this charity or affect the right of the beneficiaries, but it necessarily required a change of management, which, before the division, was by means of a *General [*291 Conference, having jurisdiction over all classes of the beneficiaries, wherever located, through the agency of annual conferences within the jurisdiction and subject to the control of the General Conference.

8. After such division in the due administration of this charity, and as near as may be to its original foundation, each of the churches becomes the proper manager of so much of the fund as is to be distributed to the beneficiaries within its exclusive jurisdiction, through the agency of its own annual conferences.

9. That the division to be made of the capital and profits of this fund to each church should be made on the basis of the number of traveling preachers in 1844, each church to have the same proportion of the entire fund as the number of traveling preachers within its bounds bore to the whole number then within the entire territory of the church prior to the division.

10. That the refusal of the annual conferences to agree to the amicable division of the fund, as proposed in the plan of 1844, and the continued refusal of the authorities of the northern church to recognize the Church South, or the beneficiaries within its jurisdiction, as entitled to the management or any distributive share of the fund, make a case for the intervention of a court of equity.

11. If the division of the church was not a constitutional act, the beneficiaries within the jurisdiction of the Church South, and who are now united to that church, have not forfeited their right to this charity.

12. The bill presents the proper parties and the proper case for the interference of this

Pl., sec. 98; *Chancey v. May*, Prec. Ch., 502; *Pearson v. Belcher*, 4 Ves., 627; *Hendrick v. Robinson*, 2 Johns. Ch., 296, 297.

One or more creditors may maintain a suit in equity on behalf of themselves and all other creditors to charge the estate of a debtor with their debts, and for an application of the estate to that purpose, in the hands of his representatives. 1 Mont. Eq. Pl., 62; *Mitt. Eq. Pl.*, by Jeremy, 165, 166; *Story, Eq. Pl.*, sec. 99; *Whitmore v. Oxborrow*, 2 Younge & Coll., New R., 13, 17; *May v. Selby*, 1 Younge & Coll., New R., 236; *Leigh v. Thomas*, 2 Ves., 312, 313; *Neve v. Weston*, 3 Atk., 557; *Coop. Eq. Pl.*, 39, 106; *West v. Randall*, 2 Mas., 194; *Law v. Rigby*, 4 Bro. C. C., 60; *Good v. Blewitt*, 19 Ves., 336; *Hendricks v. Robinson*, 2 Johns. Ch., 283, 296; *Hallett v. Hallett*, 2 Paige, 18; *Ross v. Cary*, 1 Paige, 417, note; *Brown v. Ricketta*, 3 Johns. Ch., 553, 555, 556; *Brinkerhoff v. Brown*, 6 Johns. Ch., 151; *Adair v. New River Company*, 11 Ves., 444.

Saine rule in regard to estate in hands of trustee. *Routh v. Kinder*, 3 Swanst., 145, note; *Boddy v. Kent*, 1 Meriv., 361; *Bacon v. Robertson*, 18 How., 480; *Weld v. Bonham*, 2 Sim. & Stu., 91; *Hardford v. Storie*, 2 Sim. & Stu., 196; *Pencock v. Monk*, 1 HOWARD 16.

Ves., 181; *Story, Eq. Pl.*, sec. 102; 1 Mont. Eq. Pl., 62; *Newton v. Earl of Egmont*, 4 Sim., 574; 5 Sim., 130; *Powell v. Wright*, 7 Beav., 444; *Atherton v. Worth*, 1 Dick., 375; *Patton v. Benenil*, 6 Ired. Eq., 204; *Mitt. Eq. Pl.*, by Jeremy, 167.

So a legatee is permitted to sue in equity the personal representative of the testator in behalf of himself, and all other legatees, for settlement of accounts, and payment of all the legatees. *Story, Eq. Pl.*, sec. 104; *Bennett v. Honeywood, Ambli.*, 709, 710; *Montagu v. Nucella*, 1 Russ., 173; *Kettle v. Cray*, 1 Paige, 417; *Hallett v. Hallett*, 2 Paige, 20, 21; *Lloyd v. Loring*, 6 Ves., 779; *Brown v. Ricketta*, 3 Johns. Ch., 553; *Brown v. Dowthwaite*, 1 Madd., 446.

Upon similar grounds, where a distribution of the personal estate of a deceased person is to be made among his next of kin, or among persons claiming under a general description, a bill may be filed by one claimant in behalf of himself and all others equally entitled. *Bennett v. Honeywood, Ambli.*, 709; *Montagu v. Nucella*, 1 Russ., 173; *Story, Eq. Pl.*, sec. 105.

On this subject, see further, note to *Bacon v. Robertson*, 18 How., 480.

court, in order to the due administration of this charity, to meet the exigency arising out of the division of the church, whether the division was constitutional or not.

(Mr. Stanberry's argument, both in the opening and in the reply, was very elaborate upon all these points, and therefore cannot be reported for want of room. His view of the contingent nature of the resolutions of 1844, was as follows):

I will here close the argument upon this question of the power of division, having shown its existence in every aspect—having shown it upon the true character of all Methodist organization; upon the usage of the church through all its history; and finally, upon the express provisions and limitations embodied in the written articles.

If this ground is maintained, the division of the common charitable fund is a necessary result. If the church organization is divided, the temporalities of the church must also be divided, for the right of each of the divisions **292*** stands upon the same *ground—one claims it precisely in the same character with the other.

Various objections are stated in the answer, and in the resolution of the Conference of the Church North, in 1848, to the present validity of the plan of division. They say, as it passed the General Conference, it was not absolute, but contingent in many particulars. That it was passed to meet the contingency of a future ascertained necessity for division, and that no such necessity was found to exist; that it was made to depend, in all its parts, upon the concurrence of all the Annual Conferences in the proposed change of the sixth restrictive rule, and no such concurrence was given; and finally, that it depended upon the due observance by the Church South, and all its societies and members, of the jurisdictional line of division, which line was afterwards, as they say, invaded and disregarded by some of the southern preachers and members.

None of these positions need be argued, except only the matter of the non-concurrence of the Annual Conference in the proposed change of the sixth rule.

That part of the plan of separation which respects this matter has nothing to do with the other parts of the plan, or with the taking effect of the plan as a whole. The principal thing, the division, was not in any way referred to the Northern Annual Conferences. That was a matter exclusively between the General Conference and the Southern Annual Conferences, in which the Northern Conferences had no voice. In order to provide for the contingency of division—seeing that the division of the fund must follow—and to avoid any doubt, the General Conference asks the Annual Conferences for express authority, not merely to divide the fund according to the division of the church organization, but for general authority to dispose of the entire fund for such purposes in general, as two thirds of the General Conference might determine upon.

This general authority, which would sanction a total misapplication of the fund, the Annual Conferences refused to give.

Now, the plan in no way provides that the Southern Conferences should not have any of

this fund, except by the consent of the Annual Conferences; but, in the exercise of its own discretion, by its own authority, and as its own act, the General Conference chose to ask the Annual Conferences so to modify the restrictive rule. The Annual Conferences refused, and that leaves the matter at large, as a question to be settled upon the rights of the parties consequent upon the division. If, after the division, the south had no right to any part of this fund—if it had forfeited its right by the new organization—if the beneficiaries at the south had thereby lost their character as beneficiaries, then, *indeed, there would be some ground ***293** for putting us to show a new title by the consent of the Annual Conferences, or something else. But the ground on which we stand is, that we have never for a moment lost our character as beneficiaries; that our title is equal to that of the north; and that the refusal of the Annual Conferences is the common case of a refusal to perform a duty which drives the injured party into a court of justice.

The points made by the counsel for the appellees were the following:

1. The first point was in answer to the one raised by Mr. Stanberry, namely: that the church was dissolved and destroyed by the action of the General Conference of 1844, and that two new churches have arisen out of its ruins.

In answer to the first two propositions of the complainants, involving this point, the defendants insist—

1st. That prior to 1844 the Methodist Episcopal Church was the only religious denomination bearing that name, and it was one in organization, discipline and doctrine. A large part, but not the whole territory of the United States, was contained within its organization—it did not extend on the United States possessions on the Pacific; it did embrace Texas, then a foreign country; it had been extended, but it did not then extend to the Canadas; its boundaries had been variable, and its identity or unity, its organization or existence, had no necessary dependence upon territorial limits.

2d From 1844 to the present time, the same Methodist Episcopal Church has continued to exist identical in name, organization, discipline and doctrine, and under a regular succession of the officers: some Conferences in the slaveholding States have withdrawn from it; it has lost and gained individual members; and the United States possessions on the Pacific have been received into its connection; but these changes have not affected its organization or destroyed its identity.

2. With respect to the property called the "Book Concern," after examining the constitution of this fund, the counsel came to the following conclusions:

I take it then as clear, by proof and by concession, that a Methodist Episcopal Church, having a regular and well known organization, existed prior to 1844, and that the property now in controversy was held by trustees, in trust for the church so organized, and for certain specified beneficiaries in it, and that it was only through connection with the church, in and through its organization, in a mode pointed out by its organic law, *that any in- ***294** dividual was or could be entitled to any portion of the fund.

I hold it equally clear, and of like necessity it must be conceded, that if the Methodist Episcopal Church of 1844 still exists, and retains its identity, the trustees still hold the property in trust for it only, and that it is by connection with it as an organized body, and by and through it alone, that any individual is now entitled as a beneficiary, unless indeed the church has by compact, or some equivalent act, qualified the condition of the trust, and changed its direction; and that no individual members of the church, or any section of it, large or small, could by mere secession entitle himself or themselves to any portion of the trust fund, separate from and independent of the organized, still subsisting church.

3. Then to entitle these complainants to recover, they must establish as facts:

1st. That the Methodist Episcopal Church, as it existed in and prior to 1844, was destroyed by the Acts of the General Conference of 1844, or by the Act of the Louisville Convention of 1845, in the exercise of power conferred on it by the General Conference—and thenceforth ceased to exist as an organized body; that out of a portion of its severed elements a new church was formed, composed in part of individuals who, under the former organization, were beneficiaries of the fund, and that thus the expressed object of the charity, as also its means of administration, having failed, there being now no Methodist Episcopal Church to administer the charity, and no traveling preachers, &c., of the Methodist Episcopal Church to receive and enjoy it, a court of equity will apply the charity, not according to its terms, which is no longer possible, but *cy. pres.* as far as possible according to its original object, and to this end, divide the fund *pro rata* between the fragments of the defunct Church.

2d. Or that if the Methodist Episcopal Church of 1844 still exists, some act by the General Conference of that year has changed, in part, the direction of the fund and the medium of its administration.

(After discussing these propositions, the counsel came to the following conclusions):

We find, then, on examining the bill and the book of Doctrine and Discipline, which is filed with and made part of it,

1st. That the General Conference is not, since 1808, an original body possessed of inherent powers, but representative merely, having no other powers than those conferred on it by the constitution which created it.

2d. That the general grant of powers to this **295*** Conference "extends only to the making rules and regulations for the Methodist Episcopal Church, not to the division, dissolution or destruction of the Church.

3d. That the restrictive articles forbid, by clear implication, the division or destruction of the organized Methodist Episcopal Church.

4th. That under the sixth restrictive article the General Conference cannot "appropriate the produce of the Book Concern, nor of the Charter Fund, to any purpose other than for the benefit of the traveling, supernumerary, superannuated and worn out preachers" of the Methodist Episcopal Church, within its organization, "their wives, widows and children;" nor can that Conference by any act so involve the fund or place it in such situation that a

court of equity can apply it to objects, or a manner forbidden by the declaration of trust and the constitution of the Methodist Episcopal Church.

4. We will now proceed to show that the General Conference never assumed the power of destroying the organization of the Methodist Episcopal Church, or of severing or dissolving it, but as often as they have spoken distinctly upon the subject, have disclaimed the power, and that they did not, in the case at bar, exercise or attempt to exercise it.

(The argument upon this point was very extensive, involving an examination of the *Canada* case, and of the records of the Conferences, concluding as follows):

It is, then, so far as the thirteen southern and south-western Conferences are concerned, a case of voluntary withdrawal from the Methodist Episcopal Church as organized, and the formation of a new and separate organization; and I have already shown, that if the withdrawal be small or great, of one or many, the voluntary abandonment of the organized Church is also the voluntary surrender of all the temporal privileges and immunities belonging to that organization. And it is very clear that this trust-fund, which was intrusted in its administration to the Annual Conferences of this organization, cannot be transferred by a court of equity to a Conference which has ceased to belong to that organization, any more than to one who has never had belonged to it. The southern Conferences, now the Methodist Episcopal Church South, cannot, therefore, sustain their bill on the ground of former connection with the Methodist Episcopal Church, and of their present separate existence; and I have already shown that they cannot sustain it on the ground of contract. It is equally clear that they cannot sustain it on the ground that the General Conference of 1844 had caused the southern Conferences to believe that the Book Concern would be divided, and induced them to act according to that belief. This point, however good *in law, fails as a matter **[*296]** of fact. There was no disguise, no concealment, no misrepresentation on the part of the General Conference, but the most open candor and directness; and the Conferences south were fully advised—indeed, they advised themselves—that in case of separation, a share of the Book Concern depended on the votes of the Annual Conferences, and they agreed that it did and should depend upon such vote. The Church South, therefore, in its new organization, has no standing in court. The only remaining question, which goes to the legal merits of the case is:

5. Do the individuals who join in this bill show any right to a distributive share of this fund?

They show that they "are preachers—Kelley and Allen are supernumerary, and Tevis superannuated preachers—of the Methodist Episcopal Church South, and that as such they have a personal interest in the real estate, personal property, debts and funds now holden by the Methodist Episcopal Church through said defendants, as agents and trustees appointed by the General Conference of the Methodist Episcopal Church." So much for themselves.

As to those whom they choose to represent,

they say, "That there are about fifteen hundred preachers belonging to the traveling connection of the Methodist Episcopal Church South, each of whom has a direct personal interest in the same right as your complainants to the said property," &c.

They say they are members of the Church South, preachers belonging to the traveling connection of that Church, and on that ground, and that alone, they set up this claim. They do not aver that they, or any one of them, or any one for whom they appear, ever belonged to the Methodist Episcopal Church, and acquired rights in its connection; but they simply claim that, by virtue of their connection with the Methodist Episcopal Church South, they are entitled to a distributive share of the property of the Methodist Episcopal Church. The case is certainly no better by making these persons complainants. If the Church South be not entitled, as an organized body, on some ground shown in the bill, these persons are not entitled because they are members of its organization.

The case made by complainants' counsel for widows and orphans of traveling preachers of the Methodist Episcopal Church, who became entitled by the services of their husbands and fathers, but who, since their death, have by the mere force of circumstances been withdrawn from the Methodist Episcopal Church, and attached to the Church South, if available at all, goes too far, entitles them to more than it has even contended that they have a claim to. If their relation to the Methodist Episcopal Church be not so sundered as to exonerate that church from their support, it is bound to support them out of whatsoever fund may be in its power, in common with the rest of its widows and orphans. They are not entitled to a support out of the charter fund and the produce of the Book Concern, but out of the funds of the various Annual Conferences of the Methodist Episcopal Church into which the produce of the Book Concern enters, and of which it forms a part merely, and, indeed, but a small part. If entitled to anything from the Methodist Episcopal Church since they ceased to belong to it, it is to their support, in whole or in part, according to their necessities, not to a distributive share of the produce of the Book Concern.

The separation of those who have passively suffered by the secession of so large a portion of the Methodist Episcopal Church from its ancient organization, is greatly to be commiserated and regretted, and the Methodist Episcopal Church is ready and anxious, in any possible mode, to reach and relieve them, for she still recognizes them as members. But she cannot, consistently with her discipline, deliver any part of her funds to another church, alien in organization, though the same in faith, to be administered among them. Nor can their necessities or their rights, if rights indeed they have, bring in and entitle ninety-five who voluntarily seceded, and who were active in secession, to come in and share in the funds of the Methodist Episcopal Church, with the five who were withdrawn from it by the mere force of circumstances. But those who were passive in the separation, those who did not withdraw, but who were withdrawn from the Methodist Epis-

copal Church, are not before the court. The only individuals here who claim as parties for themselves, and those standing in a like situation, claim merely by virtue of their connection with the Church South, and do not profess to have ever been members of the Methodist Episcopal Church.

This, it appears to me, is the truth and reason of this branch of the case; and if so, no equitable right arises in their behalf. And this fund is not now wasted or scattered to the winds. It is still applied strictly according to the terms and intent of the trust, in the very way in which the written declaration of the trust, known and understood by all, directs it. Unhappily, some who enjoyed the benefit of the fund are withdrawn from the sphere of its application; others, perhaps, equally worthy and equally necessitous, are brought within it. This case does not come within the principle of any of the cases cited by counsel on the other side, if the Methodist Episcopal Church has not been destroyed. If it has, I admit the application of the cases. For while that Church exists it is a trustee, in its various organism, to administer the charity, and the beneficiaries described by the declaration of trust are to be found within its bosom. The *trustee, [*298 the charity, the beneficiaries, have not failed, but merely certain individuals have ceased to be beneficiaries.

6. Certain it is, that this separation took place either by secession or by contract, the General Conference offering terms of separation, and the southern conferences acceding to them.

If the latter be the case, the condition precedent in the distribution of the charter fund and Book Concern was also agreed upon, namely: the consent of the Annual Conferences.

If the southern Conferences seceded without a contract, the legal consequences of simple secession follow. Those I have considered.

If with a contract, that contract is the law of the secession. And all that a court of equity can do is to compel the parties to carry out the contract in good faith.

7. The blame of the separation is cast by complainants on the Methodist Episcopal Church. It is contended, that the secession of the southern Conferences was not only justified, but compelled, by the continued agitation of the slavery question in the northern Annual Conferences, and also in the General Conference itself. And more especially, say they, it was compelled by the illegal and oppressive acts of the General Conference of 1844, in the cases of *Harding* and *Bishop Andrew*. These matters of complaint I will now consider. And,

1st. The agitation of the slavery question in the Methodist Episcopal Church.

(The argument upon this branch of the subject is omitted.)

Mr. Justice Nelson delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of the United States for the District of Ohio.

The bill is filed by the complainants, for themselves, and in behalf of the traveling and worn out preachers in connection with the society of the Methodist Episcopal Church South

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in the United States, against the defendants, to recover share of a fund called the Book Concern, at the City of Cincinnati, consisting of houses, machinery, printing presses, book bindery, books, &c., claimed to be of the value of some \$200,000.

The bill charges, that at and before the year 1844, there existed in the United States a voluntary association unincorporated, known as the Methodist Episcopal Church, composed of seven bishops, four thousand eight hundred and twenty-eight preachers belonging to the traveling connection; and in bishops, ministers and members about one million one hundred and nine thousand nine hundred and sixty, united and bound together in one organized body by certain doctrines of faith and morals, and by certain rules of government and discipline.

299*] *That the government of the church was vested in one body called the General Conference, and in certain subordinate bodies called Annual Conferences, and in bishops, traveling ministers and preachers.

The bill refers to a printed volume, entitled "The Doctrines and Discipline of the Methodist Episcopal Church," as containing the constitution, organization, form of government, and rules of discipline, as well as the doctrines of faith of the association.

The complainants further charge, that differences and disagreements had sprung up in the church between what was called the northern and southern members, in respect to the administration of the government with reference to the ownership of slaves by the ministers of the church, of such a character and attended with such consequences as threatened greatly to impair its usefulness, as well as permanently to disturb its harmony; and it became and was a question of grave and serious importance whether a separation ought not to take place, according to some geographical boundary to be agreed upon, so as that the Methodist Episcopal Church should thereafter constitute two separate and distinct organizations. And that, accordingly, at a session of the General Conference held in the City of New York in May, 1844, a resolution was passed by a majority of over three fourths of the body, by which it was determined, that if the Annual Conferences of the slaveholding States should find it necessary to unite in a distinct ecclesiastical connection, the following rule should be observed with regard to the northern boundary of such connection—all the societies, stations and conferences adhering to the churches in the south, by a vote of a majority of the members, should remain under the pastoral care of the southern Church; and all adhering to the Church North, by a like vote, should remain under the pastoral care of that Church. This plan of separation contains eleven other resolutions relating principally to the mode and terms of the division of the common property of the association between the two divisions, in case the separation contemplated should take place; and which, in effect, provide for a *pro rata* division, taking the number of the traveling preachers in the Church North and South as the basis upon which to make the partition.

The complainants further charge, that in pursuance of the above resolutions, the Annual

Conferences in the slaveholding States met, and and resolved in favor of a distinct and independent organization, and erected themselves into a separate ecclesiastical connection, under the provisional plan of separation based upon the discipline of the Methodist Episcopal Church, and to *be known as the Meth-***300** odist Episcopal Church South. And they insist, that by virtue of these proceedings, this Church, as it had existed in the United States previous to the year 1844, became and was divided into two separate churches, with distinct and independent powers, and authority composed of the several Annual Conferences, stations and societies, lying north and south of the aforesaid line of division. And also, that by force of the same proceedings, the division of the Church South became and was entitled to its proportion of the common property real and personal of the Methodist Episcopal Church, which belonged to it at the time the separation took place; that the property and funds of the church had been obtained by voluntary contributions, to which the members of the Church South had contributed more than their full share, and which, down to the time of the separation, belonged in common to the Methodist Episcopal Church, as then organized.

The complainants charge, that they are members of the Church South, and preachers, some of them supernumerary, and some superannuated preachers, and belonged to the traveling connection of said church; and that, as such, have a personal interest in the property, real and personal, held by the Church North, and in the hands of the defendants; and further, that there are about fifteen hundred preachers belonging to the traveling connection of the Church South, each of whom has a direct and personal interest in the same right with the complainants in the said property, the large number of whom make it inconvenient and impracticable to bring them all before the court as complainants.

They also charge, that the defendants are members of the Methodist Episcopal Church North; and that each, as such, has a personal interest in the property; and further, that two of them have the custody and control of the fund in question; and that, in addition to these defendants, there are nearly thirty-eight hundred preachers belonging to the traveling connection of the Church North, each of whom has an interest in the fund in the same right, so that it is impossible, in view of sustaining a just decision in the matter, to make them all parties to the bill.

The complainants also aver, that this bill is brought by the authority, and under the direction of the General and Annual Conferences of the Church South, and for the benefit of the same, and for themselves, and all the preachers in the traveling connection, and all other ministers and persons having an interest in the property.

The defendants, in their answer, admit most of the facts charged in the bill, as it respects the organization, government, *disci-***301** pline and faith of the Methodist Episcopal Church as it existed at and previous to the year 1844. They admit the passage of the resolutions, called the plan of separation, at the session of the General Conference of that year.



by the majority stated; but deny that the resolutions were duly and legally passed; and also deny that the General Conference possessed the competent power to pass them, and submit that they were therefore null and void. They also submit, that if the General Conference possessed the power, the separation contemplated was made dependent upon certain conditions, and among others a change of the sixth restrictive article in the constitution of the church, by a vote of the Annual Conferences, which vote the said Conferences refused.

The defendants admit the erection of the Church South into a distinct ecclesiastical organization; but deny that this was done agreeably to the plan of separation. They deny that the Methodist Episcopal Church, as it existed in 1844, or at any time, has been divided into two distinct and separate ecclesiastical organizations; and submit that the separation and voluntary withdrawal from this church of a portion of the bishops, ministers and members, and organization into a Church South, was an unauthorized separation; and that they have thereby renounced and forfeited all claim, either in law or equity, to any portion of the property in question. The defendants admit that the Book Concern at Cincinnati, with all the houses, lots, printing presses, &c., is now and always has been beneficially the property of the preachers belonging to the traveling connection of the Methodist Episcopal Church; but insist that, if such preachers do not, during life, continue in such traveling connection, and in the communion, and subject to the government of the church, they forfeit for themselves and their families all ownership in, or claim to the said Book Concern, and the produce thereof; they admit that the Book Concern was originally commenced and established by the traveling preachers of this church, upon their own capital, with the design in the first place of circulating religious knowledge, and that, at the General Conference of 1796, it was determined that the profits derived from the sale of books should in future be devoted wholly to the relief of traveling preachers, supernumerary and worn out preachers, and the widows and orphans of such preachers—and the defendants submit that the Methodist Episcopal Church South is not entitled at law or in equity to have a division of the property of the Book Concern, or the produce, or any portion thereof; and that the ministers, preachers or members, in connection with such church are not entitled to any portion of the same; and further, that being no **302*** longer traveling preachers belonging to the Methodist Episcopal Church, they are not so entitled, without a change of the sixth restrictive article of the constitution of 1808, provided for in the plan of separation, as a condition of the partition of said fund.

The proofs in the case consist chiefly of the proceedings of the General Conference of 1844, relating to the separation of the church and of the proceedings of the southern conferences, in pursuances of which a distinct and separate ecclesiastical organization south took place.

There is no material controversy between the parties, as it respects the facts. The main difference lies in the interpretation and effect

to be given to the acts and proceedings of these several bodies and authorities of the church. Our opinion will be founded almost wholly upon facts alleged in the bill, and admitted in the answer.

An objection was taken, on the argument, to the bill for want of proper parties to maintain the suit. We think the objection not well founded.

The rule is well established, that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others; and a bill may also be maintained against a portion of a numerous body of defendants, representing a common interest. (Story's Eq. Pl., secs. 97, 98, 99, 103, 107, 110, 111, 116, 120; 2 Mitf. Pl., Jer. Ed., 167, 2 Paige, 19; 4 Mylne & Cr., 134, 619; 2 De Gex & Smale, 102, 122.)

Mr. Justice Story, in his valuable treatise on Equity Pleadings, after discussing this subject with his usual research and fullness, arranges the exceptions to the general rule, as follows: 1. Where the question is one of a common or general interest, and one or more sue or defend for the benefit of the whole. 2. Where the parties form a voluntary association for public or private purposes, and those who sue or defend may fairly be presumed to represent the rights and interests of the whole; and 3. Where the parties are very numerous, and though they have or may have separate and distinct interests, yet it is impracticable to bring them all before the court.

In this latter class, though the rights of the several persons may be separate and distinct, yet there must be a common interest or a common right, which the bill seeks to establish or enforce. As an illustration, bills have been permitted to be brought by the lord of a manor against some of the tenants, and *vice versa*, by some of the tenants in behalf of themselves and the other tenants, to establish some right—such as suit to a mill, or right of common, or to cut turf. So by a parson of a parish [*303] against some of the parishioners to establish a general rights to tithes—or conversely, by some of the parishioners in behalf of all to establish a parochial *modus*.

In all cases where exceptions to the general rule are allowed, and a few are permitted to sue and defend on behalf of the many, by representation, care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried.

Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject matter of the suit is common to all, there can be very little danger but that

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the interest of all will be properly protected and maintained.

The case in hand illustrates the propriety and fitness of the rule. There are some fifteen hundred persons represented by the complainants, and over double that number by the defendants. It is manifest that to require all the parties to be brought upon the record, as is required in a suit at law, would amount to a denial of justice. The right might be defeated by objections to parties, from the difficulty of ascertaining them; or if ascertained, from the changes constantly occurring by death or otherwise.

As it respects the persons into whose hands the fund in question should be delivered for the purpose of distribution among the beneficiaries, in case of a division of it, we shall recur to the subject in another part of this opinion.

We will now proceed to an examination of the merits of the case.

The Book Concern, the property in question, is a part of a fund which had its origin at a very early day, from the voluntary contributions of the traveling preachers in the connection of the Methodist Episcopal Church. The establishment was at first small; but at present, is one of very large capital, and of extensive operations, producing great profits. In 1796, the traveling preachers in General Conference assembled, determined that these profits should be thereafter devoted to the relief of the traveling preachers, and their families; and, accordingly *resolved, that the produce of the sale of the books, after the debts were paid, and sufficient capital provided for carrying on the business, should be applied for the relief of distressed traveling preachers, for the families of traveling preachers, and for supernumerary and worn out preachers, and the widows and orphans of preachers.

The establishment was placed under the care and superintendence of the General Conference, the highest authority in the church, which was composed of the traveling preachers; and it has grown up to its present magnitude, its capital amounting to nearly a \$1,000,000, from the economy and skill with which the concern has been managed, and from the labors and fidelity of the traveling preachers, who have always had the charge of the circulation and sale of the books in the Methodist connection throughout the United States, accounting to the proper authorities for the proceeds. The agents who have the immediate charge of the establishment make up a yearly account of the profits, and transmit the same to the several Annual Conferences, each, an amount in proportion to the number of traveling preachers, their widows and orphans comprehended within it, which bodies distribute the fund to the beneficiaries individually, agreeably to the design of the original founders. These several Annual Conferences are composed of the traveling preachers residing or located within certain districts assigned to them; and comprehended, in the aggregate, the entire body in connection with the Methodist Episcopal Church. The fund has been thus faithfully administered since its foundation down to 1846, when the portion belonging to the complainants in this suit, and those they repre-

sent, was withheld, embracing some of the thirteen of the Annual Conferences.

In the year 1844 the traveling preachers in General Conference assembled, for causes which it is not important particularly to refer to, agreed upon a plan for a division of the Methodist Episcopal Church in case the Annual Conferences in the slaveholding States should deem it necessary; and to the erection of two separate and distinct ecclesiastical organizations. And according to this plan, it was agreed that all the societies, stations and Conferences adhering to the Church South, by a majority of their respective members, should remain under the pastoral care of that church; and all of these several bodies adhering, by a majority of its members, to the Church North, should remain under the pastoral care of that church; and further, that the ministers, local and traveling, should, as they might prefer, attach themselves, without blame, to the Church North or South. It was also agreed that the common property of the church, including *this Book Concern, that belonged [*305 specially to the body of traveling preachers, should, in case the separation took place, be divided between the two churches in proportion to the number of traveling preachers falling within the respective divisions. This was in 1844. In the following year the southern Annual Conferences met in convention, in pursuance of the plan of separation, and determined upon a division, and resolved that the Annual Conferences should be constituted into a separate ecclesiastical connection, and based upon the discipline of the Methodist Episcopal Church, comprehending the doctrines and entire moral, ecclesiastical and economical rules and regulations of said discipline, except only so far as verbal alterations might be necessary; and to be known by the name of the Methodist Episcopal Church South.

The division of the church, as originally constituted, thus became complete; and from this time two separate and distinct organizations have taken the place of the one previously existing.

The Methodist Episcopal Church having been thus divided, with the authority and according to the plan of the General Conference, it is claimed, on the part of the complainants, who represent the traveling preachers in the Church South, that they are entitled to their share of the capital stock and profits of this Book Concern; and that the withholding of it from them is a violation of the fundamental law prescribed by the founders, and consequently of the trust upon which it was placed in the hands of the defendants.

The principal answer set up to this claim is, that according to the original constitution and appropriation of the fund, the beneficiaries must be traveling preachers, or the widows and orphans of traveling preachers, in connection with the Methodist Episcopal Church, as organized and established in the United States at the time of the foundation of the fund; and that, as the complainants, and those they represent, are not shown to be traveling preachers in that connection, but traveling preachers in connection with a different ecclesiastical organization, they have forfeited their right, and are no longer within the description of its beneficiaries.

This argument, we apprehend, if it proves anything, proves too much; for if sound, the necessary consequence is that the beneficiaries connected with the Church North, as well as South, have forfeited their right to the fund. It can no more be affirmed, either in point of fact or of law, that they are traveling preachers in connection with the Methodist Church as originally constituted, since the division, than of those in connection with the Church South. Their organization covers but about half of the **306**] territory embraced within that of the former church; and includes within it but a little over two thirds of the traveling preachers. Their General Conference is not the General Conference of the old church, nor does it represent the interest or possess, territorially, the authority of the same; nor are they the body under whose care this fund was placed by its founders. It may be admitted that, within the restricted limits, the organization and authority are the same as the former church. But the same is equally true in respect to the organization of the Church South.

Assuming therefore that this argument is well founded, the consequence is that all the beneficiaries of the fund, whether in the southern or northern division, are deprived of any right to a distribution, not being in a condition to bring themselves within the description of persons for whose benefit it was established: in which event the foundation of the fund would become broken up, and the capital revert to the original proprietors, a result that would differ very little in its effect from that sought to be produced by the complainants in their bill.

It is insisted, however, that the General Conference of 1844 possessed no power to divide the Methodist Episcopal Church as then organized, or to consent to such division; and hence, that the organization of the Church South was without authority, and the traveling preachers within it separated from an ecclesiastical connection which is essential to enable them to participate as beneficiaries. Even if this were admitted, we do not perceive that it would change the relative position and rights of the traveling preachers within the divisions north and south, from that which we have just endeavored to explain. If the division under the direction of the General Conference has been made without the proper authority, and for that reason the traveling preachers within the southern division are wrongfully separated from their connection with the church, and thereby have lost the character of beneficiaries, those within the northern division are equally wrongfully separated from that connection, as both divisions have been brought into existence by the same authority. The same consequence would follow in respect to them, that is imputable to the traveling preachers in the other division, and hence each would be obliged to fall back upon their rights as original proprietors of the fund.

But we do not agree that this division was made without the proper authority. On the contrary, we entertain no doubt that the General Conference of 1844 was competent to make it; and that each division of the church, under the separate organization, is just as legitimate, and can claim as high a sanction, eccle-

siastical and temporal, as the Methodist Episcopal *Church first founded in the [**307** United States. The same authority which founded that church in 1784 has divided it, and established two separate and independent organizations occupying the place of the old one.

In 1784, when this church was first established, and down till 1808, the General Conference was composed of all the traveling preachers in that connection. This body of preachers founded it by organizing its government, ecclesiastical and temporal, established its doctrines and discipline, appointed its superintendents or bishops, its ministers and preachers, and other subordinate authorities to administer its polity, and promulgate its doctrines and teachings throughout the land.

It cannot therefore be denied, indeed, it has scarcely been denied that this body, while composed of all the traveling preachers, possessed the power to divide it and authorize the organization and establishment of the two separate independent churches. The power must necessarily be regarded as inherent in the General Conference. As they might have constructed two ecclesiastical organizations over the territory of the United States originally, if deemed expedient, in the place of one, so they might, at any subsequent period, the power remaining unchanged.

But it is insisted that this power has been taken away or given up, by the action of the General Conference of 1808. In that year the constitution of this body was changed so as to be composed, thereafter, by traveling preachers, to be elected by the Annual Conferences, in the ratio of one for every five members. This has been altered from time to time, so that, in 1844, the representation was one for every twenty-one members. At the time of this change, and as part of it, certain limitations were imposed upon the powers of this General Conference, called the six restrictive articles: 1. That they should not alter or change the articles of religion, or establish any new standard of doctrine. 2. Nor allow of more than one representative for every fourteen members of the Annual Conferences, nor less than one for every thirty. 3. Nor alter the government so as to do away with episcopacy, or destroy the plan of itinerant superintendencies. 4. Nor change the rules of the united societies. 5. Nor deprive the ministers or preachers of trial by a committee, and of appeal; nor members before the society, or lay committee, and appeal. And 6. Nor appropriate the proceeds of the Book Concern, nor the charter fund, to any purpose other than for the benefit of the traveling, supernumerary, superannuated and worn out preachers, their wives, widows and children. Subject to these restrictions, the delegated conference possessed the same powers as when composed of the entire body of preachers. *And it will be [**308** seen that these relate only to the doctrine of the church, its representation in the General Conference, the episcopacy, discipline of its preachers, and members, the Book Concern and charter fund. In all other respects, and in everything else that concerns the welfare of the church, the General Conference represents the sovereign power the same as before. This is the view taken by the General Conference in-

self, as exemplified by the usage and practice of that body. In 1820 they set off to the British Conference of Wesleyan Methodists the several circuits and societies in Lower Canada. And in 1828 they separated the Annual Conference of Upper Canada from their jurisdiction, and erected the same into a distinct and independent Church. These instances, together with the present division, in 1844, furnish evidence of the opinions of the eminent and experienced men of this Church in the several Conferences, of the power claimed, which, if the question was otherwise doubtful, should be regarded as decisive in favor of it. We will add, that all the northern bishops, five in number, in council of July, 1845, acting under the plan of separation, regarded it as of binding obligation, and conformed their action accordingly.

It has also been urged on the part of the defendants that the division of the church, according to the plan of the separation, was made to depend not only upon the determination of the southern Annual Conferences, but also upon the consent of the annual conferences north, as well as south, to a change of the sixth restrictive article, and as this was refused, the division which took place was unauthorized. But this is a misapprehension. The change of this article was not made a condition of the division. That depended alone upon the decision of the southern Conferences.

The division of the Methodist Episcopal Church having thus taken place, in pursuance of the proper authority, it carried with it, as matter of law, a division of the common property belonging to the ecclesiastical organization, and especially of the property in this Book Concern, which belonged to the traveling preachers. It would be strange if it could be otherwise, as it respects the Book Concern, inasmuch as the division of the association was effected under the authority of a body of preachers who were themselves the proprietors and founders of the fund.

It has been argued, however, that according to the plan of separation, the division of the property in this Book Concern was made to depend upon the vote of the annual conferences to change the sixth restrictive article, and that whatever might be the legal effect of the division of the church upon the common property **309*]** otherwise, this stipulation controls it and prevents a division till the consent is obtained.

We do not so understand the plan of separation. It admits the right of the Church South to its share of the common property, in case of a separation, and provides for a partition of it among the two divisions, upon just and equitable principles; but, regarding the sixth restrictive article as a limitation upon the power of the General Conference, as it respected a division of the property in the Book Concern, provision is made to obtain a removal of it. The removal of this limitation is not a condition to the right of the Church South to its share of the property, but is a step taken in order to enable the General Conference to complete the partition of the property.

We will simply add, that as a division of the common property followed, as matter of law, a division of the church organization, nothing short of an agreement or stipulation of the

Church South to give up their share of it, could preclude the assertion of their right; and, it is quite clear, no such agreement or stipulation is to be found in the plan of separation. The contrary intent is manifest from a perusal of it.

Without pursuing the case further, our conclusion is, that the complainants and those they represent, are entitled to their share of the property in this Book Concern. And the proper decree will be entered to carry this decision into effect.

The complainants represent, not only all the beneficiaries in the division of the Church South, but also the General Conference and the Annual Conferences of the same. The share therefore of this Book Concern belonging to the beneficiaries in that church, and which its authorities are entitled to the safe keeping and charge of, for their benefit, may be properly paid over to the complainants as the authorized agents for this purpose.

We shall accordingly direct a decree to be entered reversing the decree of the court below, and remanding the proceedings to that court, directing a decree to be entered for the complainants against the defendants; and a reference of the case to a master to take an account of the property belonging to the Book Concern, and report to the court its cash value, and to ascertain the portion belonging to the complainants, which portion shall bear to the whole amount of the fund the proportion that the traveling preachers in the division of the Church South bore to the traveling preachers of the Church North, at the time of the division of said Church. And on the coming in of the report, and confirmation of the same, a decree shall be entered in favor of the complainants for that amount.

*ORDER.

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This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Ohio, and was argued by counsel; on consideration whereof, it is ordered, adjudged and decreed by this court, that the decree of said Circuit Court in this cause be, and the same is hereby reversed and annulled. And this court doth further find, adjudge and decree:

1. That, under the resolutions of the General Conference of the Methodist Episcopal Church, holden at the City of New York, according to the usage and discipline of said Church, passed on the eighth day of June, in the year of our Lord one thousand eight hundred and forty-four (in the pleadings mentioned), it was, among other things, and in virtue of the power of the said General Conference, well agreed and determined by the Methodist Episcopal Church in the United States of America, as then existing, that in case the Annual Conferences in the slaveholding States should find it necessary to unite in a distinct ecclesiastical connection, the ministers, local and traveling, of every grade and office, in the Methodist Episcopal Church, might attach themselves to such new ecclesiastical connection, without blame.

2. That the said Annual Conferences in the slaveholding States did find and determine that it was right, expedient and necessary to erect the Annual Conferences last aforesaid into a dis-

tinct ecclesiastical connection, based upon the discipline of the Methodist Episcopal Church aforesaid, comprehending the doctrines and entire moral and ecclesiastical rules and regulations of the said discipline (except only in so far as verbal alterations might be necessary to, or for a distinct organization), which new ecclesiastical connection was to be known by the name and style of the Methodist Episcopal Church South; and that the Methodist Episcopal Church South was duly organized under said resolutions of the said General Conference, and the said decision of said Annual Conferences last aforesaid, in a convention thereof held at Louisville, in the State of Kentucky, in the month of May, in the year of our Lord one thousand eight hundred and forty five.

3. That, by force of the said resolutions of June the eighth, eighteen hundred and forty-four, and of the authority and power of the said General Conference of the Methodist Episcopal Church as then existing, by which the same were adopted, and by virtue of the said finding and determination of the said Annual Conferences in the slaveholding States therein mentioned, and by virtue of the organization 311*] of such Conferences into a *distinct ecclesiastical connection as last aforesaid: the religious association known as the Methodist Episcopal Church in the United States of America as then existing, was divided into two associations, or distinct Methodist Episcopal Churches, as in the bill of complaint is alleged.

4. That the property denominated the Methodist Book Concern at Cincinnati, in the pleadings mentioned, was, at the time of said division, and immediately before, a fund subject to the following use—that is to say: that the profits arising therefrom, after retaining a sufficient capital to carry on the business thereof, were to be regularly applied towards the support of the deficient traveling, supernumerary, superannuated and worn out preachers of the Methodist Episcopal Church, their wives, widows and children, according to the rules and discipline of said church; and that the said fund and property are held under the Act of Incorporation in the said answer mentioned, by the said defendants, Leroy Swormstedt and John H. Power, as agents of said Book Concern, and in trust for the purposes thereof.

5. That, in virtue of the said division of said Methodist Episcopal Church in the United States, the deficient, traveling supernumerary, superannuated and worn out preachers, their wives, widows and children, comprehended in, or in connection with, the Methodist Episcopal Church South, were, are, and continue to be beneficiaries of the said Book Concern to the same extent, and as fully as if the said division had not taken place, and in the same manner and degree as persons of the same description who are comprehended in, or in connection with, the other association, denominated since the division of the Methodist Episcopal Church; and that as well the principal as the profits of said Book Concern, since said division, should of right be administered and managed by the respective General and Annual Conferences of the said two associations and churches, under the separate organizations thereof, and according to the shares or proportions of the same as hereinafter mentioned, and in conformity with

the rules and discipline of said respective associations, so as to carry out the purposes and trusts aforesaid.

6. That so much of the capital and property of said Book Concern at Cincinnati, wherever situate, and so much of the produce and profits thereof as may not have been heretofore accounted for to said Church South, in the New York case hereinafter mentioned, or otherwise, shall be paid to said Church South, according to the rate and proportions following, that is to say: in respect to the capital, such share or part as corresponds with the proportion which the number of the traveling *preachers [312 in the Annual Conferences which formed themselves into the Methodist Episcopal Church South, bore to the number of all the traveling preachers of the Methodist Episcopal Church before the division thereof, which numbers shall be fixed and ascertained as they are shown by the minutes of the several Annual Conferences next preceding the said division and new organization in the month of May, A. D. 1845.

And in respect to the produce or profits, such share or part as the number of Annual Conferences which formed themselves into the Methodist Episcopal Church South bore, at the time of said division, in May, A. D. 1845, to the whole number of Annual Conferences then being in the Methodist Episcopal Church, excluding the Liberia Conference: so that the division or apportionment of said produce and profits shall be had by Conferences, and not by numbers of the traveling preachers.

7. That said payment of capital and profits, according to the ratios of apportionment so declared, shall be made and paid to the said Smith, Parsons, and Green, as Commissioners aforesaid, or their successors, on behalf of said Church South and the beneficiaries therein, or to such other person or persons as may be thereto authorized by the General Conference of said Church South, the same to be subsequently managed and administered so as to carry out the trusts and usages aforesaid, according to the discipline of said Church South, and the regulations of the General Conference thereof.

8. And in order more fully to carry out the matters hereinbefore settled and adjudged, it is further ordered and decreed, that this cause be remanded to the said Circuit Court for further proceedings—that is to say:

That the same be referred to a master to take and state an account as follows:

(1.) Of the amount and value of the said Book Concern at Cincinnati, on the 1st day of May, 1845, and of what specific property and effects (according to a general description or classification thereof) the same then consisted, whether composed of real or personal estate, and of whatever nature or description the same may have been; and a similar account as of the date or time when the said master shall take this account.

(2.) Of the produce and profits of said Book Concern, from the time of the General Conference of May, 1844, as reported thereto (if so reported), up to the time of the said division in May, 1845, and from the last-mentioned date down to the time of making up his report: specifying how much of said profits and pro-

duce have been transferred to said Book Concern, at New York, and accounted for to said §13* Church South in the *settlement of the case there; and how much remains to be accounted for to said Church South on the basis settled by this decree.

And in taking said accounts, and in the execution of said reference, the said defendants shall produce, on oath, all deeds, accounts, books of account, instruments, reports, letters, and copies of letters, memoranda, documents and writings whatever, pertinent to said reference, in their possession or control, and the said defendants may be examined, on oath, on the said reference; and each party may produce evidence before the master, and have process to compel the attendance of witnesses.

And the said master is further directed, in respect to any annual profits of said concern, not heretofore accounted for to said Church South, to allow to said Church South interest at the rate of six per cent. upon such unpaid balances from the date at which the same ought to have been paid.

And in respect to all the costs in this case, including the costs of the reference, and all other costs from the commencement of the case until its conclusion, and in respect to the fees of counsel and solicitors therein, of both parties, so far as the same may be reasonable, and in respect of just and necessary expenses, as well of plaintiffs as of defendants in conducting the suit, the same ought to be paid out of said Book Concern, and a common charge thereon, before apportionment and division, and the master is accordingly directed to allow and pay the same to the respective parties entitled thereto, and then to apportion the residue according to the principles fixed in this decree.

And the master is further directed to return his report to the said Circuit Court with all convenient dispatch, which court shall then proceed to enforce the payment of whatever sum or sums may be found due to said Church South, on the confirmation of the master's report, in such installments as may be by said court adjudged reasonable, each party having due opportunity of excepting to the master's report; and all questions arising upon said report, and not settled by this decree, may be moved before said Circuit Court, to which court either party shall be at liberty to apply on the footing of this decree.

Rev'g—8 McLean, 300.

Cited—17 How., 504; 18 How., 490; McCahon, 255; 12 Blatchf., 237.

§14*] ALEXANDER J. MARSHALL,
Plaintiff in Error,

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

Residence of R. R. Corporation—Contracts to obtain legislation are void—public policy.

NOTE.—Citizenship of corporation and its stockholders. Voluntary association. Holders of bonds of corporation secured by mortgage. General answer waives objections to residence. See note to Hope Ins. Co. v. Boardman.

"Persons" in statute includes corporation, when deemed citizens. See note to U. S. v. Amedy, 11 Wheat., 392.

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A citizen of Virginia may sue the Baltimore and Ohio Railroad Company in the Circuit Court of the United States for Maryland, and an averment that the defendants are a body corporate, created by the Legislature of Maryland, is sufficient to give the court jurisdiction.

The constitutional privilege which a citizen of one state has to sue the citizens of another state in the federal courts cannot be taken away by the erection of the latter into a corporation by the laws of the state in which they live. The corporation itself may therefore be sued as such.

The preceding cases upon this subject, examined. Where a contract was made to obtain a certain law from the Legislature of Virginia, and stated to be made on the basis of a prior communication, this communication is competent evidence in a suit upon the contract.

A contract is void, as against public policy, and can have no standing in court, by which one party stipulates to employ a number of secret agents in order to obtain the passage of a particular law by the Legislature of a state, and the other party promises to pay a large sum of money in case the law should pass.

It was also void if, when it was made, the parties agreed to conceal from the members of the Legislature the fact that the one party was the agent for the other, and was to receive a compensation for his services in case of the passage of the law.

And if there was no agreement to that effect, there can be no recovery upon the contract, if in fact the agent did conceal from the members of the Legislature that he was an agent who was to receive compensation for his services in case of the passage of the law.

Moreover, in this particular case, the law which was passed was not such a one as was stipulated for, and upon this ground there could be no recovery.

There having been a special contract between the parties by which the entire compensation was regulated and made contingent, there could be no recovery on a count for quantum meruit.

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of Maryland.

Marshall, a citizen of Virginia, sued the Railroad Company, to recover the sum of \$50,000, which he alleged that they owed him under a special contract, for his services in obtaining a law from the Legislature of Virginia, granting to the Company a right of way through Virginia to the Ohio River.

The declaration set out the special contract, and also contained a count for a quantum meruit.

The circumstances of the case are related in the opinion of the court.

Inasmuch as one of the instructions of the Circuit Court was, that if "the services of the plaintiff were to be of the character and description set forth in his letter to the president of the Company, dated November 17th, 1846, and the paper therein inclosed" no "action could be maintained on the contract," it is proper, for future reference, that both of those papers should be inserted. They were as follows:

Letter from A. J. Marshall to L. McLane, 17th November, 1846.

WARRENTON, November 17.

DEAR SIR: In an interview with you a few days since, I promised *to submit in [*315 writing a plan, by which I thought your much-

Illegal contracts, what are. How far fraud or illegal consideration will avoid contract. See note to Armstrong v. Toler, 11 Wheat., 258.

What contracts are void as against public policy, or as illegal. Illegal consideration, when a defense. Agreement not to bid. Lobby services. For contingent fees. To prevent competition. See note to Bartie v. Nutt, 4 Pet., 184.

desired "right of way" through this State might be procured from our Legislature. I herewith inclose my views on that subject, and shall respectfully await your reply.

In offering myself as the agent of your Company to manage so delicate and important a trust, I am aware I lack that commanding reputation which of itself would point me out as best qualified for such a post. Of my qualification and fitness it is not for me to speak; and, in consequence of the absolute secrecy demanded, I cannot seek testimonials of my capacity, lest I should excite inquiry. If your judgment approves my scheme, it is probable you might get satisfactory information respecting me by a cautious conversation with John M. Gordon, A. B. Gordon, Dr. John H. Thomas, or Joseph C. Wilson, all of your city. Without impropriety, I may say for myself I have had considerable experience as a lobby member before the Legislature of Virginia. For several winters past I have been before that body with difficult and important measures, affecting the improvement of this region of the country; and I think I understand the character and component material of that honorable body.

I shall have to spend six or eight weeks in Richmond, next winter, to procure important amendments to the charter of the Rappahannock Company. This will furnish reason for my presence in Richmond.

There is an effort in progress to divide our county, to which we of Warrenton are violently hostile. This furnishes another reason for myself, and also for one or two other agents, to remain in the City of Richmond during the winter.

Col. Walden and myself are interested in large bodies of land in Western Virginia, near which the track of your railroad will pass. This is an ostensible reason for our active interference. I live in a range of country whose representation ought to be entirely disinterested on this question of the "right of way." Notwithstanding which, I believe a plurality of our representatives have heretofore been in opposition. I know the influences that effected this, and am happy to say they will not exist next winter.

Edmund Broadbuss, for many years a representative from Culpepper, a shrewd, intelligent man, influenced this result. Broadbuss was a sort of protégé of the Richmond and James River whigs; was distinguished and promoted by them, and habitually acted with them. His place is now filled by Slaughter, a personal friend of mine. I should have little fear to to carry this section of the State.

The proposed plan best speaks for itself; if **316** you think it feasible, *there is no time to be lost. I hope to hear from you at your earliest leisure. With entire respect I am your humble servant, &c., A. J. MARSHALL.

I tax you with postage, as I do not wish to be known as in correspondence.

Document accompanying the foregoing letter.

In explanation of the plan I wish to submit, it is necessary to indulge some latitude of remark on the causes which have heretofore thwarted the just pretensions of your Company.

Richmond City, the Petersburg, Richmond

and Potomac Railroad, the James River Canal, and the Wheeling interests, acting in concert, have heretofore successfully combated "the right of way." These interests fall far short of a majority in the two branches of the Virginia Legislature. There is no sufficient ground, in the numeric force of this antagonists interest, to discourage the hope of an eventual success. On an examination of their arguments, based either upon justice or expediency, I find nothing to challenge a conviction of right, or an assurance of high state policy. On the contrary, standing heretofore as a disinterested spectator of the struggle, I have condemned the emptiness and arrogance of their pretensions, and felt indignant at the success of their narrow, selfish and bigoted policy.

I have observed no superiority of talent, no greater zeal, or power of advocacy in the opposition, than in favor of the "right of way." The success of a cause before our Legislature, having neither justice, greater expediency, stronger advocacy, or greater numeric strength, is matter of just amazement to the defeated party. The elements of this success should be a subject of curious and deeply anxious investigation; for when the cause is known, a remedy or counteracting influence may be readily applied. I have no idea that any dishonorable measures or appliances (further than log-rolling may be one) have been used to defeat the "right of way." As to log-rolling, I am sorry to say it has grown into a system in our Legislature. Members openly avow and act on it, and never conceal their bargain, except where publicity would jeopard success. No delegation are more skillful or less scrupulous at this game than our western right-of-way men; so, in that regard, there is a stand-off. It seems to me the great secret of this success is the propinquity, the presence on the ground, of your opponents. The Legislature sits in their midst. They exercise a vigilant, pressing, present out-of-door influence upon the members. If the capitol were located at Weston or Clarksburg, who would question success? The Richmond interest is ever present and ever pressing; her associates of the railroad and canal are at **317** hand, and equally active. You have no counteracting influence, and hence the success and triumph of your opponents. If I am right in these views, your claims, resting alone on justice, sectional necessity, or even high state policy, will be urged in vain, and must become as mere sounding clamor in the hall, unless you meet your opponents with the weapons they use so successfully against yourselves. Experience shows that something beyond what you have heretofore done is necessary to success; and in this necessity the plan I have to submit has its origin.

The mass of the members in our Legislature are a thoughtless, careless, light-hearted body of men, who come there for the "per diem," and to spend the "per diem." For a brief space they feel the importance and responsibility of their position. They soon, however, engage in idle pleasures, and on all questions disconnected with their immediate constituents, they become as wax, to be molded by the most pressing influences. You need the vote of this careless mass, and if you adopt efficient means you can obtain it. I never saw a class

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of men more eminently kind and social in their intercourse. Through these qualities they may be approached and influenced to do anything not positively wrong, or which will not affect prejudicially their immediate constituency. On this question of the "right of way," a decided majority of the members can vote either way without fear of their constituents. On this question, therefore, I consider the most active influences will ever be the most successful.

Before you can succeed, in my judgment, you must reinforce the "right of way" members of the house with an active, interested, well-organized influence about the house. You must inspire your agents with an earnest, nay, an anxious wish for success. The rich reward of their labors must depend on success. Give them nothing if they fail—endow them richly if they succeed. This is, in brief space, the outline of my plans. Reason and justice are with you; an enlarged expediency favors your claim. You have able advocates, and the best of the argument; yet, with all these advantages, you have been defeated. I think I have pointed out the cause. Your opponents better understand the nature of the tribunal before which this vast interest is brought. They act on individuals of the body out of doors and in their chambers. Your adversaries are on the spot, and hover around the careless arbiters of the question in vigilant and efficient activity. The contest, as now waged, is most unequal. My plan would aim to place the "right of way" members on an equality with their adversaries, **§18*** by sending down ***a corps of agents**, stimulated to an active partisanship by the strong lure of a high profit.

In considering the details of the plan, I would suggest that all practicable secrecy is desirable. It strikes me the Company should have or know but one agent in the matter, and let that agent select the sub-agents from such quarters and classes, and in such numbers, as his discreet observation may dictate.

I contemplate the use of no improper means or appliances in the attainment of your purpose. My scheme is to surround the Legislature with respectable and influential agents, whose persuasive arguments may influence the members to do you a naked act of justice. This is all. I require secrecy from motives of policy alone, because an open agency would furnish ground of suspicion and unmerited invective, and might weaken the impression we seek to make.

In regard to the cost of all this it must necessarily be great. The sub-agency must be extensive, and of first influence and character. All your agents must be inspired by an active zeal and a determined purpose of success. This can only be accomplished for you by offers of high contingent compensation.

I will illustrate this point by a single example. Were I to become your agent on my plan, I should like to have the services of Major Charles Hunton, of this county. Hunton, for many years, was a member of our State Senate. His last year of service was as president of that body. He is an unpretending man, of good understanding and excellent address. He is a great favorite with his own party (democratic), and universally esteemed as a gentleman of highest character. He is in moderate circumstances, with a large family. I have no doubt

if I would bear his expenses, and secure him a contingent of \$1,000, he would spend the winter in Richmond, and do good service; but if I could offer him \$2,000, it would become an object of great solicitude. It would pay all his debts and smooth the path of an advancing old age. \$2,000 would stimulate his utmost energies. If I am enabled to offer such inducements, I should have great confidence of success. Under this plan you pay nothing unless a law be passed which your Company will accept. Of what value would such a law be to you? Measure this value, and let your own interests, in view of the high stake you play for, fix the price. There is no use in sending a boy on a man's errand; a low offer, and that contingent, is bad judgment; high service can't be had at a low bid.

I have surveyed the difficulties of this undertaking, and think they may be surmounted. The cash outlay for my own expenses, and those of the sub-agents, would be heavy. I know the ***effective service of such** [***\$19** agents as I would employ cannot be had except on a heavy contingent. Taking all things into view, I should not like to undertake the business on such terms, unless provided with a contingent fund of at least \$50,000, secured to my order on the passage of a law, and its acceptance by your Company.

If the foregoing views are deemed worthy of consideration, I hold myself in readiness to meet any call in that behalf that may be made upon me. Respectfully, &c.,

A. J. MARSHALL.

After the evidence had been closed, the counsel for the plaintiff asked the court to instruct the jury as follows:

1. That there is nothing in the terms or provisions of the agreement embraced in the resolution of the committee of correspondence, dated 12th December, 1846 (which is set forth in the opinion of the court), offered in evidence, which renders the same void, on grounds of public policy.

2. That the plaintiff is not precluded from recovering under the agreement aforesaid, dated 12th December, 1846, as modified by the agreement stated in the letter of 11th of February, 1847, by reason merely of the second proviso contained in the first section of the Act of 6th of March, 1847, which has been offered in evidence, provided the jury shall find that the route, entering the ravine of the Ohio River at the mouth of Fish Creek, and running so as to pass from a point in the ravine of Buffalo Creek, at or near the mouth of Pile's Fork, to a depot to be established by the defendant on the northern side of Wheeling Creek, in the City of Wheeling, upon minute estimates made in the manner and on the basis prescribed in said Act, and made after full examination and instrumental surveys of the feasible or practicable routes, appeared to be the cheapest upon which to construct, maintain, and work said railroad; and provided they shall also find that the City of Wheeling did not agree to pay the difference of cost, as specified in said Act, but on the contrary renounced the right to do so as early as the 10th of July, 1847; and provided they shall also find that said Act was accepted

by the stockholders of the defendant, as a part of its charter, on the 25th of August, 1847.

3. Upon the evidence aforesaid, the plaintiff prays the court to instruct the jury—

That if they find the contract contained in the resolution of the committee of correspondence of 12th of December, 1846, and in the resolution of the committee of correspondence of the 18th of January, 1847, and in the letter of Louis McLane of the 11th of February, 1847, aforesaid, to have been made with the 320*] plaintiff by the defendant; and also that the Act of Virginia, of the 6th of March, 1847, was passed at the session of the Legislature of Virginia for 1846-1847, in the contract mentioned; and also that the Baltimore and Ohio Railroad, by the cheapest route to the City of Wheeling, entering the ravine of the Ohio at or north of Grave Creek, was ascertained, by such estimates as the law prescribed, to be more costly to construct, maintain and work, than said road would be by the route passing into the ravine of the Ohio at or near the mouth of Fish Creek, and then to the City of Wheeling, and that the difference of said probable cost was then in like manner ascertained; that the defendants accepted the said law within six months from the passage thereof; and also, that when the difference of probable cost between said two routes was ascertained, according [to] said Act, the City of Wheeling did not agree to pay to the defendant such difference of cost by the time specified in said Act, and that the plaintiff did attend at Richmond during the session aforesaid, and did then and there superintend and further the applications and other proceedings to obtain the right of way through the State of Virginia, on behalf of the defendant, then the plaintiff is entitled to recover, on the special contract contained in the instrument aforesaid, the value of the contingent compensation therein stipulated.

And the defendants, by their counsel, prayed the court to instruct the jury that the plaintiff was not entitled to recover, because the contract, which stipulated for the payment of a contingent fee of \$50,000, in the event of the obtaining from the Legislature of Virginia such a law as is described therein, was against public policy, and void.

2. That if the jury shall believe that it was agreed between the parties to the said contract that the same should be kept secret, either in the terms of it or otherwise, from the Legislature of Virginia or the public, such contract, if otherwise proper and legal, was invalid as against public policy, and the plaintiff is not entitled to recover.

3. If the jury find that the special contract offered in evidence by the plaintiff was proposed to be entered into by the plaintiff from the reasons and motives, and to be executed by him in the way suggested in his communication of the 17th of November, and its inclosure, offered in evidence by the defendant (if the jury shall find that such communication was so made by plaintiff), and if they shall find that the contract aforesaid was entered into accordingly, and that said contract, or plaintiff's agency under it, was not made known to the Legislature of Virginia, but in fact concealed, that then said contract was illegal and void, upon grounds of public policy.

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*4. That the contract between the [321] plaintiff and defendants of 12th of December, 1846, looked to the obtaining of a law authorizing the defendants to extend their road through the State of Virginia, to a point on the Ohio River as low down the river as Fishing Creek, which law should be afterwards accepted by the defendants with a determination to act under it, or to the incorporation of an independent company, which the defendants should determine to accept and adopt, or of whose charter they should become the proprietors, authorizing the construction of a railroad from any point on the Ohio River between the mouth of Little Kenawha and Wheeling, and that no such law having been obtained, the plaintiff is not entitled to recover.

5. That the modified contract of the 11th of February looked to the obtaining of the passage of Hunter's substitute, with the adoption of Fish Creek instead of Fishing Creek, as the point of striking the Ohio. That the law which was passed on the 6th of March, 1847, was a law which did not, in its terms or effect, fulfill the stipulations of the modified agreement of February, 11th, 1847.

6. That the acceptance of the law of March 6th, 1847, by the defendants, even supposing it to be substantially the same as Hunter's substitute, did not entitle the plaintiff to recover unless the jury should believe that such law was obtained through his agency, under the agreement with the defendants.

7. That even if the jury should believe that the law of March 6th, 1847, was obtained through the plaintiff's agency, the plaintiff is not entitled to recover if they shall believe that it was accepted by the defendants in consequence of the waiver, by the City of Wheeling, of the privileges accorded to it therein, and the stipulations contained in the agreement between the City of Wheeling and the defendants, of March 6th, 1847.

8. That the modified agreement of February 11th, 1847, which made Hunter's substitute, modified as stated in the foregoing prayer, the standard of the law which was to be obtained to entitle the plaintiff to the stipulated compensation, made it necessary that such law should give to the defendants the absolute right to approach the City of Wheeling by way of Fish Creek; should release them from the necessity of continuing their road to Wheeling, unless the city should, within one year, or the citizens of Ohio County should, in the same time, subscribe \$1,000,000 to the stock of the defendants; should enable the defendants to open and bring into use, as they progressed, the sections of their road as they were successively finished; and should authorize the defendants to charge, in proportion to distance, upon passengers and goods taken from Baltimore to Wheeling, should the road be continued to the [322] place; while the law that was actually passed made it the right of the defendants to take the Fish Creek route, depend upon its being the cheapest, and even then placed the defendant's right to go to Fish Creek at the option of the City of Wheeling; made it imperative that Wheeling should be the terminus of the road, without any subscription on the part of herself or others; prevented the opening of any portion of her road west of Monongahela until

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the whole road could be opened to Wheeling, and obliged the defendant to charge no more for passengers or tonnage to Wheeling than they charged to a point five miles from the river; and that before the defendant accepted the law thus differing from that referred to in the modified agreement of February 11th, 1847, the City of Wheeling waived its control of the route, leaving it to depend upon its comparative cost, agreed to subscribe \$500,000 to the stock of the defendants, and provided a depot for the defendants at the terminus of the road; and that the adoption and acceptance of the law of March 6th, 1847, thus differing from Hunter's substitute, and induced by the waiver and stipulation of Wheeling, already mentioned, and action under it, was not such an acceptance, adoption and action, as entitled the plaintiff to recover.

9. That if the jury shall believe that the plaintiff received from the defendants the \$600 given in evidence in full discharge of his claims for compensation under the agreement in question, then the plaintiff is not entitled to recover. But the court refused to give the instructions as prayed, by either plaintiff or defendant, but instructed the jury as follows:

1. If at the time the special contract was made, upon which this suit is brought, it was understood between the parties that the services of the plaintiff were to be of the character and description set forth in his letter to the president of the Railroad Company, dated November 17, 1846, and the paper therein inclosed, and that, in consideration of the contingent compensation mentioned in the contract, he was to use the means and influences proposed in his letter and the accompanying paper, for the purpose of obtaining the passage of the law mentioned in the agreement, the contract is against the policy of the law, and no action can be maintained.

2. If there was no agreement between the parties that the services of the plaintiff should be of the character and description mentioned in his letter and communication referred to in the preceding instruction, yet the contract is against the policy of the law, and void, if at the time it was made the parties agreed to conceal from the members of the Legislature of Virginia the fact that the plaintiff was employed [323*] by the defendant, *as its agent, to advocate the passage of the law it desired to obtain, and was to receive a compensation, in money, for his services in case the law was passed by the Legislature at the session referred to in the agreement.

3. And if there was no actual agreement to practice such concealment, yet he is not entitled to recover if he did conceal from the members of the Legislature, when advocating the passage of the law, that he was acting as agent for the defendant, and was to receive a compensation, in money, in case the law passed.

4. But if the law was made upon a valid and legal consideration, the contingency has not happened upon which the sum of \$50,000 was to be paid to the plaintiff—the law passed by the Legislature of Virginia being different, in material respects, from the one proposed to be obtained by the defendant by the agreement of February 11th, 1847; and the passage of which, by the terms of that contract, was made

a condition precedent to the payment of the money.

5. The subsequent acceptance of the law as passed, under the agreement with the City of Wheeling, stated in the evidence, was not a waiver of the condition, and does not entitle the plaintiff to recover in an action on the special contract.

6. There is no evidence that the plaintiff rendered any services, or was employed to render any, under any contract, express or implied, except the special contract stated in his declaration; and as no money is due to him under that contract, he cannot recover upon the count upon a *quantum meruit*.

And thereupon the plaintiff excepts, as well to the refusal of his prayers as to the granting of the instructions aforesaid given; and tenders this his second bill of exceptions, and prays that the same may be signed and sealed by the court, which is accordingly done — day of November, 1852.

R. B. TANEY. [SEAL.]

The first bill of exceptions was to the admissibility of the evidence above mentioned.

Upon these two exceptions the case came up to this court.

It was argued by *Messrs. Davis and Schley* for the plaintiff in error, and by *Messrs. Latrobe and Johnson* for the defendants in error.

All the points, on either side, relating to the particular route to be attained, are omitted, because it would be impossible to explain them without maps and minute geographical details.

With respect to the first three instructions, the counsel for the plaintiff in error contended:

1. That the first instruction is erroneous—because,

*a. There is no proof of any under- [*324 standing between the parties at the time of the contract, that the services were to be of the nature mentioned in the paper No. 1.

b. No service is proposed in paper No. 1, which is against the policy of the law, if the paper be fairly construed.

The paper describes the characters of the members, the conduct of the opponents of the Company in influencing them, and the necessity of a counteracting influence out of doors; but it expressly disclaims all improper means and appliances, and the proposal is confined to "surrounding the Legislature with respectable and influential agents, whose persuasive arguments may influence the members to do you a naked act of justice."

c. Even if the paper be open to a doubt, the law resolves that doubt against the conclusion of illegality, as well in object as in means. (*Levis v. Davison*, 4 M. & W., 654)

2. That the second instruction is erroneous—because,

a. There is no proof of any agreement at the time of the contract for the concealment of the agency of the plaintiff from the members of the Legislature.

b. There is no difference between the obligation of an agent to procure a law and an agent for any other purpose legal in itself; and the law does not avoid a contract of agency because it is to be kept secret.

3. That the third instruction is erroneous—because,

a. There is no proof of any actual concealment.

b. In the absence of proof of disclosure, the law does not presume concealment.

c. The proof is, that in point of fact, the agency was so conducted as to be apparent to the members of the Legislature without being in words disclosed.

d. It is proved that it was expressly disclosed both by the plaintiff and the Company.

e. But in the absence of any agreement or understanding as to concealment, which is the hypothesis of the instruction, it is clearly erroneous to avoid the contract at the instance of the Company for the failure of the plaintiff to disclose his agency. That is to avoid the contract at the instance of the defendants by matter subsequent entirely foreign to it.

f. The law does not require disclosure of an agency as a condition precedent to the right of the agent to recover from the principal.

And, upon these points, the counsel referred to the following authorities: *Davis v. Bank of Eng.*, 2 Bing., 898; *Richardson v. Millish*, 2 Bing., 229; *Harrington v. Klopogge*, 4 Doug., 5; *Stiles v. Causten*, 2 G. & J., 49; *Kalkman v. Causten*, 2 G. & J., 357; *Fishmonger Co. v. Robertson*, 5 Mann. & Gr., 131; *Hounden v. 325** *Simpson*, 10 Ad. & Ellis, 793, 800, and on appeal, 9 Cl. & Fin., 61; *Wood v. McCann*, 6 Dana, 366; *Hunt v. Test*, 8 Ala., 713; *Edwards v. Gr. J. R. R. Co.*, 7 Sim., 387, and on appeal, 1 M. & Cr. 65; *Vauxhall Br. Co. v. Spencer*, 2 Madd., 356; Jac., 64.

Upon the principal point in the case, namely: that the contract was against public policy, and therefore void, the counsel for the defendant in error cited the following authorities: *Hunt v. Test*, 8 Ala., 713; *Hatzfeld v. Gulden*, 7 Watts, 152; *Clippinger v. Hepbaugh*, 5 W. & S., 315; *Wood v. McCann*, 6 Dana, 366; *Fuller v. Dame*, 18 Pick., 472.

Mr. Justice Grier delivered the opinion of the court:

A question, necessarily preliminary to our consideration of the merits of this case, has been brought to the notice of the court, though not argued or urged by the counsel.

The plaintiff in error, who was also plaintiff below, avers in his declaration that he is a citizen of Virginia, and that "The Baltimore and Ohio Railroad Company, the defendant, is a body corporate by an Act of the General Assembly of Maryland." It has been objected, that this averment is insufficient to show jurisdiction in the courts of the United States over the "suit" or "controversy." The decision of this court in the case of *The Louisville Railroad v. Letson*, 2 How., 497, it is said, does not sanction it, or if some of the doctrines advanced should seem so to do, they are extrajudicial, and therefore not authoritative.

The published report of that case (whatever the fact may have been) exhibits no dissent to the opinion of the court by any member of it. It has, for the space of ten years, been received by the bar as a final settlement of the questions which have so frequently arisen under this clause of the Constitution; and the practice and forms of pleading in the courts of the United States have been conformed to it. Confiding in its stability, numerous controversies involving

property and interests to a large amount, have been heard and decided by circuit courts, and by this court; and many are still pending here, where the jurisdiction has been assumed on the faith of the sufficiency of such an averment. If we should now declare these judgments to have been entered without jurisdiction or authority, we should inflict a great and irreparable evil on the community. There are no cases, where an adherence to the maxim of "*stare decisis*" is so absolutely necessary to the peace of society, as those which affect retroactively the jurisdiction of courts. For this reason alone, even if the court were now of opinion that the principles affirmed in the case just mentioned, and that of **The Bank v. Deceaux*, 5 Cranch, 61, [*326] were not founded on right reason, we should not be justified in overruling them. The practice founded on these decisions, to say the least, injures or wrongs no man; while their reversal could not fail to work wrong and injury to many.

Besides the numerous cases, with similar averments, over which the court have exercised jurisdiction without objection, we may mention that of *Rundle v. The Delaware and Raritan Canal Co.*, 14 How., 80, as one precisely in point with the present. The report of that case shows that the question of jurisdiction, though not noticed in the opinion of the court, was not overlooked, three of the judges having severally expressed their opinion upon it. Its value as a precedent is therefore not merely negative. But as we do not rely only on precedent to justify our conclusion in this case, it may not be improper, once again, to notice the argument used to impugn the correctness of our former decisions, and also to make a brief statement of the reasons which, in our opinion, fully vindicate their propriety.

By the Constitution, the jurisdiction of the courts of the United States is declared to extend, *inter alia*, to "controversies between citizens of different states." The Judiciary Act confers on the circuit courts jurisdiction "in suits between a citizen of the state where the suit is brought and a citizen of another state."

The reasons for conferring this jurisdiction on the courts of the United States, are thus correctly stated by a contemporary writer (*Federalist*, No. 80): "It may be esteemed as the basis of the Union, 'that the citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several States.' And if it be a just principle, that every government ought to possess the means of executing its own provisions by its own authority, it will follow, that in order to the inviolable maintenance of that equality of privileges and immunities, the national judiciary ought to preside in all cases in which one state or its citizens are opposed to another state or its citizens."

Now, if this be a right, or privilege guaranteed by the Constitution to citizens of one state in their controversies with citizens of another, it is plain that it cannot be taken away from the plaintiff by any legislation of the state in which the defendant resides. If A, B and C, with other dormant or secret partners, be empowered to act by their representatives, to sue or to be sued in a collective or corporate name, their enjoyment of these privileges, granted by state authority, cannot nullify this

important right conferred on those who con-
327*] tract with them. It was *well remarked
 by *Mr Justice Catron*, in his opinion delivered
 in the case of *Rundle*, already referred to, that
 "if the United States courts could be ousted of
 jurisdiction, and citizens of other states be
 forced into the state courts, without the power
 of election, they would often be deprived, in
 great cases, of all benefit contemplated by the
 Constitution; and in many cases be compelled
 to submit their rights to judges and juries who
 are inhabitants of the cities where the suit
 must be tried, and to contend with powerful
 corporations, where the chances, of impartial
 justice would be greatly against them; and
 where no prudent man would engage with such
 an antagonist, if he could help it. State laws,
 by combining large masses of men under a
 corporate name, cannot repeal the Constitution.
 All corporations must have trustees and repre-
 sentatives who are usually citizens of the state
 where the corporation is created: and these
 citizens can be sued, and the corporate property
 charged by the suit. Nor can the courts allow
 the constitutional security to be evaded by un-
 necessary refinements, without inflicting a deep
 injury on the institutions of the country."

Let us now examine the reasons which are
 considered so conclusive and imperative, that
 they should compel the court to give a con-
 struction to this clause of the Constitution,
 practically destructive of the privilege so clear-
 ly intended to be conferred by it.

"A corporation, it is said, is an artificial per-
 son, a mere legal entity, invisible and intangi-
 ble."

This is no doubt metaphysically true in
 a certain sense. The inference, also, that such
 an artificial entity "cannot be a citizen," is a
 logical conclusion from the premise which can-
 not be denied.

But a citizen who has made a contract, and
 has a "controversy" with a corporation, may
 also say, with equal truth, that he did not deal
 with a mere metaphysical abstraction, but with
 natural persons; that his writ has not been
 served on an imaginary entity, but on men and
 citizens; and that his contract was made with
 them as the legal representatives of numerous
 unknown associates, or secret and dormant
 partners.

The necessities and conveniences of trade
 and business require that such numerous as-
 sociates and stockholders should act by repre-
 sentation, and have the faculty of contracting,
 suing, and being sued in a factitious or collec-
 tive name. But these important faculties, con-
 ferred on them by state legislation, for their
 own convenience, cannot be wielded to deprive
 others of acknowledged rights. It is not rea-
 sonable that those who deal with such persons
 should be deprived of a valuable privilege by
 a syllogism, or rather sophism, which deals
328*] subtly with *words and names, without
 regard to the things or persons they are used to
 represent.

Nor is it reasonable that representatives of
 numerous unknown and ever-changing as-
 sociates should be permitted to allege the differ-
 ent citizenship of one or more of these stock-
 holders, in order to defeat the plaintiff's
 privilege. It is true that these stockholders are
 corporators, and represented by this "juridical

person," and come under the shadow of its
 name." But for all the purposes of acting, con-
 tracting, and judicial remedy, they can speak,
 act, and plead, only through their representa-
 tives or curators. For the purposes of a suit
 or controversy, the persons represented by a
 corporate name can appear only by attorney,
 appointed by its constitutional organs. The
 individual or personal appearance of each and
 every corporator would not be a compliance
 with the exigency of the writ of summons or
distringas. Though, nominally, they are not
 really parties to the suit or controversy. In
 courts of equity, where there are very numer-
 ous associates having all the same interest, they
 may plead and be impleaded through persons
 representing their joint interests; and, as in the
 case between the northern and southern
 branches of the Methodist Church, lately de-
 cided by this court, the fact that individuals
 adhering to each division were known to reside
 within both states of which the parties to the
 suit were citizens, was not considered as a valid
 objection to the jurisdiction.

In courts of law, an act of incorporation and
 a corporate name are necessary to enable the
 representatives of a numerous association to
 sue and be sued. "And this corporation can
 have no legal existence out of the bounds of the
 sovereignty by which it is created. It exists
 only in contemplation of law and by force of
 the law; and where that law ceases to operate,
 the corporation can have no existence. It must
 dwell in the place of its creation." (*Bank of*
Agusta v. Earle, 18 Pet., 512.) The persons
 who act under these faculties, and use this cor-
 porate name, may be justly presumed to be
 resident in the state which is the necessary
habitat of the corporation, and where alone they
 can be made subject to suit; and should be
 estopped in equity from averring a different
 domicile as against those who are compelled to
 seek them there, and can find them there and
 nowhere else. If it were otherwise it would be
 in the power of every corporation, by electing
 a single director residing in a different state, to
 deprive citizens of other states, with whom
 they have controversies, of this constitutional
 privilege, and compel them to resort to state
 tribunals in cases in which, of all others, such
 privilege may be considered most valuable.

But it is contended, that notwithstanding the
 court in deciding the question of jurisdiction,
 will look behind the corporate *or col- [**329**
 lective name given to the party, to find the per-
 sons who act as the representatives, curators
 or trustees, of the association, stockholders or
cestuis que trust, and in such capacity are the
 real parties to the controversy; yet that the
 declaration contains no sufficient averment of
 their citizenship. Whether the averment of
 this fact be sufficient in law, is merely a ques-
 tion of pleading. If the declaration sets forth
 facts from which the citizenship of the parties
 may be presumed or legally inferred, it is suffi-
 cient. The presumption arising from the
habitat of a corporation in the place of its
 creation being conclusive as to the residence or
 citizenship of those who use the corporate name
 and exercise the faculties conferred by it, the
 allegation that the "defendants are a body
 corporate by the Act of the General Assembly
 of Maryland," is a sufficient averment that the

real defendants are citizens of that State. This form of averment has been used for many years. Any established form of words used for the expression of a particular fact, is a sufficient averment of it in law. In the case of *Gassies v. Ballou*, 6 Pet., 761., the petition alleged that "the defendant had caused himself to be naturalized an American citizen, and that he was at the time of filing the petition residing in the parish of West Baton Rouge." This was held to be a sufficient averment that he was a citizen of the State of Louisiana. And the court say, "a citizen of the United States residing in any state of the Union, is a citizen of that state." They also express their regret that previous decisions of this court had gone so far in narrowing and limiting the rights conferred by this article of the Constitution. And we may add, that instead of viewing it as a clause conferring a privilege on the citizens of the different states, it has been construed too often, as if it were a penal statute, and as if a construction which did not adhere to its very letter without regard to its obvious meaning and intention, would be a tyrannical invasion of some power supposed to be secured to the States or not surrendered by them.

The right of choosing an impartial tribunal is a privilege of no small practical importance, and more especially in cases where a distant plaintiff has to contend with the power and influence of great numbers and the combined wealth wielded by corporations in almost every state. It is of importance also to corporations themselves that they should enjoy the same privileges, in other states, where local prejudices or jealousy might injuriously affect them.

With these remarks on the subject of jurisdiction, we will now proceed to notice the various exceptions to the rulings of the court on the trial.

The declaration, besides a count for work **330*** and labor done and *services rendered in procuring certain legislation in Virginia, demands the sum of \$50,000 on a special contract made with the defendants, through a committee of the Board of Directors, dated 12th of December, 1846, as follows:

"On motion, it was resolved that the President be, and is hereby authorized, in addition to the agent heretofore employed by the committee for the same purpose, to employ and make arrangements, with other responsible persons, to attend at Richmond during the present session of the Legislature, in order to superintend and further any application or other proceeding to obtain the right of way through the State of Virginia, on behalf of this Company, and to take all proper measures for that purpose; that he also be authorized to agree with such agent or agents, in case a law shall be obtained from the said Legislature, during its present session, authorizing the Company to extend their road through that State to a point on the Ohio River as low down the river as Fishing Creek; and the stockholders of this Company shall afterwards accept such law as may be obtained, and determine to act under it; or, in case a law should be passed authorizing the construction of a railroad from any point on the Ohio River above the mouth of the Little Kanawha and below the City of Wheeling, with authority to intersect with the present Baltimore

and Ohio Railroad; and the stockholders of the Baltimore and Ohio Railroad Company shall determine to accept and adopt said law, or shall become the proprietors thereof, and prosecute their road according to its provisions, then, in either of the said cases, the President shall be, and is authorized to pay to the agent or agents whom he may employ in pursuance of this resolution, the sum of \$50,000, in the six per cent. bonds of this Company, at their par value, and to be made payable at any time within the period of five years. Resolved, That it shall be expressly stipulated in the agreement with the said agent or agents employed pursuant to this resolution, and as a condition thereof, that if no such law as aforesaid shall pass, or if any law that may be passed shall not be accepted, or adopted, or used by the stockholders, the said agents shall not be entitled to receive any compensation whatever for the service they may render in the premises, or for any expenses they may incur in obtaining such law or otherwise."

And also the following resolution of January 18th, 1847:

"On motion it was unanimously resolved, that the right of Mr. Marshall to the compensation under the existing contract shall attach upon the passage of a law at the present session of the Legislature, giving the right of way to Parkersburg or to Fishing Creek, either to the Baltimore and Ohio Railroad Company, or to an independent company: provided this Company *accept the one, and adopt and act [***331** under the other, as contemplated by the contract."

And also a letter from the President of the Company, of February 11th, 1847, containing a further modification of the terms as exhibited in the following extract:

"In this crisis, if after the utmost exertion nothing better can be done, if it were practicable to pass Mr. Hunter's substitute with Fishing Creek instead of Fishing Creek, we would not undertake to prevent the passage of such a law. We would then refer the whole question to the stockholders; and I am authorized to say, that everything else failing, if such a law as is indicated pass, and the stockholders adopt it and act under it in the manner contemplated by the contract, your compensation shall apply to that as to any other aspect of the case."

The defendants gave notice of the following grounds of defense, as those upon which they intended to rely:

"1. That the agreement sought to be enforced by the plaintiff, admitting his ability to make it out by legal proof to the extent of his pretensions, was an agreement contrary to the policy of the law, and which cannot be sustained.

2. That, admitting the said agreement to be a valid one, which the courts would enforce, yet the plaintiff is not entitled to recover, because he failed to accomplish the object for which it was entered into.

3. That the law of Virginia, which was accepted by the defendants after it had been modified by the waiver of the City of Wheeling, as mentioned in the plaintiff's notice, was not obtained through the efforts of the plaintiff, but against his strenuous opposition, and furnishes him no ground for his present claim.

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4. "That there was a final settlement between the plaintiff and defendants, after the passage of the Virginia law aforesaid, which concludes him on this behalf."

On the trial the plaintiff, after giving in evidence the contract as above stated, produced various letters and documents tending to show the measures pursued, and their result—a particular recapitulation of these facts is not necessary, and would encumber the case. A very brief outline will suffice to an understanding of the points to be considered.

It appears that the defendants were desirous to obtain, from the Legislature of Virginia, the grant of a right of way so as to strike the Ohio River as low down as possible in view of a connection from thence towards Cincinnati. It was the interest of the people of Wheeling to prevent, if possible, the terminus of the road on the Ohio from being anywhere else but at their City. In the winter of 1846–7 the antagonist **332**] parties came into *collision again before the Legislature of Virginia, at Richmond. In this contest the plaintiff acted as general agent of the defendants, under the contract in question. The bills granting the desired franchise to the defendants were defeated in every form proposed by them, and a substitute, altered and amended to suit the interests of Wheeling, was finally passed in face of the strenuous opposition of the defendants.

The plaintiff afterwards admitted his defeat, and want of success in fulfilling the conditions of his contract. He at the same time demanded and received the sum of \$600 for expenses of agents, &c. But as Wheeling and defendants both desired the extension of the road to the Ohio, they finally agreed to a compromise, modifying the operation of the Act under which the road has since been completed.

The defendants then offered in evidence, in support of their defense, on the ground of illegality of the contract, a letter from the plaintiff to the President of the Board, dated 17th November, 1846, with an accompanying document, in which plaintiff proposes himself as agent, and states his terms; and the course he advises to be pursued, and the means to be used to insure success; and also a letter from the President in answer thereto, stating his inability to act on his individual responsibility, and inviting an interview; together, also, with a letter from the same, dated 12th of December, in which he says: "I am now prepared to close an arrangement with you on the basis of your communication of the 17th of November."

The plaintiffs objection to the admission of these documents in evidence, and the reception of them, form the subject of the first bill of exceptions.

In order to judge of the competency and relevancy of these documents to the issue in the case, it will be necessary to give a brief statement of some portion of their contents.

The letter of November 17th commences by referring to a former interview and a promise to submit a plan, in writing, by which it was supposed the much-desired right of way through Virginia might be procured from the Legislature. It proposes that the writer should be appointed, as agent of the Company, to manage "the delicate and important trust." It states that, as the business required "absolute secre-

cy," he could not safely get testimonials as to his qualifications; but that he had "considerable experience as a lobby member" before the Legislature of Virginia, and could allege "an ostensible reason" for his presence in Richmond, and his active interference, without disclosing his real character and object.

The accompanying document explains the cause of previous failures, and shows what remedy or counteracting influence should be *employed. It announces that "log-***333** rolling" was the principal measure used to defeat them before. That it has grown into a system; that however "skillful and unscrupulous" the friends of defendants may have been in this respect, still their opponents had got the advantage, being present on the ground, and "using out-door influence." That it was necessary to meet their opponents with their own weapons. That the mass of the members of the Legislature were "careless and good natured," and "engaged in idle pleasures," capable of being molded like wax" by the "most pressing influences." That, to get the vote of this careless mass, "efficient means" must be adopted. That through their "kind and social dispositions" they may be approached and influenced to do anything not positively wrong, "where they can act without fear of their constituents." That to the accomplishment of success it was necessary to have "an active, interested, and well-organized influence about the house." That these agents "must be inspired with an earnest, nay, anxious wish for success," "and have their whole reward depending on it." Give them nothing if they fail—endow them richly if they succeed." "Stimulate them to active partisanship by the strong lure of high profit."

That, in order to the "requisite secrecy," the Company should know but one agent, and he select the others; that the cost of all this will "necessarily be great," as the result can be obtained "only by offers of high contingent compensation;" that "high services cannot be had at a low bid," and that he would not be willing to undertake the business unless "provided with a fund of at least \$50,000."

As the contract was made "on the basis of this communication," there can be no doubt as to its legal competence as evidence to show the nature and object of the agreement. As parts of one and the same transaction, they may be considered as incorporated in the contract declared on. The testimony is therefore competent. Is it relevant?

As the first three propositions, contained in the charge of the court, have reference to the question of the relevancy of this matter to the issues, they may well be considered together.

They are as follows:

"1. If at the time the special contract was made, upon which this suit is brought, it was understood between the parties that the services of the plaintiff were to be of the character and description set forth in his letter to the President of the Railroad Company, dated November 17th, 1846, and the paper therein inclosed, and that, in consideration of the contingent compensation mentioned in the contract, he was to use the means and influences proposed in his letter and the accompanying paper, *for [***334** the purpose of obtaining the passage of the law

mentioned in the agreement, the contract is against the policy of the law, and no action can be maintained.

2. "If there was no agreement between the parties that the services of the plaintiff should be of the character and description mentioned in his letter and communication referred to in the preceding instruction, yet the contract is against the policy of the law, and void, if, at the time it was made, the parties agreed to conceal from the members of the Legislature of Virginia the fact that the plaintiff was employed by the defendant, as its agent, to advocate the passage of the law it desired to obtain, and was to receive a compensation, in money, for his services, in case the law was passed by the Legislature at the session referred to in the agreement."

3. "And if there was no actual agreement to practice such concealment, yet he is not entitled to recover if he did conceal from the members of the Legislature, when advocating the passage of the law, that he was acting as agent for the defendant, and was to receive a compensation, in money, in case the law passed."

It is an undoubted principle of the common law, that it will not lend its aid to enforce a contract to do an act that is illegal; or which is inconsistent with sound morals or public policy; or which tends to corrupt or contaminate, by improper influences, the integrity of our social or political institutions. Hence all contracts to evade the revenue laws are void. Persons entering into the marriage relation should be free from extraneous or deceptive influences; hence the law avoids all contracts to pay money for procuring a marriage. It is the interest of the State that all places of public trust should be filled by men of capacity and integrity, and that the appointing power should be shielded from influences which may prevent the best selection; hence the law annuls every contract for procuring the appointment or election of any person to an office. The pardoning power, committed to the executive, should be exercised as free from any improper bias or influence as the trial of the convict before the court; consequently, the law will not enforce a contract to pay money for soliciting petitions or using influence to obtain a pardon. Legislators should act from high considerations of public duty. Public policy and sound morality do therefore imperatively require that courts should put the stamp of their disapprobation on every act, and pronounce void every contract the ultimate or probable tendency of which would be to sully the purity or mislead the judgments of those to whom the high trust of legislation is confided.

All persons whose interests may in any way **335**] be affected by any public or private act of the Legislature, have an undoubted right to urge their claims and arguments, either in person or by counsel professing to act for them, before legislative committees, as well as in courts of justice. But where persons act as counsel or agents, or in any representative capacity, it is due to those before whom they plead or solicit, that they should honestly appear in their true characters, so that their arguments and representations, open and candidly made, may receive their just weight and consideration. A hired advocate or agent, assuming to act in a different character, is practicing deceit on the Legislature. Advice or informa-

tion flowing from the unbiased judgment of disinterested persons, will naturally be received with more confidence and less scrupulously examined than where the recommendations are known to be the result of pecuniary interest, or the arguments prompted and pressed by hope of a large contingent reward, and the agent "stimulated to active partisanship by the strong lure of high profit." Any attempts to deceive persons intrusted with the high functions of legislation, by secret combinations, or to create or bring into operation undue influences of any kind, have all the injurious effects of a direct fraud on the public.

Legislators should act with a single eye to the true interest of the whole people, and courts of justice can give no countenance to the use of means which may subject them to be misled by the pertinacious importunity and indirect influences of interested and unscrupulous agents or solicitors.

Influences secretly urged under false and covert pretenses must necessarily operate deleteriously on legislative action, whether it be employed to obtain the passage of private or public acts. Bribes, in the shape of high contingent compensation, must necessarily lead to the use of improper means and the exercise of undue influence. Their necessary consequence is the demoralization of the agent who covenants for them; he is soon brought to believe that any means which will produce so beneficial a result to himself are "proper means;" and that a share of these profits may have the same effect of quickening the perceptions and warming the zeal of influential or "careless" members in favor of his bill. The use of such means and such agents will have the effect to subject the state governments to the combined capital of wealthy corporations, and produce universal corruption, commencing with the representative and ending with the elector. Speculators in legislation, public and private, a compact corps of venal solicitors, vending their secret influences, will infest the capital of the Union and of every State, till corruption shall become the normal condition of the body politic, and it will be said of us as of Rome—"omne Romæ venale."

*That the consequences we deprecate [**336** are not merely visionary, the Act of Congress of 1853, ch. 81, "to prevent frauds upon the Treasury of the United States," may be cited as legitimate evidence. This Act annuls all champertous contracts with agents of private claims.

2d. It forbids all officers of the United States to be engaged as agents or attorneys for prosecuting claims or from receiving any gratuity or interest in them in consideration of having aided or assisted in the prosecution of them, under penalty of fine and imprisonment in the penitentiary.

3d. It forbids members of Congress, under a like penalty, from acting as agents for any claim in consideration of pay or compensation, or from accepting any gratuity for the same.

4th. It subjects any person who shall attempt to bribe a member of Congress to punishment in the penitentiary, and the party accepting the bribe to the forfeiture of his office.

If severity of legislation be any evidence of the practice of the offenses prohibited, it must be the duty of courts to take a firm stand, and

discountenance, as against the policy of the law, any and every contract which may tend to introduce the offenses prohibited.

Nor are these principles now advanced for the first time. Whenever similar cases have been brought to the notice of courts they have received the same decision.

Without examining them particularly, we would refer to the cases of *Fuller v. Dame*, 18 Pick., 470; *Hatzfield v. Guldén*, 7 Watts, 152; *Clippinger v. Hepbaugh*, 5 W. & S., 315; *Wood v. McCan*, 6 Dana, 366; and *Hunt v. Test*, 8 Ala., 719; *The Commonwealth v. Callaghan*, 2 V. Cas., 460.

The sum of these cases is, 1st. That all contracts for a contingent compensation for obtaining legislation, or to use personal or any secret or sinister influence on legislators, is void by the policy of the law.

2d. Secrecy, as to the character under which the agent or solicitor acts, tends to deception, and is immoral and fraudulent; and where the agent contracts to use secret influences, or voluntarily, without contract with his principal, uses such means, he cannot have the assistance of a court to recover compensation.

3d. That what, in the technical vocabulary of politicians is termed "log-rolling," is a misdemeanor at common law, punishable by indictment.

It follows, as a consequence, that the documents given in evidence under the first bill of exceptions were relevant to the issue; and that the court below very properly gave the instructions under consideration.

337*] *We now come to the last three exceptions to the instructions of the court, which were as follows:

"4. But if the contract was made upon a valid and legal consideration, the contingency has not happened upon which the sum of \$50,000 was to be paid to the plaintiff—the law passed by the Legislature of Virginia being different, in material respects, from the one proposed to be obtained by the defendant by the agreement of February 11th, 1847; and the passage of which, by the terms of that contract, was made a condition precedent to the payment of the money.

5. The subsequent acceptance of the law as passed, under the agreement with the City of Wheeling, stated in the evidence, was not a waiver of the condition, and does not entitle the plaintiff to recover in an action on the special contract.

6. There is no evidence that the plaintiff rendered any services, or was employed to render any, under any contract, express or implied, except the special contract stated in his declaration; and as no money is due to him, under that contract, he cannot recover upon the count of *quantum meruit*."

We do not think it necessary, in order to justify these instructions of the court below, or to vindicate our affirmance of them, to enter into a long and perplexed history of the various schemes of legislative action, and their results, as exhibited by the testimony in the case. It would require a map of the country, and tedious and prolix explanations. Suffice it to say, that after a careful examination of the admitted facts of the case, we are fully satisfied of the correctness of the instructions.

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1. Because the plaintiff, by his own showing, had not performed the conditions which entitled him to demand this stipulated compensation.

2. The Act of Assembly which was passed, and afterwards used by defendant for want of better, was obtained by the opponents of defendants, and in spite of the opposition of plaintiff; and the fact that the Company were compelled to accept the Act under modifications, by compromise with their opponents, would not entitle plaintiff to his stipulated reward.

3. By the stipulations of his contract he is estopped from claiming under a *quantum meruit*, as his whole compensation depended on success in obtaining certain specified legislation, which he acknowledged he had failed to achieve.

The judgment of the Circuit Court is therefore affirmed, with costs.

Messrs. Justices Catron, Daniel, and Campbell, dissented.

Mr. Justice Catron said that he concurred with his brother, **Mr. Justice Campbell*—[*338 bell, in the opinion which he was about to pronounce, and had authorized him so to state. But inasmuch as reference had been made in the opinion of the court, which had just been delivered, to an opinion which he himself had given in the case of *Rundle v. The Delaware and Raritan Canal Company*, 14 How., 80, he felt it to be a duty to himself to remark, that he had at all times denied that a corporation is a citizen within the sense of the Constitution, and so he had declared in the opinion just referred to. He had there stated the necessity of the existence of jurisdiction in the federal courts as against corporations, but held that citizenship of the president and directors must be averred to be of a different state from the other party to the suit; without which averment this court could not proceed, according to the settled practice of fifty years standing. *Letson's* case (which is the foundation of the new doctrine) contained the necessary averment within the settled practice, and consequently it was not necessary to give a separate opinion in that case.

He remarked, further, that according to the assumption that a corporation was a citizen of the state where it was incorporated, a company having a charter for a railroad in two states (and there were many such) might sue citizens of the state and place where the president and directors resided, averring that the company was a citizen of the other state, and *vice versa*. In such case the corporation could sue in every federal court in the Union.

Mr. Justice Daniel:

From the opinion just delivered I must declare my dissent. In the settlement of the discreditable controversy between the parties to this cause, I take no part. If I did, I should probably say that it is a case without merits, either in the plaintiff or in the defendants, and that in such a case they should be dismissed by courts of justice to settle their dispute by some standard which is cognate to the transaction in which they have been engaged.

My participation in this case has reference to a far different and more important ingredient involved in the opinion just announced, namely: the power of this court to adjudicate this cause consistently with a just obedience to that authority from which, and from which alone, their being and their every power are derived.

Having in former instances, and particularly in the case of *Rundle v. The Delaware and Raritan Canal Company*, endeavored to expose the utter want of jurisdiction in the courts of the United States over causes in which corporations³³⁹ shall be parties *either as plaintiffs or defendants, I hold it to be unnecessary in this place to repeat or enlarge upon the positions maintained in the case above mentioned, as they are presented in 14 How., 95. Indeed, from any real necessity for enforcing the general fundamental proposition contended for by me in the case of *Rundle v. The Delaware and Raritan Canal Company*, namely: that under the second section of the third article of the Constitution, citizens only, that is to say men, material, social, moral, sentient beings, must be parties, in order to give jurisdiction to the federal courts. I am wholly relieved by the virtual, obvious, and inevitable concessions, comprised in the attempt now essayed, to carry the provision of the Constitution beyond either its philological, technical, political or vulgar acceptance. For in no one step in the progress of this attempt, is it denied that a corporation is not and cannot be a citizen, nor that a citizen does not mean a corporation, nor that the assertion of a power by an individual outside of the corporation, and interfering with and controlling its organization and functions (whatever might be the degree of interest owned by that individual in the corporation), would be incompatible with the existence of the corporate body itself. Nothing of this kind is attempted. But an effort is made to escape from the effect of these concessions, by assumptions which leave them in all their force, and show that such concessions and assumptions cannot exist in harmony with each other.

Thus it has been insisted that a corporation, created by a state, can have no being or faculties beyond the limits of that state; and if its president and officers reside within that state, such a conjuncture will meet and satisfy the predicament laid down by the Constitution.

The want of integrity, in this argument, is exposed by the following questions:

1. Does the restriction of the corporate body within particular geographical limits, or the residence of its officers within those limits, render it less a corporation, or alter its nature and legal character in any degree?

2. Does the restriction of the corporate faculties within given bounds necessarily, or by any reasonable presumption, imply that the interest of its stockholders, either in its property or its acts, is confined to the same limits? If it does, then a change of residence by officers, agents or stockholders, or a transfer of a portion of the interests of the latter, would destroy the qualification of citizenship depending upon locality. If it would not have this effect, then this anomalous citizen may possess the rights of both plaintiff and defendant; nay, by a sort of plural being or ubiquity, may be a citizen of

every State in the Union. *may even be [*340 a state and a citizen of the same state at the same time.

Again it has been said, that the Constitution has reference merely to the interests of those who may have access to the federal courts; and that provided those interests can be traced, or presumed to have existence in persons residing in different states, it cannot be required that those by whom such interests are legally held and controlled, or represented, should be alleged or proved to be citizens, or should appear in that character as parties upon the record. In reply to this proposition it may be asked, upon what principle anyone can be admitted into a court of justice apart from the interest he may possess in the matter in controversy; and whether it is not that interest alone and the position he holds in relation thereto, which can give him access to any court? But, again; the language of the Constitution refers expressly and conclusively to the civil or political character of the party litigant, and constitutes that character the test of his capacity to sue or be sued in the courts of the United States.

In strict accordance with this doctrine has been the interpretation of the Constitution from the early, and what may in some sense be called the cotemporaneous interpretation of that instrument, an interpretation handed down in an unbroken series of decisions, until crossed and disturbed by the anomalous ruling in the case of *Lelton v. The Louisville Railroad Company*.

Beginning with the case of *Bingham v. Cabot*, in the 3d of Dallas, 382, and running through the cases of *Turner v. The Bank of North America*, 4 Dall., 8; *Turner's Adm'r Erville*, 1b., 7; *Mossman v. Higginson*, 1b., 12; *Abercrombie v. Dupuis*, 1 Cranch, 343; *Wood v. Wagon*, 2 1b., 1; *Capron v. Van Noorden*, 2 1b., 126; *Strawbridge v. Curtis*, 3 1b., 267; *The Bank of the United States v. Deveaux*, 5 1b., 61; *Hodgson v. Bowerbank*, 5 1b., 303; *The Corporation of New Orleans v. Winter*, 1 Wheat., 91; *Sullivan v. The Fulton Steamboat Company*, 6 Wheat., 450, the doctrine is ruled and reiterated, that in order to maintain an action in the courts of the United States, under the clause in question, not only must the parties be citizens of different states, but that this character must be averred explicitly, and must appear upon the record, and cannot be inferred from residence or locality, however expressly stated, and that the failure to make the required averment will be fatal to the jurisdiction of a federal court, either original or appellate; and is not cured by the want of a plea or of a formal exception in any other form. But the decisions have not stopped at this point; they have ruled that to come within the meaning of the Constitution, the cause of action *must have [*341 existed *ab origine* between citizens of different states, and that the article in question cannot be evaded by a transfer of rights which, by their primitive and intrinsic character, were not cognizable in the courts of the United States as between citizens of different states (See *Turner v. The Bank of North America*, already cited, and the cases of *Montale v. Murray*, 4 Cranch, 46; and *Gibson v. Chew*, 16 Pet., 815.) It is remarkable to perceive how perfectly the case of *Turner v. The Bank of North*

America covers that now under consideration, and how strongly and emphatically it rebukes the effort to claim by indirect and violent construction, powers for the federal courts which not only have never been delegated to them, nor implied by the silence of the Constitution, but still more powers assumed in defiance of its express inhibition. In the case last mentioned, the plaintiffs were well described as citizens of Pennsylvania, suing Turner and others, who were properly described as citizens of North Carolina, upon a promissory note made by the defendants, and payable to Biddle & Company, and which, by assignment, became the property of the plaintiffs. Biddle & Co. were not otherwise described than as "using trade and partnership" at Philadelphia or North Carolina. Upon an exception upon argument, taken for the first time in this court, Ellsworth, *Chief Justice*, pronounced its decision in these words: "A circuit court is one of limited jurisdiction, and has cognizance not of causes generally, but only of a few specially circumstanced, amounting to a small proportion of the cases which an unlimited jurisdiction would embrace. And the fair presumption is (not as with regard to a court of general jurisdiction, that a cause is within its jurisdiction unless the contrary appears, but rather), that a cause is without its jurisdiction till the contrary appears.

This renders it necessary, inasmuch as the proceedings of no court can be valid farther than its jurisdiction appears or can be presumed, to set forth upon the record of a circuit court, the facts or circumstances which give it jurisdiction, either expressly, or in such manner as to render them certain by legal intentment. Amongst those circumstances it is necessary, where the defendant appears to be a citizen of one state, to show that the plaintiff is a citizen of some other state, or an alien; or if, as in the present case, the suit be upon a promissory note by an assignee, to show that the original promisee is so, for by a special provision of the statute it is his description as well as that of the assignee, which effectuates the jurisdiction: but here the description given of the promisee only is, that he used to trade at Philadelphia or North Carolina; which, taking either place for that where he used to trade, contains no **342**] averment that "he was a citizen of a state other than that of North Carolina, or an alien, nor anything which by legal intentment can amount to such an averment." Let it be remembered, that the statute alluded to by *Chief Justice* Ellsworth is nothing more nor less than an assertion in terms of the second section of the third article of the Constitution; and it may then be asked, what becomes of this awkward attempt to force upon both the Constitution and statute a construction which the just meaning of both absolutely repels? Everyone must be sensible that the seat of a man's business, of his daily pursuits and occupations, must probably, if not necessarily, be the place of his residence; yet here we find it expressly ruled, that such a comorancy by no just legal intentment any more than by express language, constitutes him a citizen of that community or state in which he may happen to be then residing or transacting his business. Moreover, it is familiar to every lawyer or other person conversant with

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history, that during the periods of greatest jealousy and strictness of the English polity, aliens were permitted, for the convenience and advancement of commerce, to reside within the realm and to rent and occupy real property; but it never was pretended that such permission or residence clothed them with the character or with a single right pertaining to a British subject.

Nor has the doctrine ruled by the cases just cited been applied to proceedings at law alone, in which a peculiar strictness or an adherence to what may seem to partake of form, is adhered to. The overruling authority of the Constitution has been regarded by this court as equally extending itself to equitable as to legal rights and proceedings in the courts of the United States. Thus in the case of *Course v. Stead*, in 4 Dall., 22. That was a suit in equity in the Circuit Court of the United States for the District of Georgia, in which it was deemed necessary to make a new party by a supplemental bill. This last bill recited the original bill, and all the orders which had been made in the cause, but omitted to allege the citizenship of the newly made defendant. In this case, when brought here by appeal from the court below, this court say, in reference to the omission to aver the citizenship of the new party, "it is unnecessary to form or to deliver any opinion upon the merits of this cause; let the decree of the Circuit Court be reversed." The case of *Jackson v. Ashton*, in 8 Pet., 148, is still more in point. This also was a suit in equity. The caption of the bill was in these words: "*Thomas Jackson and others, citizens of the State of Virginia, v. The Rev. William E. Ashton, a citizen of Pennsylvania.*" What said this court by its organ, Marshall, *Chief Justice*, upon this state of the case? "The title or caption *of [**343** the bill is no part of the bill, and does not remove the objection of the defects in the pleadings. The bill and proceedings should state the citizenship of the parties to give the court jurisdiction." In these last decisions must be perceived the most emphatic refutation of this newly assumed version of the Constitution, which affirms that, although by the language of that instrument citizenship and neither residence nor property, but citizenship, the civil and political relation or *status* independently of either, is explicitly demanded, yet this requisition is fully satisfied by the presumption of a beneficiary interest in property apart either from possession or right of possession or from any legal estate or title makes the interest thus inferred equivalent with citizenship of the person to whom interest is thus strangely imputed. Perhaps the most singular circumstance attending the interpolation of this new doctrine is the effort made to sustain it upon the rule *stare decisis*. After the numerous and direct authorities before cited, showing the inapplicability to this case of this rule, it would have been thought *a priori* that the very last aid to be invoked in its support, would be the maxim *stare decisis*. For this new class of citizen corporations, incongruous as it must appear to every legal definition or conception, is not less incongruous nor less novel to the relation claimed for it, or rather for its total want of relation to the settled adjudications of this court. It is strictly a new creation, an alien and an intruder, and is at war

with almost all that has gone before it; and can trace its being no farther back than the case of *Letson v. The Louisville Railroad Company*.

The principle *stare decisis*, adopted by the courts in order to give stability to private rights, and to prevent the mischiefs incident to mutations for light and insufficient causes, is doubtless a wholesome rule of decision when derived from legitimate and competent authority, and when limited to the necessity which shall have demanded its application; but, like every other rule, must be fruitful of ill when it shall be wrested to the suppression of reason or duty, or to the arbitrary maintenance of injustice, of palpable error, or of absurdity. Such an application of this rule must be necessarily to rivet upon justice, upon social improvement and happiness, the fetters of ignorance, of wrong and usurpation. It is a rule which, whenever applied, should be derived from a sound discretion, a discretion having its origin in the regular and legitimate powers of those who assert it. It can never be appealed to in derogation or for the destruction of the supreme authority, of that authority which created and which holds in subordination the agents whose functions it has defined, and bounded by clear **344*** and plainly marked limits. *Whenever the Constitution commands, discretion terminates. Considerations of policy or convenience, if ever appealed to, I had almost said if ever imagined in derogation of its mandate, become an offense. Beyond the Constitution or the powers it invests, every act must be a violation of duty, as usurpation.

There cannot be a more striking example than is instanced by the case before us, of the mischiefs that must follow from disregarding the language, the plain words, or what may be termed the body, the *corpus* of the Constitution, to ramble in pursuit of some *ignis fatuus* of construction or implication, called its spirit or its intention—a spirit not unfrequently about as veracious, and as closely connected with the Constitution, as are the spirits of the dead with the revolving tables and chairs which, by a fashionable metempsychosis of the day, they are said to animate.

The second section of the third article of the Constitution prescribes citizenship as an indispensable requisite for obtaining admission to the courts of the United States—prescribes it in language too plain for misapprehension. This court, in the case of *Deveaux v. The Bank of the United States*, yielded obedience, professedly at any rate, to the constitutional mandate: for they asserted the indispensable requisite of citizenship; but in an unhappy attempt to reconcile that obedience with an unwarranted claim to power, they utterly demolished the legal rights, nay, the very existence of one of the parties to the controversy, thereby taking from that party all standing or capacity to appear in any court. This was *ignis fatuus*, No. 1. This was succeeded by the case of *Letson v. The Cincinnati and Louisville Railroad Company*, in which, by a species of judicial resurrection, this party (the corporation) was *déterré*, raised up again, but was not restored to the full possession of life and vigor, or to the use of all his members and faculties, nor even allowed the privilege of his original name; but semi-animate, and in virtue of some rite of ju-

dicial baptism, “though curtailed of his natural dimensions,” he is rendered equal to a release from the thralldom of constitutional restriction, and made competent at any rate to the power of commanding the action of the federal courts. This is *ignis fatuus*, No. 2. Next in order is the case of *Marshall v. The Baltimore and Ohio Railroad Company*. This is indeed the *chef d’œuvre* amongst the experiments to command the action of the spirit in defiance of the body of the Constitution.

It is compelled, from the negation of that instrument, by some necromantic influence, potent as that by which, as we read, the resisting Pythia was constrained to yield her vaticinations of an occult futurity. For in this case is manifested the most entire *dis- **[345]** regard of any and every qualification, political, civil or local. This Company is not described as a citizen or resident of any state; nor as having for its members the citizens of any state; nor as a *quasi* citizen; nor as having any of the rights of a citizen; nor as residing or being located in any state, or in any other place. No intimation of its “whereabout” is alluded to. It is said to have been incorporated by the State of Maryland; but whether the State of Maryland had authority to fix its locality or ever directed that locality, and whether that be in the moon or *in terra incognita*, is nowhere disclosed. It is said that because this Company was incorporated by the Legislature of Maryland, we may conjecture, and are bound to conjecture, that it is situated in Maryland, and must possess all the qualifications appertaining to a citizen of Maryland to sue or be sued in the courts of the United States; and this inference we are called upon to deduce, in opposition to the pleadings, the proofs and the arguments, all of which demonstrate that this corporation claims to extend its property, its powers and operations, and of course its locality, over a portion of the State of Virginia, and that it was in reference to its rights and operations within the latter State, that the present controversy had its origin.

Thus does it appear to me that this court has been led on from dark to darker, until at present it is environed and is beaconsward by varying and deceptive gleams, calculated to end in a deeper and more dense obscurity. In dread of the precipices to which they would conduct me, I am unwilling to trust myself to these rambling lights; and if I cannot have reflected upon my steps the bright and cheering day-spring of the Constitution, I feel bound nevertheless to remit no effort to halt in what, to my apprehension, is the path that terminates in ruin. And in considering the tendencies and the results of this progress, there is nothing which seems to me more calculated to hasten them than is the too evidently prevailing disposition to trench upon the barrier which, in the creation by the several States of the federal government, they designed to draw around and protect their sovereign authority and their social and private rights; and to regard and treat with affected derision every effort to arrest any hostile approach, either indirectly or openly, to the consecrated precincts of that barrier. It is indeed a sad symptom of the downward progress of political morals, when any appeal to the Constitution shall fail to

"give us pause," and to suggest the necessity for solemn reflection. Still more fearful is the prevalence of the disposition, either in or out of office, to meet the honest or scrupulous devotion to its commands with a sneer, as folly unsuited to the times, and condemned by that [346*] *new-born wisdom which measures the Constitution only by its own superior and infallible standard of policy and convenience. By the disciples of this new morality it seems to be thought that the mandates or axioms of the Constitution, when found obstructing the way to power, and when they cannot be overstepped by truth or logic, may be conveniently turned and shunned under the denomination of abstractions or refinements; and the loyal supporters of those mandates may be borne down under the reproach of a narrow prejudice or fanaticism incapable of perceiving through the letter, and in contradiction of the language of the charter, its true spirit and intent; and as being wholly behind the sagacity and requirements of the age.

We cannot, however, resist the disposition to ask of those whose expanded and more pervading view can penetrate beyond the palpable form of the charter, what it is they mean to convey by the term *abstraction*, which is found so well adapted to their purposes. We would, with becoming modesty, inquire whether every axiom or precept, either in politics or ethics, or in any other science, is not an abstraction. Whether truth itself, whether justice or common honesty, is not an abstraction. And we would farther ask those who so deal with what they call abstractions, whether they design to assail all general precepts and definitions as incapable of becoming the fixed and fundamental basis of rights or of duties. The philosophy of these expositions may easily embrace the rejection of the decalogue itself, and might be particularly effectual in reference to that injunction which forbids the coveting of all that appertains to our neighbor. The Constitution itself is nothing more than an enumeration of general abstract rules, promulgated by the several States, for the guidance and control of their creature or agent, the federal government, which for their exclusive benefit they were about to call into being. Apart from these abstract rules, the federal government can have no functions and no existence. All its attributes are strictly derivative, and any and every attempt to transcend the foundations (those prescribed abstractions) on which its existence depends, is an attempt at anarchy, violence and usurpation. Amongst the most dangerous means, perhaps, of accomplishing his usurpation, because its application is noiseless whilst it is persevering, is the habitual interference, for reasons entirely insufficient, by the federal authorities with the governments of the several States; and this, too, most commonly under the strange (I had almost called it the preposterous) pretext of guarding the people of the States against their own governments, constituted of, and administered by, their own fellow-citizens, bound to them by the sympathies arising from a community or identity of interests, *from intimate intercourse, and selected by and responsible to themselves. Or it may be said, under the excuse of protecting the people of the States

against themselves, converting the federal government in reference to the States into one grand commission, "*De lunatico inquirendo*." The effect of this practice is to reduce the people of the States and their governments under an habitual subservency to federal power; and gives to the latter what ever has been and ever must be, the result of intervention by a foreign, a powerful, and interested mediator, the lion's share in every division. For myself I would never hunt with the lion. I would anxiously avoid his path; and as far as possible keep him from my own; always bearing in mind the pregnant reply told in the Apologue as having been made to his gracious invitation to visit him in his lair; that although in the path that conducted to its entrance, innumerable foot-prints were to be seen, yet in the same path there could be discerned "*Nulla vestigia retrorsum*." The vortex of federal incroachment is of a capacity ample enough for the engulfing and retention of every power; and inevitably must a catastrophe like this ensue, so long as a justification of power, however obtained, and the end of every hope of escape or redemption can to the sickening and desponding sense, in the iron rule of *stare decisis*, be proclaimed. A rule which says to us, "The abuse has been already put in practice; it has, by practice merely, become sanctified; and may therefore be repeated at pleasure." The promulgation of a doctrine like this does indeed cut off all hope of redress, of escape, or of redemption, unless one may be looked for, however remote, in a single remedy—that sharp remedy to be applied by the true original sovereignty abiding with the States of this Union, namely: a reorganization of existing institutions, such as shall give assurance that if in their definition and announcement their rights can, by their appointed agents, be esteemed as abstractions merely, yet in the concrete, that is, in the exercise and enjoyment, those rights are real and substantive, and may neither be impaired nor denied.

My opinion is, that this cause should have been dismissed by the Circuit Court for want of jurisdiction, and should now be remanded to that court with instruction for its dismissal.

Mr. Justice Campbell:

I dissent from that portion of the opinion of the court which affirms the jurisdiction of the Circuit Court in this case. The question involves a construction of a clause in the Constitution, and arises under circumstances which make it proper that I should record the reasons for the dissent.

*The conditions under which corporations might be parties to suits in the courts of the United States engaged the attention of this court not long after its organization. At the session of the court, in 1809, three cases exhibited questions of jurisdiction in regard to them, under three distinct aspects. *The Bank of the United States v. Devaux*, was the case of a corporation plaintiff, whose corporators were described as citizens of Pennsylvania suing a citizen of Georgia in the federal court of that State. The case of *Wood v. Maryland Insurance Company* was that of a corporation defendant, whose corporators were properly described, sued in the state of its charter. And

the case of *Hope Insurance Company v. Boardman* was that of a "legally incorporated body," sued in the state from which it derived its charter, and was "legally established," but of whose corporators there was no description (5 Cranch, 57, 61, 78).

The cases were argued together by counsel of eminent ability, with preparation and care, and were decided by the court with much deliberation and solemnity. Chief Justice Marshall declared the opinion of the court to be "that the invisible, intangible, and artificial being, the mere legal entity, a corporation aggregate, is certainly not a citizen, and consequently cannot sue or be sued in the courts of the United States unless the rights of the members in this respect can be exercised in the corporate name." As it appeared in the two cases first mentioned that the corporators might sue and be sued in the courts of the United States under the circumstances of the cases, the court on those cases treated them "as a company of individuals who, in transacting their joint concerns, had used a legal name," and for the reason "that the right of a corporation to litigate depended upon the character (as to citizenship) of the members which compose it, and that a body corporate cannot be a citizen within the meaning of the Constitution." The judgment in the last case was reversed for want of jurisdiction.

In *Sullivan v. Fulton Steamboat Company*, 6 Wheat., 450, the defendant was described as a body corporate, incorporated by the Legislature of the State of New York, for the purpose of navigating, by steamboats, the waters of East River or Long Island Sound, in that State." This corporation was sued in New York. Upon appeal, this court determined that the Circuit Court had no jurisdiction of the defendant. In *Breithaupt v. The Bank of Georgia*, that corporation was sued in that State, but this court certified "that as the bill did not aver that the corporators of the Bank of Georgia are citizens of the State of Georgia, the Circuit Court had no jurisdiction of the case." In *The Vicksburg Bank v. Slocumb*, 14 Pet., 60, a corporation was sued by a citizen of a different state, in the 349*] state of its charter, *but it appearing by plea, that two of its corporators were citizens of the same state as the plaintiff, this court declined jurisdiction for the federal tribunals. This was in accordance with the circuit decisions 4 (Wash. C. C., 597; 3 Sumn., 472; 1 Paine); and their doctrine was repeated in *Irvine v. Lourey*, 14 Pet., 298. Such was the condition of the precedents in this court when, in 1844, the case of *Louisville Railroad Company v. Letson*, 2 How., 497, arose. The case was one of a New York plaintiff suing a South Carolina corporation, in that State, and describing its corporators as citizens. It appeared by plea, among other things, not material to the present discussion, "that two of the corporators were citizens of North Carolina."

In similar pleas, before this, it had appeared that the corporators belonged to the state of the adverse party, and consequently were within the exclusion of the eleventh section of the Judiciary Act of 1789. In the present case, the plaintiff was a citizen from a different state from these corporators. The court notices this fact as a peculiarity. "The point," they say,

"has never before been under the consideration of this court. We are not aware that it ever occurred in either of the circuits until it was made in this case. It has not, then, been directly ruled in any case." The court proceeded then to decide that there was jurisdiction under the Constitution, for the parties were citizens of different states, and that the Judiciary Act did not exclude it. Thus was this point in the plea disposed of, upon grounds which unsettled none of the cases before cited. The court avows this, and says, "that the case might be safely put upon these reasonings," conducted, "in deference to the doctrines of former cases." It then proceeds, "but there is a broader ground, upon which we desire to be understood upon which we altogether rest our present judgment, although it might be maintained upon the narrower ground already suggested. It is, that a corporation created by and doing business in a particular state, is to be deemed, to all intents and purposes, as a person, although an artificial person, an inhabitant of the same state, for the purposes of its incorporation, capable of being treated as a citizen of that state, as much as a natural person."

Since the decision of *Letson's* case, there have been cases of corporations, suing in the federal courts beyond the state of their location, and suing and being sued in the state of their location, in which this question might have been considered in this court. But there was no argument at the bar, and no notice of it in the opinion of the court. In one of these, one of the six judges who assisted in the decision of *Letson's* case expressed strongly a disapprobation of its doctrine, while another limited the *conclusions of the court to the decision [*350 of the case then before it. (*Rundle v. Delaware Canal Company*, 14 How., 80.)

The case of *The Indiana Railroad Company v. Michigan Railroad Company*, 15 How., 233, presented the question now before us, and at that time I was favorable to its re-examination; but this was expressly waived by the court, and the case decided upon another question of jurisdiction.

In the case of *The Methodist Church*, there was but one corporation before the court as a party. The two corporators who composed that were defendants in their corporate, as well as individual capacity. The citizenship of all the parties to the record was legally declared; and the parties to the record legally represented all the interests of the voluntary association at issue. In reference to jurisdiction, Justice Washington says, "the cases of a voluntary association, trustees, executors, partners, legatees, distributees, parishioners and the like, are totally dissimilar to a corporation, and this dissimilarity arises from the peculiar character of a corporation (4 Wash. C. C., 595), and this is clear by the decisions of this court. (4 Cranch, 306; 8 Wheat., 642.)

I have been thus specific in the statement of the precedents in the court, that it may appear that this dissent involves no attempt to innovate upon the doctrines of the court, but the contrary, to maintain those sustained by time and authority in all their integrity.

The declaration before us describes the defendant "as a body corporate by Act of the General Assembly of Maryland," and corre-

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sponds, therefore, with the cases cited from 5 Cranch, 57; 6 Wheat., 450; 1 Pet., 238; and in those cases jurisdiction was first questioned and disclaimed in this court. These cases were not cited in *Letson's* case, and are decisive of this.

If we search the record for facts to sustain the jurisdiction, we can collect that the defendant has been recognized as a body corporate by the Legislature of Virginia, is commorant, and transacts business there by its authority, has for its corporators citizens and a city of that State, and that the plaintiff is also a citizen of Virginia. If these facts are considered with reference to the question of jurisdiction, all the cases decided by this court on this subject have principles which would exclude it. Even *Letson's* case prescribes that the corporation should carry on its business in the state of its charter, and that case hardly contemplated an estoppel, such as is described in the opinion of the court.

I am compelled to consider this case as uncontrolled by the declaration of doctrine in *Letson's* case; nor do I consider the cases in which the decision of the question has been waived as obligatory. I cannot look for the 351*] conclusions of this court or *any of its members, except from the public, authorized and responsible opinions delivered here in cases legitimately calling for them. For this conclusion I have the sanction of the highest authority. Chief Justice Marshall, replying to the argument that corporations under no circumstances, and by no averment, could be a party to a suit in the courts of the United States, says "repeatedly has this court decided cases between a corporation and an individual without feeling a doubt of its jurisdiction," and adds, "those decisions are not cited as authority, for they were made without a consideration of the particular point."

The inquiry now presented is, shall I concur in a judgment which removes the ancient landmarks of the court, in reference to its jurisdiction, and which it established with care and solemnity, and maintained for so long a period with consistency and circumspection? I am compelled to reply in the negative.

A corporation is not a citizen. It may be an artificial person, a moral person, a juridical person, a legal entity, a faculty, an intangible, invisible being; but Chief Justice Marshall employed no metaphysical refinement, nor subtlety, nor sophism, but spoke the common sense, "the universal understanding," as he calls it, of the people, when he declared the unanimous judgment of this court, "that it certainly is not a citizen."

Nor were corporations within the contemplation of the framers of the Constitution when they delegated a jurisdiction over controversies between the citizens of different states. The citation by the court from the *Federalist* proves this. It is said by the writers of that work, "that it may be esteemed as the basis of union that the citizens of each state shall be entitled to all the immunities and privileges of citizens of the several States." And if it be a just principle that every government ought to possess the means of executing its own provisions, by its own authority, it will follow that, in order to the inviolable maintenance of that equality of

immunities and privileges to which citizens of Union the will be entitled, the national judiciary ought to preside in all cases in which one state or its citizens are opposed to another state or its citizens. Thus to administer the rights and privileges of citizens of the different states, held under a constitutional guaranty, when brought into collision or controversy—rights and immunities derived from the constitutional compact, and forming one of its fundamental conditions, was the object of this jurisdiction. The commonplace, that it resulted as a concession to the possible fears and apprehensions of suitors, that justice might not be impartially administered in state jurisdiction, soothing as it is to the official sensibilities of the federal courts, furnishes no satisfactory explanation of it.

*Hence the interpretation of that instrument which transferred to the artificial persons created by state legislation, the rights or privileges of the corporators, derived from the Constitution of the United States, as citizens of the Union, and held independently and without any relation to their rights as corporators—was, to say no more, a broad and liberal interpretation. Nor did the court in *Deveaux's* case affect the least self-denial or diffidence in making the bounds of its power. It declared that "the duties of the court, to exercise a jurisdiction where it is conferred, and not to usurp it where it is not conferred are of equal obligation," and in this spirit rejected a jurisdiction over a case exactly like the present.

The doctrine of the court in *Earle's* case, 13 Pet., 519, and *Runyan's* case, 14 Pet., 122, to the result that corporations have no extraterritorial rights, but that the legal exercise of their faculties, extraterritorially, was the effect of a rule of comity among the States dependent upon their policy and convenience, and revocable at their pleasure, was in harmony with these judgments of the court, and the constitutional principles I have stated. The administration of the rules of domestic policy adopted by the several states, in reference to these artificial creatures of a domestic legislation, belonged to state jurisdictions, and were ascertainable from its laws and judicial interpretations. But when, from the later case of *Letson*, it was supposed that these legal entities had a *status* which admitted them to the federal tribunals by a constitutional recognition, the inquiry at once arose, for what purpose was this privilege held? The interdependence between the sections of the Constitution which defined the privileges and immunities of citizens of the Union, and the jurisdiction of the federal courts in controversies between citizens of the States, was known and felt. It was argued that the capacity to sue was only a consequent of the right to contract, to hold property, and to perform civil acts. They commenced, therefore, an agitation of the state courts for their rights as "citizens of the Union." The Supreme Court of Kentucky (12 B. Mon., 212), repelling these pretensions and exposing their perilous character, thus refers to *Letson's* case, which had been relied on for their support: "There are some expressions in that opinion which indicate that corporations may be regarded as citizens to all intents and purposes. But in saying this, the court went far beyond

the question before them, and to which it may be assumed that their attention was particularly directed." So, too, in *New Jersey* (8 Zabris., 429), it was argued that the existence of the extraterritorial rights of corporations "is not now a question of comity in the United States, but a constitutional principle incapable of being altered by state legislation."

353*] *And opinions from jurists of pre-eminence in Massachusetts and New York were laid before the court to sustain the argument founded upon the relaxing doctrines of this court.

Thus the introduction of new subjects of doubt, contest and contradiction, is the fruit of abandoning the constitutional land marks.

Nor can we tell when the mischief will end. It may be safely assumed that no offering could be made to the wealthy, powerful and ambitious corporations of the populous and commercial States of the Union so valuable, and none which would so serve to enlarge the influence of those States, as the adoption, to its full import, of the conclusion, "that to all intents and purposes, for the objects of their incorporation, these artificial persons are capable of being treated as a citizen as much as a natural person."

The Supreme Court of Kentucky, says truly: "The apparent reciprocity of the power would prove to be a delusion. The competition for extraterritorial advantages would but aggrandize the stronger to the disparagement of the weaker states. Resistance and retaliation would lead to conflict and confusion, and the weaker states must either submit to have their policy controlled, their business monopolized, their domestic institutions reduced to insignificance, or the peace and harmony of the states broken up and destroyed." To this consummation this judgment of the court is deemed to be a progress. The word "citizen," in American constitutions, state and federal, had a clear, distinct and recognized meaning, understood by the common sense, and interpreted accordingly by this court through a series of adjudications.

The court has contradicted that interpretation, and applied to it rules of construction which will undermine every limitation in the Constitution, if universally adopted. A single instance of the kind awakens apprehension, for it is regarded as a link in a chain of repetitions.

The litigation before this court, during this term, suffices to disclose the complication, difficulty and danger of the controversies that must arise before these anomalous institutions shall have attained their legitimate place in the body politic. Their revenues and establishments mock at the frugal and stinted conditions of state administration; their pretensions and demands are sovereign, admitting impatiently, interference by state legislative authority. And from the present case we learn that disdainful of "the careless arbiters" of state interests, they are ready "to hover about them" in "efficient and vigilant activity," to make them a prey; and, to accomplish this, to employ corrupt and polluting appliances.

354*] *I am not willing to strengthen or to enlarge the connections between the courts of the United States and these litigants. I can consent to overturn none of the precedents or prin-

ciples of this court to bring them within their control or influence. I consider that the maintenance of the Constitution, unimpaired and unaltered, a greater good than could possibly be effected by the extension of the jurisdiction of his court, to embrace any class either of cases or of persons.

Mr. Justice Catron authorizes me to say that he concurs in the conclusions of this opinion.

Our opinion is, that the judgment of the Circuit Court should be affirmed for the want of jurisdiction.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Maryland, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

Att'g—Taney, 204.

Cited—18 How., 364, 371, 406; 20 How., 234; 21 How., 123, 214; 1 Bl., 298; 2 Wall., 55; 5 Wall., 542; 8 Wall., 178; 10 Wall., 556; 12 Wall., 82; 16 Wall., 575; 21 Wall., 450; 11 Otto, 111; 12 Otto, 274; 1 Flippin, 612; 2 McArthur, 274; 10 Biss., 127, n. 273; 1 Abb. U. S., 12; 2 Abb. U. S., 239; 1 Dill., 231, 233; 3 Dill., 409; 6 Blatchf., 112; 8 Blatchf., 143; 16 Blatchf., 466; 7 Bank. Reg., 280; 1 Cliff., 458; 1 Hughes, 95; 1 McCrary, 397; 2 Woods, 455, 481.

FITZ HENRY HOMER, *Plaintiff in Error,*

v.

GEORGE L. BROWN.¹

Will—Effect of codicil of peculiar wording—Consequence of non-suit explained.

In April, 1815, William Brown, of Massachusetts, made his will, by which he made sundry bequests to his youngest son, Samuel. One of them was of the rent or improvement of the store and wharf privilege of the Stoddard property, during his natural life, and the premises to descend to his heirs. After two other similar bequests, the will then gave to Samuel, absolutely, a share in certain property when turned into money.

In May, 1816, the testator made a codicil, revoking that part of the will wherein any part of the estate was devised or bequeathed to Samuel, and in lieu thereof, bequeathing to him only the income, interest or rent. At his decease it was to go to the legal heirs.

Under the circumstances of this will and codicil, the revoking part applied only to such share of the estate as was given to Samuel, absolutely; leaving in the Stoddard property a life estate in Samuel, with a remainder to his heirs, which remainder was protected by the laws of Massachusetts until Samuel's death.

At the death of Samuel the title to the property became vested in fee simple in the two children of Samuel.

One of these children had a right to bring a real action by a writ of right for his undivided moiety of the property.

The writ of right was abolished by Massachusetts, in 1840, but was previously adopted as a process by the Acts of Congress of 1789 and 1792. Its

1.—Mr. Justice CURTIS, having been of counsel, did not sit in the argument of this case.

NOTE.—Consequences of a nonsuit, or dismissal of complaint. A nonsuit is no bar to another action for same cause. Distinction in action for equitable relief, of dismissal on merits.

1 Pet., 469, 476; 9 Ind., 51; 14 Ark., 708; 1 Serg. & B., 360; 2 Binn., 264, 248; 4 Binn., 84; 6 Pick., 117; 3

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repeal by Massachusetts did not repeal it as a process in the Circuit Court of the United States.

A judgment of *non pros* given by a state court in a case between the same parties, for the same property, was not a sufficient plea in bar to prevent a recovery under the writ of right; nor was the agreement of the plaintiff to submit his case to §355*) that "court upon a statement of facts, sufficient to prevent his recovery in the Circuit Court.

The consequences of a nonsuit examined.

THIS case came up by writ of error from the Circuit Court of the United States for the District of Massachusetts.

Brown, who was a citizen of Vermont, brought a writ of right to recover an undivided moiety of certain property in Boston. He was one of the two sons of Samuel Brown, and the grandson of William Brown, the testator, the construction of whose will and codicil, was the principal point in controversy.

As to part of the demanded premises there was a joinder of the mise. As to another part of the premises a plea of non-tenure on which issue was joined. The verdict on the joinder of the mise was for the plaintiff, the now defendant in error.

Upon the issue on the plea of non-tenure, the verdict was for the tenant, now plaintiff in error.

Before pleading, the tenant submitted a motion that the writ be quashed because writs of right were, by the one hundred and first chapter of the Revised Statutes of Massachusetts, abolished.

This motion was disallowed.

At the trial, the demandant put in evidence the will of William Brown, dated 26th April, 1815, and a codicil thereto, dated 30th May, 1816, upon which his claim of title rests.

The substance of the said will and codicil was as follows, the demandant, Brown, claiming under the devise to Samuel L. Brown, his father:

Item: For my youngest child and son, Samuel Livermore Brown, who was born of my last wife, Elizabeth Livermore, I make the following arrangement of property in my estate for him: The property of my first wife has been in some measure mingled in common stock; the property which might otherwise have descended to me by my last wife, Elizabeth, was, after her decease, conveyed by her father, by deed, and by a brother by will, to

her only surviving child (the said Samuel), which was perfectly consistent with my approbation; and the property, being in land, is sufficient for several farms; and if the said Samuel should quit seafaring pursuits, which he has selected for his employment, and turn his attention to agricultural pursuits, he will not need any addition to his acres, but it may be necessary and convenient to have some annual income to aid him in his labor; therefore I give and bequeath to my son, Samuel L. Brown, the rent or improvement of my store and *wharf privilege, situate on the [§356] northerly side of the town dock, in Boston; he to receive the rent annually or quarterly (if the same should be leased or let) during his natural life, and the premises to descend to his heirs; this being the estate I purchased of Mr. Stoddard—reference to the records will give the bounds. Also, I do hereby direct my son, William, to vest one thousand dollars in bank stock, or the stocks of this State or the United States, the interest of which, as it arises, to be paid by him to the said Samuel during his life, and the stock to descend to the heirs of the said Samuel. This is to be advanced by the said William, as some consideration for the difference in the value of the two stores.

(The will then went on to create a fund, which was to be divided into four equal parts, one of which was for Samuel, and then proceeded thus):

But I do hereby direct my executor, hereafter named, to vest one half of the said Samuel's fourth part of this property in the stock of some approved bank in Boston, or in the stocks of this State, or the United States, or in real estate; the dividend or rent to [be] paid by him to the said Samuel as it may arise, and the principal or premises to descend to his heirs; and the other half of this fourth part to be paid to the said Samuel in money, when collected, to stock his farm, or for other purposes.

This will was executed on the 26th of April, 1815.

On the 30th of May, 1816, the testator added the following codicil:

Whereas, my son Samuel has sold his two farms which were left to him; one by his late grandfather Livermore, by deed, and the other by his uncle George Livermore, by will; and

Overt, 57; 4 Yerg., 528; 1 Wash., 87, 219; 12 Johns., 299; Pratt v. Johnson, 13 Johns., 334; Stuart v. Simpson, 1 Wend., 376; 2 Benj., 128, 445; 2 Bailey, 321; 2 McCord, 26; 2 Me., 5; 3 Me., 97; 41 Me., 65; 42 Me., 259; 28 N. H., 351; 31 N. H., 92; 4 Ohio, 628; Holland v. Hatch, 15 Ohio St., 464; 17 Ill., 494; 5 Fla., 176; 9 Ind., 179; 16 Ga., 154; 1 Cal., 108, 125, 221; 19 Mo., 101; see 26 Penn. St., 192; Jay v. Carthage, 48 Me., 353; Anderson v. Gregory, 43 Conn., 61; Eaton v. George, 40 N. H., 258; Adabon v. Excelsior Ins. Co., 27 N. Y., 216; Merritt v. Campbell, 47 Cal., 542; Westcott v. Book, 2 Col. T., 235.

A judgment of nonsuit upon an agreed statement of facts, and for the defendant for his costs, constitutes no bar to a subsequent action for the same cause. Knox v. Waldborough, 5 Greenl. (Me.), 185; Derby v. Jacques, 1 Cliff., 425; Wade v. Howard, 8 Pick., 353.

The granting a nonsuit is, in effect, a decision that, as matter of law, the plaintiff has not produced evidence sufficient to sustain the cause of action. Scofield v. Hernandez, 47 N. Y., 313.

In effect, a nonsuit, or what is the same thing, a judgment of dismissal of the complaint, is not a bar to another action. Cort v. Blund, 22 How. Pr., 2; 33 Barb., 357; 12 Abb. Pr., 468; Wheeler v. Ruck-

man, 7 Rob., 447; 35 How. Pr., 350; Mechanics' Bank-ling Association v. Mariposa Co., 7 Rob., 225.

The dismissal of a complaint on the merits, in action for equitable relief, is, until reversed, a bar to a second action for the same cause. Bosterick v. Abbott, 40 Barb., 337; S. C., 10 Abb. Pr., 417; 3 Walt's Pract. N. Y., 163; 4 Johns. Ch., 140; Holmes v. Ranson, 7 Johns. Ch., 286; Burhaus v. Van Zandt, 7 N. Y., 523; Durant v. Essex Co., 7 Wall., 107; Black v. Black, 27 Ga., 40; Jenkins v. Johnston, 4 Jones (N. C.) Eq., 149; Thompson v. Clay, 3 T. B. Monr., 359.

But a judgment, or decree of dismissal, for any other cause than on the merits, is no bar to a subsequent suit involving the same subject matter. Crews v. Cleghorn, 13 Ind., 438; Allinet v. Creditors, 15 La. Ann., 180; Dexter v. Clark, 22 How. Pr., 289; 35 Barb., 271; Wheeler v. Buckman, 51 N. Y., 391; Bond v. M'Nider, 3 Ired. L., 440; Cavanaugh v. Davis, 7 J. J. Marsh., 371; Saylor v. Tibbitts, 5 R. J., 79; Hughes v. United States, 4 Wall., 232; Loudenback v. Collins, 4 Ohio St., 251; Allen v. Blunt, 2 Wood. & M., 121; Van Vleet v. Olin, 1 Nev., 495; Porter v. Vaughn, 26 Vt., 624; Nevitt v. Bacon, 32 Miss., 212; Trapnall v. Barton, 24 Ark., 371; Curtis v. Trustees of Bardstown, 6 J. J. Marsh., 536.

whereas it appears he has relinquished every intention to agricultural pursuits, and is now absent at sea, with a view to qualify himself for a seafaring life; and under these circumstances, considering it to be more for his interest and happiness, I do hereby repeal and revoke the part of my will wherein any part of my estate, real or personal, is devised or bequeathed to my son, Samuel, therein named, and in lieu thereof do bequeath to my son, the said Samuel, only the income, interest, or rent of said real or personal estate, as the case may be, so that no more than the income, interest or rent of any portion of my real or personal estate, and not the principal of said personal or fee of said real estate may come to the said Samuel, my son, which, at his decease, it is my will that the said real and personal estate shall then go to the legal heirs.

The demandant, George L. Brown, was, at the date of his writ, a citizen of the State of Vermont, and made actual entry on the land demanded in his writ, January twenty-ninth, 357*] eighteen hundred and fifty-one, claiming an undivided moiety thereof in fee simple against the defendant as in no way entitled to said land.

The demandant maintained, that under and by virtue of the said will and codicil of William Brown, he was entitled, at the death of his father, Samuel Livermore Brown, to one undivided moiety of the demanded premises in fee simple absolute.

The tenant produced the record of a judgment in a writ of entry, brought by the defendant in error against the plaintiff in error in the Supreme Judicial Court of Massachusetts, embracing the premises now demanded, and submitted to that court on an agreement of facts, in which suit judgment of nonsuit was directed by the court; and this agreement of facts and judgment the tenant offered in evidence as a bar of estoppel to the demandant, so far as the premises were identical with those claimed in this writ of right, and moved the court so to instruct the jury.

The tenant put in the deeds of William Brown, Zebiah C. Tilden, Sally Brown, and Samuel Livermore Brown, dated May 5th, 1824, who were the only children and sole heirs at law of William Brown, the testator, and he maintained that the afore-named grantors were enabled, by virtue of the will and codicil, to pass, and by these deeds did pass, all the title to the demanded premises which the testator had at the time of his death.

The counsel for the defendant then prayed the court to instruct the jury, 1st. That this action cannot be maintained, because writs of right to recover land situate in the State of Massachusetts have been abolished by its laws.

2. That this action is barred by the judgment of the Supreme Judicial Court of Massachusetts, which was rendered in a case between the same parties and upon the same cause of action; if that judgment be not a bar to this action, the demandant is estopped by his agreement to submit in that case from prosecuting this action.

3d. That the demandant takes nothing under the will of William Brown, and that he has no title to the demanded premises or any part thereof.

4th: That the rights and title of the demandant, and those under whom he claims, in and to the demanded premises, or any part thereof, have been barred by the Statute of Limitations of Massachusetts.

5th. That on the pleadings and facts in this case, all of which hereinbefore appear, the demandant cannot maintain this action.

But the honorable court did refuse then and there to give the said instructions to the jury, in the terms and manner in which the same were prayed, but did instruct the jury as follows:

*That the demandant was entitled to [*358 a verdict for that part of the demanded premises as to which the tenants had pleaded the general issue; and that as to that part of the demanded premises to which the tenants had put in pleas of non-tenure, their verdict should be for the tenants.

Whereupon the counsel for the defendant did then and there except to the aforesaid refusals and to the instructions and charge of the honorable court; and thereupon the jury returned a verdict for the said demandant, in words following, to wit: (finding for the demandant on the joinder of the mise, and for the tenant on the plea of non-tenure).

Upon these exceptions, the case came up to this court, and was argued by *Messrs. Chandler and Bartlett* for the plaintiff in error, and by *Messrs. Lawrence and Dow* for the defendant.

I. That the Statute of Massachusetts is not a mere act to regulate process, but that it establishes a rule of property and of evidence, and so furnishes a "rule of decision" within the thirty-fourth section of the Judiciary Act, 1789, chapter 20; and in support of this proposition the plaintiff refers to Rev. Sta. of Mass., ch. 101, Act of 1786, ch. 18; Act of 1807, ch. 75; Rev. Stat. of Mass., ch. 146; Act of February 20th, 1836, repealing expressly previous Acts: Rev. Sta., 814, 821; Rev. Sta. of Mass., ch. 119; Report of the Commissioners of Revision of Mass. Sta., part 3d, p. 154; Report of the Commissioners of Revision of Mass. Sta., part 3d, p. 268; *Ross v. Dural*, 13 Pet., 45-60; *Fullerton v. Bank of the United States*, 1 Pet., 604-613; *McNeil v. Holbrook*, 12 Pet., 84, 88; *The Society, &c., v. Wheeler*, 2 Gall., 104, 138; *Jackson v. Chew*, 12 Wheat., 153.

II. The defendant in error takes nothing under the will of William Brown, and has no title to the demanded premises. (*Baskin's Appeal*, 3 Barr., 304.)

1. The devise to Samuel L. Brown, under whom the demandant claims the estate, was in the following words: (then followed a recital of the will.)

2. When this will was executed and when it was proved, the Statute of Massachusetts of 1791, ch. 60, sec. 8, was in force, and provided that "whenever any person shall hereafter in and by his last will and testament devise any lands, tenements or hereditaments, to any person for and during the terms of such person's natural life, and after his death to his children or heirs, or right heirs in fee, such devise shall be taken and concluded to vest an estate for life only in such devise, and a remainder in fee simply in such children, heirs and right heirs, any law, usage or custom to the contrary notwithstanding."

359*] *By the rule in *Shelly's* case, 1 Coke, 94, modified in Massachusetts, by the Statute of 1791, the Stoddard estate, by the clause of the will just quoted, would have been devised to Samuel L. Brown for life, with remainder in fee to his own heirs.

3. But by the codicil to the will, executed May 30, 1815, the testator, for reasons therein stated, determined to change the character of the original devise, and he then proceeded to "revoke the part of my [his] will wherein any part of my [his] estate, real or personal, is devised or bequeathed to my [his] son Samuel therein named," and in lieu thereof to bequeath to the said Samuel "only the income, interest, or rent of said real or personal estate, as the case may be, so that no more than the income, interest, or rent of any portion of my real or personal estate and not the principal of said personal or fee of said real estate may come to the said Samuel, my son, which, at his decease, it is my will that the said real and personal estate shall then go the legal heirs."

4. Unless the testator intended that the fee of his estate should go to his own heirs, he made no change in the direction of the property whatever, because by the devise in the body of the will, which he wished to change, he had already provided that the fee should go to the heirs of his son.

And the legal construction in such a case is, that the estate goes to those who were the legal heirs at the time of the testator's death. (*Childs v. Russell*, 11 Met., 16; *Doe v. Prigg*, 8 B. & Cr., 231.)

5. The devise in the codicil created a vested remainder in the heirs of the testator; and the plaintiff in error, claiming under the deeds of all the legal heirs, takes the estate. (4 Kent's Com., 202; *Fearne on Cont.*, Remainders, Introduction; *Moore v. Lyons*, 25 Wend., 119; *Doe v. Prigg*, 8 B. & C., 231.)

6. The construction of this will involves also the construction of a local statute, namely, the Act of 1791, ch. 60: and both have been the subject of adjudication by the highest local tribunal, in a suit between the same parties.

This court will therefore give effect to that construction and adjudication, to the end that rights and remedies respecting lands may be regulated and governed by one law, and that, the law of the place where the land is situated. (*Brown v. Homer*, 3 Cush., 390; *Jackson v. Chew*, 12 Wheat., 153, 168; *Henderson v. Griffin*, 5 Pet., 151; *Daly v. James*, 8 Wheat., 535; *Lane v. Vick*, 3 How., 464; *Society v. Wheeler*, 2 Gall., 137.)

360*] *The points made by the counsel for the defendant in error were the following:

First. That as to the first prayer, the writ of right was a proper remedy in this case, because in Massachusetts the writ of right was ever, prior to 1840, a proper remedy in the state courts for a demandant claiming lands therein in fee simply, and having had actual seisin under title coming by purchase. (Laws of Massachusetts, Stat., 1786, ch. 13, and 1807, ch. 75; *Jackson on Real Actions*, 276, 279, 280; *Stearns on Real Actions*, 357, 359.)

And this remedy became, by the Judiciary Act of Congress of 1789, continued by Act of 1792, ch. 36, sec. 2, the proper remedy in like cases in the Circuit Court of the United States.

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sitting in and for the District of Massachusetts, in the absence of any rule to the contrary prescribed by said Circuit or the Supreme Court of the United States

And because ch. 101, sec. 51, of the Rev. Stat. of Massachusetts, abolishing writs of right, and taking effect in 1840, with certain exceptions, has no force *ex proprio vigore* in the courts of the United States, as it relates merely to process. (*Springer v. Foster*, 1 Story, 602; Judiciary Act of 1789, sec. 32; *Wayman v. Southard*, 10 Wheat., 1-54; *Fiedler et al. v. Carpenter*, 2 Wood. & M., 211.)

Second. That, as to the second prayer, the judgment of nonsuit between these parties in the state court was no bar nor estoppel to the demandant in the court below. (*Knox v. Waldoborough*, 5 Greenl., 185; 1 Pick., 371; *Snowhill v. Hillyer*, 4 Halst., 38; 2 Mass., 113; *Bank of Illinois v. Hicks*, 4 J. J. Marsh., 128; 16 Mass., 317.)

Third. That as to the third prayer, by the following language in the will, "I give and bequeath to my son, Samuel L. Brown, the rent or improvement of my store and wharf privilege, situate on the northerly side of the town dock in Boston, he to receive the rent annually or quarterly (if the same should be leased or let), during his natural life, and the premises to descend to his heirs, this being the estate I purchased of Mr. Stoddard," a life estate, in the premises named, was given to Samuel L. Brown, and the remainder to his heirs, and that this remainder became by the laws of Massachusetts a distinct estate, protected by statute abolishing the rule in *Shelly's* case, and was contingent till the heirs of the said Samuel were ascertained by his death, occurring January 31, 1881, when it vested absolutely and became a title in fee simple in George L. Brown, the defendant in error, and Josiah Brown, the only children and heirs at law of said Samuel. (Laws of Massachusetts, Stat. 1791, ch. 60, sec. 8; Revenue Statutes of same, ch. 59, sec. 9; *Richardson v. Wheatland*, 7 Metc., 169; [*361] *Holm et ux. v. Low*, 4 Metc., 201; *Wheatland v. Dodge*, 10 Metc., 502; *White v. Woodbury*, 9 Pick., 136.)

Also, that the foregoing gift was not disturbed by the codicil to the will, as to which the burden is on the plaintiff in error to show that it was disturbed.

"To revoke a clear devise the intention to revoke must be as clear as the devise." (*Doe, dem. Hearle et ux. v. Hicks*, upon error, 8 Bing., 475.)

"A revocation must be by express words or necessary implication." (Per Shaw, *Ch. J.*, *arguendo*; *Lamb v. Lamb*, 11 Pick., 875, 876.)

Also, the defendant contends that the revocation in the codicil was carefully guarded and limited, "so that no more than the income, interest or rent of any portion of my real or personal estate, and not the principal of said personal or fee of said real estate may come to the said Samuel."

And to prevent misapprehension, the testator repeated the devise to the heirs of Samuel, in the will already cited as to "the principal of said personal and fee of said real estate," by the words, "which at his decease it is my will that the said real and personal estate shall then go to the legal heirs," obviously of Samuel, be-

cause "his interest and happiness" was the sole object of the codicil.

Also, that the real and personal estate of which the testator had by his will given "more than the income," &c., was the large mass of property, both real and personal, given to the executor in trust to be divided into four equal parts, half of one of which fourth parts was given to Samuel for life, remainder to his heirs, "and the other half of this fourth part to be paid to the said Samuel in money, when collected, to stock his farm, or for other purposes."

And the revocation in the codicil made, because "Samuel had sold his two farms," was intended merely to revoke the gift to Samuel of this "other half of said fourth part," in terms carrying all the interest therein, to enable him to stock his farm, or for other purposes."

That besides these interests in such fourth part, and his life interest in the Stoddard lot (the land in controversy), the will contains no gift whatever to Samuel, except some trifles in books and clothing.

Fourth. That as to the fourth prayer—if the time of limitation prescribed by the Revised Statutes of Massachusetts, chapter 119, be the governing rule in this case, allowing twenty years from the death of Samuel L. Brown, with ten years after disability removed—the defendant could have brought his action* at any time before February 6th, 1852; but if the Act of Massachusetts of 1786, chapter 13 (the only Limitation Act in force prior to Revised Statutes touching real actions), be the governing rule in this case, then entry made and action brought before January 31st, 1861, would be sufficient, as to time of entry and action brought.

Fifth. That as to the fifth prayer—the pleadings and facts in this case—the defendant rightfully recovered in the court below on the following grounds, collectively:

1st. Because he had title in fee simple to real estate, lying within the jurisdiction of the court to which he brought suit.

2d. Because he had actual seisin (see *Ward v. Fuller et al.*, 15 Pick., 185) of the same within the time of limitation allowed by law, and brought his action therefor in season.

3d. Because his writ of right against the tenant in possession of the freehold for the recovery of the fee simple after actual entry, was a proper remedy. (*Green v. Lister*, 8 Cranch, 229; *Wells v. Prince*, 4 Mass., 64; *Hunt v. Hunt*, 3 Metc., 175; *Jackson on Real Actions*, 15; *Stearns on Real Actions*, 350, 370. As to forms of writs in all actions in Massachusetts, *Stearns*, 91, 92, 200, 244.)

4th. Because, by the Judiciary Act of Congress of 1789, the court below had jurisdiction over the subject of controversy and the parties.

5th. Because no fact in the case for the jury to consider was in dispute between the parties.

6th. Because the pleadings put in issue the whole subject in dispute and passed upon by the court and jury.

7th. Because the opinion of the state court (which seems not to have at all considered the very important and essential feature of the will touching the large mass of real and personal property given in trust to the executor, and divisible in four parts) being upon the construction of a will only, had no binding force in the

United States courts, and was entitled only to the confidence created by its reasoning. (*Lane et al v. Vick*, 3 How., 464; *Forcraft v. Mallet*, 4 How., 370; *Thomas et al. v. Hatch*, 3 Sumn., 170.)

8th. That if the judgment in the state court, instead of a nonsuit, had been for the tenant; yet as that action was by writ of entry, it would be no bar to a writ of right, which would be a higher remedy. (*Stearns on Real Actions*, p. 359.)

9th. Because the conveyances of Samuel and others worked no forfeiture of the remainder given to the heirs of Samuel. (*Stearns et al. v. Winship et al.*, 1 Pick., 318; 4 Kent, 255.)

Commissioner's notes to Revised Statutes of Massachusetts, pt. 2, ch. 59, sec. 6.

**Mr. Justice Wayne* delivered the [*363 opinion of the court:

This cause has been brought to this court from the Circuit Court of the United States for the District of Massachusetts, by a writ of error.

The action is a writ of right. The demandant declares that he has been deforced by the tenant, Fitz Henry Homer, of certain premises claimed by him as his right and inheritance, of which he was seised in fee within twenty years before the commencement of his suit, at the May Term of the Circuit Court, A. D. 1851. A motion was made at a subsequent term to quash the writ, upon the ground that the remedy by a writ of right had been abolished by the Revised Statutes of Massachusetts, ch. 101, sec. 51. The court denied the motion. Then the defendant, Fitz Henry Homer, who is tenant of a part of the land demanded, tendered the general issue on a joinder of the mise, on the mere right of the demandant, as to that of part of the land of which the defendant is tenant; with pleas of general non-tenure as to a part of the demanded premises, and of special non-tenure as to the residue. His tender was allowed, and such pleas were filed; upon which the counsel of the demandant joined issue. Subsequently, the defendant asked leave to amend his pleas, by striking out the pleas of the general issue and general non-tenure, as the same had been pleaded, which was permitted, and he filed a plea of joinder of the mise on the mere right, with pleas of non-tenure. The demandant joined issue on the first plea, and filed a replication averring that, from anything alleged, he was not precluded from having his action against the defendant, because, at the time of suing out his writ, the tenant was tenant of the freehold, as has been supposed in the writ, of all the residue of the demanded premises; and he prayed that the same might be inquired of by the country. Issue having been taken upon the replication, the cause was tried. At the trial, the demandant put in evidence the will of William Brown, dated the 26th April, 1815, with a codicil dated 30th May, 1816, upon which he rested his title. The tenant produced the record of a judgment in a writ of entry, brought by the defendant in error against the plaintiff in error, in the Supreme Judicial Court of Massachusetts, embracing the premises here demanded, and which had been submitted to that court on an agreement of facts, in which a judgment of nonsuit was directed

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by the court; and this agreement of facts and judgment the tenant offered in evidence as a bar or estoppel to the demandant, so far as the premises were identical with those claimed in this writ of right, and moved the court so to instruct the jury. The tenant then put in the deeds of William Brown, Zebiah C. Tilden, Sally Brown, and Samuel Livermore Brown, **364***) *dated May 5, 1824, who were the only children and sole heirs at law of William Brown, the testator, maintaining that the grantors were enabled, by virtue of the will and codicil, to pass all the title to the demanded premises which the testator had at the time of his death.

The tenant further moved the court to instruct the jury that the action could not be maintained, because writs of right to recover land in the State of Massachusetts had been abolished by its laws.

Also, to instruct the jury that the demandant took nothing under the will and codicil of William Brown, and that on the pleadings and facts in the case the demandant could not maintain this action. Another instruction was asked, namely: that the rights and title of the demandant, and those under whom he claims, to the demanded premises, or any part thereof, have been barred by the Statute of Limitations of Massachusetts. But the counsel for the tenant, now the plaintiff in error in this court, stated in his argument that his other prayers for instruction were not relied upon. The court refused to give either of the instructions just recited, and instructed the jury that the demandant was entitled to a verdict for that part of the demanded premises as to which the tenant had pleaded the general issue; and as to that part of the demanded premises to which the tenant had put in pleas of non-tenure, that their verdict should be for the tenant. The counsel for the defendant excepted to the refusals and to the instructions which the court gave, and the jury returned a verdict for the demandant, "that on the first issue, being the general issue, the jury find that the said George L. Brown hath more mere right to have an undivided moiety of so much of the demanded premises as is thus described (northerly by Clinton Street sixteen feet; easterly by the center of a brick wall, dividing the premises from land formerly of D. Packer, deceased, fifteen feet eight inches; southwardly by land, formerly of Savage, now of Homer, the defendant, twenty-three feet, with the appurtenances to him and his heirs, as he hath above demanded the same) than the said Homer has to hold the same as he now holds it, as the said Brown by his aforesaid writ hath above supposed; and that the demandant was seised of the same, as by him in his writ alleged. On the second and third issues, being upon the pleas of general and special non-tenure, the jury find that the said Fitz Henry Homer was not at the date of the writ, has not been since, and is not now, seised as of freehold of any part of the land therein described, as the said Brown by his aforesaid writ hath above supposed."

We think that the remedy by a writ of right **365***) for the recovery *of corporeal hereditaments in fee simple, may still be resorted to in the Circuit Court of the United States for the District of Massachusetts, though the same has been abolished in the courts of that State, and

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that the court did not err in instructing the jury accordingly. Such a remedy existed in the courts of Massachusetts until the year 1840, and it became, by the Judiciary Acts of 1789 and 1792, a remedy in the Circuit Court for that district; any subsequent legislation of the State abolishing it in its courts does not extend to the courts of the United States, because it is a matter of process which is exclusively regulated by the Acts of Congress. (*Wayman v. Southard*, 10 Wheat., 1.) It is as process alone, however, that it continues in the courts of the United States, subject to the limitation prescribed by the Revised Statutes of Massachusetts, as to the time within which such a remedy may be prosecuted in its courts.

The second instruction asked was also properly refused. A judgment of nonsuit is only given after the appearance of the defendant, when, from any delay or other fault of the plaintiff against the rules of law in any subsequent stage of the case, he has not followed the remedy which he has chosen to assert his claim as he ought to do. For such delinquency or mistake he may be *non pros'd.* and is liable to pay the costs. But as nothing positive can be implied from the plaintiff's error as to the subject matter of his suit, he may re-assert it by the same remedy in another suit, if it be appropriate to his cause of action, or by any other which is so, if the first was not. (*Black*, 295; 1 Pick., 371; 2 Mass., 113.)

It is not, however, only for a non-appearance, or for delays or defaults that a nonsuit may be entered. The plaintiff in such particulars may be altogether regular, and the pleadings be completed to an issue for a trial by the jury; yet the parties may concur to take it from the jury with the view to submit the law of the case to the court upon an agreed statement of facts with an agreement that the plaintiff shall be *non pros'd.* if the facts stated are insufficient to maintain the right which he claims. The court in such a case will order a nonsuit, if it shall think the law of it against the plaintiff, but it will declare it to be done in conformity with the agreement of the parties, and its effect upon the plaintiff will be precisely the same and no more than if he had been *non pros'd.* for a non-appearance when called to prosecute his suit, or for one of those delays from which it may be adjudged that he is indifferent. The Supreme Court of Massachusetts, in deciding the cause submitted to it, did so in conformity to an agreement between the parties, but its judgment cannot be pleaded as a bar to the suit, though in giving it, an opinion was expressed upon the merit of the demandant's *claim under the will of his [**366** grandfather, William Brown.

The court was also asked to instruct the jury that the demandant was estopped from prosecuting this action by his agreement in his previous suit to submit it upon a statement of facts. In every view which can be taken of an estoppel, that agreement cannot be such here, because the demandant does not make in this case any denial of a fact admitted by him in that case. He rests his title here to the demanded premises upon the same proofs which were then agreed by him to be facts. This he has a right to do. His agreement only estopped him from denying that he had submitted himself to

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be nonsuited, or that he was not liable to its consequences.

We come now to the third prayer for an instruction which the court denied. It was that the demandant takes nothing under the will of William Brown, and that he has no title to the demanded premises or any part thereof. The land sued for is a part of what the testator designates in his will, the estate bought from Mr. Stoddard. He bequeaths the rent or improvement of the store upon it, with the wharf privilege, to his son, Samuel L. Brown, during his natural life, "and the premises to descend to his heirs." It is here said that this bequest and devise was revoked by the testator in the codicil to his will. Care must be taken in the application of the codicil to the will, but in our opinion the testator's intention may be satisfactorily shown from the language which he uses in the codicil, and from its direct connection with one of the bequests in the will to Samuel. The latter will be more readily seen by a recital of all the testator's bequests to Samuel, before we make the application of the codicil to that to which we have referred. The first bequest is that already stated of the rent or improvement of the store and wharf privilege of the Stoddard property. He then directs his son William, as some consideration for the difference in the value of the devise to him over that of his bequest to Samuel, to vest one thousand dollars in stock, the interest of which is to be paid to Samuel during his life and the principal to descend to his heirs. The third bequest to Samuel is one fourth part of a mass of real and personal estate as it is mentioned in the will, and all of his other property not before or hereafter disposed of, as the same may be turned into money, with this direction to his executor, to vest one half of one fourth of it in stock or real estate, "the dividend or rent of which is to be paid to Samuel as it may arise, and the principal or premises to descend to his heirs." The testator then bequeaths to Samuel the other half of that fourth in money, when collected, to stock his farm or for other **367*** purposes. The difference between this last and the other bequests to Samuel being that he had in all of the others only a life interest, and in this an unqualified and absolute right. Now, the question is, what qualifications have been made by the testator's codicil of his bequests in the will to Samuel and his heirs, and whether the codicil does not relate exclusively to that bequest of money left to Samuel to stock his farm and for other purposes? That must be determined by the language of the codicil. If that is sufficient to indicate the testator's meaning, we are not permitted to search out of it for an inference of his intention. If it bears directly upon one of his bequests to Samuel in such a way as to change it from an absolute gift into a life interest, in conformity with the prevalent intention of the testator manifested throughout the body of his will, to leave to Samuel only a life interest in any part of his estate, except as to that bequest of the one half of one fourth already mentioned to stock his farm and for other purposes, no other application of the codicil can be made to any other bequest in the testator's will.

We learn from the codicil that Samuel had

sold his farm between the date of the will and that of the codicil, for the stocking of which the testator had given to him a sum of money. And then the testator states his inducement for making the codicil to be Samuel's apparent relinquishment "of every intention to agricultural pursuits," and that being absent at sea to qualify himself for a seafaring life, he considers it to be more for his interest and happiness to repeal and revoke "the part of my will wherein any part of my estate, real or personal, is devised or bequeathed to my son Samuel therein named," and in lieu thereof to bequeath to him only the income, interest, or rent of the real or personal estate during his life. Now, excepting the unqualified bequest of the money to stock his farm, the testator had not, in either of his other bequests, left to Samuel any more than the income, interest or rent of any part of his real or personal estate; declaring that the property or stock from which such rent or income might arise, should go to his heirs. With such corresponding intentions, both in the will and in the codicil, in regard to Samuel, the codicil cannot be considered as a revocation of the former interest given to Samuel for his life, and afterwards to his heirs, unless the testator has used language showing an express intention to exclude Samuel's heirs from that which had been given to him for his life, and afterwards without any limitation to them. That the testator has not done. The only words in the codicil which have been urged in the argument to show that the testator meant to do so, is his uncertain declaration at the end of it, that it was his will that the real and personal estate out of which Samuel was to ***have the income during his life, [*368** should at his death go to the legal heirs. It was said that these words—the legal heirs—in connection with those immediately preceding, "so that no more than the income, interest or rent of any portion of his real or personal, and not the fee of said real, may come to the said Samuel," meant nothing, unless they related to the devise of the Stoddard estate, and to the testator's own heirs, because in that devise it had been provided already that the fee should go to the heirs of Samuel.

Without yielding to such a conclusion, it is sufficient for us to say, that the testator had provided that other real estate might be bought out of one half of one fourth of the proceeds of the property left to the executor, in trust to be sold for the benefit of his four children, the rent of which was given to Samuel with a devise of it after his death to his heirs, and that he had given to Samuel absolutely the other half of that fourth, which last he meant by his codicil to revoke and to place upon the same footing with the rest of his estate, the interest or rent of which he bequeathed to Samuel for his life. We have been brought to this conclusion by the language of the testator in his will and codicil. His recital of the causes which induced him to make the codicil, shows that he had a particular part of his will in view (and not all those parts of it in which he had provided for Samuel), singly in connection with Samuel, and that it was a consequence of those circumstances (the sale by Samuel of his farm and his intention to follow a seafaring life) which made him consider it to be more

for his interest and happiness to revoke that bequest only in which he had given absolutely a sum of money to his son to stock his farm. The words of revocation are: "I do hereby repeal and revoke the part of my will wherein any part of my estate, real or personal, is bequeathed to my son, the said Samuel, and in lieu thereof do bequeath to my son, the said Samuel, only the income, interest or rent of said real or personal estate, as the case may be." It is only by changing the words "the part of my will" into the "parts" of my will, that the codicil can be made to bear upon all of those parts of the will in which Samuel had been made for his life the object of that arrangement for him of which his father speaks in that clause of the will which contains the Stoddard bequest. We think, from the language used by the testator, that he has bequeathed and devised to the heirs of Samuel all of the property in which their father was given a life interest; that the codicil revokes only that clause of the will which contains a bequest of money absolutely to Samuel, and puts it upon the same footing with his other bequests to Samuel, both as respects Samuel and his heirs. The instruction asked by the tenant was therefore, in our opinion, rightly refused by the court, and we shall direct its judgment in the suit to be affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Massachusetts, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

Cited—19 How., 608; 15 Otto, 651; 1 Cliff., 245, 422, 437.

THE PIQUA BRANCH OF THE STATE BANK OF OHIO, Plaintiff in Error,

v.

JACOB KNOOP, Treasurer of MIAMI COUNTY.

Municipal corporations—private—difference explained—General Banking Law of Ohio is contract as to taxes—obligation of.

In 1845 the Legislature of Ohio passed a general banking law, the fifty-ninth section of which required the officers to make semi-annual dividends, and the sixtieth required them to set off six per cent. of such dividends for the use of the State, which sum or amount so set off should be in lieu of all taxes to which the company, or the stockholders therein, would otherwise be subject.

This was a contract fixing the amount of taxation, and not a law prescribing a rule of taxation, until changed by the Legislature.

In 1851 an Act was passed entitled, "An Act to tax banks, and bank and other stocks, the same as property is now taxable by the laws of this State." The operation of this law being to increase the tax, the banks were not bound to pay that increase.

A municipal corporation, in which is vested some portion of the administration of the government, may be changed at the will of the Legislature. But a bank, where the stock is owned by individuals, is a private corporation. Its charter is a legislative contract, and cannot be changed without its assent.

The preceding case upon this subject, examined, and the case of *The Providence Bank v. Billings*, 4 Pet., 561, explained.

THIS case was brought up from the Supreme Court of Ohio, by a writ of error issued under the twenty-fifth section of the Judiciary Act.

In the record there was the following certificate from the Supreme Court of Ohio, which explains the nature of the case.

And thereupon, on motion of the defendant, it is hereby certified by the court, and ordered to be made a part of the record herein, that in the above-entitled cause the petitioner claimed to collect, and prayed the aid of the court to enforce the payment of, the tax in the petition mentioned, under an Act of the General Assembly of the State of Ohio, passed March 21st, 1851, entitled "An Act to tax banks, and bank and other stocks, the same as other [*370] property is now taxable by the laws of this State," a certified copy of which is filed as an exhibit in this cause, marked "A." The said defendant, by way of defense to the prayer of said petitioner, &c., set up an Act, entitled "An Act to incorporate the State Bank of Ohio, and other banking companies," enacted by the General Assembly of the State of Ohio, February 24th, 1845, a certified copy of which is filed as an exhibit in this cause, marked "B"; under which Act the defendants organized and became and was, a branch of the State Bank of Ohio, exercising the franchises of such bank prior to and ever since the year 1847; and that the defendant claimed that, by virtue of the operation of said Act last mentioned, the State of Ohio had entered into a binding contract and obligation, whereby the State of Ohio had agreed and bound herself not to impose any tax upon the defendant, and not to require the defendant to pay any tax for the year 1851, other or greater than six per cent. on its dividends or profits, as provided by the sixtieth section of the said Act of February 24th, 1845. And it is further certified, that there was drawn in question in said cause the validity of the said Statute of the State of Ohio, passed March 21st, 1851, hereinbefore mentioned, the said defendant claiming that it was a violation of the said alleged agreement and contract between the State of Ohio and the said defendant, and on that account repugnant to the Constitution of the United States, and void; but the court here held and decided: 1st. That the sixtieth section of said Act of February 24th, 1845, to incorporate the State Bank of Ohio, and other banking companies, contains no pledge or contract on the part of the State not to alter or change the mode or amount of taxation therein specified; but the taxing power of the

NOTE.—As to point that when the charter of a bank fixes the amount of taxes it is to pay, the state cannot levy another or greater tax—approved in *Dodge v. Woolsey*, 18 How. 331; see also, *Mech's & Traders' B'k v. Debolt*, 18 How. 390; *Jefferson Branch B'k v. Skelley*, 436; *Franklin Branch B'k v. Ohio*, 1 Black, 474; *Wright v. Sill*, 2 Black, 544.

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U. S., Book 14.

Constitutionality of law altering charter as impairing contract. See note to *Dart. Coll. v. Woodward*, 4 Wheat., 518.

What laws are void as impairing obligation of contracts. *Constitutionality of laws or of repeal or modification of statute. Vested rights, how affected by subsequent repeal of statute. Vested rights defined.* See note to *Fletcher v. Peck*, 6 Cranch, 87.

General Assembly of the State of Ohio over the property of companies formed under that Act is the same as over the property of individuals. And 2d. That whether the franchises of such companies may be revoked, changed or modified, or not, the Act of March 21st, 1851, upon any construction, does not impair any right secured to them by the Act of 1845, and is a constitutional and valid law. And it is further certified, that the decision of the question as to the validity of the said Statute of 1851, was necessary to the decision of said cause, and the decision in the premises was in favor of the validity of said Statute. The court do further certify, that this court is the highest court of law and equity of the State of Ohio in which a decision of this suit could be held. And it is ordered, that said exhibits A and B be made parts of the complete record in this cause.

The contents of exhibits A and B are stated in the opinion of the court.

371*] *The case was argued by *Messrs. Stanberry and Veriton* for the plaintiff in error, and by *Messrs. Spalding and Pugh* for the defendant in error.

The points made by the counsel for the plaintiff in error were the following:

1st. That the Piqua Branch of the State Bank of Ohio is a private corporation.

The principle governing this point is, that if the whole interest of a corporation do not belong to the public, it is a private corporation. (Angell & Ames on Corporations, secs. 31 to 36 inclusive; *Dartmouth v. Woodward*, 4 Wheat., 636; *Baily v. Mayor of New York*, 3 Hill, 531; *Bank United States v. Planters' Bank Georgia*, 9 Wheat., 907; *Miners' Bank v. United States*, 1 Greene, 553; *Bonaparte v Camden & Amboy R. R. Co.*, 1 Bald., 222.)

2d. The Act of the 24th of February, A. D. 1845, providing for the creation of this private corporation, became, by its acceptance, a contract between the State and the corporators, which contract is entitled to the protection of that clause of the Constitution of the United States which prohibits the States from passing any law impairing the obligation of contracts.

Angell & Ames on Corp., secs. 31, 469, 767; *Dartmouth College v. Woodward*, 4 Wheat., 636; *Gordon v. Appeal Tax Court*, 8 How., 145; *West River Bridge Co. v. Diz*, 6 How., 531; *Planters' Bank of Mississippi v. Sharp*, 6 How., 326, 327; *East Hartford v. Hartford Bridge Co.*, 17 Conn., 93; *New Jersey v. Wilson*, 7 Cranch, 164; *Fletcher v. Peck*, 6 Cranch, 88; *Terrell v. Taylor*, 9 Cranch, 43; *Town of Pawlet v. Clarke*, 9 Cranch, 292; *Wales v. Stetson*, 2 Mass., 143; *Enfield Toll Bridge v. Conn. River Co.*, 7 Conn., 53; *McLoren v. Pennington*, 1 Paige, Ch., 107; 2 Kent's Com., 305, 306; *Greene v. Biddle*, 8 Wheat., 1; *University of Maryland v. Williams*, 9 G. & J., 402; *Bayne v. Baldwin*, 3 Sm. & M. (Miss.), 661; *Aberdeen Academy v. Mayor of Aberdeen*, 13 Sm. & M., 645; *Young v. Harrison*, 6 Ga., 130; *Coles v. Madison County, Breese* (Ill.), 120; *Bush v. Shipman*, 4 Scam. (Ill.), 190; *The People v. Marshall*, 1 Gilman (Ill.), 672; *State v. Hayward*, 3 Rich. S. C., 389; *Baily v. Railroad Co.*, 4 Harr. (Del.), 389; *LeClercq v. Gallipolis*, 7 Ohio, 217; *State v. Com'l Bank of Cincinnati*, 7 Ohio, 125; *State v. Wash. Soc. Library*, 9 Ohio, 96; *Michigan Bank v. Hast-*

ings, 1 Doug. (Mich.), 225; *Bank of Pennsylvania v. Commonwealth*, 19 Penn., 151; *Hardy v. Waltham*, 9 Pick., 108.

3d. The right of a state to tax the property of a private corporation * (such as a bank) [*372 or to tax any specified property of private persons may, by legislative contract, be wholly relinquished, commuted, or limited to an agreed amount, and no State law can impair the validity of such contract.

Angell & Ames on Corp., secs. 469-472 inclusive; *Gordon v. Appeal Tax Court*, 8 How., 133; *Gordon's Ex'rs v. Baltimore*, 5 Gill, 231; *Bank of Cape Fear v. Edwards*, 5 Ired., 516; *Bank of Cape Fear v. Deming*, 7 Ired., 516; *Union Bank of Tennessee v. State*, 9 Yerg., 490; *State of New Jersey v. Bury*, 2 Harr., 84; *Gordon v. State*, 1 Zabriskie, 527; *Johnson v. Commonwealth*, 7 Dana, 342; *Bank of Illinois v. The People*, 4 Scam., 304; *Williams v. Union Bank of Tennessee*, 2 Hump., 339; *Atwater v. Woodbridge*, 6 Conn., 223; *Osborne v. Humphrey*, 7 Conn., 335; *East Hartford v. Hartford Bridge Company*, 17 Conn., 93; *State v. Com'l Bank of Cincinnati*, 7 Ohio, 125.

In the absence of adjudicated cases to establish the right of the Legislature of a state thus to relinquish, commute or limit the amount of taxation, it might and ought to be inferred from the uniformity and extent of its exercise by the States from their earliest history to the present time.

In the case of *Briscoe v. Bank of Kentucky*, 11 Pet., 318, the court say, "that a uniform course of action involving the right to the exercise of an important power by the State governments for half a century, and this almost without question, is no unsatisfactory evidence that the power is rightly exercised. (*Cin. Wd. & Zanesville R. R. Co. v. Com'rs Clinton Co.*, 21 Ohio, 95.)

In accomplishing the lawful purposes of legislation, the choice of means adapted to the end must be left exclusively to the discretion of the Legislature, provided the means used are not prohibited by the Constitution. (*Cin. Wd. & Zanesville R. R. Co. v. Com'rs Clinton Co.*, 21 Ohio, 95.)

4th. The plaintiff in error claims that by the sixtieth section of the Act of 24th of February, 1845, the State, by contract (and not by legislative command), fixed and agreed upon the time, manner, and amount of taxation to be imposed upon and paid by said bank, which contract is mutually binding on the parties, and cannot be changed or abrogated by either without the consent of the other.

This last proposition involves an interpretation of so much of said law as relates to the subject of taxation in two aspects:

1. Whether the sixtieth section be a contract on the subject of taxation, as claimed by the plaintiff in error, or a law dictating and commanding the amount of taxation, as claimed by the defendant in error.

*2. If it be a contract, whether it was [*373 temporary and depending on the will of the Legislature, or permanent, and to remain in force during the term of the charter.

The court lay down the doctrine in *Charles River Bridge v. Warren Bridge*, 11 Pet., 545, that in the construction of statutes creating corporations, the rules of the common law must

govern in this country; and in the same opinion, at page 548, the court say, that the rules of construing a statute which surrenders the taxing power, are the same as those that apply to any other affecting the public interest.

In the case of *The Sutton Hospital*, Lord Coke lays down the rule of the common law in the construction of charters in the following terms, namely: "That the best exposition of the King's charter is upon the consideration of the whole charter to expound the charter by the charter itself, every material part thereof being explained according to the true and genuine sense, which is the best method." The rule of interpretation is laid down by the Supreme Court in *Charles River Bridge v. Warren Bridge*, 11 Pet., 549. Also, by Judge Story, in his dissenting opinion, at page 600. Also, in case of *Richmond Railroad Co. v. Louisa Railroad Company*, 13 How., 18.

Where a right is not given in express words by the charter, it may be deduced by interpretation, if it is clearly inferable from some of its provisions. (*Stourbridge Canal v. Wheely*, 2 Barn. & Adol., 792; *Union Bank of Tennessee v. The State*, 9 Yerg., 495.)

In adopting the rule of expounding the charter by the charter itself, the court is referred to all that part of the Act of Incorporation which is subsequent to the forty-fifth section.

In construing statutes making grants for private enterprise, it is a settled principle,

1st. That all grants for purposes of this sort are to be construed as contracts between the government and the grantee, and not as mere laws. (11 Pet., 660; *Judge Story's* opinion.)

2d. That they are to receive a reasonable construction. And if from the express words of the act, or just and plain inference from the terms used, the intent can be satisfactorily made out, it is to prevail and be carried into effect. But if the language be ambiguous, or the intent cannot be satisfactorily made out from the terms used, then the act is to be taken most strongly against the grantee and most beneficially to the public. (11 Pet., 600.)

The following points made on behalf of the defendant in error, are copied from the brief of Mr. Spaulding.

The first section of the "Act to tax banks, and § 74" and bank and other "stocks, the same as other property is now taxable by the laws of this State," passed March 21, 1851, reads as follows:

"That it shall be the duty of the president and cashier of each and every banking institution incorporated by the laws of this State, and having the right to issue bills or notes for circulation, at the time for listing personal property under the laws of this State, to list the capital stock of such banking institution, under oath, at its true value in money, and return the same, with the amount of surplus and contingent fund belonging to such banking institution, to the assessor of the township or ward in which such banking institution is located; and the amount so returned shall be placed on the grand duplicate of the proper county (and upon the city duplicate for city taxes, in cases where such city tax does not go upon the grand duplicate, but is collected by the city officers), and taxed for the same purposes and to the same extent that personal property is or may be

required to be taxed in the place where such bank is located; and such tax shall be collected and paid over in the same manner that taxes on other personal property are required by law to be collected and paid over: provided, however, that the capital stock of any bank shall not be returned or taxed for a less amount than its capital stock paid in."

The single question presented in this case is the following:

Has the Legislature of Ohio, in the enactment last recited, impaired the obligation of a contract, within the meaning of the prohibition contained in the tenth section of the first article of the Constitution of the United States.

I maintain that it has not; and, in support of my position, respectfully advance, for the consideration of the court, the following propositions:

1st. The Act of the General Assembly of the State of Ohio, entitled "An Act to incorporate the State Bank of Ohio, and other banking companies," passed February 24, 1845, is not a contract in the sense in which that term is used in the Constitution.

It is a system of rules and regulations prescribed by the law-making power in the State for the government of all the citizens of Ohio who may choose, within certain limits, to embark in the business of banking. It is as mandatory in its character as any law upon the statute book, and some of its mandates are enforced under the severest penalties known to the law. (See sec. 67.)

It is susceptible of amendment, and it has been amended, without objection, in its most important features. (46 Ohio Laws, 92; 48 *Id.*, 35.) At the time of its enactment February 24, 1845, there was a general law in force in Ohio, providing that "all subsequent corporations, whether possessing banking powers or not, were to hold their charters subject to alteration, suspension, and repeal, in the discretion of the Legislature. (Ohio Laws, Vol. XL., p. 70; *The Bank of Toledo v. The City of Toledo*, 1 Ohio St., 622, 696.)

2d. "With the sole exception of duties on imports and exports, the individual States possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants; and any attempt on the part of the national government to abridge them in the exercise of it would be a violent assumption of power unwarranted by any article or clause of its constitution." (Alexander Hamilton, No. 32, *Federalist*, p. 140.)

3d. The taxing power is of such vital importance, and is so essentially necessary to the very existence of a state government, that its relinquishment cannot be made the subject matter of a binding contract between the Legislature and individuals or corporations. It is a prerogative of sovereignty that must of necessity always be exerted according to present exigencies, and consequently must of necessity continue to be held by each succeeding Legislature, undiminished and unimpaired. (*The Mechanics' and Traders' Bank v. Henry Debolt*, 1 Ohio St., 591; *Brewster v. Hough*, 10 N. H., 138; *The Providence Bank v. Billings*, 4 Pet., 514; *The Proprietors of the Charles River Bridge v. The Proprietors of the Warren Bridge*, 11 Pet., 420, and cases therein cited; *The*

West River Bridge Company v. Dix, 6 How., 517; *The Richmond Railroad Company v. The Louisa Railroad Company*, 13 How., 71.)

4th. The sixtieth section of the "Act to incorporate the State Bank of Ohio, and other banking companies," passed February 24, 1845, provides only a measure of taxation for the time being, and does not relinquish the right to increase the rate as the future exigencies of the State may require. (*Debolt v. The Ohio Life Insurance and Trust Company*, 1 Ohio St., 576; 10 Penn. St., 442; 10 N. H., 138; 13 How., 71; 9 Ga., 517; 2 Barn. & Adol., 793; 3 Pet., 289; *Id.*, 168, 514; 11 *Id.*, 544.)

5th. The Supreme Court of Ohio has done nothing more than give a construction to a statute law of the State (the Act of 1845), that is, to say the least, somewhat ambiguous.

By this construction, the Act of March 21, 1851, does no violence to the Constitution of the United States. This court is in the habit of adopting the interpretation given by the state courts to the statutes of their own state. Surely it will not, in this instance, undertake to give a construction counter to that of the state court, [376*] when that counter construction will bring subsequent legislation of the state into conflict with the Federal Constitution. (10 Wheat., 159; 11 *Id.*, 361; 4 Pet., 127; 6 *Id.*, 291; 16 *Id.*, 18; 7 How., 40, 219, 818; 13 *Id.*, 271; 14 *Id.*, 78, 79.)

Upon the 3d point the counsel cited these further authorities: 16 Pet., 281; 8 How., 584; 10 *Id.*, 402; 4 Com., 423; 2 Denio, 474; 5 Cow., 538; 7 *Id.*, 585; 1 El. & Black., 858.

And read the following extract from Local Laws of Ohio, Vol. XLIII., p. 51:

An Act to incorporate the Milau and Richland Plank Road Company, passed January 31, 1845:

Sec. 9. "That in consideration of the expenses which said Company will necessarily incur in constructing said road, with the appurtenances thereof, and in keeping the same in repair, the said road and its appurtenances, together with all tolls and profits arising therefrom, are hereby vested in said Corporation, and the same shall be forever exempt from any tax, imposition, or assessment whatever."

An Act to incorporate the Huron Plank Road Company, passed February 19, 1845. (Local Laws, Vol. XLIII., pp. 111, 114.) The ninth section is copied exactly from the ninth section of the Milan and Richland charter.

On the 4th point: 8 How., 581; 9 *Id.*, 185; 19 Ohio, 110; 1 Ohio, 313; 4 Wheat., 235; 4 Cranch, 897; 7 How., 279; 10 *Id.*, 396.

On the 5th point: 5 How., 342.

Mr. Justice McLean delivered the opinion of the court:

This is a writ of error to the Supreme Court of the State of Ohio.

The proceeding was instituted to reverse a decree of that court, entered in behalf of Jacob Knoop, treasurer, against the Piqua Branch of the State Bank of Ohio, for a tax of \$1,266.63, assessed against the said Branch Bank for the year 1851.

By the Act of 1845, under which this Bank was incorporated, any number of individuals, not less than five, were authorized to form banking associations to carry on the business of

banking in the State of Ohio, at a place designated; the aggregate amount of capital stock in all the companies not to exceed \$6,150,000.

In the fifty-first section it is provided that every banking company authorized under the Act to carry on the business of banking, whether as a branch of the State Bank of Ohio, or as an independent banking association, "shall be held and adjudged to be a body corporate, with succession, until the 1st of May, *1866; [*377 and thereafter until its affairs shall be closed." It was made subject to the restrictions of the Act.

The fifty-ninth section requires "the directors of each banking company, semi-annually, on the first Mondays of May and November, to declare a dividend of so much of the net profits of the company as they shall judge expedient; and on each dividend day the cashier shall make out and verify by oath, a full, clear and accurate statement of the condition of the company as it shall be on that day, after declaring the dividend, and similar statements shall also be made on the first Mondays of February and August in each year." This statement is required to be transmitted to the Auditor of State.

The sixtieth section provides that each banking company under the Act, or accepting thereof, and complying with it, provisions, shall, semi-annually, on the days designated for declaring dividends, set off to the State six per cent. on the profits, deducting therefrom the expenses and ascertained losses of the company for the six months next preceding, which sum or amount so set off shall be in lieu of all taxes to which the company, or the stockholders therein, would otherwise be subject. The sum so set off to be paid to the treasurer, on the order of the Auditor of State.

The Piqua Branch Bank was organized in the year 1847, under the above Act; and still continues to carry on the business of banking, and continued to set off and pay the semi-annual amount as required; and on the first Mondays of May and November, in 1851, there was set off to the State six per cent. of the profits, deducting expenses and ascertained losses for the six months next preceding each of those days, and the cashier did, within ten days thereafter, inform the Auditor of State of the amount so set off on the 15th of November, 1851, the same amounting to \$862.50; which sum was paid to the Treasurer of State, on the order of the auditor; which payment the Bank claims was in lieu of all taxes to which the Company or its stockholders were subject for the year 1851.

On the 21st of March, 1851, an Act was passed entitled "An Act to tax banks and bank and other stocks, the same as property is now taxable by the laws of the State."

This Act provides that the capital stock of every banking company incorporated by the laws of the State, and having the right to issue bills or notes for circulation, shall be listed at its true value in money, with the amount of the surplus and contingent fund belonging to such bank; and that the amount of such capital stock, surplus, and contingent fund, should be taxed for the same purposes and to the same extent that personal property was or might be required to be taxed in the place *where such [*378 bank is located; and that such tax should be

collected and paid over in the same manner that taxes on other personal property are required by law to be collected and paid over.

In pursuance of this Act there was assessed, for the year 1851, on the capital stock, contingent and surplus fund of the Piqua Bank, a tax amounting to the sum of \$1,266.63. The bank refused to pay this tax on the ground that it was in violation of its charter. Suit was brought by the State against the Bank for this tax. The defense set up by the Bank was, that the tax imposed was in violation of its charter, which fixed the rate of taxation at six per cent. on its dividends, deducting expenses and losses; but the Supreme Court of the State sustained the Act of 1851, against the provision of the charter by which, it is insisted, the contract in the charter was impaired.

We will first consider whether the specific mode of taxation, provided in the sixtieth section of the charter, is a contract.

The operative words are, that the Bank shall, "semi-annually on the days designated in the fifty ninth section for declaring dividends, set off to the State six per cent. on the profits, deducting therefrom the expenses and ascertained losses of the company for the six months next preceding, which sum or amount so set off shall be in lieu of all taxes to which such company, or the stockholders thereof, on account of stock owned therein, would otherwise be subject."

This sentence is so explicit, that it would seem to be susceptible of but one construction. There is not one word of doubtful meaning when taken singly, or as it stands connected with the sentence in which it is used. Nothing is left to inference. The time, the amount to be set off, the means of ascertaining it, to whom it is to be paid, and the object of the payment, are so clearly stated, that no one who reads the provision can fail to understand it. The payment was to be in lieu of all taxes to which the Company or stockholders would otherwise be subject. This is the full measure of taxation on the Bank. It is in the place of any other tax which, had it not been for this stipulation, might have been imposed on the Company or stockholders.

This construction, I can say, was given to the Act by the executive authorities of Ohio, by those who were interested in the Bank, and generally by the public, from the time the Bank was organized down to the Tax Law of 1851.

In the case of *Debolt v. The Ohio Insurance and Trust Company*, 1 Ohio, 563, new series, the Supreme Court, in considering the 60th section now before us, say: "It must be admitted the section contains no language importing a **379***] surrender *of the right to alter the taxation prescribed, unless it is to be inferred from the words, 'shall be in lieu of all taxes to which such company, or the stockholders thereof, on account of stock owned therein, would otherwise be subject,' and it is frankly conceded that if these words had occurred in a general law they would not be open to such a construction. If the place where they are found is important, we have already seen this law is general in many of its provisions, and upon a general subject. Why may not this be classed with these provisions, especially in view of the fact, that in its nature it properly belongs there? We think it should be regarded as a law pre-

scribing a rule of taxation, until changed, and not a contract stipulating against any change: a legislative command and not a legislative compact with these institutions." And the court further say, "the taxes required by this Act are to be in lieu of other taxes—that is, to take the place of other taxes. What other taxes? The answer is, such as the banks or the stockholders 'would otherwise be subject to pay. The taxes to which they would be otherwise subject were prescribed by existing laws, and this, in effect, operated as a repeal of them, so far as these institutions were concerned.'"

With great respect, it may be suggested there was no general tax law existing, as supposed by the court, under which the banks chartered by the Act of 1845 could have been taxed, and on which the above provision could, "in effect, operate to repeal."

The General Tax Law of the 12th of March, 1831, which raised the tax to five per cent. on dividends, and which operated on all the banks of Ohio, except the "Commercial Bank of Cincinnati," was repealed by the Small Note Act of 1836, and that could operate only on banks doing business at the time of its passage.

The Act of the 13th of March, 1838, repealed the Act of 1836, so far "as it restricts or prohibits the issuing and circulation of small bills." The Act of 1836 authorized the Treasurer of State to draw upon the banks for the amount of twenty per cent. upon their dividends, as their proportion of the State tax; and provided that if any bank should relinquish its charter privilege of issuing bills of less denomination than three and five dollars, the tax should be reduced to five per cent. upon its dividends. As the prohibition of circulating small notes was repealed, the tax necessarily fell. Neither the twenty nor the five per cent. could be exacted. The five per cent. was a compromise for the twenty; as the twenty was repealed by the repeal of the prohibition of small notes, neither the one nor the other could be collected.

But if this were not so, the Bank Act of 1842, which imposed *a tax of one half per [**380** cent. on the capital stock of the bank, repealed, by its repugnancy, any part of the Act of 1836 which, by construction or otherwise, could be considered in force. And the Act of 1842 was repealed by the Act of 1845. There is a general Act in Ohio declaring that the repeal of an Act shall not revive any Act which had been previously repealed. (Swan's Stat., 59.)

If this statement be correct, as it is believed to be, the Legislature could not have intended, by the special provision in the sixtieth section, to exempt the Bank from tax by the existing law, as no such law existed, but to exempt from the operation of tax laws subsequently passed. This is the clear and fair import of the compact, which we think would not be rendered doubtful if a tax law had existed at the time the Act of 1845 was passed.

The 60th section is not found in a general law, as is intimated by the Supreme Court of the State. The Act of 1845 is general only in the sense, that all banking associations were permitted to organize under it; but the Act is as special to each bank as if no other institution were incorporated by it. We suppose this cannot be controverted by anyone. This view is

so clear in itself that no illustration can make it clearer.

Every valuable privilege given by the charter, and which conduced to an acceptance of it and an organization under it, is a contract which cannot be changed by the Legislature, where the power to do so is not reserved in the charter. The rate of discount, the duration of the charter, the specific tax agreed to be paid, and other provisions essentially connected with the franchise, and necessary to the business of the Bank, cannot, without its consent, become a subject for legislative action.

A municipal corporation, in which is vested some portion of the administration of the government, may be changed at the will of the Legislature. Such is a public corporation, used for public purposes. But a bank, where the stock is owned by individuals, is a private corporation. This was not denied or questioned by the counsel in argument, although it has been controverted in this case elsewhere. But this court and the courts of the different States, not excepting the Supreme Court of Ohio, have so universally held that banks, where the stock is owned by individuals, are private corporations, that no legal fact is susceptible of less doubt. *Mr. Justice Story*, in his learned and able remarks in *The Dartmouth College* case, says: "A bank created by the government for its own uses, where the stock is exclusively owned by the government is, in the strictest sense, a public corporation."

"But a bank whose stock is owned by private persons is a private corporation, although it is erected by the government, and its objects and operations partake of a public nature. The same doctrine, he says, may be affirmed of insurance, canal, bridge and turnpike companies. There can be no doubt that these definitions are sound, and are sustained by the settled principles of law."

It by no means follows that because the action of a corporation may be beneficial to the public, therefore it is a public corporation. This may be said of all corporations whose objects are the administration of charities. But these are not public, though incorporated by the Legislature, unless their funds belong to the government. Where the property of a corporation is private it gives the same character to the institution, and to this there is no exception. Men who are engaged in banking understand the distinction above stated, and also that privileges granted in private corporations are not a legislative command, but a legislative contract, not liable to be changed.

This fact is shown by the following circumstances: "An Act to regulate banking in Ohio," passed the 7th of March, 1842. The 1st section provided, "that all companies or associations of persons desiring to engage in and carry on the business of banking within this State, which may hereafter be incorporated, shall be subject to the rules, regulations, limitations, conditions, and provisions contained in this Act, and such other Acts to regulate banking as are now in force, or may hereafter be enacted, in this State."

The 20th section of that Act provided that a tax of one half per cent. per annum on its capital should be paid, and such other tax upon its capital or circulation as the General Assem-

bly may hereafter impose. An amendment to this Act was passed the 21st February, 1843; but the Act and the amendment remained a dead letter upon the statute book. No stock was subscribed under them, and they were both repealed by the Act of 1845, under which nearly three fourths of the banks in Ohio were organized. This Act contained the express stipulation that "six per cent. on the dividends, after deducting expenses and losses, should be paid in lieu of all taxes."

This compact was accepted, and on the faith of it fifty banks were organized, which are still in operation. Up to the year 1851, I believe, the banks, the profession, and the bench, considered this as a contract, and binding upon the State and the banks. For more than thirty-five years this mode of taxing the dividends of banks had been sanctioned in the State of Ohio. With few exceptions the banks were so taxed, where any tax on them was imposed. In the case of *The State of Ohio v. The Commercial Bank of Cincinnati*, 10 Ohio, 535, the Supreme Court of Ohio say, we take it to be well [*382 settled, that the charter of a private corporation is in the nature of a contract between the State and the corporation. Had there ever been any doubts upon this subject, those doubts must have been removed by the decision of the Supreme Court of the United States, in the case of *Woodward v. Dartmouth College*. And the court remark, "the General Assembly say to such persons as may take the stock, you may enjoy the privileges of banking, if you will consent to pay to the State of Ohio, for this privilege, four per cent. on your dividends, as they shall from time to time be made. The charter is accepted, the stock is subscribed, and the corporation pays, or is willing to pay, the consideration stipulated, to wit: the four per cent." And the court say, "here is a contract, specific in its terms, and easy to be understood." "A contract between the State and individuals is as obligatory as any other contract. Until a state is lost to all sense of justice and propriety, she will scrupulously abide by her contracts, more scrupulously than she will exact their fulfillment by the opposite contracting party."

This opinion commends itself to the judgment, both on account of its sound constitutional views and its elevated morality. It was pronounced at December Term, 1835. That decision was calculated to give confidence to those who were desirous to make investments in banking operations, or otherwise, in the State of Ohio.

Ten years after this opinion, and after an ineffectual attempt had been made by the Act of 1842, and its amendment in 1843, to organize banks in Ohio, without a compact as to taxation, the Act of 1845 was passed, containing a compact much more specific than that which had been sustained by the Supreme Court of the State. Under such circumstances, can the intentions of the Legislature of Ohio, in passing the Act of 1845, be doubted, or the inducements of the stockholders to vest their money under it? Could either have supposed that the 60th section proposed a temporary taxation? Such a supposition does great injustice to the Legislature of 1845. It is against the clear language of the section, which must ever shield them from the imputation of having acted in-

considerately or in bad faith. They passed the charter of 1845, which they know would be accepted, as it removed the objections to the Act of 1842.

Can the compact in the 60th section be "regarded as a law prescribing a rule of taxation until changed, and not a contract stipulating against any change; a legislative command, and not a legislative compact with these institutions?" We cannot but treat with great respect the language of the highest judicial tribunal of a state, and we would say, that in our opinion it does **383*** "not import to be a legislative command nor a rule of taxation until changed, but a contract stipulating against any change, from the nature of the language used and the circumstances under which it was adopted. According to our views, no other construction can be given to the contract, than that the tax of six per cent. on the dividends is in lieu of all subsequent taxes which might otherwise be imposed; in other words, taxes to which the Company or the stockholders would have been liable, had the specific tax on the dividends on the terms stated not been enacted.

In the opinion of the Supreme Court of the State, it is said, the 60th section, in effect, repealed the existing law under which the bank would have been taxed, and that this is the obvious application of the language used; and they add, "that the General Assembly intended only this, and did not intend it to operate upon the sovereign power of the State, or to tie up the hands of their successors, we feel fully assured. To suppose the contrary would be to impeach them of gross violation of public duty, if not usurpation of authority."

So far as regards the effect of the 60th section to repeal existing laws, if no such laws existed, it would follow that no such effect was produced, and we may presume that this was in the knowledge of the Legislature of 1845; and in saying that the compact was intended to run with the charter, we only impute to the Legislature a full knowledge of their own powers, and the highest regard to the public interest. The idea that a state, by exempting from taxation certain property, parts with a portion of its sovereignty, is of modern growth; and so is the argument that if a state may part with this in one instance it may in every other, so as to divest itself of the sovereign power of taxation. Such an argument would be as strong and as conclusive against the exercise of the taxing power. For if the Legislature may levy a tax upon property, they may absorb the entire property of the tax payer. The same may be said of every power where there is an exercise of judgment.

The Legislature of Ohio passes a Statute of Limitations to all civil and criminal actions. Is there no danger that in the exercise of this power it may not be abused? Suppose a year, a month, a week, or a day should be fixed as the time within which all actions shall be brought on existing demands, and if not so brought, the remedy should be barred. This is a supposition more probable under circumstances of great embarrassment, when the voice of the debtor is always potent, than that the Legislature will inconsiderately exempt property from taxation.

Under a Statute of Limitation, as supposed,
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the remedy of the *creditor would be [**384** cut off, unless the courts should decide that a limitation to bar the right must be reasonable, but this power could not be exercised under any constitutional provision. It could rest only on the great and immutable principles of justice, unless the time was so short as manifestly to have been intended to impair or destroy the contract. To carry on a government, a more practical view of public duties must be taken.

When the State of Ohio was admitted into the Union by the Act of the 30th of April, 1802, it was admitted under a compact that "the lands within the State sold by Congress shall remain exempt from any tax laid by or under the authority of the State, whether for state, county, township, or any other purpose whatever, for the term of five years from and after the day of sale." And yet by the same law the State "was admitted into the Union upon the same footing with the original States in all respects whatever."

Now, if this new doctrine of sovereignty be correct, Ohio was not admitted into the Union on the footing of the other sovereign States. Whatever may be considered of such a compact now, it was not held to be objectionable at the time it was made.

The assumption that a state, in exempting certain property from taxation, relinquishes a part of its sovereign power, is unfounded. The taxing power may select its objects of taxation; and this is generally regulated by the amount necessary to answer the purposes of the State. Now, the exemption of property from taxation is a question of policy and not of power. A sound currency should be a desirable object to every government; and this in our country is secured generally through the instrumentality of a well-regulated system of banking. To establish such institutions as shall meet the public wants and secure the public confidence, inducements must be held out to capitalists to invest their funds. They must know the rate of interest to be charged by the Bank, the time the charter shall run, the liabilities of the company, the rate of taxation, and other privileges necessary to a successful banking operation.

These privileges are proffered by the State, accepted by the stockholders, and in consideration funds are invested in the bank. Here is a contract by the State and the Bank, a contract founded upon considerations of policy required by the general interests of the community, a contract protected by the laws of England and America, and by all civilized States where the common or the civil law is established. In *Fletcher v. Peck*, 6 Cranch, 135. Chief Justice Marshall says, "The principle asserted is, that one Legislature is competent to repeal any act *which a former Legislature was com- [**385** petent to pass, and that one Legislature cannot abridge the powers of a succeeding Legislature."

"The correctness of this principle," he says, "so far as respects general legislation, can never be controverted. But if an act be done under a law, a succeeding Legislature cannot undo it. When, then, a law is in its nature a contract, a repeal of the law cannot divest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community."

And in another part of the opinion he says, "Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the Constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment, and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the States are obviously founded on this sentiment; and the Constitution of the United States contains what may be deemed a bill of rights for the people of each State."

"No State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligations of contracts. A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both."

In this form he says, "the power of the Legislature over the lives and fortunes of individuals is expressly restrained. What motive, then, for implying, in words which import a general prohibition to impair the obligation of contracts, an exception in favor of the right to impair the obligations of those contracts into which the State may enter?"

The history of England affords melancholy instances where bills of attainder were prosecuted in Parliament to the destruction of the lives and fortunes of some of its most eminent subjects. A knowledge of this caused a prohibition in the Constitution against such a procedure by the States.

In the case of *The State of New Jersey v. Wilson*, 7 Cranch, 164, it was held, "that a legislative Act, declaring that certain lands, which should be purchased for the Indians, should not thereafter be subject to any tax, constituted a contract which could not be rescinded by a subsequent legislative Act. Such Repealing Act being void under that clause of the Constitution of the United States which prohibits a state from passing any law impairing the obligation of contracts."

In 1758 the government of New Jersey purchased the Indians' title to lands in that State, in consideration of which the government bought a tract of land on which the Indians might reside, an Act having previously been passed that "the lands to be purchased for them shall not hereafter be subject to any tax, any law, usage or custom to the contrary thereof in any wise notwithstanding." The Indians continued in possession of the lands purchased until 1801, when they applied for and obtained an Act of the Legislature, authorizing a sale of their lands. This Act contained no provision in regard to taxation; under it the Indian lands were sold.

In October, 1804, the Legislature repealed the Act of August, 1758, which exempted these lands from taxes; the lands were then assessed, and the taxes demanded. The court held the repealing law was unconstitutional, as impairing the obligation of the contract, although the land was in the hands of the grantee of the Indians. This case shows that although a state government may make a contract to exempt property from taxation, yet the sovereignty cannot annul that contract.

In the case of *Gordon v. The Appeal Tax*, 3 How., 183, Mr. Justice Wayne, giving the opinion of the court, held, "that the charter of a bank is a franchise, which is not taxable as such, if a price has been paid for it, which the Legislature accepted. But that the corporate property of the Bank, being separable from the franchise, may be taxed, unless there is a special agreement to the contrary."

And the court say, the language of the eleventh section of the Act of 1821 is, "And be it enacted, that upon any of the aforesaid banks accepting and complying with the terms and conditions of this Act, the faith of the State is hereby pledged not to impose any further tax or burden upon them during the continuance of their charters under this Act." This, the court say, is the language of grave deliberation, pledging the faith of the State for some purpose, some effectual purpose. Was that purpose the protection of the banks from what that Legislature and succeeding Legislatures could not do, if the banks accepted the Act, or from what they might do in the exercise of the taxing power. The terms and conditions of the Act were, that the banks should construct the road and pay annually a designated charge upon their capital stocks, as the price of the prolongation of their franchise of banking. The power of the State to lay any further tax upon the franchise was exhausted. That is the contract between the State and the banks. It follows, then, as a matter of course, when the Legislature go out of the contract, proposing to pledge its faith, if the banks shall accept the Act not to impose any further tax or burden upon them, that it must have meant by these words an exemption from some other tax than a further tax upon the franchise of the banks. The latter was already provided against; and the court held that the exemption extended to the respective capital stocks of the banks as an aggregate, and to the stockholders, as persons on account of their stocks. The judgment of the Court of Appeals of Maryland, which sustained the Act imposing an additional tax on the banks, was reversed.

It will be observed that the above compact was applied to the stocks of the bank and the interest of the stockholders by construction.

The Supreme Court of Ohio say in relation to this case, that "the power to tax and the right to limit the power were both admitted by counsel, and taken for granted in the consideration of the case; and that a very large consideration had been paid for the extension of the franchise and the exemption of the stock from taxation.

In relation to the admissions of the counsel it may be said that they were men not likely to admit anything to the prejudice of their clients, which could be successfully opposed; nor would the court, on a constitutional question, rest their judgment on the admissions of counsel. Whether the consideration paid by the banks was large or small, we suppose was not a matter for the court, as the motives or consideration which induced a sovereign state to make a contract, cannot be inquired into as affecting the validity of the Act.

In the argument, the case of *The Providence Bank v. Billings*, was referred to, 4 Pet., 561. This reference impresses me with the shortness

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and uncertainty of human life. Of all the judges on this bench, when that decision was given, I am the only survivor. From several circumstances the principles of that case were strongly impressed upon my memory; and I was surprised when it was cited in support of the doctrines maintained in the case before us. The principle held in that case was, that where there was no exemption from taxation in the charter, the bank might be taxed. This was the unanimous opinion of the judges, but no one of them doubted that the Legislature had the power, in the charter or otherwise, from motives of public policy, to exempt the bank from taxation, or by compact to compose a specific tax on it. And this is clear from the language of the court.

The Chief Justice in that case says: "that the taxing power is of vital importance, that it is essential to the existence of government, are truths which it cannot be necessary to reaffirm. They are acknowledged and asserted by all. It would seem that the relinquishment of such a power is never to be presumed. No one can controvert the correctness of these axioms." *The relinquishment of such a power is never to be presumed; but this implies it may be relinquished, or taxable objects may be exempted, if specially provided for in the charter. And this is still more clearly expressed, as follows: "We will not say that a state may not relinquish it; that a consideration sufficiently valuable to induce a partial release of it may not exist; but as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of a state to abandon it does not appear."

Such a case was not then before the court. There was no provision in the Providence Bank charter which exempted it from taxation, and in that case the court could presume no such intention.

But suppose, in the language of that great man, "a consideration sufficiently valuable to induce a partial release of it, and such release had been contained in a charter; would not that have been held sufficient? And of the sufficiency of the consideration, whether it was a bonus paid by the Bank, or in supplying a sound currency, the Legislature would be the exclusive judges. This would constitute a contract which a Legislature could not impair.

The above case is a strong authority against the defendants. The Chief Justice further says, "any privileges which may exempt the corporation from the burdens common to individuals, do not flow necessarily from the charter, but must be expressed in it, or they do not exist." But if so expressed, do they not exist?

A case is cited from the *Stourbridge Canal v. Wheely*, 2 Barn. & Adol., 793, to show that no implications in favor of chartered rights are admissible. Lord Tenterden says, "that any ambiguity in the terms of the contract must operate against the adventurers, and in favor of the public; and the plaintiffs can claim nothing that is not clearly given them by the Act." In the same opinion his Lordship said: "Now, it is quite certain that the company have no right expressly to receive any compen-

sation, except the tonnage paid for goods carried through some of the canals or the locks on the canal, or the collateral cuts, and it is therefore incumbent upon them to show that they have a right clearly given by inference from some of the other clauses."

Neither this, the *Rhode Island Bank* case, nor the *Charles River Bridge* case, affords any aid to the doctrines maintained, with the single exception, that a right set up under a grant must clearly appear, and cannot be presumed; and this has not been controverted.

*That a state has power to make a [*389 contract which shall bind it in future, is so universally held by the courts of the United States and of the States, that a general citation of the authorities is unnecessary on the subject. (*Dartmouth College v. Woodward*, 4 Wheat., 518; *Terrett v. Taylor*, 9 Cranch, 43; *Town of Pawlet*, 9 Cranch, 292.)

Mr. Justice Blackstone says (2 Bl. Com., 37), "that the same franchise that has before been granted to one, cannot be bestowed on another, because it would prejudice the former grant: In *The King v. Pasmore*, 3 Term, 246, Lord Kenyon says, that an existing corporation cannot have another charter obtruded upon it, or accept the whole or any part of the new charter. The reason of this, it is said, is obvious. A charter is a contract, to the validity of which the consent of both parties is essential, and therefore it cannot be altered or added to without consent."

There is no constitutional objection to the exercise of the power to make a binding contract by a state. It necessarily exists in its sovereignty, and it has been so held by all the courts in this country. A denial of this is a denial of state sovereignty. It takes from the state a power essential to the discharge of its functions as sovereign. If it do not possess this attribute, it could not communicate it to others. There is no power possessed by it more essential than this. Through the instrumentality of contracts, the machinery of the government is carried on. Money is borrowed, and obligations given for payment. Contracts are made with individuals, who give bonds to the State. So in the granting of charters. If there be any force in the argument, it applies to contracts made with individuals, the same as with corporations. But it is said the State cannot barter away any part of its sovereignty. No one ever contended that it could.

A state, in granting privileges to a bank, with a view of affording a sound currency, or of advancing any policy connected with the public interest, exercises its sovereignty, and for a public purpose, of which it is the exclusive judge. Under such circumstances, a contract made for a specific tax, as in the case before us, is binding. This tax continues, although all other banks should be exempted from taxation. Having the power to make the contract, and rights becoming vested under it, it can no more be disregarded nor set aside by a subsequent Legislature, than a grant for land. This Act, so far from parting with any portion of the sovereignty, is an exercise of it. Can any one deny this power to the Legislature? Has it not a right to select the objects of taxation and determine the amount? To deny either of these, is to take away state sovereignty.

390*] *It must be admitted that the state has the sovereign power to do this, and it would have the sovereign power to impair or annul a contract so made, had not the Constitution of the United States inhibited the exercise of such a power. The vague and undefined and indefinable notion, that every exemption from taxation or a specific tax, which withdraws certain objects from the general tax law, affects the sovereignty of the State, is indefensible.

There has been rarely, if ever, it is believed, a tax law passed by any State in the Union, which did not contain some exemptions from general taxation. The Act of Ohio of the 25th of March, 1851, in the fifty-eighth section, declared that "the provisions of that Act shall not extend to any joint stock company which now is, or may hereafter be organized, whose charter or act of incorporation shall have guaranteed to such company an exemption from taxation, or has prescribed any other as the exclusive mode of taxing the same." Here is a recognition of the principle now repudiated. In the same Act, there are eighteen exemptions from taxation.

The federal government enters into an arrangement with a foreign state for reciprocal duties on imported merchandise, from the one country to the other. Does this affect the sovereign power of either state? The sovereign power in each was exercised in making the compact, and this was done for the mutual advantage of both countries. Whether this be done by treaty, or by law, is immaterial. The compact is made, and it is binding on both countries.

The argument is, and must be, that a sovereign state may make a binding contract with one of its citizens, and in the exercise of its sovereignty, repudiate it.

The Constitution of the Union, when first adopted, made states subject to the federal judicial power. Could a state, while this power continued, being sued for a debt contracted in its sovereign capacity, have repudiated it in the same capacity? In this respect the Constitution was very properly changed, as no state should be subject to the judicial power generally.

Much stress was laid on the argument, and in the decisions of the Supreme Court, on the fact that the banks paid no bonus for their charters, and that no contract can be binding which is not mutual.

This is a matter which can have no influence in deciding the legal question. The State did not require a bonus, but other requisitions are found in the charter, which the Legislature deemed sufficient, and this is not questionable by any other authority. The obligation is as **391*]** strong on the State, from *the privileges granted and accepted, as if a bonus had been paid.

Another assumption is made, that the banks are taxed as property is taxed in the hands of individuals. No deduction, it appears, is made from banks on account of debts due to depositors or others, whilst debts due by an individual are deducted from his credits. If this be so, it places banks on a very different footing from individuals.

The power of taxation has been compared to

that of eminent domain, and it is said, as regards the question before us, they are substantially the same. These powers exist in the same sovereignty, but their exercise involve different principles. Property may be appropriated for public purposes, but it must be paid for. Taxes are assessed on property for the support of the government under a legislative act.

We were not prepared for the position taken by the Supreme Court of Ohio, that "no control over the right of taxation by the States was intended to be conferred upon the general government by the section referred to, or any other, except in relation to duties upon imports and exports." This has never been pretended by anyone. The section referred to gives the federal government no power over taxation by a state. Such an idea does not belong to the case, and the argument used, we submit, is not legitimate. We have power only to deal with contracts under the tenth section of the first article of the Constitution, whether made by a state or an individual; if such contract be impaired by an Act of the State, such Act is void, as the power is prohibited to the State. This is the extent of our jurisdiction. As well might it be contended under the above section that no power was given to the federal government to regulate the numberless internal concerns of a state which are the subjects of contracts. With those concerns we have nothing to do; but when contracts growing out of them are impaired by an Act of the state, under the Federal Constitution we inquire whether the Act complained of is in violation of it.

The rule observed by this court to follow the construction of the statute of the State by its Supreme Court is strongly urged. This is done when we are required to administer the laws of the State. The established construction of a statute of the State is received as a part of the statute. But we are called in the case before us not to carry into effect a law of the State, but to test the validity of such a law by the Constitution of the Union. We are exercising an appellate jurisdiction. The decision of the Supreme Court of the State is before us for revision, and if their construction of the contract in question impairs its obligation, we are required to reverse their judgment. To follow the *construction of a state court in ***[392]** such a case, would be to surrender one of the most important provisions in the Federal Constitution.

There is no jurisdiction which we are called to exercise of higher importance, nor one of deeper interest to the people of the States. It is, in the emphatic language of *Chief Justice Marshall*, a bill of rights to the people of the States, incorporated into the fundamental law of the Union. And whilst we have all the respect for the learning and ability which the opinions of the judges of the Supreme Court of the State command, we are called upon to exercise our own judgments in the case.

In the discussion of the principles of this case, we have not felt ourselves at liberty to indulge in general remarks on the theory of our government. That is a subject which belongs to a convention for the formation of a constitution; and in a limited view, to the law-making power. Theories depend so much on the qual-

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ities of the human mind, and these are so diversified by education and habits as to constitute an unsafe rule for judicial action. Our prosperity, individually and nationally, depends upon a close adherence to the settled rules of law, and especially to the great fundamental law of the Union.

Having considered this case in its legal aspects, as presented in the arguments of counsel, and in the views of the Supreme Court of the State, and especially as regards the rights of the Bank under the charter, we are brought to the conclusion, that in the acceptance of the charter, on its terms, and the payment of the capital stock, under an agreement to pay six per cent. semi-annually on the dividends made, deducting expenses and ascertained losses, in lieu of all taxes, a contract was made binding on the State and on the Bank; and that the Tax Law or 1851, under which a higher tax has been assessed on the Bank than was stipulated in its charter, impairs the obligation of the contract, which is prohibited by the Constitution of the United States, and consequently, that the Act of 1851, as regards the tax thus imposed, is void.

The judgment of the Supreme Court of Ohio, in giving effect to that law, is therefore reversed.

Messrs. Justices Catron, Daniel, and Campbell, dissented.

Mr. Chief Justice Taney gave a separate opinion, as follows:

I concur in the judgment in this case. I think that by the sixtieth section of the Act of 1845, the State bound itself by contract to levy no higher tax than the one therein mentioned, upon the banks or stocks in the banks which organized under that law during the continuance of their charters. In my judgment the **393*** words used are too plain to admit of any other construction.

But I do not assent altogether to the principles or reasoning contained in the opinion just delivered. The grounds upon which I hold this contract to be obligatory on the State, will appear in my opinion in the case of *The Ohio Life Insurance and Trust Company*, also decided at the present term.

Mr. Justice Catron:

This is a contest between the State of Ohio and a portion of her banking institutions, organized under a general banking law, passed in 1845. She was then a wealthy and prosperous community, and had numerous banks which employed a large capital, and were taxed by the general laws five per cent. on their dividends, being equal to thirty cents on each hundred dollars' worth of stock, supposing it to be at par value. But this was merely a state tax, payable into the State Treasury. The old banks were liable to taxes for county purposes, besides; and when located in cities or towns, for corporation taxes also. These two items usually amounted to much more than the State tax.

Such was the condition of Ohio when the General Banking Law was passed in 1845. By this Act, any number of persons not less than five might associate together, by articles, to carry on banking.

The State was laid off into districts, and the

law prescribes the amount of stock that may be employed in each. Every county was entitled to one bank, and some to more. Commissioners were appointed to carry the law into effect. It was the duty of this Board of Control to judge of the articles of association, and other matters necessary to put the banks into operation. Any company might elect to become a branch of the State Bank, or to be a separate bank, disconnected with any other. \$50,000 was the minimum, and \$500,000 the maximum that could be employed in any one proposed institution.

By the fifty-first section, each of the banking companies authorized to carry on business was declared to be a body corporate with succession to the 1st day of May, 1866, with general banking powers; with the privilege to issue notes of one dollar and upwards, to \$100; and each bank was required to have "on hand in gold and silver coin, or their equivalent, one half at least of which shall be in gold and silver coin in its vault, an amount equal to thirty per cent. of its outstanding notes of circulation;" and whenever the specie on hand, or its equivalent, shall fall below twenty per cent. of the outstanding notes, then no more notes [*394 shall be circulated." The equivalent to specie, meant deposits that might be drawn against in the hands of eastern banks, or bankers of good credit. In this provision constituted the great value of the franchise.

The 59th section declares that semi annual dividends shall be made by each bank of its profits, after deducting expenses; and the 60th section provides, that six per cent. per annum of these profits shall be set off to the State, "which sum or amount so set off shall be in lieu of all taxes to which such company, or the stockholders thereof an account of stock owned therein, would otherwise be subject." This was equal to thirty-six cents per annum on each hundred dollars of stock subscribed, surpassing it to yield six per cent. interest.

By an Act of 1851, it was declared that bank stock should be assessed at its true value, and that it should be taxed for state, county and city purposes, to the same extent that personal property was required to be taxed at the place where the bank was located. As this rate was much more than that prescribed by the 60th section of the Act of 1845, the Bank before us refused to pay the excess, and suffered herself to be sued by the tax collector, relying on the 60th section, above recited, as an irrevocable contract, which stood protected by the Constitution of the United States.

It is proper to say that the trifling sum in dispute in this cause is the mere ground of raising the question between the State of Ohio and some fifty of her banks, claiming exemption under the Act of 1845.

The taxable property of these banks is about \$18,000,000, according to the auditor's report of last year, and which was used on the argument of this cause, by both sides. Of course, the state officers and other tax payers assailed the corporations claiming the exemption, and various cases were brought before the Supreme Court of Ohio, drawing in question the validity of the Act of 1851 in so far as it increased the taxes of the banks beyond the amount imposed by the 60th section of the Act

of 1845. The State Court sustained the Act of 1851, from which decision a writ of error was prosecuted, and the cause brought to this court.

The opinions of the State Court have been laid before us for our consideration; and on our assent or dissent to them, the case depends.

The first question made and decided in the Supreme Court of Ohio, was whether the 60th section of the Act of 1845, purported to be, in its terms, a contract not further to tax the banks organized under it during the entire term of their existence. The court held that it imported no such contract; and with this opinion I concur.

395*] *The question was examined by the judge who delivered the unanimous opinion of the court, in the case of *Debolt v. The Ohio Life Insurance and Trust Company*, 1 Ohio, 564, with a fairness, ability and learning, calculated to command the respect of all those who have his opinion to review: and which opinion has, as I think, construed the 60th section truly. But, as my brother Campbell has rested his opinion on this section without going beyond it, and as I concur in his views, I will not further examine that question, but adopt his opinion in regard to it.

The next question, decided by the State Court, is of most grave importance: I give it in the language of the State Court: "Had the General Assembly power, under the constitution then in force, permanently to surrender, by contract, within the meaning and under the protection of the Constitution of the United States, the right of taxation over any portion of the property of individuals, otherwise subject to it?" On which proposition the court proceeds to remark:

"Our observations and conclusions upon this question, must be taken with reference to the unquestionable facts, that the Act of 1851 was a *bona fide* attempt to raise revenue by an equal and uniform tax upon property, and contained no covert attack upon the franchises of these institutions. That the surrender did not relate to property granted by the State, so as to make it a part of the grant for which a consideration was paid; the State having granted nothing but the franchise, and the tax being upon nothing but the money of individuals invested in the stock; and that no bonus or gross sum was paid in hand for the surrender, so as to leave it open to controversy, that reasonable taxes, to accrue in future, were paid in advance of their becoming due. (What effect a different state of facts might have, we do not stop to inquire. Indeed, if the attempt has here been made, it is a naked release of sovereign power without any consideration or attendant circumstance to give it strength or color; and, so far as we are advised, it is the first instance where the rights and interests of the public have been entirely overlooked.)"

"Under these circumstances, we feel no hesitation in saying the General Assembly was incompetent to such a task. This conclusion is drawn from a consideration of the limited authority of that body, and the nature of the power claimed to be abridged.

That political sovereignty, in its true sense, exists only with the people, and that government is "founded on their sole authority," and subject to be altered, reformed, or abolished

only by them, is a political axiom upon which all the American governments have [*396 been based, and is expressly asserted in the bill of rights. Such of the sovereign powers with which they were invested, as they deem necessary for protecting their rights and liberties, and securing their independence, they have delegated to governments created by themselves, to be exercised in such manner and for such purposes as were contemplated in the delegation. That these powers can neither be enlarged or diminished by these repositories of delegated authority, would seem to result, inevitably, from the fundamental maxim referred to, and to be too plain to need argument or illustration.

If they could be enlarged, government might become absolute: if they could be diminished or abridged, it might be stripped of the attributes indispensable to enable it to accomplish the great purposes for which it was instituted. And in either event the constitution would be made either more or less than it was when it came from the hands of its authors; being changed and subverted without their action or consent. In the one event its power for evil might be indefinitely enlarged; while in the other its capacity for good might be entirely destroyed; and thus become either an engine of oppression, or an instrument of weakness and pusillanimity.

The government created by the constitution of this State (Ohio), although not of enumerated, is yet one of limited powers. It is true, the grant to the General Assembly of "legislative authority" is general; but its exercise within that limit is necessarily restrained by the previous grant of certain powers to the federal government, and by the express limitations to be found in other parts of the instrument. Outside of that boundary, it needed no express limitations, for nothing was granted. Hence this court held, in *Cincinnati, Wilmington, &c. v. R. R. v. Clinton Co.*, 1 Ohio, 77, that any Act passed by the General Assembly not falling fairly within the scope of "legislative authority," was as clearly void as though expressly prohibited. So careful was the convention to enforce this principle, and to prevent the enlargement of the granted powers by construction or otherwise, that they expressly declared in art. 8, sec. 28—"To guard against the transgression of the high powers we have delegated, we declare that all powers, not hereby delegated, remain with the people." When, therefore, the exercise of any power by that body is questioned, its validity must be determined from the nature of the power, connected with the manner and purpose of its exercise. What, then, is the taxing power? And to what extent, and for what purposes has it been conferred upon the Legislature? That it is a power incident to sovereignty—"a power of vital importance to the very existence of every government"—has been as often declared as it has been spoken of. [*397 Its importance is not too strongly represented by Alexander Hamilton, in the 30th number of the *Federalist*, when he says: "Money is with propriety considered as the vital principle of the body politic; as that which sustains its life and motion, and enables it to perform its most important functions. A complete power, therefore, to procure a regular and adequate supply

of revenue, as far as the resources of the community will permit, may be regarded as an indispensable ingredient in every constitution. From a deficiency in this particular, one of two evils must ensue; either the people must be subjected to continual plunder, as a substitute for a more eligible mode of supplying the public wants, or the government must sink into a fatal atrophy, and in a short course of time perish."

"This power is not to be distinguished, in any particular material to the present inquiry, from the power of eminent domain. Both rest upon the same foundation—both involve the taking of private property—and both, to a limited extent, interfere with the natural right guaranteed by the constitution, of acquiring and enjoying it. But, as this court has already said, in the case referred to, "neither can be classed amongst the independent powers of government, or included in its objects and ends." No government was ever created for the purpose of taking, taxing, or otherwise interfering with the private property of its citizens. "But charged with the accomplishment of great objects necessary to the safety and prosperity of the people, these rights attach as incidents to those objects, and become indispensable means to the attainment of those ends." They can only be called into being to attend the independent powers, and can never be exercised without an existing necessity.

"To sustain this power in the General Assembly, would be to violate all the great principles to which I have alluded. It would affirm its right to deal in, and barter away the sovereign right of the State, and thereby, in effect, to change the Constitution. When the General Assembly of 1845 convened, it found the State in the unquestionable possession of the sovereign right of taxation, for the accomplishment of its lawful objects, extending to all the persons and property belonging to the body politic."

When its successor convened, in 1846, under the same constitution, and to legislate for the same people, if this defense is available, it found the State shorn of this power over fifteen or twenty millions of property, still within its jurisdiction and protected by its laws. This and each succeeding Legislature had the same power to surrender the right, as to any and all other property; until at length the government, deprived of everything upon which it could [*398] operate, to raise the means to attain *its necessary ends, by the exercise of its granted powers, would have worked its own inevitable destruction, beyond all power of remedy, either by the Legislature or the people. It is no answer to this to say that confidence must be reposed in the legislative body, that it will not thus abuse the power.

"But, in the language of the court, in *McCulloch v. Maryland*, 4 Wheat., 316, 'is this a case of confidence?'"

"For every surrender of the right to tax particular property not only tends to paralyze the government, but involves a direct invasion of the rights of property, of the balance of the community; since the deficiency thus created must be made up by larger contributions from them, to meet the public demand."

The foregoing are some of the reasonings of
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the state court on the consideration here involved. With these views I concur, and will add some of my own. The first is, "That acts of Parliament derogatory from the power of subsequent Legislatures are not binding. Because (as Blackstone says), the Legislature being in truth the sovereign power, is always equal, always absolute; and it acknowledges no superior on earth, which the prior Legislature must have been if its ordinances could bind a subsequent Parliament. And upon the same principle Cicero, in his letters to Atticus, treats with proper contempt these restraining clauses which endeavor to tie up the hands of succeeding Legislatures. When you repeal the law itself, says he, you at the same time repeal the prohibitory clause which guards against repeal."

If this is so under the British government, how is it in Ohio? Her Supreme Court holds that the State constitution of 1803 expressly prohibited one Legislature from restraining its successors by the indirect means of contracts exempting certain property from taxation. The court says, Power to exempt property was reserved to the people; they alone could exempt, by an organic law. That is to say, by an amended constitution. The clause mainly relied on declares "that all powers not delegated, remain with the people." Now, it must be admitted that this clause has a meaning; and it must also be conceded (as I think) that the Supreme Court of Ohio has the uncontrollable right to declare what that meaning is; and that this court has just as little right to question that construction as the Supreme Court of Ohio has to question our construction of the Constitution of the United States.

In my judgment the construction of the court of Ohio is proper; but if I believed otherwise I should at once acquiesce. Let us look at the matter fairly and truly as it is, and see what a different course on part of this court would lead to: nay, what Ohio is bound to do in self defense and for self-preservation, under the circumstances.

*In 1845 a general banking law is [*399] sought at the hands of the Legislature, where \$5.00 in paper can be circulated for every dollar in specie in the Bank, or on deposit; in eastern banks or with brokers. \$1.00 notes are authorized; every county in the State is entitled to a bank, and the large ones to several; the tempting lure is held out of six per cent. interest on \$500 for every hundred dollars paid in as stock: thus obtaining a profit of \$24 on each hundred dollars actually paid in. That such a bill would have advocates enough to pass it through the Legislature, all experience attests; and that the slight tax of thirty-six cents on each hundred dollars' worth of stock, subscribed and paid, was deemed a privilege, when the existing banks and other property were taxed much higher is plainly manifest. As was obvious, when the law passed, banks sprang up at once—some fifty in number having a taxable basis last year of about eighteen millions. The elder and safer banks were, of course, driven out, and new organizations sought under the general law, by the stockholders. From having constructed large public works, and made great expenditures, Ohio has become indebted so as to require a very

burdensome tax on every species of property; this was imposed by the Act of 1851, and on demanding from these institutions their equal share, the State is told that they were protected by a contract made with the Legislature of 1845, to be exempt from further taxation, and were not bound by the late law, and, of course, they were sued in their own courts. The Supreme Court holds that by the express terms of the State constitution no such contract could be made by the Legislature of 1845, to tie up the hands of the Legislature of 1851. And then the banks come here and ask our protection against this decision, which declares the true meaning of the State constitution. It expressly guarantees to the people of Ohio the right to assemble, consult, and instruct their representatives for their common good; and then "to apply to the Legislature for a redress of grievances." It further declares, that all powers not conferred by that constitution on the Legislature are reserved to the people. Now, of what consequence or practical value will these attempted securities be, if one Legislature can restrain all subsequent ones by contracting away the sovereign power to which instructions could apply?

The question, whether the people have reserved this right so as to hold it in their own hands, and thereby be enabled to regulate it by instructions to a subsequent Legislature (or by a new constitution), is a question that has been directly raised only once, in any State of the Union, so far as I know. In the case of *Brewster 400** v. *Hough*, 10 N. H., 139, it was raised, and *Chief Justice Parker*, in delivering the opinion of the court in a case in all respects like the one before us, says, "That it is as essential that the public faith should be preserved inviolate as it is that individual grants and contracts should be maintained and enforced. But there is a material difference between the right of a Legislature to grant lands or corporate powers, or money, and a right to grant away the essential attributes of sovereignty or rights of eminent domain. These do not seem to furnish the subject matter of a contract."

This court sustained the principle announced by the Supreme Court of New Hampshire, in *The West River Bridge* case. A charter for one hundred years, incorporating a bridge company had been granted; the bridge was built and enjoyed by the Company. Then another law was passed authorizing public roads to be laid out, and free bridges to be erected; the commissioners appropriated the West River Bridge and made it free; the Supreme Court of Vermont sustained the proceeding on a review of that decision. And this court held that the first charter was a contract securing the franchises and property in the bridge to the Company; but that the first Legislature could not cede away the sovereign right of eminent domain, and that the franchises and property could be taken for the uses of free roads and bridges, on compensation being made.

Where the distinction lies, involving a principle between that case and this, I cannot perceive, as every tax payer is compensated by the security and comfort government affords. The political necessities for money are constant and more stringent in favor of the right of taxation;

its exercise is required daily to sustain the government. But in the essential attributes of sovereignty the right of eminent domain and the right of taxation are not distinguishable.

If *The West River Bridge* case be sound constitutional law (as I think it is), then it must be true that the Supreme Court of Ohio is right in holding that the Legislature of 1845 could not deprive the Legislature of 1851 of its sovereign powers or of any part of them.

It is insisted, that the case of *The State of Ohio v. The Commercial Bank of Cincinnati*, 7 Ohio, 125, has held otherwise. This is clearly a mistake. The State in that case raised no question as to the right of one Legislature to cede the sovereign power to a corporation, and tie up the hands of all subsequent Legislatures: no such constitutional question entered into the decision; nor is any allusion made to it in the opinion of the court. It merely construed the Acts of Assembly, and held that a contract did exist on the ground that by the charter the Bank was taxed four per cent.; and therefore the charter must be enforced, as this [*401 rate of taxation adhered to the charter, and excluded a higher imposition.

It would be most unfortunate for any court, and especially for this one, to hold that a decision affecting a great constitutional consideration, involving the harmony of the Union (as this case obviously does), should be concluded by a decision in a case where the constitutional question was not raised by counsel; and so far from being considered by the court, was never thought of: such a doctrine is altogether inadmissible. And in this connection I will say, that there are two cases decided by this court (and relied on by the plaintiff in error), in regard to which similar remarks apply. The first one is that of *New Jersey v. Wilson*, 7 Cranch, 164. An exchange of lands took place in 1758 between the British colony of New Jersey and a small tribe of Indians residing there. The Indians had the land granted to them by an Act of the Colonial Legislature, which exempted it from taxes. They afterwards sold it, and removed. In 1804 the State Legislature taxed these lands in the hands of the purchasers; they were proceeded against for the taxes, and a judgment rendered, declaring the Act of 1804 valid. In 1812, the judgment was brought before this court, and the case submitted on the part of the plaintiff in error without argument; no one appearing for New Jersey. This court held the British contract with the Indians binding; and second, that it run with the land, which was exempt from taxation in the hands of the purchasers.

No question was raised in the Supreme Court of New Jersey, nor decided there, or in this court, as to the constitutional question of one Legislature having authority to deprive a succeeding one of sovereign power. The question was not considered, nor does it seem to have been thought of in the State Court or here.

The next case is *Gordon's case*, 3 How., 144. What questions were there presented on the part of the State of Maryland, does not appear in the report of the case, but I have turned to them in the record, to see how they were made in the state courts. They are as follows:

"1st. That at the time of passing the general assessment law of 1841, there was no con-

tract existing between the State and the banks, or any of them, or the stockholders therein or any of them, by which any of the banks or stockholders can claim an exemption from the taxation imposed upon them by the said Act of 1841."

"2d. That the contract between the State and the old banks, if there be any contract, extends only to an exemption from further 'taxes or burdens,' of the corporate privileges of bank-**402**]; *and does not exempt the property, either real or personal, of said banks, or the individual stockholders therein."

"3d. That even if the contract should be construed to exempt the real and personal property of the old banks, and the property of the stockholders therein, yet such exemption does not extend to the new banks, or those chartered since 1830, and, moreover, that the power of revocation, in certain cases in these charters, reserves to the State the power of passing the general assessment law."

"4th. That the imposition of a tax of 20 cents upon every one hundred dollars' worth of property, upon both the old and new banks, under the said assessment law, is neither unequal nor oppressive, nor in violation of the bill of rights."

"5th. That taxation upon property within the State, wherever the owners may reside, is not against the bill of rights."

On these legal propositions the opinion here given sets out by declaring that, "The question, however, which this court is called on to decide, and to which our decision will be confined, is—Are the shareholders in the old and new banks, liable to be taxed under the Act of 1841, on account of the stock which they own in the banks."

The following paragraph is the one relied on as adjudging the question, that the taxing power may be embodied in a charter and contracted away as private property, to wit: "Such a contract is a limitation on the taxing power of the Legislature making it, and upon succeeding Legislatures, to impose any further tax on the franchise."

"But why, when bought, as it becomes property, may it not be taxed as land is taxed which has been bought from the State, was repeatedly asked in the course of the argument. The reason is, that everyone buys land, subject in his own apprehension to the great law of necessity, that we must contribute from it and all of our property something to maintain the State. But a franchise for banking, when bought, the price is paid for the use of the privilege whilst it lasts, and any tax upon it would substantially be an addition to the price."

As the case came up from the Supreme Court of Maryland, this court had power to re-examine the questions raised in the court below, and decided there. All that is asserted in the opinion beyond this is outside of the case of which this court had jurisdiction, and is only so far to be respected as it is sustained by sound reasoning; but its *dicta* are not binding as authority; and so the Supreme Court of Maryland held in the case of *The Mayor, &c., of Baltimore v. The Baltimore and Ohio Railroad Co.*, 6 Gill, 288.

The State of Maryland merely asked to have **403**]* her statutes *construed, and if, by their HOWARD 16.

true terms, she had promised to exempt the stockholders of her banks from taxation, then she claimed no tax of them. She took no shelter under constitutional objections, but guardedly avoided doing so.

If an expression of opinion is authority that binds, regardless of the case presented, then we are as well bound the other way, by another quite equal authority. In the case of *East Hartford v. Hartford Bridge Co.*, 10 How., 535, Mr. Justice Woodbury, delivering the opinion of the court, says: "The case of *Gonzalez v. The Corporation of Georgetown*, 6 Wheat., 596, 598, appears to settle the principle that a legislative body cannot part with its powers by any proceeding so as not to be able to continue the exercise of them. It can, and should, exercise them again and again, as often as the public interest require." * * *

"Its members are made, by the people, agents or trustees for them, on this subject, and can possess no authority to sell or grant their power over the trust to others."

The *Hartford* case was brought here from the Supreme Court of Connecticut, by writ of error, on the ground that East Hartford held a ferry right secured by a legislative act that was a private contract. But this court held, among other things, that by a true construction of the State laws, no such contract existed; so that this case cannot be relied on as binding authority more than *Gordon's* case. If fair reasoning and clearness of statement are to give any advantage, then the *Hartford* case has that advantage over *Gordon's* case.

It is next insisted that the State Legislatures have in many instances, and constantly, discriminated among the objects of taxation; and have taxed and exempted according to their discretion. This is most true. But the matter under discussion is aside from the exercise of this undeniable power in the Legislature. The question is whether one Legislature can, by contract, vest the sovereign power of a right to tax, in a corporation as a franchise, and withhold the same power that Legislature had to tax, from all future ones? Can it pass an irrepealable law of exemption?

General principles, however, have little application to the real question before us, which is this: Has the constitution of Ohio withheld from the Legislature the authority to grant, by contract with individuals, the sovereign power; and are we bound to hold her constitution to mean as her Supreme Court has construed it to mean. If the decisions in Ohio have settled the question in the affirmative that the sovereign political power is not the subject of an irrepealable contract, then few will be so bold as to deny that it is our duty to conform to the construction they have settled; and the only objection to conformity *that I suppose [**404**] could exist with anyone is, that the construction is not settled. How is the fact?

The refusal of some fifty banks to pay their assessed portion of the revenue for the year 1851, raised the question for the first time in the State of Ohio; since then the doctrine has been maintained in various cases, supported unanimously by all the judges of the Supreme Court of that State, in opinions deeply considered, and manifesting a high degree of ability in the judges, as the extract from one of them, above

set forth, abundantly shows. If the construction of the State constitution is not settled, it must be owing to the recent date of the decisions. An opinion proceeding on this hypothesis will, as I think, involve our judgment, now given in great peril, hereafter; for if the courts of Ohio do not recede, but firmly adhere to their construction until the decisions, now existing, gain maturity and strength by time, and the support of other adjudications conforming to them, then it must of necessity occur that this court will be eventually compelled to hold that the construction is settled in Ohio; when it must be followed to avoid conflict between the judicial powers of that State and the Union, an evil that prudence forbids.

1. The result of the foregoing opinion is, that the sixtieth section of the General Banking Law of 1845 is, in its terms, no contract professing to bind the Legislature of Ohio not to change the mode and amount of taxation on the banks organized under this law; and for this conclusion I rely on the reasons stated by my brother Campbell, in his opinion, with which I concur.

2. That, according to the constitutions of all the States of this Union, and even of the British Parliament, the sovereign political power is not the subject of contract so as to be vested in an irrevocable charter of incorporation, and taken away from, and placed beyond the reach of, future Legislatures; that the taking power is a political power of the highest class, and each successive Legislature having vested in it, unimpaired, all the political powers previous Legislatures had, is authorized to impose taxes on all property in the State that its constitution does not exempt.

It is undeniably true that one Legislature may by a charter of incorporation exempt from taxation the property of the corporation in part, or in whole, and with or without consideration; but this exemption will only last until the necessities of the State require its modification or repeal.

3. But if I am mistaken in both these conclusions, then I am of opinion, that by the express provisions of the constitution of Ohio, of 1802, the Legislature of that State had with-
405*] held *from its powers the authority to tie up the hands of subsequent Legislatures in the exercise of the powers of taxation, and this opinion rests on judicial authority that this court is bound to follow; the Supreme Court of Ohio having held by various solemn and unanimous decisions, that the political power of taxation was one of those reserved rights intended to be delegated by the people to each successive Legislature, and to be exercised alike by every Legislature according to the instructions of the people. This being the true meaning of the nineteenth and twenty-eighth sections of the bill of rights, forming a part of the constitution of 1802; one section securing the right of instructing representatives, and the other protecting reserved rights held by the people.

Whether this construction given to the State constitution is the proper one, is not a subject of inquiry in this court; it belongs exclusively to the state courts, and can no more be questioned by us than state courts and judges can question our construction of the Constitution of the United States.

For these reasons I am of opinion that the judgment of the Supreme Court of Ohio should be affirmed.

Mr. Justice Daniel:

In the views so clearly taken by my brother Campbell of the character of the legislation of Ohio, impeached by the decision of the court, I entirely coincide. I will add to the objections he has so well urged to the jurisdiction of this court, another, which to my mind at least is satisfactory; it is this, that one of the parties to this controversy being a corporation created by a State, this court can take no cognizance, by the constitution, of the acts, or rights, or pretensions of that corporation.

Mr. Justice Campbell:

I dissent from the opinion of the court.

The question disclosed by the record is contained in the sixtieth section of an Act of the General Assembly of Ohio, "to incorporate the State Bank of Ohio and other banking companies of that State," adopted February, 1845.

The sections provides, that every banking company organized by the Act, or complying with its provisions, shall semi-annually, at designated days, set off to the State six per cent. of the net profits for the six months next preceding, "which sum or amount so set off shall be in lieu of all taxes to which such company, or the stockholders thereof, on account of stock owned therein, would otherwise be subject;" and the cashier was required to report the amount to the auditor and to pay it to the treasurer; but in computing the profits of the company for the purposes *aforesaid, [*406 the interest received on the certificates of the funded debt held by the company, or deposited with and transferred to the Treasurer of the State, or to the board of control by such company, shall not be taken into the account." I have extracted the last clause merely because it forms a part of the section.

It is not usual for governments to levy taxes upon the certificates of their funded debt, and Ohio had, in an early statute, forbidden taxation of hers. This clause was a cumulative precaution, wholly unnecessary. (Swan. Stat., 747, sec. 5).

The case lies in the solution of the question whether the clause directing the banks to set apart semi-annually, upon the profits for the six months preceding, six per cent. in lieu of all other taxes to which the company or stockholders would otherwise be subject on account of the stock, institutes an unalterable rule of taxation for the whole time of the corporate existence of these banks. The General Assembly of Ohio thinks otherwise, and has imposed a tax upon the stock of the banks, corresponding with the taxes levied upon other personal property held in the State. The payment of this tax has been resisted by the banks. The Supreme Court of Ohio, by its judgment, affirms the validity of the Act of the General Assembly, and has condemned the Bank to the payment. This judgment is the matter of consideration.

The section of the Act above cited furnishes a rule of taxation, and while it remains in force a compliance with it relieves the banks

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from all other taxes to which they would otherwise be subject. Such is the letter of the section.

The question is, has the State of Ohio inhibited herself from adopting any other rule of taxation either for amount or mode of collection, while these banks continue in existence. It is not asserted that such a prohibition has been imposed by the express language of the section. The term for which this rule of taxation is to continue is not plainly declared. The amounts paid according to it discharge the taxes for the antecedent six months. Protection is given in advance of exaction.

The clause in the section, that this "sum or amount, so set off, shall be in lieu of all taxes to which such company or the stockholders thereof would otherwise be subject," requires an addition to ascertain the duration of the rule. It may be completed in adding, "by the existing laws for the taxation of banks," or "till otherwise provided by law," or at "the date of such apportionment or dividend." Or, following the argument of the banks, in adding, "during the existence of the banks." Whether we shall select from the one series of expressions, leading to one result, or the expression leading to another altogether different, depends upon the rules of interpretation applicable to the subject.

407*] "The first inquiries are of the relations of the parties to the supposed contract to its subject matter, and the form in which it has been concluded. The sixtieth section of the Act of 1845, was adopted by the General Assembly of Ohio in the exercise of legislative powers, as a part [of] its public law. The powers of that Assembly in general, and that of taxation especially, are trust powers, held by them as magistrates, in deposit, to be returned, after a short period, to their constituents without abuse or diminution.

The nature of the legislative authority is inconsistent with an inflexible stationary system of administration. Its office is one of vigilance over the varying wants and changing elements of the association, to the end of ameliorating its condition. Every General Assembly is organized with the charge of the legislative powers of the State; each is placed under the same guidance, experience and observation; and all are forbidden to impress finally and irrevocably their ideas or policy upon the political body. Each, with the aid of an experience, liberal and enlightened, is bound to maintain the State in the command of all the resources and faculties necessary to a full and unshackled self-government. No implication can be favored which convicts a Legislature of a departure from this law of its being.

The subject matter of this section is the contributive share of an important element of the productive capital of the State to the support of its government. The duty of all to make such a contribution in the form of an equal and apportioned taxation, is a consequence of the social organization. The right to enforce it is a sovereign right, stronger than any proprietary claim to property. The amount to be taken, the mode of collection, and the duration of any particular assessment or form of collection, are questions of administration submitted to the discretion of the legislative authority;

and variations must frequently occur, according to the mutable conditions, circumstances or policy of the State. These conditions are regulated for the time, in the sixtieth section of this Act. That section comes from the law-maker, who ordains that the officers of certain banking corporations, at stated periods, shall set apart from their property a designated sum as their share of the public burden, in lieu of other sums or modes of payment to which they would be subject; but there is no promise that the same authority may not, as it clearly had a right to do, apportion a different rate of contribution. I will not say that a contract may not be contained in a law, but the practice is not to be encouraged, and courts discourage the interpretation which discovers them. A common informer sues for a penalty, or a revenue officer makes a seizure under a promise that on conviction the recovery shall be shared, and yet the State *discharges the for- [*408 feiture, or prevents the recovery by a repeal of the law, violating thereby no vested right nor impairing the obligation of any contract. (5 Cranch, 281; 10 Wheat., 246; 6 Pet., 404.)

A captor may be deprived of his share of prize money, pensioners of their promised bounty, at any time before their payment. (2 Russ. & M., 85.)

Salaries may be reduced, offices having a definite tenure, though filled, may be abolished, faculties may be withdrawn, the inducements to vest capital impaired and defeated by the varying legislation of a state, without impairing constitutional obligation. (8 How., 163; 10 Ib., 395; 3 Ib., 534; 8 Pet., 88; 2 Sanf. S. C., 355.) The whole society is under the dominion of law, and acts, which seem independent of its authority, rest upon its toleration. The multifarious interests of a civilized state must be continually subject to the legislative control. General regulations, affecting the public order, or extending to the administrative arrangements of the State, must overrule individual hopes and calculations, though they may have originated in the legislation. It is only when rights have vested under laws that the citizen can claim a protection to them as property. Rights do not vest until all the conditions of the law have been fulfilled with exactitude during its continuance, or a direct engagement has been made, limiting legislative power over and producing an obligation. In this case it may be conceded that at the end of every six months the payment then taken is a discharge for all antecedent liabilities for taxes; that there could be no retrospective legislation. But beyond this the concessions of the section do not extend.

A plain distinction exists between the statutes which create hopes, expectations, faculties, conditions, and those which form contracts. These banks might fairly hope that without a change in the necessities of the State, their quota of taxes would not be increased; and that while payment was punctually made the form of collection would not be altered. But the General Assembly represents a sovereign, and as such designated this rule of taxation upon existing considerations of policy without annexing restraints on its will, or abdicating its prerogative, and consequently was free to modify, alter or repeal the entire disposition.

I have thus far considered the sixtieth section of the Act as a distinct act, embodying a state regulation with the view of ascertaining its precise limitations.

I shall, however, examine the general scheme and object of the Act, of which it forms a part, to ascertain whether a different signification can be given to it. Before doing so, it is a matter of consequence to ascertain on what principles the inquiry must be conducted.

409*] *Three cases occurred in this court, before either of the members who now compose it belonged to it, in which taxation Acts of the States or its municipal authorities, involving questions of great feeling and interest, were pronounced invalid. In the last of these the court said, "that in a society like ours, with one supreme government for national purposes, and numerous State governments for other purposes, in many respects independent and in the uncontrolled exercise of many important powers, occasional interferences ought not to surprise us. The power of taxation is one of the most essential to a state, and one of the most extensive in its operation. The attempt to maintain a rule which shall limit its exercise is undoubtedly among the most delicate and difficult duties which can devolve on those whose province it is to expound the supreme law of the land, in its application to individuals." The court in each of these cases affirm, "that the sovereignty of the State extends to everything which exists by its authority, or is introduced by its permission, and all on subjects of taxation." (2 Pet., 449; 9 Wheat., 738; 4 Ib., 316.)

The limitations imposed by the court in those cases excited a deep and pervading discontent, and must have directed the court to a profound consideration of the question in its various relations. The case of *The Providence Bank v. Billings*, 4 Pet., 514, enabled the court to give a practical illustration of sincerity with which the principle I have quoted was declared. A bank, existing by the authority of a state Legislature, claimed an immunity from taxation against the authority of its creator.

The court then said "however absolute the right of an individual (to property) may be, it is still in the nature of that right, that it must bear a portion of the public burdens, and that portion is determined by the Legislature." The court declared that the relinquishment of the power of taxation is never to be assumed. "The community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not plainly appear."

The principles were re-affirmed, their sphere enlarged, and their authority placed upon broad and solid foundations of constitutional law and general policy, in the opinion of this court, in the case of *The Charles River Bridge*, 11 Pet., 420. No opinion of the court more fully satisfied the legal judgment of the country, and consequently none has exercised more influence upon its legislation. The Supreme Court of Pennsylvania, speaking of these cases, says, "they are binding on the state courts not merely as precedents, and therefore proving what law is, but as the deliberate judgment of 410*] that tribunal *with whom the final decisions of all such questions rests. The state

courts have almost universally followed them. But no tribunal of the Union has acceded to the rule they lay down with a more earnest appreciation of its justice than did this court." (7 Harr., 144; 10 Barr, 142.)

The Supreme Court of Georgia says, "the decision, based as it is upon a subject particularly within the cognizance of jurisdiction of the Supreme Court of the United States, is entitled to the highest deference." And the eminent Chief Justice of that court adds, "that the proposition it establishes commands my entire assent and approbation." (9 Ga., 517; 10 N. H., 138; 17 Conn., 454; 21 Vt., 590; 21 Ohio, McCook's Rep., 564; 9 Ala., 235; 9 Rob., 324; 4 Coms., 419; 6 Gill, 288.)

The Chief Justice, delivering the opinion of this court in that case, quotes with approbation the principle, that the abandonment of the power of taxation ought not to be presumed in a case in which the deliberate purpose to do so did not appear, and says, "The continued existence of a government would be of no great value, if, by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creations, and the functions it was designed to perform transferred to the hands of privileged corporations. The rule of construction announced by the court was not confined to the taxing power; nor is it so limited in the opinion delivered. On the contrary it was distinctly placed on the ground that the interests of the community were concerned in preserving undiminished the power in question; and whenever any power of the state is said to be surrendered or diminished, whether it be the taxing power or any other affecting the public interest, the same principle applies, and the rule of construction must be the same."

The court only declared those principles for which the commons of England had struggled for centuries, and which were only established by magnanimous and heroic efforts. The rules that public grants convey nothing by implication, are construed strictly in favor of the sovereign, do not pass anything not described nor referred to, and when the thing granted is described, nothing else passes; that general words shall never be so construed as to deprive him of a greater amount of revenue than he intended to grant, were not the inventions of the craft of the crown lawyers, but were established in contests with crown favorites, and impressed upon the administration, executive and judicial as checks for the people. The invention of crown lawyers was employed about such phrases, as *ex speciali gratia, certa scientia mero motu*, and *non obstante*, to undermine the strength of such rules, and to enervate the force of wholesome statutes. A writer of the seventeenth century says, "from the time of William *Rufus, our kings have thought they [*411 might alienate and dispose of the crown lands at will and pleasure; and in all ages, not only charters of liberty, but likewise letters patent for lands and manors, have actually passed in every reign. Nor would it have been convenient that the prince's hand should have been absolutely bound up by any law, or that what had once got into the crown should have been forever separated from private possession. For then by forfeitures and attainitures he must

have become lord of the whole soil in a long course of time. The constitution, therefore, seems to have left him free in this matter; but upon this tacit trust (as he has all his other power), that he shall do nothing which may tend to the destruction of his subjects. However, though he be thus trusted, it is only as head of the Commonwealth; and the people of England have in no age been wanting to put in their claim that to which they conceived themselves to have a remaining interest; which claims are the acts of resumption that from time to time have been made in Parliament, when such gifts and grants were made as becomes burdensome and hurtful to the people. Nor can any government or state divest itself of the means of its own preservation; and if our kings should have had an unlimited power of giving away their whole revenue, and if no authority could have revoked such gifts, every profuse prince, of which we have had many in this kingdom, would have ruined his successor, and the people must have been destroyed with new and repeated taxes; for by our duty we are likewise to support the next prince. So that if no authority could look into this, a nation must be utterly undone without any way of redressing itself, which is against the nature and essence of any free establishment.

Our constitution, therefore, seems to have been, that the king always might make grants, and that these grants, if passed according to the forms prescribed by the law, were valid and pleadable, against not only him, but his successors. However, it is likewise manifest that the legislative power has had an uncontested right to look into those grants, and to make them void whenever they were thought exorbitant."

Nor were they careless or indifferent to precautionary measures for the preservation of the revenues of the state from spoliation and waste. Official responsibility was established, and the Lords High Treasurer and Chancellor, through whose offices the grants were to pass, were severally sworn "that they would neither know nor suffer the king's hurt, nor his dishonour, nor that the rights of his crown be distressed by any means as far forth as ye may let; and if ye may not let it, ye shall make knowledge thereof clearly and explicitly to the king with your true advice and counsel."

[*412] The responsibility of these high officers, as the history of England abundantly shows, was something more than nominal; nor did the frequent enforcement of that rule of responsibility, nor the adoption by the judges of the stringent rules I have cited, protect the revenues of the state from spoliation. "The wickedness of men," continues this writer, "was either too cunning or too powerful for the wisdom of laws in being. And from time to time great men, ministers, minions, favorites, have broken down the fences contrived and settled in our constitution. They have made a prey of the Commonwealth, plumed the prince, and converted to their own use what was intended for the service and preservation of the state. That to obviate this mischief, the legislative authority has interposed with inquiries, accusations and impeachments, till at last such dangerous heads were reached." (Davenant's *Dis. passim.*)

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Nor let it be said that this history contains no lessons nor instructions suitable to our condition. The discussions before this court in the Indiana Railroad and the Baltimore Railroad cases exposed to us the sly and stealthy arts to which state Legislatures are exposed, and the greedy appetites of adventurers, for monopolies and immunities from the state right of government. We cannot close our eyes to their insidious efforts to ignore the fundamental laws and institutions of the States, and to subject the highest popular interests to their central boards of control and directors' management.

This is not the time for the relaxation of those time-honored maxims, under the rule of which free institutions have acquired their reality, and liberty and property their most stable guaranties. The Supreme Court of Pennsylvania says, with great force, "that if acts of incorporation are to be so construed as to make them imply grants of privileges, immunities and exemptions, which are not expressly given, every company of adventurers may carry what they wish, without letting the Legislature know their designs. Charters would be framed in doubtful or ambiguous language, on purpose to deceive those who grant them; and laws, which seem perfectly harmless on their face, and which plain men would suppose to mean no more than what they say, might be converted into engines of infinite mischief. There is no safety to the public interest except in the rule which declares that the privileges not expressly granted are withheld. (7 Harr., 144.)

The principles of interpretation, contained in these cases, control the decision of this, if applied in this Act. Indeed, the argument of the plaintiff rests upon rules created for, and adapted to, a class of statutes entirely dissimilar. We were invited to consider the antecedent legislation of Ohio, in reference to its banks, "the discouraging effects of that legis- [*413] lation, and then to deal with this Act, as a medicinal and curative measure; as an act recognizing past error, and correcting for the future the consequences. It is proper to employ this argument to its just limit. The legislation of Ohio since 1825 certainly manifests a distinct purpose of the State to maintain its powers over these corporations, in the matter of taxation, unimpaired. With a very few exceptions this appears in all the statutes. It is seen in the Act of 1825, in the charters granted in 1834, in the Acts of 1841-2-3, the last two being acts embracing the whole subject matter of banking. It is said this austerity was the source of great mischief, depreciated the paper currency of the State, and occasioned distress to the people, and that the change apparent in the Act of 1845 was the consequence.

The existence of a consistent and uniform purpose for a long period is admitted. The abandonment of such a purpose, and one so in harmony with sound principles of legislation, cannot be presumed. If the application of these principles in Ohio was productive of mischief, we should have looked for an explicit and unequivocal disclaimer. We have seen that the Act contains no renunciation of this important power. And it may be fairly questioned whether the people of Ohio would have sanctioned such a measure. I know of no

principle which enables me to treat the sixtieth section of this Act as a remedial statute. Even the dissenting opinions in the Charles River and Louisa Railroad cases, which have formed the repertory from which the arguments of the plaintiffs have been derived, do not in terms declare such a rule, and the opinions delivered by the authority of the court repel such a conclusion. Nor can I consider the decision in 7 Ohio, 125, of consequence in this discussion. That case was decided upon a form of doctrine which after the judgments of this court, before cited, had no title to any place in the legal judgment of the country. The case was decided in advance of the most important and authoritative of those decisions. It is not surprising to hear that the judges who gave the judgment, afterwards renounced its principle, or that another state court has disapproved it (7 Harris, 144), or that it has not been followed in kindred cases (11 Ohio, 12, 393; 19 *Id.*, 110; 21 *Id.*, McCook, 563, 604, 626); and at the first time when it came up for revision it was overruled.

It remains for me to consider the Act of 1845, its purpose and details, in connection with the sixtieth section of the Act, to ascertain whether it is proper to assume that the State has relinquished its rights of taxation over the banking capital of the State.

The Act of 1845 was designed to enable any **414*** number, not *fewer than five persons, to form associations to carry on the business of banking.

The Legislature determined the whole amount of the capital which should be employed under the Act—that it should be distributed over the State, according to a specified measure of apportionment; that the bills to circulate as currency should have certain marks of uniformity, and be in a certain proportion to capital and specie on hand, and that a collateral security should be given for their redemption. The Act contains measures for organization, relating to subscriptions for stock, the appointment of officers and boards of management; sections, of a general interest, referring to the frauds of officers, insolvency of the corporations, their misdirection and forfeiture; sections containing explicit and clear statements of corporate right and privilege, the capacities they can exercise, the functions they are to perform, and the term of their existence.

The Act initiates a system of banking of which any five of its citizens may avail, and which provides for the confederacy of these associations under the general title of the State Bank of Ohio, and its branches, and their subjection to a board of control, appointed by them.

More than fifty banks have been formed under this Act, and thirty-nine belong to the confederacy. Some of the banks over whose charters the State has reserved a plenary control, are by the Act permitted to join it. It is said "that the whole of this Act is to be taken; the purpose of the Act and the time of the Act. It is a unit." It will not be contended that the fifty-first section of this Act, by which this multitude of banking companies are adjudged to be corporations, with succession for twenty years, places every other relation established by the Act beyond the legislative domain for

the same period of time. For there are in the Act measures designed for organization and arrangement for the convenience and benefit of the corporators only; there are concessions creating hopes and expectations out of which rights may grow by subsequent events; there are sections which convey present rights, or from which rights may possibly arise in the form of a contract; there are others which enter into the general system of administration, affect the public order, and tend to promote the common security. Some of these provisions may be dispensed with by those for whose exclusive benefit they were made. Some may be altered, modified or repealed, to meet other conditions of the public interest, and some perhaps may not be alterable except with the consent of the corporators themselves. To determine the class to which one enactment or another belongs, we are referred to those general principles I have already considered. In this Act, *of seventy-five sec. [**415** tions, which organizes a vast machinery for private banking, which directs the delicate and complex arrangements for the supply of a paper currency to the State, and determines the investment of millions of capital, we find this sixtieth section. The Act is enabling and permissive. It makes it lawful for persons to combine and to conduct business in a particular manner. It forms no partnership for the State, compels no one to embrace or to continue the application of industry and capital according to its scheme. It grants licenses under certain conditions and reservations, but is nowhere coercive. Among the general regulations is the one which directs the banks at the end of every six months to ascertain their net profits for the six months next preceding and to set apart six per cent. for the State in the place of the other taxes or contributions to which they would be liable. But the Legislature imposes no limit to its power, nor term to the exercise of its will, nor binds itself to adhere to this or any other rule of taxation.

The subject affects the public order and general administration. It is not properly a matter for bargain or barter; but the enactment is in the exercise of a sovereign power, comprehending within its scope every individual interest in the State. It is a power which every department of government knows that the community is interested in retaining unimpaired, and that every corporator understood its abandonment ought not to be presumed in a case in which the deliberate purpose to abandon it does not appear.

I have sought in vain the sixtieth section of the Act, in the Act itself, and in the legislation and jurisprudence of Ohio, for the expression of such a deliberate purpose.

My opinion is that the Supreme Court of Ohio has faithfully applied the lessons inculcated by this court, and that its judgment should be affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Supreme Court of Ohio, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court of Ohio, in this cause be,

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and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Supreme Court of Ohio, for further proceedings to be had therein in conformity to the opinion of this court.

Rev'g—6 Ohio St., 342.

Cited—16 How., 430, 440-443, 446, 447; 18 How., 346, 360, 369, 376, 383-385; 19 How., 604; 1 Black, 442, 448, 475; 2 Black, 544, 545; 1 Wall., 393; 4 Wall., 554; 8 Wall., 438; 13 Wall., 214, 376, 378; 16 Wall., 220, 233; 21 Wall., 498; 5 Otto, 690; 1 McCrary, 527; 1 Abb. U. S., 25; 2 Abb. U. S., 337; 1 Woods, 423, 424; 2 Woods, 195; 3 Woods, 242, 254, 360; 5 Blatchf., 263; 12 Blatchf., 462; 14 Blatchf., 430; 1 Flippin, 128, 129.

416*] *THE OHIO LIFE INSURANCE AND TRUST COMPANY, Plaintiff in Error.

v.

HENRY DEBOLT, Treasurer of HAMILTON COUNTY, Defendant in Error.

As to exemption of Life Insurance Company from taxation under laws of Ohio.

There being no opinion of the court, as such, in this case, the reporter can only state the laws of Ohio which were drawn into question.

In 1834 the Legislature of Ohio passed an Act incorporating the Ohio Life Insurance and Trust Company, with power, amongst other things, to issue bills or notes until the year 1843. One section of the charter provided that no higher taxes should be levied on the capital stock or dividends of the Company than are or may be levied on the capital stock or dividends of incorporated banking institutions in the State.

In 1836 the Legislature passed an Act to prohibit the circulation of small bills. This Act provided, that if any bank should surrender the right to issue small notes, the treasurer should collect a tax from such bank of five per cent. upon its dividends; if not, he should collect twenty per cent. The Life Insurance and Trust Company surrendered the right.

In 1835 this law was repealed.

In 1845 an Act was passed to incorporate the State Bank of Ohio and other banking companies. The 60th section provided that each company should pay, annually, six per cent. upon its profits, in lieu of all taxes to which such company or the stockholders thereof, on account of stocks owned therein, would otherwise be subject.

In 1851 an Act was passed to tax banks and bank and other stocks, the same as other property was taxable by the laws of the State.

There was nothing in previous legislation to exempt the Life Insurance and Trust Company from the operation of this Act.

THIS case was brought up from the District Court of the State of Ohio, in and for the County of Hamilton, by a writ of error issued under the 25th section of the Judiciary Act. The court was held by the Honorable John A. Corwin, Chief Justice of the Supreme Court of the State of Ohio, presiding, and the Honorable Alfred G. W. Carter, and the Honorable Edward Woodruff, and the Honorable John B. Stalle, Judges of the Court of Common Pleas, in and for the County of Hamilton, associates.

The following certificate, which was a part of the record, explains the nature of the case:

And thereupon, on motion of the counsel for the said The Ohio Life Insurance and Trust Company, defendants, it is ordered to be certified and made part of the record that the said Company did set up, by way of defense to the prayer of the bill of complainants, a certain Act of the General Assembly of this State, HOWARD 16.

entitled An Act to incorporate the Ohio Life Insurance and Trust Company, passed the twelfth day of February, in the year eighteen hundred and thirty-four; and also a certain other Act of the General Assembly, entitled An Act to prohibit the circulation of small bills, passed the fourteenth day of March, in the year eighteen hundred and thirty-six; and thereupon *claimed, that in virtue of the said [*417 Acts, and of the instrument of writing, "Exhibit B," attached to its answer, the General Assembly of this State had entered into a contract with the said Company never to impose upon the property of said Company a greater or different burden of taxation than five per cent. upon its dividends of net profits, and that therefore the Act of the General Assembly, entitled An Act to tax banks and bank and other stocks, the same as other property is now taxable by the laws of this State, passed the twenty-first day of March, in the year eighteen hundred and fifty-one, impaired the obligation of a contract, and therein was repugnant to the Constitution of the United States; but the court decided that there was no conflict between the said several Acts, for the reason that the said Act passed the fourteenth day of March, in the year eighteen hundred and thirty-six, expired, and ceased to have any effect or operation as respects The Ohio Life Insurance and Trust Company, on the first day of January, in the year eighteen hundred and forty-three, when the power of the said Company to issue bills or notes for circulation expired and ceased by the terms of the said Act passed the twelfth day of February, in the year eighteen hundred and thirty-four; and that there was, therefore, at the date of the said Act passed the twenty-first day of March, in the year eighteen hundred and fifty-one, no such contract, agreement, pledge, or understanding as the said Company claimed; and that the said Act passed the twenty-first day of March, in the year eighteen hundred and fifty-one, was, in that respect, Constitutional and valid; and it was ordered to be further certified on the same motion, that the said Company did likewise set up by way of defense to the prayer of said bill a certain Act of the General Assembly of this State, entitled An Act to incorporate the State Bank of Ohio and other banking companies, passed the twenty-fourth day of February, in the year eighteen hundred and forty-five, and thereupon claimed that in virtue of the said last-mentioned Act, and of the said Act passed the twelfth day of February, in the year eighteen hundred and thirty-four, the General Assembly of this State had entered into a contract with the said Company not to impose upon the property of the said Company a greater or different burden of taxation than six per cent. upon its dividends of net profit, until after the first day of May, in the year eighteen hundred and sixty-six, and that therefore the act of the said General Assembly, entitled An Act to tax banks, and bank and other stocks, the same as other property is now taxable by the laws of this State, passed the twenty-first day of March, in the year eighteen hundred and fifty-one, impaired the obligation of a contract, and therein was repugnant to the Constitution of the United States; *but the court de- [*418 cided that the said Act passed the twenty-fourth day of February, in the year eighteen

hundred and forty-five, contained no pledge on the part of the State not to alter the amount or the mode of taxation therein specified, but that the taxing power of the General Assembly of this State over the property of companies formed under that Act, was and is the same as over the property of individuals, and that there was, consequently, no such contract, agreement, pledge or understanding as the said Company claimed; and that whether the franchises of companies organized under the said last mentioned Act, could not be revoked, changed or modified, the said Act passed the twenty-first day of March, in the year eighteen hundred and fifty-one, did not, upon any construction, impair any right secured to such companies, by the said Act passed the twenty-fourth day of February, in the year eighteen hundred and forty-five, and that the said Act passed the twenty-first day of March, in the year eighteen hundred and fifty-one, was therefore a constitutional and valid law. And it is ordered to be certified, also, that the question of the validity of the said Act passed the twenty-first day of March, in the year eighteen hundred and fifty-one, was material and necessary to the decision of this cause, and that the validity of the said Act was drawn in question (in the manner and to the intent hereinbefore specified) as being repugnant to the Constitution of the United States, and that the decision of the court was in favor of the validity of the said law. And it is further certified that this court is the highest court of law and in equity in the State of Ohio, in which a decision in this suit can be had.

The several Acts mentioned in the above certificate, are stated in the opinions delivered by the judges of this court, and it is not necessary to set them forth *in extenso*.

The case was argued by *Messrs. Worthington and Stanberry* for the plaintiff in error, and by *Messrs. Spalding and Pugh* for the defendant in error.

The following points, on behalf of the plaintiff in error, are taken from the brief of *Mr. Worthington*, filed for himself and *Mr. Matthews*:

Points for Plaintiff.—I. Our first point involves the taxing power, the objects and subjects of taxation, and the manner and extent of its exercise. This power, under the Constitution of Ohio, of 1802, is legislative, and placed under the control of the General Assembly, subject only to the few limitations put upon it by the instrument of its creation, and by the Constitution of the United States. (Constitution of Ohio, of 29th of Nov., 1802, art. 1., sec. 1.; *Id.*, 419*) art. 8, sec. 23; *McCulloch v. State of Maryland*, 4 Pet. Cond., 475, 486; *Nathan v. Louisiana*, 8 How., 82; *Mager v. Grima et al.*, 8 Ib., 490; *The People v. The Mayor, &c., of Brooklyn*, 4 Coms., 419, 423; *Loring et al. v. The State of Ohio*, 16 Ohio, 590; *Gazlay v. The State of Ohio*, 5 Ib., 14; *State of Ohio v. Hubbard*, 3 Ib., 63; *License Cases*, 5 How., 616, 593; *Loughbrough v. Blake*, 4 Pet. Cond., 660; *Proc. Bank v. Billings*, 4 Pet., 463; 1 Ohio 102.)

II. The only limitation placed upon the exercise of the taxing power is by the 23d section of the 8th article of the constitution of Ohio, which declares, "That the levying taxes by the poll is grievous and oppressive; where-

fore the Legislature shall never levy a poll tax for county or state purposes." This being the only limit, the power can be exercised to any and every extent, for any and every purpose, and upon any and every object or thing, at discretion, subject only to the limitation given. (Constitution of Ohio of 29th of November, 1802, art. 8, sec. 23; *McCulloch v. State of Maryland*, 4 Pet. Cond., 475, 488; *Osborne v. Bank of United States*, 5 Ib., 771; *Nathan v. Louisiana*, 8 How., 82; *Mager v. Grima et al.*, 8 Ib., 490; *The License Cases*, 5 Ib., 593; *Gazlay v. State of Ohio*, 5 Ohio, 21; *Loring et al. v. The State of Ohio*, 16 Ib., 590; *People v. Mayor, &c., of Brooklyn*, 4 Coms., 426; 1 Ohio, 77, 102.)

III. The taxing power comes to the Legislature from the people, and is measured by the authority the people possess and can confer upon their government, and have actually conferred. Their authority being unlimited, as to themselves and their resources, and their exigencies without bounds, they can exercise this power at will and at discretion, without limit or measure, as to themselves and their property. And if they confer the authority they have upon their General Assembly or Legislative Department of their government with or without limit, it can be exercised within the grant just as the people themselves could have exercised it. (*McCulloch v. State of Maryland*, 4 Pet. Cond., 484; *Loughbrough v. Blake*, 4 Ib., 660; *Osborne v. Bank United States*, 5 Ib., 771; *Weston et al. v. City of Charleston*, 2 Ib., 465; *Providence Bank v. Billings et al.*, 4 Ib., 559; *Charles River Bridge v. Warren Bridge*, 11 Pet., 546, 567; *Vaughn v. Northup et al.*, 15 Ib., 4; *Dobbins v. Com. of Erie County*, 16 Ib., 447; *License Cases*, 5 How., 575, 588, 592, 627; *West River Bridge v. Dix et al.*, 6 Ib., 523, 539; *Passenger Cases*, 8 Ib., 407, 421, 447, 530, 531; *Nathan v. Louisiana*, 8 Ib., 80, 82; *Mager v. Grima et al.*, 8 Ib., 490; *The People v. Mayor, &c., Brooklyn*, 4 Coms., 419; 1 Ohio, 10.)

*IV. The legislative power of a state, [*420 as given by its constitution, can be exercised only upon what belongs to the State in actual or constructive right, and can never extend to what belongs to another government. The same person or thing cannot at the same time be under the power of both. (*Vaughn v. Northup et al.*, 15 Pet., 1; *McCulloch v. Rodrick*, 2 Ohio, 284; *Rogers et al. v. Allen*, 8 Ib., 488; *Mager v. Grima et al.*, 8 How., 490; *Holmes v. Remsen*, 20 Johns., 254; *Gordon v. Appeal Tax*, 3 How., 150.)

V. The charter of The Ohio Life Insurance and Trust Company, and the charter of the State Bank of Ohio, and other banking companies, are contracts obligatory upon the State of Ohio, in all their parts, and as such, protected by the Constitution of the United States, from violation or invasion, upon the part of the State of Ohio. (Constitution of the United States, art. 1, sec. 10; *Fletcher v. Peck*, 3 Pet. Cond., 821; *New Jersey v. Wilson*, 2 Ib., 457; *Terret et al. v. Taylor et al.*, 3 Ib., 356; *Town of Pavolet v. Clark et al.*, 3 Ib., 408; *Sturgis v. Crowninshield*, 4 Ib., 415; *Dartmouth College v. Woodward*, 4 Ib., 533; *McCulloch v. State of Maryland*, 4 Ib., 470; *Providence Bank v. Billings*, 4 Pet., 559; *Charles River Bridge v. Warren Bridge*, 11 Ib., 540, 611; *Gordon v. Appeal*

Tax, 3 How., 138; *Planters' Bank v. Sharp et al.*, 6 Ib., 318; *West River Bridge v. Dix*, 6 Ib., 531, 536, 539, 542; *Paup et al. v. Dren*, 10 Ib., 218; *Woodruff v. Trapnall*, 10 Ib., 204, 208, 214; *Baltimore and Susquehanna Railroad Company v. Nesbit*, 10 Ib., 395; *East Hartford v. Hartford Bridge*, 10 Ib., 535.)

VI. The 25th section of the charter of The Ohio Life Insurance and Trust Company, and the 60th section of the charter of the State Bank of Ohio, and other banking companies, are contracts, limiting the exercise of taxation upon the part of the State, and, as such, are protected by the Constitution of the United States from invasion. (Constitution of the United States, art. 1, sec. 10; *Fletcher v. Peck*, 3 Pet. Cond., 231; *New Jersey v. Wilson*, 2 Ib., 457; *Providence Bank v. Billings et al.*, 4 Ib., 559; *Charles R. Bridge v. Warren Bridge*, 11 Ib., 540; *Gordon v. Appeal Tax*, 3 How., 133, 146; *West Bridge v. Dix et al.*, 6 Ib., 531, 544; *Woodruff v. Trapnall*, 10 Ib., 207, 208; *Mills v. St. Clair Co.*, 8 Ib., 580.)

VII. The 25th section of the charter of The Ohio Life Insurance and Trust Company, being a contract prohibiting higher taxes upon the property or dividends of the Company, other than were, or might be levied on the property or dividends of incorporated banking institutions of the State, no higher tax could be levied upon the property, or dividends of the 421*] *Company than could be levied upon the property or dividends of incorporated banks of the State. A question arises as to the banking institutions here referred to. The reference must be to incorporated banks, existing at the time the charter was enacted, or that may exist at the time of the levy. In either case, no higher tax could be levied against the Company than could be levied against such incorporated banks. If such banks be subject to different rates of taxation, then the prevailing rates of the greater proportion of such institutions would control the rates of taxation against the Company. If the former rule prevail, then the rate of taxation against the old banks in Ohio furnishes the rule against the Company; but if the latter rule prevail, then the rate of taxation against the State Bank of Ohio, and other banking companies, under the 60th section of their charter of the 24th February, 1845, furnishes the rule of taxation against the Company. The Act to authorize free banking, of 21st March, 1851 (49 Gen. Laws of Ohio, 41), has no application to the present tax, because, aside from other considerations, no banks were organized under it when the tax against the Company was authorized to be assessed, under the Act of 21st March, 1851, to tax banks, &c. (49 Gen. Laws of Ohio, 56; 44 Ib., 108, 121, sec. 60; 48 Ib., 88.)

VIII. All the banking institutions in operation in Ohio, at the time The Ohio Life Insurance and Trust Company was chartered, except the Commercial Bank of Cincinnati, which paid four per cent. on her dividends—and the Franklin Bank of Cincinnati, which paid five per cent. upon her dividends—were, by their charters, not exempt from general taxation under a general law. And all the banks incorporated at the same session of the General Assembly in which the Ohio Life Insurance and Trust Company was incorporated, were by

their charters made subject to the tax imposed by the Act of 12th March, 1831, to tax banks, &c. (Swan's Statutes, 916), and such taxes as might be imposed by law. The Ohio Life Insurance and Trust Company prior to July, 1836, that is, in 1835, was taxed under the Act of 12th March, 1831, if taxed at all, five per cent. upon her dividends. (3 Chase Stat., 2010 to 2033, ch. 100 to 133 inclusive; 2 Ib., 913-924, ch. 351, secs. 42, 1463, ch. 655; 32 Local Laws of Ohio, 76, sec. 21, *Bank of Wooster*; 32 Ib., 197, sec. 21, *Bank of Massillon*; 2 Ib., 233, sec. 6, *Bank of Xenia*; 32 Ib., 293, sec. 17, *Bank of New Lisbon*; 32 Ib., 299, sec. 6, *Lafayette Bank of Cincinnati*; 32 Ib., 407, sec. 22, *Bank of Cleveland*; 32 Ib., 412, sec. 6, *Bank of Sandusky*; 32 Ib., 419, sec. 6, *Clinton Bank of Columbus*.)

IX. The Ohio Life Insurance and Trust Company must declare *dividends on [*422 the first Mondays in January and July, annually from the profits of said Company, so as not to impair, or in anywise lessen the capital stock. These divisions are upon the entire profits of the Company, and are not divisible, or declared separate from any special business of the Company. (Charter of the Ohio Life Insurance & Trust Co., sec. 27.)

X. The Ohio Life Insurance and Trust Company, and all the banks in Ohio, except the Commercial Bank of Cincinnati, and the Franklin Bank of Cincinnati, being bound to report to the Auditor of State, under the Act of 12th March, 1831, to tax banks, &c., were embraced in the Act of 14th March, 1836, "To prohibit the circulation of small bills," as that Act, in express terms, included all banks that made returns to the Auditor of State under said Act of 12th March, 1831, to tax banks, &c., 34 Gen. Laws of Ohio, 42, sec. 1, of the Act to prohibit the circulation of small bills.

XI. All banks, including The Ohio Life Insurance and Trust Company, coming under the Act of 14th March, 1836, "to prohibit the circulation of small bills," were, by the terms of the Act and their charters, subject to a tax of twenty per cent. upon their dividends, unless they surrendered by the 4th July, 1836, as therein directed, their rights to issue or circulate notes or bills, less than \$3, after 4th July, 1836, and \$5 after 4th July, 1837; and "then and in that case, the Auditor of State shall thereafter draw on such banks only for the amount of five per cent. upon their dividends, declared after such surrender." The Act of 14th March, 1836, repealed so much of the Act of 12th March, 1831, to tax banks, &c., as was inconsistent with it. (32 Gen. Laws of Ohio, 42; *Mills v. St. Clair County*, 8 How., 581.)

XII. The Ohio Life Insurance and Trust Company having accepted the provisions of the Act of 14th March, 1836, "to prohibit the circulation of small bills," and made the surrender in due form required by said Act, is entitled to the benefit or consideration tendered by said Act to obtain said surrender, and can be taxed only five per cent. upon her dividends declared after such surrender. This surrender upon her part, under said Act, constitutes a valid contract between her and the State, and its invasion is prohibited by the Con-

stitution of the United States. (*Gordon v. Appeal Tax*, 3 How. 133; *Woodruff v. Trapnall*, 10 *Id.*, 204 *Rich. R. R. Co. v. La. R. R. Co.*, 13 *Id.*, 81, 86, 90; *Seagriff v. Stokes* 3 *Id.*, 167, *Neil, Moore & Co. v. Ohio*, 3 *Id.*, 742; *Achison v. Huddleson*, 12 *Id.*, 296; *Huidekeper v. Douglas*, 1 Pet. Cond., 452; *United States v. Fisher*, 1 *Id.*, 428; *Sturgis v. Crowninshield*, 4 *Id.*, 418, 481.)

XIII. The Supreme Court of the United 423*] States, as a general *rule, in the construction of the statutes and constitutions of the States, follows the construction of their courts, but when the construction of a statute in conflict with the Constitution of the United States is involved, then the rule is reversed, and the state courts must follow the construction given to the statute by the Supreme Court of the United States. (*Luther v. Bowen*, 7 How., 1, 40, 219, 818; *East Hartford v. Hartford Bridge Co.*, 10 *Id.*, 539; *Strader et al v. Graham*, 10 *Id.*, 94; *Elmendorf v. Taylor*, 6 Pet. Cond., 50; *Swift v. Tyson*, 16 Pet., 1; 2 *Id.*, 878.)

XIV. The repeal of the Act of 14th March, 1836, "to prohibit the circulation of small bills," by the Act of 18th March, 1838 (36 General Laws of Ohio, 55), does not annul or abrogate the contract of surrender of 22d June, 1836, made by The Ohio Life Insurance and Trust Company, by which she lost the right to issue and circulate small notes, and the State lost the right thereafter to tax her beyond five per cent. on her dividends. (*Woodruff v. Trapnall*, 10 How., 204, 206, 207; *East Hartford v. Hartford Bridge Co.*, 10 *Id.*, 535; *Briscoe v. Bank of Com. of Ky.*, 11 Pet., 257; *Charles R. Bridge v. War. Bridge*, 11 *Id.*, 420; *Ball & Susq. R. R. v. Nesbitt*, 10 How., 395; *Satterlee v. Mathewson*, 2 Pet., 412; *Bronson v. Kinzie et al.*, 1 How., 311; *Watson et al. v. Mercer*, 8 Pet., 110; *Fletcher v. Peck*, 2 Pet. Cond., 321; *Neil, Moore & Co. v. Ohio*, 3 How., 742; *Achison v. Huddleson*, 12 *Id.*, 296; 10 *Id.*, 395, 402.)

For the defendant in error, the points will be given as stated by *Mr. Spalding*, and also the third and fourth points of *Mr. Pugh*.

Mr. Spalding's points for defendant in error:

First. The taxing power is of such vital importance, and is so essentially necessary to the very existence of a state government, that its relinquishment or diminution for a fixed period, cannot be made the subject matter of a binding contract between the Legislature of a state and individuals or private corporations. It is one of the highest attributes of sovereignty, and under our form of government belongs to the people. They have lodged it in the hands of the law-making power, to be exerted for their benefit, not to be impaired or destroyed. It must of necessity always be exerted according to present exigencies, and therefore must necessarily continue to be held by each succeeding Legislature undiminished and unimpaired.

Second. The Act of the General Assembly of the State of Ohio, entitled "An Act to incorporate the State Bank of Ohio and other banking companies," passed February 24, 1845, is not 424*] a "contract in the sense in which that term is used in the Constitution of the United States, art. 1, sec. 10. It is a general law upon the subject of banking; it prescribes rules for

the government of all the citizens of the State who may choose, within certain limits, to embark in the business of banking, and is as mandatory in its character as any law upon the statute book. These mandates are some of them enforced under the severest penalties known to the law.

Third. This Act was made subject to alteration, suspension and repeal, for, at the time of its enactment, February 24, 1845, there was a general law in full force in Ohio, which was passed March 7, 1842, entitled, "An Act instituting proceedings against corporations not possessing banking powers and the visatorial powers of courts, and to provide for the regulation of corporations generally," that provided in section nine as follows: "That the charter of every corporation of every description, 'whether possessing banking powers or not,' that shall hereafter be granted by the Legislature, shall be subject to alteration, suspension, and repeal, in the discretion of the Legislature." (Ohio Laws, Vol. XL., page 70.)

Fourth. The 60th section of the Act of February 24th, 1845, provides only a measure of taxation for the time being, and does not relinquish the right to increase the rate as the future exigencies of the State may require.

Fifth. The record shows (pages 24, 25) that the Supreme Court of the State decide nothing more than that the proviso to the Act of March 14, 1836, ceased to affect the plaintiff when the power to issue bills for circulation ceased in January, 1843; and that the Act of February 24, 1845, contained no pledge on the part of the State not to alter the amount and mode of taxation therein specified. And in so doing, said court has done no more than to give a construction to the statutes of Ohio. With such a construction, this court has always manifested a reluctance to interfere. But more especially will it feel that reluctance when such interference may bring the Acts of the State Legislature in conflict with the Constitution of the United States.

Mr. Pugh's third and fourth points:

III. The Supreme Court of Ohio rightly construes the statutes.

1. The proviso to the first section of the Act "to prohibit the circulation of small bills," passed March 14th, 1836, does not contain any stipulation or promise. It merely exempted such banks as complied with its terms, before a certain day, from the operation of the principal clause. (*Minis v. The United States*, 15 Pet., 445; *The Commissioners of Kensington v. Keith*, *2 Penn., 320; *The Treasurer of Vermont v. Clark*, 19 Vt., 129.)

2. The proviso does not operate as a contract, or stipulation, merely because the consent of the banks is invoked. (*The Cincinnati, Wilmington and Zanesville Railroad Company v. The Commissioners of Clinton County*, 21 Ohio, 77; *The Cargo of the Brig Aurora v. The United States*, 7 Cranch, 382.)

3. The benefit of the proviso (if construed as a contract) only applied to the plaintiff in error, whilst it was authorized, by its charter, to issue bills or notes for circulation. (*Hildebrand v. Fogle*, 20 Ohio, 147; *Bradley v. The Washington, Alexandria and Georgetown Steam Packet Company*, 18 Pet., 97; *Snyder v. Leisengood*, 4 Penn., 308; *Washburn v. Gould*, 3 Story,

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162; *Case v. Cushman*, 8 Watts & S., 544; *The Commercial Bank v. Pleasant*, 6 Whart., 375; *Loring v. The City of Boston*, 7 Metc., 409; *Robinson v. Fiske*, 25 Maine, 405; *Brown v. Slater*, 16 Conn., 192; *Porter v. Breckenridge*, Hard., 26; *Sayre v. Peck*, 1 Barb. S. C., 468, 469; and see 5 Cruise's Digest, 44, 45; *Bozoun's case*, 4 Rep., 35; case of *The Abbot of Strata Mercella*, 9 Rep., 80; *Ford and Sheldon's case*, 12 Rep., 2; *The Earl of Shrewsbury's case*, 9 Rep., 45.)

4. The sixtieth section of the Act "to incorporate the State Bank of Ohio and other banking companies," passed February 24th, 1845, provides only a present measure and system of taxation, and does not relinquish, expressly or impliedly, the power of the State to alter the measure, as well as the system, at any future period. (*The Commonwealth v. The Eastern Bank*, 10 Penn., 442; *Bank of Pennsylvania v. The Commonwealth*, 19 Penn., 144; *Brewster v. Hough*, 10 N. H., 188; *The Richmond Railroad Company v. The Louisa Railroad Company*, 13 How., 71; *Shorter v. Smith*, 9 Ga., 517; *Armstrong v. The Treasurer of Athens County*, 16 Pet., 281; *The Providence Bank v. Billings*, 4 Ib., 514.)

The following cases are distinguishable: *Gordon v. The Appeal Tax Court*, 8 How., 133; *The Union Bank v. The State*, 9 Yerg., 490; *Johnson v. The Commonwealth*, 7 Dana, 338; *The State v. Berry*, 2 Harr., 80; *Municipality Number One v. The Louisiana State Bank*, 5 La. Ann., 394; *The Mayor of Baltimore v. The Baltimore and Ohio Railroad Company*, 6 Gill, 288.

Statutes of Ohio, *in pari materia*, to be examined: Act "to tax bank, insurance and bridge companies," passed March 12th, 1881, section 1st, Swan's Statutes, 916, 917. Act "For levying taxes on all property in this State according to its true value," passed March 2d, 1846, sec. 10th, 44 General Laws, 90, 91. Act "To exempt revolutionary soldiers from taxation," passed February 8th, 1847, 45 General Laws, 51. Act "To exempt from taxation a branch of the New York Methodist Episcopal Church Book Concern in Cincinnati, and for other purposes," passed February 17th, 1884, 32 Local Laws, 91. Act "To incorporate the The Milan and Richland Plank Road Company," passed January 31st, 1845, sec. 9th, 43 Local Laws, 51. See, also, The Constitution of Ohio, adopted June 17th, 1851, article first and section second; article twelfth and sections second and third; article thirteenth and section fourth. Constitution of Ohio, adopted November 29th, 1802, article eighth and sections first, eighteenth, nineteenth, twenty-fourth, twenty-seventh, and twenty-eighth. As to the effect of these provisions in construing both the Act of March 14th, 1836, and the Act of February 24th, 1845, see *Rez v. Loadale*, 1 Burrow, 447.

5. It does not follow, because the provision was made part of an Act to incorporate the State Bank of Ohio and other banking companies, that the design was to create a permanent measure or system of taxation. (*The Preble County Bank v. Russell*, 21 Ohio, 318; *The Bank of Columbia v. Okely*, 4 Wheat., 285; *Young v. The Bank of Alexandria*, 4 Cranch, 397; *Crawford v. The Bank of Mobile*, 7 How., 279; *The Baltimore and Susquehanna Railroad Company v. Nesbit*, 10 How., 896.

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6. All grants in derogation of common right (including all exemptions from the payment of taxes) must be strictly construed. (*The Proprietors of the Charles River Bridge v. The Proprietors of the Warren Bridge*, 11 Pet., 545, 546; *The Providence Bank v. Billings*, 4 Pet., 561; *The United States v. Arredondo*, 6 Pet., 738; *Mills v. St. Clair County*, 8 How., 581; *Perrine v. The Chesapeake and Delaware Canal Company*, 9 How., 185; *The Cincinnati College v. The State*, 19 Ohio, 110; *The Richmond Railroad v. The Louisa Railroad*, 13 How., 81.)

IV. The right of taxation is a pre-eminent and indispensable right, and cannot be so aliened by a mere statute or by any grant (other than a treaty or compact between sovereigns) as to prevent its resumption, by the Legislature, whenever the public necessities require. And the Legislature is the judge of public necessity in such cases. (*The West River Bridge Company v. Dix*, 6 How., 507; *Mills v. St. Clair County*, 8 How., 584, 585; *Butler v. The State of Pennsylvania*, 10 How., 402; *The People v. The Mayor of Brooklyn*, 4 Comst., 423; *The Providence Bank v. Billings*, 5 Pet., 563; *Brewster v. Hough*, 10 N. H., 188; *Mack v. Jones*, 1 Foster, 393; *Russell v. The Mayor of New York*, 2 Denio, 474; *Maleverer v. Spinks*, 1 Dyer, 86, b; *Coates v. The Mayor of New York*, 7 Cow., 585; *The Brick Presbyterian Church v. The City of New York*, 5 Cow., 538; *Vanderbilt v. Adams*, 7 Cow., 351, 352.) Cases to be examined: *The State of New Jersey v. Wilson*, 7 Cranch, 164; *Armstrong v. The Treasurer of Athens Co.*, 16 Pet., 290; *Fletcher v. Peck*, 6 Cranch, 87; *The New York and North Midland Railway Co. v. The Queen*, 1 Ell. & B., 858.

Mr. Chief Justice Taney: In this case the judgment of the Supreme Court of the State of Ohio is affirmed. But the majority of the court who give this judgment, do not altogether agree in the principles upon which it ought to be maintained. I proceed, therefore, to state my own opinion, in which I am authorized to say my brother Grier entirely concurs.

In 1851 the Legislature of Ohio passed an Act "to tax banks and bank and other stocks, the same as other property." The Act makes it the duty of the president and cashier of every banking institution having the right to issue bills or notes for circulation, annually, to list and return to the assessor in the township or ward where the bank is located, the amount of capital and stock at its true value in money, together with the amount of surplus and contingent fund belonging to such institution, upon which the same amount of tax is to be levied and paid as upon the property of individuals. And by the third section of this Act the Ohio Life Insurance and Trust Company (the plaintiff in error) was brought within its provisions, and subjected to the payment of a like tax in all the several counties where its capital stock was loaned, according to the amount loaned and the average rate of taxation in each.

The payment of this tax was resisted by the plaintiff in error, upon the ground that the law imposing it impaired the obligation of certain contracts previously made between the State and the corporation.

On the other hand, it was insisted on behalf

of the State that the right of taxation cannot be so aliened by mere statute as to prevent its resumption by the Legislature whenever the public necessities require; and that the Legislature was the judge of the public necessity in such cases.

And further, if it should be held that the Legislature of Ohio had no power to alienate its right of taxation, yet it had not exercised it in this instance; and when the tax in question was levied, there was no previous contract between the State and the Corporation by which the State had relinquished the right to impose it.

The Company having refused to pay the tax **428***] upon the ground *above stated, the defendant in error, who is the Treasurer of Hamilton County, in which the corporation is located, instituted proceedings to enforce its collection. And upon final hearing of the parties, the Supreme Court of Ohio decided in favor of the State, and directed the tax to be paid, together with the penalty which the law inflicted for its detention. It is to revise this decree of the State Court that the present writ of error is brought.

This brief statement will show that the questions which arise on this record are very grave ones. They are the more important, because, from the multitude of corporations chartered in the different States, and the privileges and exemptions granted to them, questions of a like character are continually arising, and ultimately brought here for final decision. These controversies between a state and its own corporations necessarily embarrass the legislation of the state, and are injurious to the individuals who have an interest in the Company. And as the principles upon which this case is decided, will, for the most part equally apply to all of them, it is proper that they should be clearly and distinctly stated. I proceed to express my own opinion on the subject.

It will be admitted on all hands, that with the exception of the powers surrendered by the Constitution of the United States, the people of the several States are absolutely and unconditionally sovereign within their respective territories. It follows that they may impose what taxes they think proper upon persons or things within their dominion, and may apportion them according to their discretion and judgment. They may, if they deem it advisable to do so, exempt certain descriptions of property from taxation, and lay the burden of supporting the government elsewhere. And they may do this in the ordinary forms of legislation or by contract, as may seem best to the people of the State. There is nothing in the Constitution of the United States to forbid it, nor any authority given to this court to question the right of a state to bind itself by such contracts, whenever it may think proper to make them.

There are, undoubtedly, fixed and immutable principles of justice, sound policy and public duty, which no state can disregard without serious injury to the community, and to the individual citizens who compose it. And contracts are sometimes incautiously made by states as well as individuals; and franchises, immunities, and exemptions from public burdens invidiously granted. But whether such contracts should be made or not, is exclusively

for the consideration of the State. It is the exercise of an undoubted power of sovereignty which has not been surrendered by the adoption of the Constitution of the United States, and over which this court has no control. For it can never be maintained in any tribunal in this country, that the people of a state, in the exercise of the powers of sovereignty, can be restrained within narrower limits than those fixed by the Constitution of the United States, upon the ground that they may make contracts ruinous or injurious to themselves. The principle that they are the best judges of what is for their own interest, is the foundation of our political institutions.

It is equally clear, upon the same principle, that the people of a state may, by the form of government they adopt, confer on their public servants and representatives all the powers and rights of sovereignty which they themselves possess; or may restrict them within such limits as may be deemed best and safest for the public interest. They may confer on them the power to charter banks or other companies, and to exempt the property vested in them from taxation by the State for a limited time during the continuance of their charters, or accept a specified amount less than its fair share of the public burdens. This power may be indiscreetly and injudiciously exercised. Banks and other companies may be exempted, by contract, from their equal share of the taxes, under the belief that the corporation will prove to be a public benefit. Experience may prove that it is a public injury. Yet, if the contract was within the scope of the authority conferred by the constitution of the State, it is like any other contract made by competent authority, binding upon the parties. Nor can the people or their representatives, by any act of theirs afterwards, impair its obligation. When the contract is made, the Constitution of the United States acts upon it, and declares that it shall not be impaired, and makes it the duty of this court to carry it into execution. That duty must be performed.

This doctrine was recognized in the case of *Billings v. The Providence Bank*, and again in the case of *The Charles River Bridge Company*. In both of these cases the court, in the clearest terms, recognized the power of a state Legislature to bind the State by contract; and the cases were decided against the corporations, because, according to the rule of construction in such cases, the privilege or exemption claimed had not been granted. But the power to make the contract was not questioned. And I am not aware of any decision in this court calling into question any of the principles maintained in either of these two leading cases. On the contrary, they have since, in the case of *Gordon v. Appeal Tax Court*, 3 How., 183, been directly re-affirmed.

The question in that case was precisely the same with the present one; that is to say—whether the State had relinquished *its **430** right of taxation to a certain extent, in its charter to a bank? The court held that it had, and reversed the judgment of the State Court, which had decided to the contrary. And this opinion appears to have been unanimous, for no dissent is entered.

Again, in the case of *The Richmond Rail-*

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road Company v. The Louisa Railroad Company, 13 How., 71, the question was, whether the State had not, by its charter to the former, contracted not to authorize a road like the latter, which would tend to diminish the number of passengers traveling upon the former between Richmond and Washington. The case therefore in principle was the same with that of *The Charles River Bridge v. The Warren Bridge*; and it was decided on the same ground: that is that the contract, according to the rule of construction laid down in *The Charles River Bridge* case, did not extend to such a road as was authorized by the charter to the Louisa Railroad Company. But the opinion of the majority of the court is founded expressly upon the assumption that the Legislature might bind the State by such a contract; and the three judges who dissented were of opinion not only that the Legislature might bind it, but that it had bound it; and that the charter to the Louisa Railroad Company violated the contract and impaired its obligation. They adopted a rule of construction more favorable to the corporation than the one sanctioned in *The Charles River Bridge v. The Warren Bridge*.

It seemed proper on this occasion to remark more particularly upon this case, and the case of *Gordon v. The Appeal Tax Court*, because the last-mentioned case was a restriction upon the taxing power of the State; and the other a restriction upon its power to authorize useful internal improvements—the two together illustrating and confirming the principles upon which *The Providence Bank v. Billings*, and *The Charles River Bridge* case, were decided.

There are other cases upon the same subject, but it is not necessary to extend this opinion by referring to them. It is sufficient to say, that they will all be found to maintain the same principles with the cases above mentioned, and that there is no one case in which this court has sanctioned a contrary doctrine.

I have dwelt upon this point more at length, because, while I concur in affirming the judgment of the Supreme Court of the State of Ohio, I desire that the grounds upon which I give that opinion should not be misunderstood; for I dissent most decidedly, as will appear by this opinion, from many of the doctrines contained in the opinions of some of my brethren, who concur with me in affirming this judgment. I speak of the opinions they have expressed in the case of *The Piqua Bank*, as well as in this.

431*] *The powers of sovereignty confided to the legislative body of a state are undoubtedly a trust committed to them, to be executed to the best of their judgment for the public good; and no one Legislature can, by its own act, disarm their successors of any of the powers or rights of sovereignty confided by the people to the legislative body, unless they are authorized to do so by the constitution under which they are elected. They cannot, therefore, by contract, deprive a future Legislature of the power of imposing any tax it may deem necessary for the public service—or of exercising any other act of sovereignty confided to the legislative body, unless the power to make such a contract is conferred upon them by the constitution of the State. And in every controversy on this subject, the question must depend on the con-

stitution of the State, and the extent of the power thereby conferred on the legislative body.

This brings me to the question more immediately before the court: did the constitution of Ohio authorize its Legislature, by contract, to exempt this Company from its equal share of the public burdens during the continuance of its charter. The Supreme Court of Ohio, in the case before us, has decided that it did not. But this charter was granted while the constitution of 1802 was in force; and it is evident that this decision is in conflict with the uniform construction of that constitution during the whole period of its existence. It appears, from the Acts of the Legislature, that the power was repeatedly exercised while that constitution was in force, and acquiesced in by the people of the State. It was directly and distinctly sanctioned by the Supreme Court of the State in the case of *The State v. The Commercial Bank of Cincinnati*, 7 Ohio, 125.

And when the constitution of a state, for nearly half a century, has received one uniform and unquestioned construction by all the departments of the government, legislative, executive, and judicial, I think it must be regarded as the true one. It is true that this court always follows the decision of the state courts in the construction of their own constitution and laws. But where those decisions are in conflict, this court must determine between them. And certainly a construction acted on as undisputed for nearly fifty years by every department of the government, and supported by judicial decision, ought to be regarded as sufficient to give to the instrument a fixed and definite meaning. Contracts with the State authorities were made under it. And upon a question as to the validity of such a contract, the court, upon the soundest principles of justice, is bound to adopt the construction it received from the State authorities at the time the contract was made.

It was upon this ground that the court sustained contracts *made in good faith [***432** in the State of Mississippi, under an existing construction of its constitution, although a subsequent and contrary construction given by the courts of the State, would have made such contracts illegal and void. The point arose in the case of *Rowan et al. v. Runnels*, 5 How., 184. And the court then said, that it would always feel itself bound to respect the decisions of the state courts, and from time to time as they were made, would regard them as conclusive in all cases upon the construction of their own constitution and laws; but that it ought not to give them a retroactive effect, and allow them to render invalid contracts entered into with citizens of other states, which in the judgment of this court were lawful at the time they were made. It is true, the language of the court is confined to contracts with citizens of other states, because it was a case of that description which was then before it. But the principle applies with equal force to all contracts which come within its jurisdiction.

Indeed, the duty imposed upon this court to enforce contracts honestly and legally made, would be vain and nugatory, if we were bound to follow those changes in judicial decisions which the lapse of time, and the change in judicial officers, will often produce. The writ of

error to a state court would be no protection to a contract, if we were bound to follow the judgment which the state court had given, and which the writ of error brings up for revision here. And the sound and true rule is, that if the contract, when made, was valid by the laws of the state, as then expounded by all the departments of its governments, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the Legislature of the state, or decision of its courts, altering the construction of the law.

It remains to inquire whether the Act of 1851 impaired the obligation of any existing contract or contracts with the plaintiff in error.

Before, however, I speak more particularly of the Acts of the Legislature of Ohio, which the Company rely on as contracts, it is proper to state the principles upon which acts of that description are always expounded by this court.

It has been contended, on behalf of the defendant in error (the Treasurer of the State), that the construction given to these Acts of Assembly by the state courts ought to be regarded as conclusive. It is said that they are laws of the State, and that this court always follows the construction given by the state courts to their own constitution and laws.

But this rule of interpretation is confined to ordinary acts of legislation, and does not extend [*433] tend to the contracts of the State, *although they should be made in the form of a law. For it would be impossible for this court to exercise any appellate power in a case of this kind, unless it was at liberty to interpret for itself the instrument relied on as the contract between the parties. It must necessarily decide whether the words used are words of contract, and what is their true meaning, before it can determine whether the obligation the instrument created has or has not been impaired by the law complained of. And in forming its judgment upon this subject, it can make no difference whether the instrument claimed to be a contract is in the form of a law passed by the Legislature, or of a covenant or agreement by one of its agents acting under the authority of the State.

It is very true, that if there was any controversy about the construction and meaning of the Act of 1851, this court would adopt the construction given by the State Court. And if that construction did not impair the obligation of the contract as interpreted by this court, there would be no ground for interfering with the judgment. For then the contract, as expounded here, would not be impaired by the state law. But if we were bound to follow not only the interpretation given to the law, but also to the instrument claimed to be a contract, and alleged to be violated, there would be nothing left for the judgment and decision of this court. There would be nothing open which a writ of error or appeal could bring here for consideration and judgment; and the duty imposed upon this court under this clause of the Constitution would, in effect, be abandoned.

I proceed, therefore, to examine whether there is any contract in the Acts of the Legislature relied on by the plaintiff in error, which deprives the State of the power of levying upon the stock and property of the company its equal share of the taxes deemed necessary for the support of the government.

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The Company was chartered by the Legislature of Ohio on the 12th of February, 1834.

The purposes for which it was incorporated, and the character of the business it was authorized to transact, are defined in the 2d section. It confers upon the Company the power—1. To make insurance on lives. 2. To grant and purchase annuities. 3. To make any other contracts involving the interest or use of money and the duration of life. 4. To receive money in trust, and to accumulate the same at such rate of interest as may be obtained or agreed on, or to allow such interest thereon as may be agreed on. 5. To accept and execute all such trusts of every description as may be committed to them by any person or persons whatsoever, or may be transferred to them by order of any court of record whatever. 6. To receive and hold lands under *grants with general [*434] or special covenants, so far as may be necessary for the transaction of their business, or where the same may be taken in payment of their debts, or purchased upon sales made under any law of the State, so far as the same may be necessary to protect the rights of said Company, and the same again to sell, convey and dispose of. 7. To buy and sell drafts and bills of exchange.

In addition to these powers, it was authorized by the 23d section of the charter to issue bills or notes until the year 1843—subject to certain restrictions and limitations therein specified.

And the 25th section provides that no higher taxes shall be levied on the capital stock or dividends of the Company, than are or may be levied on the capital stock or dividends of incorporated banking institutions in the State.

The last section of the charter reserved the right to the State to repeal, amend or alter it after the year 1870.

These are the only provisions material to the question before us.

At the time this charter was granted the Act of March 31, 1831, was in force, which imposed a tax of five per cent. on the dividends declared by any bank, insurance or bridge companies.

Subsequently, on the 14th of March, 1836, after this Company was incorporated, another law was passed to prohibit the circulation of small bills; and by this law a tax of twenty per cent. was imposed upon dividends, with a proviso, "That should any bank, prior to the 4th of July next following, with the consent of its stockholders, by an instrument of writing under its corporate seal, addressed to the auditor of the State, surrender the right conferred by its charter to issue or circulate notes or bills of a less denomination than \$3, after the 4th of July, 1836; and any notes or bills of a less denomination than \$5 after the 4th of July, 1837: then the Auditor of the State should be authorized to draw on such banks only for the amount of five per cent. upon its dividends declared after the surrender.

As the plaintiff in error had the usual banking power of issuing notes and bills for circulation until 1843, it justly considered itself within the provisions of this law, and filed the surrender required; and ever since, until 1851, has paid the tax of five per cent., and no more, upon the dividends it declared. The Act of

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1836 was repealed in 1838, and permission again given to the banks to issue small notes and bills; but it does not appear that the Life Insurance and Trust Company ever availed itself of the privilege. Afterwards, in 1845, another law was passed incorporating the State Bank of 435*] Ohio, and such banking companies *as might afterwards organize themselves under and according to the provisions of that Act. And the 60th section of this law provided that each banking company organized under that Act should pay, semi-annually, six per cent. on its profits, which should be in lieu of all taxes to which such companies, or the stockholders thereof, on account of stocks owned therein, would otherwise be subject.

Upon these Acts of Assembly the plaintiff in error defends itself against the tax imposed by the Act of 1851, upon two grounds:

1. That by the Act of 1836 the State agreed to relinquish the right to impose a higher tax than five per cent. upon the dividends declared by the corporation, during the continuance of its charter, upon the surrender of its right to issue small bills or notes.

2. That if this proposition is decided against it, yet, as the Act of 1845 established a general banking system, by which the State agreed to receive from each bank organized under it, six per cent. upon its profits, in lieu of all taxes to which it would otherwise be subject, the State could not impose a higher tax upon this Company under the contract contained in the 25th section of its charter hereinbefore mentioned.

The rule of construction, in cases of this kind, has been well settled by this court. The grant of privileges and exemptions to a corporation are strictly construed against the corporation, and in favor of the public. Nothing passes but what is granted in clear and explicit terms. And neither the right of taxation nor any other power of sovereignty which the community have an interest in preserving, undiminished, will be held by the court to be surrendered, unless the intention to surrender is manifested by words too plain to be mistaken. This is the rule laid down in the case of *Billings v. The Providence Bank*, and re-affirmed in the case of *The Charles River Bridge Company*.

Nor does the rule rest merely on the authority of adjudged cases. It is founded in principles of justice, and necessary for the safety and well being of every State in the Union. For it is a matter of public history, which this court cannot refuse to notice, that almost every bill for the incorporation of banking companies, insurance and trust companies, railroad companies, or other corporations, is drawn originally by the parties who are personally interested in obtaining the charter; and that they are often passed by the Legislature in the last days of its session, when, from the nature of our political institutions, the business is unavoidably transacted in a hurried manner, and it is impossible that every member can deliberately examine every provision in every bill upon which he is called on to act.

436*] *On the other hand, those who accept the charter have abundant time to examine and consider its provisions, before they invest their money. And if they mean to claim under it any peculiar privileges, or any exemption from the burden of taxation, it is their duty to see

that the right or exemption they intend to claim is granted in clear and unambiguous language. The authority which this court is bound under the Constitution of the United States to exercise, in cases of this kind, is one of its most delicate and important duties. And if individuals choose to accept a charter in which the words used are susceptible of different meanings—or might have been considered by the representatives of the State as words of legislation only, and subject to future revision and repeal, and not as words of contract—the parties who accept it have no just right to call upon this court to exercise its high power over a state upon doubtful or ambiguous words, nor upon any supposed equitable construction, or inferences made from other provisions in the Act of Incorporation. If there are equitable considerations in their favor, the application should be made to the State and not to this court. If they come here to claim an exemption from their equal share of the public burdens, or any peculiar exemption or privilege they must show their title to it—and that title must be shown by plain and unequivocal language.

Applying this rule of construction to the laws hereinbefore referred to, it is evident that the first ground of defense cannot be maintained.

When the Act of 1836 was passed, the State had an undoubted right, if it deemed proper, to impose the tax of twenty per cent. upon the incorporated companies therein mentioned, and to include the Life Insurance and Trust Company among them. Indeed, the right of the State in this respect is not disputed, and the argument on behalf of the plaintiff in error upon this point necessarily admits it. And we see nothing in the proviso which can fairly be construed as a contract on the part of the State that it would not afterwards change the policy which that law was intended to carry into operation; nor anything like a pledge that the State would not thereafter impose a tax of more than five per cent. upon the dividends of such banks as complied with the specified condition. The law is not a proposition addressed to the banks, but an ordinary act of legislation addressed to its own officer, and prescribing his duty in levying and collecting taxes from the corporations it mentions. It was the policy of the State, at that time, to infuse more gold and silver in the circulating currency, and to put an end to the circulation of small notes. The Act of 1836 was manifestly intended to accomplish that object. And the tax is accordingly so regulated as to make *it the interest of the [437] banks to abstain from issuing them. But the insolvency of the Bank of the United States, and many of the state banks, and the general stoppage of specie payments, which happened soon afterwards, made it impossible to carry out the policy which the State deemed best for the public interests. The prohibition to issue small notes was therefore repealed in 1838, and the privilege of issuing them again restored to the banks. Now, without resorting to the established rule of construction, above stated, no fair interpretation of the words of these laws can make them other than ordinary acts of legislation, which the State might modify or change according to the necessities of the public service. It would be straining the words

beyond their just import and meaning to construe the reduced taxes levied, while the banks were prohibited from issuing small notes, as a perpetual contract not to levy more, although the privilege for which the reduction was intended, as an equitable compensation, should be restored. If it could be regarded as a contract, it evidently meant nothing more than that the tax should not be raised while the banks were prohibited from issuing small notes.

But the subject matter of these laws shows that no contract could have been intended. Every contract of this kind presupposes that some consideration is given, or supposed to be given, by the corporation—that the community is to receive from it some public benefit, which it could not obtain without the aid of the Company. But in this instance the consent or co-operation of this Company was not necessary to enable the State to carry out the policy indicated by the Act of 1836. It had indeed at that time the power to issue notes and bills for circulation. But the grant of this right to the corporation, in general terms, was not a surrender of the right of the State to prescribe by law, the lowest denomination for which notes or bills should be allowed to circulate. No such surrender is expressed, and none such, therefore, can be implied or presumed. For it is not only the right, but the duty of the State to secure to its citizens, as far as it is able, a safe and sound currency, and to prevent the circulation of small notes when they become depreciated, and are a public evil. And the community have as deep an interest in preserving this right undiminished, as they have in the taxing power. And like the taxing power, it will not be construed to be relinquished, unless the intention to do so is clearly expressed. The general power to issue notes and bills, without any express grant as to small notes, is subordinate to the power of the State to regulate the amount for which they may be issued.

Moreover, the power of the Life Insurance and Trust Company to issue notes or bills, of **438*** any description, terminated by the *express provision in its charter in 1843. And if the acceptance of the condition contained in the proviso in the Act of 1836 made that law a contract on the part of the State, the reduced tax was the consideration for the surrender of the privilege. It surrendered the privilege until 1843. It had nothing to surrender after that time. And of course there was nothing for which the State was to give an equivalent, or for which the Company had even an equitable claim to require compensation. It would be a most unreasonable construction of such an agreement to say, that in consideration that the Company would abstain from embarrassing the community with a small note circulation for seven years, the State contracted not only to exempt it from its equal share of taxation during the time it abstained, but also for twenty-seven years afterwards, during which period the Corporation would be exercising every privilege originally conferred on it by its charter, and giving no equivalent for the exemption. Before such a conclusion can be arrived at, the rule hereinbefore stated must be reversed, and every intendment made in favor of the exclusive privileges of the Corporation, and against the community; and that intendment, too, must

be pushed beyond the fair and just construction of the language used, or the subject matter and object of the agreement.

In every view of the subject, therefore, the defense taken under the Act of 1836 cannot be maintained.

The second proposition of the plaintiff in error is equally untenable.

The contract with this Company in relation to taxation is contained in the 25th section of the charter hereinbefore set forth. Its obvious meaning is, that the tax upon this Company should be regulated by the taxes which the policy or the wants of the State might induce it to impose by its general laws upon banking institutions. And in the legislation of Ohio, the words "banking institutions" or "banks" appear always to be confined to corporations which were authorized to issue bills or notes for circulation as currency. This Company, therefore, was to be subject to the taxes then levied, or which its policy or necessities might afterwards induce it to levy, on banking institutions. The tax is not to be regulated by any special contract that the State had made, or might afterwards make, with a particular bank or banks. Nor is there any pledge on the part of the State that it will not afterwards enter into such contracts, and reserve in them a higher or lower rate of interest than that prescribed by its general laws. There is no provision in relation to such contracts contained in its charter. Its taxes are to be raised or lessened as the Legislature may from time to time prescribe in cases of banks where no special contract intervenes *to forbid it. This, in my opinion, is [**439** the true interpretation of the words used.

At the time the charter was granted, the Act of March 12, 1831, was in force, which imposed a tax of five per cent. on the dividends of banks, insurance and bridge companies. Of course, the plaintiffs in error were subject to that tax, and no more, while the law of 1831 continued in force; and it was not affected by any special contracts which the State had previously made. And it would have been liable to the tax of twenty per cent. imposed by the general Act of 1836, if it had not complied with the condition in the proviso. But having complied, it remained, like other banking institutions which had no special contract, subject to the tax of five per cent.

Then came the Act of 1845, which incorporated the State Bank, and authorized individuals to form banking companies in the manner and upon the terms therein specified. The 60th section provided that the banking companies organized under it should each pay, semi-annually, six per cent. on its profits, which sum should be in lieu of all taxes to which the Company or stockholders would otherwise be subject. It will be observed that this provision does not extend to all the banks in the State, but is, in express terms, confined to those which should be organized under that Act of Assembly; that is to say, to such banks only as should be organized in the manner authorized by that law, and become liable to all the restrictions, provisions, and duties prescribed in it.

The court has already decided at the present term that the State has, by this section, relinquished the right to impose a higher tax than

the one therein mentioned, upon any bank organized under that law. But that decision does not affect this case. For this Company was not organized under the Act of 1845, and is not, therefore, embraced by the 60th section. It remained under the regulation of the general law, and was still subject to a tax of six per cent. on its dividends, and nothing more. It was not liable to the increased tax of five per cent. upon profits levied upon these banks. For that tax was the result of a special agreement, and not of the repeal of former laws. And so it appears to have been understood and construed by the parties interested. The plaintiff in error continued to pay five per cent. on its dividends; while the banks organized the Act of 1845, paid the increased tax of six per cent. on their profits. Neither was the duration of its charter shortened. It still was to continue until 1870, while the corporate existence of these banks was to terminate in 1866. Nor was it subject to the restrictions, limitations or duties imposed upon them, when they differed from those of its own charter.

440*] *This being the case, there is no reason why the tax to be paid by the plaintiff in error should not be regulated by the general rule prescribed by the Act of 1851. It was regulated by the general Act of 1836, until this law was passed. Its tax was then lower than that levied on the banking companies organized under the Act of 1845. And, as the special contract on which these banks were chartered did not apply to this Corporation before the Act of 1851, we do not see upon what ground it can be applied afterwards. As the tax levied on the Life Insurance and Trust Company was regulated by the general rule before, it would seem to follow that it should continue to be so regulated, as there is nothing in that law to alter its original charter. The increased amount of the tax can make no difference.

It is said, however, that when the Act of 1851 was passed, there was no solvent bank in the State except those brought into existence by the Act of 1845; that those previously established had all failed, and consequently there was no banking institution upon which the increased tax could operate. There is some difference, as to this fact, between the counsel. But I do not deem it material to institute a particular inquiry upon the subject. The provisions of the Act of 1851 are general, and expressly apply to all banks then in existence, if any, or which have since been established, unless they were exempted from its operation by contract with the State. And it is by this general rule or policy that this Company is bound by its charter to abide.

Besides, it has been stated in the argument, and seems to have been admitted, that in 1845 there was no banking institution in the State upon which a tax was levied. They had all, it is said, stopped payment and made no dividends, and consequently no tax was paid. And this fact was strongly urged in the case of *The Piqua Branch of the State Bank of Ohio v. Jacob Knoop, Treasurer*, in order to support the construction of the contract which has been sanctioned by the court. Yet the fact that there was no bank then in existence paying the tax, did not withdraw the Life Insurance and

Trust Company from the operation of the general law, nor subject it to the increased taxation of the Act of 1845.

Again it is said, that forty or fifty banks were organized under the Act of 1845, and that that Act formed the general banking system of the State; and the rule of taxation then prescribed ought therefore to be applied to this corporation, under the terms of its charter. But, as I have already said, the charter to the Life Insurance and Trust Company does not prohibit the State from granting charters, under any special limitation as to *taxa- [*441 tion, which it may deem advisable and for the public interest. And if it may grant one, it may grant as many as it may suppose the public interest requires, upon the same or upon different conditions from each other. The State has not contracted that this Company shall have the benefit of all or any of such agreements, or shall pay only the lowest tax levied on a bank, or the tax levied on the greater number of them. It has agreed that it shall have the benefit of its general regulations and laws in this respect, but not of its special contracts. And when the owners of property, vested in the stocks of a corporation, come here to claim a privilege or franchise, which exempts them from their equal share of the public burdens borne by the rest of the community, they are entitled to receive what is expressly or plainly granted to them, and nothing more.

Upon the whole, I am of opinion that the Act of 1851 does not impair the obligation of any contract with the plaintiff in error, and the judgment of the Supreme Court of Ohio ought therefore to be affirmed.

Mr. Justice Catron :

I stated my views as to the character and effect of the sixtieth section of the Act of 1845, in the case of *The Piqua Bank v. Knoop*; there I came to the conclusion that no restraint was intended to be imposed on a future Legislature to impose different and additional taxes on the banks to which the Act applies, if that was deemed necessary for the public welfare.

2d. My conclusion, also, was in the above case, that if such restraint had been attempted, it was inoperative for want of authority in a Legislature to vest in a corporation by contract, to be held as a franchise and as corporate property, a general political power of legislation, so that it could not be resumed and exercised by each future Legislature. That a different doctrine would tend to sap and eventually might destroy the state constitutions and governments; as every grant of the kind, to corporations or individuals, would expunge so much of the legislative power from the State constitution as the contract embraced; and if the same process was applied to objects of taxation, first one and then another might be exempted, until all were covered, and subject to the same immunity, when the government must cease to exist for want of revenue.

3d. That the constitution of Ohio, of 1802, forbids such tying up of the hands of future Legislatures acting under its authority, it being so construed by her own courts, whose decisions we were bound to follow. Nor has any law or decision of a court in Ohio construed its

late constitution of 1802 in this regard, until the decisions, lately made on the tax laws here in controversy, settled its true meaning.

442*] *These principles will equally apply in this case as they did in that of *The Piqua Bank v. Knoop*; even admitting that the sixtieth section of the Act of 1845 is in effect and fact a general provision applicable to the existing banks of Ohio, and embraces the Insurance and Trust Company.

It is proper that I should say, my object here is not to express an opinion in this case further than to guard myself against being committed in any degree to the doctrine that the sovereign political power is the subject matter of a private contract that cannot be impaired or altered by a subsequent Legislature; that such act of incorporation is superior to subsequent state laws affecting the corporators injuriously; and that the corporation holds its granted franchises under the Constitution of the United States, in effect, and holds and maintains the portion of sovereign power vested in it by force of the authority of this court: thus standing off from and above the local state authorities, political and judicial, and setting them at defiance, as has been most signally done in one instance, brought to our consideration from Ohio at this term, in the case of *Deshler v. Dodge*. There the tax collector distrained nearly \$40,000 worth of property from four of these banks claiming exemption. On the same day an assignment was made by the four banks of the property in the collector's hands to Deshler, a citizen of New York. He sued out a writ of replevin in the Circuit Court of the United States, founded on these assignments. The marshal of that court, by its process, retook the property from the tax collector's hands, and delivered it to the non-resident assignee, as the legal and true owner, who now holds it.

No other or further step is required to secure our protection to corporations setting up claims to exemption from state laws. I have become entirely convinced that the protection of State legislation and independence, supposed to be found in a liberal construction of state laws in favor of the public and against monopolies, as asserted in *The Charles River Bridge* case, is illusory and nearly useless, as almost any beneficial privilege, property or exemption, claimed by corporations or individuals in virtue of state laws, may be construed into a contract, presenting itself as unambiguous and manifestly plain to one mind, whereas to another it may seem obscure, and not amounting to a contract. No better example can be found than is here furnished.

When I take into consideration this fact, and, in connection with it, the unparalleled increase of corporations throughout the Union within the last few years; the ease with which charters, containing exclusive privileges and exemptions are obtained; the vast amount of property, power, and exclusive benefits, prejudicial to other classes of society that are vested in and held *by these numerous bodies of associated wealth, I cannot but feel the grave importance of being called on to sanction the conclusion that they hold their rights of franchise and property under the Constitution of the United States, and practically

under this court, and stand above the State government creating them.

My opinion is, that the judgment of the State Court should be affirmed for the reasons here suggested, and stated by me at large in the case of *The Piqua Bank v. Knoop*.

Mr. Justice Daniel:

In the conclusion adopted by the opinion of the court, that the judgment of the Supreme Court of Ohio should be affirmed, I entirely concur, but from the reasoning by which the court has reached its conclusion I am constrained to dissent. I never can believe in that, to my mind, suicidal doctrine, which confers upon one Legislature, the creatures and limited agents of the sovereign people, the power, by a breach of duty and by transcending the commission with which they are clothed, to bind forever and irrevocably their creator, for whose benefit and by whose authority alone they are delegated to act, to consequences however mischievous or destructive. The argument of the court in this case leading, in my apprehension, to the justification of abuses like those just referred to, I must repudiate that argument, whilst I concur in the conclusion that the decision of the Supreme Court of the State of Ohio should be affirmed, both for the reasons assigned in support of their judgment by that court, and for the further reason that this court cannot rightfully take cognizance of the parties to this controversy.

Mr. Justice Campbell:

My opinion is, that the Act of the General Assembly of Ohio, entitled "An Act to tax banks, and bank and other stocks, the same as other property is now taxable by the laws of this State, of March, 1851," does not impair the obligation of any contract contained in the Act of Incorporation of the plaintiff, or in any other Act of the General Assembly of the State with which the plaintiff is concerned.

I concur in the opinion of the Chief Justice concerning the interpretation of the statutes of Ohio involved in this case, and the doctrines of interpretation applicable to these and statutes of a similar description, and in the conclusions to which they conduct.

In the decision of the cases which have been brought to this court from the Supreme Court of Ohio, I have not found it necessary to declare an opinion upon the power of the General Assembly to modify or to repeal an [*444] act of incorporation like the one held by these banking institutions; nor of the limitations upon the General Assembly in administering the power of taxation—much less to consider the powers of the people of Ohio, to reform all the proceedings and acts of their government, or whether those powers of the people can be controlled in their exercise by any jurisdiction or authority lodged in this court.

The questions pressing upon us involve interests of such a magnitude and consequences so important, that I feel constrained to stop at the precise limit at which I find myself unable to decide the case at law or equity before me—that being the limit of my constitutional power and duty.

I file this opinion merely to say, that I do not concur in the opinion which has been de-

livered on the points wherein any of these questions are directly or indirectly considered.

Mr. Justice McLean:

The language of the 25th section of the charter of the Ohio Life Insurance and Trust Company, is, "No higher taxes shall be levied on the capital stock or dividends of the Company than are or may be levied on the capital stock or dividends of incorporated banking institutions in this State."

This charter was passed the 12th of February, 1834. It was accepted by the Company, a large amount of stock was subscribed and paid, and the Bank was organized and went into operation.

The 2d section gave power to the Company, 1. To make insurances on lives. 2. To grant and purchase annuities. 3. To make any other contracts involving the interest or use of money, and the duration of life. 4. To receive money in trust, and to accumulate the same at such a rate of interest as may be obtained or agreed on, or to allow such interest thereon as may be agreed on. 5. To accept and execute all such trusts of every description, as may be committed to them by any person or persons whatsoever, or may be transferred to them by order of any court of record whatever. 6. To receive and hold lands under grants, with general or special covenants, so far as the same may be necessary for the transaction of their business, or where the same may be taken in payment of their debts, or purchased upon sales made under any law of this State, so far as the same may be necessary to protect the rights of the said Company, and the same again to sell, convey, and dispose of. 7. To buy and sell drafts and bills of exchange.

The capital stock of the corporation was fixed at \$2,000,000, the whole of which was required to be invested in bonds or notes notes drawing interest, not exceeding seven per cent. per annum, secured by unencumbered real estate within the State of Ohio, of at least double the value in each case of the sum so secured.

By the 23d section it is declared, that "the Company shall have power until the year 1843, to issue bills or notes to an amount not exceeding twice the amount of the funds deposited with said Company, for a time not less than one year, other than capital; but shall not, at any time, have in circulation an amount greater than one half the capital actually paid in and invested in bonds or notes secured by an unencumbered real estate, agreeably to the 7th section of this Act, nor a greater amount than twice the amount of deposits, &c.

The section under which the claim to a limited taxation is maintained, is only made certain by reference to the taxes levied on the capital stock or dividends of other incorporated banking institutions. And more satisfactorily to arrive at this result, it may be proper to see what construction has been given to the section by the officers of state, whose duty it was to assess the tax and collect it.

The Act of the 12th of March, 1831, imposed a tax on banks of five per cent. upon the amount of their dividends. This tax was paid by the Trust Company until the Act of the 14th of March, 1836, called the Act to prohibit the cir-

ulation of small bills. Under this Act the auditor was authorized to draw in favor of the Treasurer of State for twenty per cent. on the dividends of the banks, provided, if they should agree in the form required to relinquish the right under their charters to issue five dollar bills, and three dollars, the auditor should draw only for five per cent.

The Trust Company acceded to the proposal, and filed the necessary papers relinquishing the right to issue the small bills as required. But this made no difference in the amount of the tax paid by the Bank.

The tax continued the same rate of five per cent. on the dividends of banks until the Act of 1845 was passed, containing the following compact: "Each banking company, organized under this Act, or accepting thereof, and complying with its provisions, shall semi-annually, on the days designated in the fifty-ninth section, set off to the State six per cent. on the profits, deducting therefrom the expenses and ascertained losses of the company for the six months next preceding; which sum or amount, so set off, shall be in lieu of all taxes to which such company, or the stockholders thereof, on account of stock owned therein, would otherwise be subject," &c.

As the power of State to exempt property from taxation, under a compact which binds it, has been discussed somewhat at large [*446 in the case of *The Piqua Branch Bank v. Knapp*, at this term, nothing farther need now be said on the subjects there examined; but the point, whether there is a contract which should exempt the Trust Company Bank from general taxation, must be considered. There are two grounds under which this Bank claims an exemption.

1. Under its original charter.

2. Under the Small Note Act of 1836. The second I shall not consider.

The twenty-fifth section in the charter guarantees that "no higher taxes shall be levied on the Trust Company than on the capital or dividends of incorporated banking institutions in the State." Now, to make this provision specific as to the amount of the tax, the other banking institutions of the State to which the section refers, must be ascertained.

Some doubt may arise, whether the institutions referred to were such as were existing at the time the charter was granted, or to banks subsequently taxed. As the words in the section, in relation to taxation of the bank, are, "than are or may be levied," it would seem to embrace the future law of taxation, as well as the one in force at the date of the charter. Taking this as the true construction, the tax of five per cent. on the dividends was properly assessed under the Act of 1831 and 1836.

At the time the charter of this Company went into operation, some of the banks were taxed four per cent. on their dividends; but as the greater number were taxed five per cent. on their dividends, the Auditor of State drew for five. This seemed to be a reasonable construction of the twenty-fifth section, as it refers to a general rule of taxation, and not to a particular one. The tax shall not be higher than that on the incorporated banks of the State.

After the Act of 1845, the Trust Company was chargeable with six per cent. on the div-

dividends, deducting expenses and ascertained losses, on the ground that a very large proportion of the banks of the State were so taxed; and that would seem to come within the intention of the Trust Company charter. Without doing violence to the language of the twenty-fifth section, it cannot be said to embrace the highest rate of taxation nor the lowest; that rate which would include the greater number of banks, would seem to be just. And that was the construction given by the auditor before the Tax Law of 1851.

The Act of the 12th of March, 1851, imposed a much higher tax on banks, by assessing it on all the property of the banks, instead of the six per cent. on the dividends. This embraced the banks chartered under the Act of 1845, as well as all others. And if this law had been held to be constitutional, it would, undoubtedly, apply to the Trust Company.

447*] *On the 21st of March, 1851, the same day the above tax law was passed, an Act to authorize free banking was enacted, which continued in force until it was repealed by the adoption of the constitution. Under this law it is ascertained, from the report of the auditor, that thirteen banks, or about that number, were organized. There were about fifty banks organized under the Act of 1845. Four of the old banks were not included in this organization. Now, all the banks organized under the Act of 1845, as we have held in *The Piqua Branch Bank* case, were not subject to a higher tax than six per cent. on their dividends.

At the time the Tax Law of 1851 was made to operate on the Trust Company, there does not appear to have been a bank in the State on which such tax could be assessed. There were, it is believed from the report of the Auditor of State, thirteen banks organized under the Bank Act of 1851, passed on the same day as the Tax Act; but not one of those banks was in operation until some time after the tax took effect on the Trust Company. This Bank Act was repealed by the new constitution so as to arrest the further organization of banks under it. Now, from these facts the question arises, whether the twenty-fifth section shall be held to apply to the fifty banks in operation under the Act of 1845, or to the thirteen banks which were afterwards organized under the Act of 1851. It is true that the Act of 1851, imposing the tax, was intended to affect all the banks, and especially the Trust Company, but that Act being held to be unconstitutional, cannot be considered as governing the twenty-fifth section of the Trust Company charter. The provision in that section, that "no higher duties shall be levied on the capital stock or dividends of the Company than are or may be levied on the capital stock or dividends of incorporated banking institutions in the State," must refer to a legal taxation; and if this be the correct interpretation, then, at the time this tax law was passed, there was not a bank in the State on which the tax could take effect. The twenty-fifth section referred to incorporated institutions and not to contemplated incorporated banks. Such a construction must be given to the section, if it have any effect. This reference, embracing the taxation under the Act of 1845, gives to the Trust Company charter the same effect as if the sixtieth section of the Act of 1845 had been em-

bodied in it. By reference it constitutes a part of the Trust Company charter, and it would seem to me that nothing short of this gives to the twenty-fifth section the effect it was intended to have.

That section has been relied on by the Bank as a pledge or compact, not complete within itself as to the amount of the tax; but by reference to existing incorporated banks, embracing *the tax imposed upon them as the tax [*448 intended to be applied to the Trust Company.

In this view this section is made certain, and contains all the requisites of a contract. The same certainly would make good a grant for land. And this is sufficient. The restriction of the power of the Legislature of Maryland, in regard to taxing the banks of that State, was made out by construction as clearly and as satisfactorily as if it had been expressed in words.

Would anyone contend that the Legislature of Ohio could tax the Trust Company under its charter, without any reference to existing incorporated banks? This was done by the Tax Law of 1851. But the Legislature may have supposed that law would operate upon all banks in the State. As that law cannot so operate, this tax on the Trust Company then should be considered as taxing the Trust Company without reference to any existing banks, but to those which might or might not be organized under the Act of 1851. This, it seems to me, is in violation of all sound rules of construing the twenty-fifth section.

The Supreme Court of the State considered this charter of the Trust Company as resting on the same footing as the other banks. In the discussion of the subject the sixtieth section of the Act of 1845 was examined. They rightly considered that section as applying, by reference, to that Company; and in this respect, I entirely agree with them. I think the Trust Company stands upon the same basis, and should have the same judgment applied to it, as was applied to the banks under the Act of 1845.

In the argument of the counsel against the Trust Company Bank, it was insisted that the rule which is to determine the amount of taxation, is found in the banking companies under the Act of 1851, and not under the Act of 1845. And this is founded chiefly on the fact that the Act of 1851 was a general law, and imposed a tax upon all the banks of Ohio. This argument would be unanswerable, if the existing banks were subject to the Tax Law of 1851. But, under our decision, that law has no operation on the existing banks; and this fact was not considered by the counsel. The decision in *The Piqua Bank* case has taken this ground from the counsel. For they did not, in any part of their argument, contend that the tax could apply to the Trust Company as "incorporated banks," when no such banks were incorporated. This would seem to be in violation, not only of the words of the 25th section, but of the clear import of that section.

Neither the Supreme Court of the State nor the counsel relied upon such an argument. The court of the State and the counsel in *The Trust Company* case, discussed the 60th section *of the Act of 1845, as by reference, [*449 constituting a part of its charter. And this is the true question in the case.

The privilege of issuing bills of circulation, which terminated in 1843, can have no effect upon the question of taxation. That company still exercised, under its charter, its banking powers as a bank of deposit, and did a much larger business than any bank of the State. After 1843, as before that period, its dividends were taxed as the other banks. It was in fact a bank, and discounted, and was the principal bank in the State. These facts appear from the taxes paid to the auditor, which constitute a part of the record.

In the argument it is assumed that this Bank is taxed at the rate only at which individuals are taxed. From the facts before us, I think there is a mistake in this statement.

The capital of this Bank is stated in the charter to be \$2,000,000. From the record it appears that eight per cent. is the average dividend declared. This would give \$160,000, as dividend, per annum. From the report of the Auditor of Ohio I observe the taxes charged against the Trust Company, including the penalties incurred for that year, amounts to the sum of \$108,477.85. This sum, deducted from the dividends for the year, will leave only the sum of \$51,523 to be distributed among the stockholders. This would give to them little more than two and a half per cent. on their capital. But if the Bank had paid the tax, without incurring any penalty, it would have amounted to a sum not much below \$70,000. This would take nearly one half of the profits of the year. This result must convince anyone that there must be some error in the statement, that this Bank is taxed no more than property is taxed in the hands of individuals. No free people would pay nearly one half the profit of a large concern, in taxes. But I think this result may be accounted for.

The capital of this Bank is loaned at seven per cent., and distributed among the counties of the State. Funds are received on deposits for which four per cent. per annum, or a higher rate of interest is paid. The Bank having the general confidence of business men, its deposits are large, the notes payable to the Bank, bills of exchange, &c., are all assessed at their face, as capital, and also, it is supposed, all moneys on deposit. From these no deduction is made on account of debts due to depositors or to other persons, as the law requires, in assessing the personal property of an individual. No trust company, organized as this Company is organized, can do business under such a pressure of taxation.

This Bank was organized when the currency [450*] of Ohio was "deranged, and embarrassments were general throughout the country. The general Bankrupt Act followed, after the lapse of some years. The agency of the Trust Company Bank, in distributing its capital in every county in the State, as required by its charter, conduced to correct the evils of a vitiated currency in the State; and in that respect, has continued to exercise a salutary influence over its circulation. These considerations, I am aware, have nothing to do with the constitutional question in the case, and I only advert to them in answer to the argument that this Bank has no ground of complaint, as it is taxed on its property as if the property were in the hands of an individual.

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Mr. Justice Wayne dissented from the judgment of the court:

Mr. Justice Curtis :

I dissent from the judgment of the majority of the court in this case. I consider the twenty-fifth section of the charter of the Company to be a contract by the State with the Corporation, that the rate of taxation of this Company shall not at any time be higher than the rate of taxation actually and legitimately imposed on banking institutions; that this contract is not complied with by passing an act to tax banks, which could not, and did not operate, in point of fact, to tax the banking institutions of the State; that what was bargained for and granted was not conformity to an inoperative general law, but conformity to the actual and legal rate of taxation of banks for the time being; and consequently, as when the tax in question was levied, the banking institutions existing in the State were not subject to the law under which the Life and Trust Company was taxed, and were not liable to pay the rate of taxation imposed on that Company, the obligation of the contract of the State to impose on the Life and Trust Company no higher taxes than are or may be imposed on banking institutions, has been impaired; because when this tax was imposed it was a higher tax than was or could be legitimately imposed on the then existing banking institutions of the State. I do not go into an extended examination of this subject, because it involves only a construction of this particular contract, and though important to the parties, is not of general interest. Upon the other questions involved in the case, namely: as to the power or the Legislature of Ohio to make a contract fixing the rate of taxation of certain property for a term of years—as to the duty of this court to expound the contract whose obligation is alleged to be impaired—and the propriety of accepting the construction of the "constitution of the State which [451] had been practiced on by all the branches of its government, and acquiesced in by the people for many years, when the contract in question was made, I fully concur in the views of the Chief Justice, as expressed in his opinion.

Mr. Justice Nelson concurs with *Mr. Justice Curtis*.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the State of Ohio for Hamilton County, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the judgment and decree of the Supreme Court of Ohio, in this cause, as remitted to the District Court of the State of Ohio for Hamilton County, and contained in the transcript of the record filed in this cause be, and the same is hereby affirmed, with costs, and interest at the same rate per annum that similar judgments or decrees bear in the courts of the State of Ohio.

Cited—16 How., 333; 1 Black, 380; 1 Wall., 208, 216; 8 Wall., 433; 13 Wall., 376; 16 Wall., 220, 680;

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20 Wall., 61; 1 Otto, 42; 5 Otto, 691; 11 Otto, 696; 15 Otto, 71; 5 Sawy., 561; McAll., 375; 1 Woods, 423, 424; 2 Woods, 471; 3 Woods, 238, 390.

LOUIS D. GAMACHE, SAMUEL AND LEO-
NORE GAMACHE, by Guardian; WIL-
SON PRIMM, LOUIS PRIMM, JOHN
CAVENDEN, AND ABBY P. TRUE,
Plaintiffs in Error,

FRANCOIS X. PIQUIGNOT, AND THE IN-
HABITANTS OF THE TOWN OF CA-
RONDELET.

Acts confirming claims to town and village lots
—*Evidence.*

In 1812 Congress passed an Act (2 Stat. at L., 748) entitled "An Act making further provision for settling claims to land in the Territory of Missouri." It confirmed the titles to town or village lots, out lots, &c., in several towns and villages, and amongst them the Town of Carondelet, where they had been inhabited, cultivated or possessed, prior to the 20th day of December, 1803.

In 1824 Congress passed another Act (4 Stat. at L., 65), supplementary to the above, the first section of which made it the duty of the individual owners or claimants, whose lots were confirmed by the Act of 1812, to proceed within 18 months to designate their lots by proving cultivation, boundaries, &c., before the recorder of land titles. The third section made it the duty of this officer to issue a certificate of confirmation for each claim confirmed, and furnish the surveyor-general with a list of the lots so confirmed.

This list was furnished in 1827.
452* Afterwards, in 1839, another recorder gave a certificate of confirmation; an extract from the registry showing that this second recorder entered the certificate in 1839; and an extract from the additional list of claims, which addition was that of a single claim, being the same as above.

These three papers were not admissible as evidence in an ejectment brought by the owners of this claim. The time had elapsed within which the recorder could confirm a claim.

THIS case was brought up from the Supreme Court of Missouri by a writ of error issued under the 25th section of the Judiciary Act.

It was an action in the nature of an ejectment brought by the plaintiffs in error, for the recovery of a tract of land described in the declaration as survey No. 120 of the out lots and common field lots of the Village of Carondelet.

The substance of the two Acts of Congress of 1812 and 1824 is given in the caption of this report, and need not be repeated.

Upon the trial, the plaintiff offered the three following pieces of evidence, all of which were rejected by the court. There was much other evidence offered both by the plaintiffs and defendants; but as the opinion of this court turned chiefly upon the propriety of this rejection, the other pieces of evidence, and instructions of the court founded thereon, will

NOTE.—*Missouri private land claims.* See note to *Les Bois v. Bramell*, 4 How., 449.

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be omitted. It will be perceived that each one of the three purports to derive its efficacy from the certificate of Mr. Conway, in 1839.

The plaintiffs then offered in evidence the following certificate of confirmation of the Recorder of Land Titles of Missouri, as follows, to wit: (Indorsed on the outside "Jno. Bte. Gamache, Sr., 6 by 40 arpents, field of Carondelet. Fees \$1. paid.") John Baptiste De Gamache, Sr., or his legal representatives, claims an out lot, adjoining the Village of Carondelet, containing six arpents in front by forty in depth, bounded, northerly, by the common fields; eastwardly by the Mississippi River (leaving a tow between it and the river); south, by an out lot claimed by the legal representatives of Gabriel Constant (Jamond), Sr., an[d] west by the land formerly the property of Antoine Riehl.

John Baptiste Maurice Chatillon, being duly sworn, says he knows the land claimed, and that he is about sixty-six years of age, and that he was born in Kaskaskia, and A. D. seventeen hundred and eighty-eight he removed from Ste. Genevieve to Carondelet, where he has resided ever since; that A. D. seventeen hundred and ninety-seven or ninety-eight he was employed by John Baptiste Gamache, Sr., to fence in a field which said Gamache had been clearing, and working for about two years within this field lot; and he, this respondent, says, he did fence in about three arpents of this land, and did build a cabin on the same at this time; and this deponent further says that Gamache did cultivate this same field for five or six years until his death; *and this de- [*453] ponent further says he always understood this land was owned by said John Baptiste Gamache.

JOHN BAPTISTE MAURICE X CHATILLON.
his mark.

Sworn to before me, July 6th, 1825.

THEODORE HUNT,
Recorder L. T.

Translated to witness.

J. V. GARNIER.

RECORDER'S OFFICE,

St. Louis, Missouri, 22d January, 1839.

I certify the foregoing within to be truly copied from book No. 2, page 46, of the minutes of the proceedings of the recorder of land titles in the State of Missouri, under the Act of Congress of the 26th of May, 1824, entitled "An Act supplementary of an Act passed on the 13th day of June, 1812," entitled "An Act making further provisions for settling the claims to land in the Territory of Missouri," all of record in this office, and confirmed by the Act of 13th June, 1812, above cited.

F. R. CONWAY,
U. S. Recorder of Land Titles in the
State of Missouri.

To DANIEL DUNKLIN, Esq.,
U. S. Surveyor of Public Lands,
St. Louis, Mo.

Together with a certified extract from the registry of certificates from the office of the recorder of land titles as follows, to wit:

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Registry of Certificates of confirmation on town lots, out lots, and common field lots, issued by the Recorder of Land Titles.

Quantity.	Remarks.	Situation.	Date.	In whose name issued.
	Bounded north by the common fields, eastwardly by the Mississippi (leaving a tow [path] between it and the river), south by an out lot claimed by the legal representatives of Gabriel Constant (aimond), Sr., and westwardly by the land formerly the property of Antoine Rheil.	Carondelet fields.	6th July, 1838.	The following claim was omitted by Mr. Hunt, late Recorder, in furnishing the list of claims proven up before him, to wit: John Baptiste de Gamache.

454*] *The above claim entered by me in the book, 12th March, 1839, having this day furnished the Surveyor-General with a description thereof.

F. R. CONWAY, Recorder.

RECORDER'S OFFICE,
St. Louis, January 28d, 1851.

The above is correctly copied from the registry on file in this office.

ADOLPH RENARD,
U. S. Recorder of Land Titles in the State of Missouri.

And also a certified extract from the list of claims proved before the recorder of land titles, under the Act of 26th May, 1824 (in which is contained the Gamache claim to which particular reference was made at this stage of the case), transmitted by the recorder of land titles, to the Surveyor-General of the United States in Illinois and Missouri, certified from the office of the Surveyor-General as follows, to wit:

(This was a list of cases transmitted by Mr. Hunt to the Surveyor General, as a supplemental report. The cases bear various dates, the last being 12th April, 1830. They were 16 in number. Then came the following, transmitted by Mr. Conway, accompanied by a certificate by him, dated 12th March, 1839,

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stating that it had been omitted to be furnished by his predecessor, Mr. Hunt.)

No. 17—Not in list.

John Baptiste de Gamache, Sr., or his legal representatives, claim an out lot adjoining the Village of Carondelet, containing six arpents in front by forty in depth, bounded northerly by the common; eastwardly by the Mississippi (leaving a tow between it and the river); south by an out lot claimed by the legal representatives of Gabriel Constant (Lalamand), Sr., and west by the land formerly the property of Antoine Rheil.

John Baptiste Maurice Chatillon, being duly sworn, says he knows the land claimed, and that he is about sixty-six years of age, and that he was born in Kaskaskia, and A. D. 1788, he moved from St. Genevieve to Carondelet, where he has resided ever since; that A. D. seventeen hundred ninety-seven or ninety (8) eight he was employed by John Baptiste Gamache, Sr., to fence in a field—which said Gamache had been clearing and working in for about two years within this field lot—and he, this deponent, says he did fence about three arpents of this land, and build a cabin on the same, at this time. And this deponent further says, that Gamache did cultivate this same field for five or six years, until his death. And this deponent *further says, he always understood [*455 this land was owned by said* John Baptiste Gamache.

his
JOHN BAPTISTE MAURICE X CHATILLON.
mark.

Sworn to before me, July 6th, 1825.
(Signed)

THEODORE HUNT, Rec'r L. T.

Translated to witness by J. V. Garnier.

The plaintiff also offered in evidence a certified extract from Hunt's minutes, containing the entry of Gamache's claim, with a description of the lot; and also the evidence therein recorded, but the court refused to receive it; and also testimony to prove the inhabitation and cultivation of the lot prior to December, 1803, and until his death in 1805. There was also much other evidence which need not be stated in this report.

The defendants offered evidence

1. To show a title under the Act of Congress, of 1812, as commons of Carondelet.
2. An adverse possession for twenty years.
3. Rebutting evidence.

After the evidence was closed various instructions were asked for, both by the counsel for plaintiff and defendant, some of each of which were given and some refused by the court, as the verdict was for the defendants, and the case was brought up by the plaintiffs, only those instructions and refusals to which they excepted, will be here stated.

Instructions for plaintiffs refused. 3. The jury are instructed that, as against such a claim and cultivation, or possession, as that mentioned in said second instructions, no adverse user as commons as a ground of title, under the Act of Congress of 18th June, 1812, can prevail, unless such user existed in fact by an actual occupation and use as commons of the same ground, visible and continued, notorious, hostile, and exclusive, [and then] only to the extent that such actual occupation and use as

commons existed in fact, and to the exclusion of such claim and cultivation, or possession, by Gamache, of the same land, as an out lot, or cultivated field lot, of the village, prior to the 20th day of December, 1803; provided the jury also believe, from the evidence, that the tract of land in the declaration described was claimed and inhabited, cultivated or possessed, by John B. Gamache, Sr., prior to the 20th day of December, 1803, as an out lot or cultivated field lot of said village, with such a cultivation or possession as that mentioned in the said second instructions for the plaintiffs.

4. If the jury believe, from the evidence, that the claim of the Village of Carondelet to commons, prior to the 20th day of December, 1803, was bounded north (in part) [by] the cultivated lands of the village, and that, prior to said date, the lot of land in said declaration described as having been claimed by Gamache was one of the cultivated lands of the village, then there is no conflict of title in this case, and the defendants have shown no title to the land in controversy.

5. The jury are instructed, that on the evidence given in this case, the statute of limitations is no bar to this action, unless they shall believe, from the evidence, that the town of Carondelet, or those holding under said town, have had an adverse possession in fact of the land in controversy in this case by an actual occupation on the ground, visible and continued, notorious, hostile, and exclusive, for at least twenty years next preceding the commencement of this suit.

7. The jury are instructed that the survey No. 120, and the plats and field notes thereof given in evidence by the plaintiffs, are evidence of the true location, extent and boundary of the out lot of the village of Carondelet, claimed under John B. Gamache, Sr., by his legal representatives.

8. The certified extract from the minutes of Recorder Hunt, taken under the Act of Congress of 26th of May, 1824, [is] evidence that the tract of land therein mentioned and described was claimed and inhabited, cultivated or possessed, by John B. Gamache, Sr., prior to the 20th day of December, 1803, and evidence that the same was confirmed to John B. Gamache, Sr., or his legal representatives, by the Act of Congress of 13th June, 1812.

9. The certified extract from [the] registry of certificates from the recorder's office, offered in evidence [by the plaintiffs, is evidence] that the out lot therein mentioned was confirmed to John B. Gamache, Sr., or his legal representatives, by the Act of 13th June, 1812.

10. The certified extract from the list of claims transmitted by the recorder of land titles to the Surveyor-General, and certified from the office of the Surveyor-General, relating to the claims of the legal representatives of John B. Gamache, Sr., is evidence of said claim and the extent and boundary thereof, and that the same was confirmed by the Act of Congress of 13th June, 1812.

11. The certificate of confirmation of the recorder of land titles in Missouri, given in evidence by the plaintiffs, shows a *prima facie* title from the United States, in the legal representatives of John B. Gamache, Sr., to the land therein described.

To which decision of the court, refusing said instructions, the plaintiffs by their counsel excepted.

*The defendants then asked the [*457 following instructions, which were given by the court as follows, to wit:

Instructions given to defendants. 5. If the jury find that the land spoken of by the witnesses as actually cultivated and possessed by Gamache did not embrace the land now in dispute, they ought to find for the defendants.

17. The survey No. 120, read by the plaintiffs, is no evidence of title, nor of the extent and boundaries of Gamache's claim.

18. The testimony taken before Hunt, and read in evidence by the plaintiff, is not to be regarded by the jury in the present case, the defendant insisting that the claim had been abandoned.

To the giving of which instructions the [plaintiffs] by their counsel excepted.

The verdict being for the defendants, the case was carried by the plaintiffs to the Supreme Court of Missouri, where the judgment of the court below was affirmed. It was then brought to this court by the plaintiffs, by a writ of error, issued under the twenty-fifth section of the Judiciary Act.

It was argued by Mr. Holmes for the plaintiffs in error, and Mr. Picot for the defendants.

Only those points will be noted which are connected with the decision of the court. The counsel for the plaintiffs in error made the following:

III. The certificate of the recorder of land titles, offered in evidence in this case, dated the 22d of January, 1839, was competent and admissible evidence of the facts necessary to give title under and by virtue of the Act of 13th June, 1812, and showed a *prima facie* title in the legal representatives of Gamache, of the date of that Act, to the lot therein described. *Mucklot v. Dubreuil*, 9 Mo., 489, a certificate issued in 1842 held good, and evidence of title; *Boyce v. Papin*, 11 Mo., 16; *Hunter v. Hemphill*, 6 Mo., 106; and *Sarpy v. Papin*, 7 Mo., 503, one in possession, merely, not showing a title, cannot question the certificate, or survey; *Soulard v. Allen* (Sup. Court of Mo., Oct. Term, 1853), a certificate issued by Conway, since 1839, held good. The objection of the Supreme Court of Missouri to this case of *Gamache v. Piquinot* is based on the omission of this claim in the first list sent to the Surveyor-General. No limit of time was fixed by the terms, or spirit of the Act, within which the certificate must be issued, after proof made within the eighteen months prescribed, or when the power of the recorder to issue it was to cease.

IV. The certified extract from the registry of certificates was competent evidence, that the certificate, authorized by the Act of [*458 26th May, 1824, had been duly issued by the recorder of land titles, for the claim therein mentioned and described, and that the same had been confirmed by the Act of 13th June, 1812. *McGill v. Somers*, 15 Mo., 80; *Bickler v. Coonce*, 9 Mo., 351, an extract from this same registry of certificates held admissible evidence. (*Roussin v. Parks*, 8 Mo., 544.)

V. The certified extract from the Surveyor-General's list of claims proved was competent evidence that this claim had been officially reported to him by the recorder of land titles, as a claim that had been duly proved before him within the eighteen months, and that the Surveyor-General had authority by law to survey it as such. *McGill v. Somers*, and other cases cited; the Act of Congress of the 29th April, 1816, 3 Stat. at L., 324, authorized the survey to be made.

VI. The certified extract from the books of Hunt's minutes of testimony, was competent and admissible evidence, for the purpose of showing, that whatever title the government had in this out lot, at the date of the Act of 13th of June, 1812, as between the government and the claimants, had passed to the claimants; a matter in which the defendants, as third persons, had no interest and no concern, at least until they should show some prior or superior title to this land. *McGill v. Somers*, 15 Mo., 80-86: extracts from these same "recorder's (Hunt's) minutes," and from the Surveyor-General's list, held admissible evidence as good as the certificate itself. (*Biehler v. Coonce*, 9 Mo., 351; *Roussin v. Parks*, 8 Mo., 544.)

1. On the same principle as a deed that constitutes a link in a plaintiff's chain of title, and to which the defendant may be no party nor privy; and,

2. On the principle of a deposition taken to perpetuate testimony, the government and the claimants being the only parties concerned in the effect of it, and both being present at the taking of it, by authority of the Act of Congress.

3. Like a deposition, it is evidence tending to prove the existence of the facts prior to 1808, necessary to bring this out lot within the operation of the Act of 1812, as a grant of title.

4. The Supreme Court of Missouri (Gamble J., delivering the opinion of the court in this case), affected to treat this testimony of witnesses as if it had been some mere volunteer "affidavits" of the parties themselves, made extrajudicially, and without authority of law. In *McGill v. Somers*, the same judge (delivering the opinion of the court) held an extract from these same "minutes," to be evidence as good as the certificate. In *Soulard v. Allen*, October Term, 1853, Scott J., delivering the opinion of the court (Gamble J., not sitting), held a certificate of Conway (recorder) issued upon these "minutes" of testimony to be good evidence. *All the certificates that have been issued by Hunt or Conway, since the eighteen months expired, were necessarily based on these "minutes" of the proof made. Memory of three large volumes of proof was out of the question; and the Surveyor-General's list was not a record of the recorder's office, otherwise than as Hunt's books of minutes were the original from which that list was drawn off as an abstract, in 1827.

5. Nothing had been done by any officer of the government at the date of the taking of this testimony, in relation to the claim of commons, that recognized any right or title of the inhabitants of the Town of Carondelet to the land included in this outlet as commons.

The survey of the commons, No. 3102, and

the outline survey of the common field, No. 3108, were made in 1834.

VII. The fact that this claim had been omitted in the first list furnished by Recorder Hunt to the Surveyor-General, and that it was not reported till the 12th of March, 1839, has no legal effect whatever on the title, or any right of the claimant under the Act of the 26th of May, 1824, nor upon the validity or admissibility of the above documents as evidence; for,

1. The entry of the claim in the books of Hunt's minutes as a claim proved and the certificate issued upon it, as such, are the proper legal evidence of the decision of the recorder of land titles upon the sufficiency of the proof made. *Macklot v. Dubreuil*, 9 Mo., 490: the recorder passed upon the facts referred to him when he issued the certificate; the point was made in Mr. Gamble's brief, that the recorder had no authority to issue a certificate in 1842, but it was not specially noticed in the opinion of the court, which held the certificate good.

2. The powers conferred and the duties imposed by the Act were conferred and imposed on the recorder of land titles (a perpetual officer), and not upon Theodore Hunt merely; he was expressly required, by the third section of the Act, to issue such a certificate, and no limit of time was fixed by the Act within which he was to make his decision on the proof taken within the eighteen months, or report the claims to the surveyor, or issue the certificate, nor in which his power to do so was to cease, otherwise than by a complete performance of the duties imposed on him. (Act of the 26th of May, 1824, 4 Stat. at L., 65.)

3. The second clause of the third section of that Act, requiring a list of claims proved to be furnished the Surveyor-General, was merely directory, and imposed a ministerial duty only on the Recorder of land titles, touching the internal administration of the Land Office, and it was not intended by the Act to be a condition precedent to the issuing of a certificate, nor even to the right of the claimant to [*460 have a survey made of his claim, according to law, as a confirmed lot. (*Lytle v. State of Arkansas*, 9 How., 814-833.) *Perry v. O'Hanlon*, 11 Mo., 589-595: parties are not to be prejudiced by delays and omissions of merely ministerial officers and government agents. *Taylor v. Brown*, 5 Cranch, 284: a law requiring an officer to record surveys within two months, and return a list, is merely directory, and the validity of the survey is not affected, if not done. In point by principle and analogy.

4. The certificate containing an accurate description of the lot, so that any surveyor could find it, was all the evidence of title the claimants needed; and no public survey was necessary for them, though a convenience to them, as well as to the government.

Ott v. Soulard, 9 Mo., 603, 604, where the calls are ascertained by the grant, the construction is then matter of law for the court. *Menard's Heirs v. Massey*, 8 How., 293, as to certainty of description, "Id certum est," &c., *Smith v. United States*, 10 Pet., 338: a grant is good if capable of definite location by its description, without a survey. *Chouteau v. Eckhart*, 2 How., 344: an Act gives title, if the land can be identified as confirmed without resort to a survey. *United States v. Lawton*, 5 How., 10:

the identity of the land granted may be established by the face of the grant, or by survey.

The proof made ascertains (for the certificates), designates, and proves the tract, which was granted by the Act of 1812.

5. The list of claims proved was not required to be sent to the Surveyor-General for the purpose of being the only and conclusive evidence for or against the claimants, nor was it made so by the terms or nature of the Act, either of the fact that a claim had been proved and a certificate issued, or of the recorder's decision on the proof; nor was it of any importance to the claimant whether the claims were all reported at once or not; but the first list was sufficient information and good evidence for the Surveyor-General of what it contained, and the supplementary lists were likewise good evidence, and sufficient to authorize a survey to be made of the claims reported, when reported.

6. No limit of time was fixed within which, if claims proved were not reported, they should never be reported at all. One object of the Act was to get information for the Surveyor-General, and obviously, the sooner he got it, and the whole of it, the better.

7. When the first list had been furnished to the Surveyor-General, nearly two years after the expiration of the 18 months prescribed for the taking of the proof (then supposed by the 461*) *recorder to contain all), and when, by supplementary lists, the omissions had been supplied, and the errors corrected, the Act of Congress had then only, and not before, been fully and substantially complied with, in this respect.

8. Any merely extra legal inference to be drawn from the fact of the omission is rebutted by the fact that there were other omissions and errors, certified by Hunt himself to have been errors in transcribing the former list from the books in his office (Hunt's minutes), and conclusively rebutted by the fact that a certificate was issued; for if the recorder's opinion had been against the claim, at first, the issuing of a certificate shows that he had changed that opinion, and was satisfied with the proof.

9. The omission and delay have prejudiced nobody. The lot has not been set apart for schools, as a vacant lot, nor would it have been included in the survey of the commons, by Brown, if the commons belonging to the village had been surveyed according to their claim and confirmation, as directed by the 2d section of the Act of 26th May, 1824, nor if he had consulted the records of the recorder's office, and the proof there made of this claim, as he ought to have done.

This out lot was surveyed by Brown, at the same time, and under the same instructions, as the other town lots, out lots, and common fields of Carondelet (in 1839). Brown might as well have included other common fields as this one in his survey of commons, in 1834. Many of them were never proved before the recorder.

The counsel for the defendant in error made (amongst others) the following points:

I. The list returned by Recorder Hunt (certified to include a description of all the lots proved up before him), which does not include a description of the Gamache claim, is conclusive

against the plaintiffs. (8d sec. Act of May 26, 1824, Stat. at L., Vol. IV., p. 66.)

1. Whether, if the plaintiffs had a certificate of confirmation issued by Hunt for their claim, they could dispute the correctness of the list need not be inquired into, seeing that the plaintiffs have no such certificate.

The statute, however, designated two distinct matters of evidence which it would seem were both required to be possessed by a party claiming the benefits of the law. First, the certificate. This was intrusted to the claimant, whose claim was confirmed, and the plaintiffs should either have produced the certificate, or at least shown that it was issued. Second, the list. This was retained by the government as the record of what was confirmed; and the plaintiffs should have shown *that it [*462 included their claim. In this case it appears, affirmatively, that no such certificate was ever issued, and that neither the list nor the copy thereof embraces this claim.

2. It is not necessary, for the disposal of this case, to inquire into the validity of the acts of Recorder Hunt in making supplemental and explanatory returns to the surveyor, subsequent to his return of the list required by law, seeing that the plaintiff's claim is not included in any such return. Whether such acts were valid or not, they are cumulative evidence against the claim of plaintiffs. They go to show, that even after reviewing and revising his decisions, the recorder persevered in his rejection of the claim of Gamache's representatives.

3. The recorder expressly certified that the list contains all the lots confirmed by him. Courts cannot look behind that list. Similar lists have always been considered as binding on the ministerial departments of the government.

4. In the list are included numerous claims, proved before, and certified by the recorder as confirmed, and which were embraced within the limits of the claim. He must necessarily have decided against the Gamache claim in deciding in favor of the adversary claims.

The recorder acted in a judicial capacity in the execution of the extraordinary duties imposed on him by the Act of 1824, and his decisions are *res adjudicata*.

II. The certificate of confirmation issued by Recorder Conway in 1839, is merely void.

1. It is void on its face.

2. It is void for want of jurisdiction. The general powers of the recorder, as denoted by his title, are purely clerical, and are set forth in the law creating the office. (See sections 3 and 4 of Act of March 2, 1805, Stat. at L., Vol. II., p. 326.)

The powers given to the recorder by the Act of 1824 were extraordinary and judicial. Upon their execution the office as to such extraordinary powers became *functus officio*. The powers, if not exhausted, ceased by limitation. First, eighteen months from the passage of the Act, the power to receive claims and evidence, expressly ended by the terms of the first section.

The second section, although confined to regulating the duties of the surveyor, looks to a prompt determination of the duties of the recorder. How could the surveyor, immediately after the expiration of the eighteen months,

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designate the vacant lots (namely: those not certified and listed by the recorder as confirmed) unless the recorder had previously performed those duties?

The third section contemplates the issuing of the recorder's certificates within the eighteen **463**] months. After providing for "them," it proceeds to require, further, that so soon as the said term shall have expired, the recorder shall furnish the surveyor with a list of the lots so proved. The list was designed to embrace the certified lots only. The Act contemplates the impossibility of the recorder preserving in his breast during a term of near eighteen months, the remembrance of many hundreds of decisions, and points out the certificates, or registry thereof, as the record which he shall preserve of the lots "so proved," and from which he is to compile his list. The making and transmitting the list was the final act. That done, the powers conferred by the law ceased.

Second. Although the office and general powers of the recorder are perpetual, yet special and temporary powers given for a particular purpose, will not endure forever.

Granting that the powers conferred by the Act of 1824 were not simply conferred on Hunt, the recorder for the time being, but on his office; yet to have authorized Conway, or any successor, to have issued a certificate of confirmation, such successor should have succeeded to the office during the prescribed term of eighteen months, and the proof must have been made before him.

8. The head of the Land Department on the appeal of the plaintiffs, has decided that the proceedings of Conway were of no avail under the law.

III. The abstract from the registry of confirmations issued by Conway, is void.

The certificate itself being a "mere nullity" as declared by the Supreme Court of Missouri, the fact that it was issued, and when, is of no importance. Its only use in the case is to show affirmatively, what might otherwise appear only negatively, that Recorder Hunt issued no certificate of confirmation.

IV. The extracts from Hunt's minutes are not evidence.

1. Hunt was not a commissioner to take testimony, and the affidavits were received without notice, the co-defendant in this suit being then in the actual possession of the land.

2. The Act required no recorded or written proof before the recorder, and the circumstance that affidavits were taken by Hunt, touching the Gamache claim, is no evidence that he considered it as proved to have been inhabited, cultivated or possessed, prior to the 20th December, 1808, and that the land claimed was an out lot.

8. On the contrary, the circumstance that the claim was not entered in his list, is decisive to show that he was not satisfied with the proof.

V. The return of the description of the Gamache claim to the surveyor, by Conway, in 1839, was merely null, and afforded no evidence of title whatever.

464] *The abuses to which such a practice will lead are manifest. If Hunt's may be altered after twelve years have elapsed, alterations may be made at any distance of time; if future recorders may supply fancied omis-

sions, they may strike out such claims as they may regard as erroneously entered; if they can thus deal with the list of Hunt, they can do the same with Bates' confirmations, and the numerous land titles depending on the action of the recorders of former days, will lie at the mercy of officers, selected not for their capacity to judge of the proofs of titles, but for their fidelity in taking care of books and papers.

Mr. Justice Catron delivered the opinion of the court:

This case was brought here by writ of error to the Supreme Court of Missouri, and presents questions alleged to be cognizable in this court under the 25th section of the Judiciary Act. The plaintiffs claimed a tract of land of six arpents in front, and forty back, lying adjoining to the Village of Carondelet, in Missouri. It was claimed as "an out lot" which had been confirmed by the Act of Congress of June 18th, 1812, to John B. Gamache, the ancestor of the plaintiffs.

In support of this position there was offered, in evidence, certain documents issued from the office of the recorder of land titles. The first was a paper claimed to be a certificate of confirmation issued by Conway, the Recorder of land titles, dated 22d January, 1839, under the Act of Congress of the 26th May, 1824. The second was an extract from the registry kept by the Recorder of certificates, issued by him under the Act of 1824, by which it appears that Conway entered the certificate of Gamache's representatives on that register on the 12th March, 1839, and furnished on that day to the Surveyor-General a description of the land. The third was an extract from the additional list of claims furnished by the Recorder to the Surveyor-General on the 12th March, 1839, which addition was of the Gamache claim alone. There were other documents showing that Hunt, who was the recorder of land titles, who acted under the Act of 1824 in taking proof of claims, and who filed with the surveyor the list of claims proved before him, had filed one or two supplemental or explanatory lists after the first.

The court below rejected the evidence offered.

A survey of the claim of Gamache was made by a deputy-surveyor under instructions from the Surveyor-General, and the survey being returned to the office by the deputy and a plat made, the word "approved" was written upon it and signed by the then Surveyor-General, but it never was recorded. It appeared, in evidence, that the practice of the surveyor's office, *when a deputy-surveyor made return [**465** of a survey which he had been instructed to make, was, to have the survey examined, to see the manner in which the deputy had followed the instructions given, and if he had followed them, his work was approved, and the approval evidenced by such writing as had been made in this case, which was intended to authorize the payment of the deputy for his work; and that subsequently the survey was more carefully examined, and if found to be a proper survey in all respects it was recorded in the books of the office, which was the evidence that it was finally adopted and approved, and that by the practice of the office certified copies

of surveys were not given out until they were thus finally approved and recorded. Conway, who had been Surveyor-General as well as Recorder, testified that he would regard the survey of the Gamache claim as an approved survey, and would record it as such if he were in the office.

It appeared in evidence, that the present Surveyor-General refused to record it as an approved survey, or to certify it to the Recorder as a survey of land for which a certificate of confirmation is to issue, and that in that refusal he is sustained by the department at Washington.

After the evidence was closed, the court, by an instruction, declared that the survey was not evidence of title, nor of the boundaries and extent of Gamache's claim.

A certified copy of the affidavits made by Recorder Hunt, when he was taking proof under the Act of 1824, was in evidence, but an instruction given to the jury substantially excluded them from consideration.

On this state of facts the Supreme Court of Missouri held, among other things, as follows:

"In the present case we have a recorder of land titles, fourteen years from the passage of this Act, attempting to give the evidence of title, by issuing a certificate of confirmation, and certifying the claim to the Surveyor-General as one confirmed by the Act of 1812. If the government of the United States has confirmed the title set up by the plaintiffs by that Act of Congress, then the party, as has been held in this court, does not lose his land by the failure to procure the evidence provided for by the Act of 1824; and under these decisions the plaintiffs in this case, after the evidence was rejected, which they claimed was rightly issued under the last-mentioned Act, proceeded to prove the cultivation and possession of their ancestor, Gamache, and claimed that the title was confirmed by the Act of 1812."

"If the evidence of title, purporting to be issued under the Act of 1824, appeared undisputed by the United States, and acknowledged and treated by the government as effectual, ⁴⁶⁶ then it may *be that a person who was a mere stranger to the title would not be allowed to dispute the correctness of the conduct of the officers in their attempt to carry out the law. But when we find that the government itself, in its own officers, arrests the progress of the title, and the whole reliance of the party in this case is upon the acts of the recorder, the correctness of which is denied by the government, we will examine his acts and give them effect only so far as they conform to the law."

"That the recorder, under the Act of 1824, was required to act in a *quasi* judicial character, is perfectly manifest, although there was no mode provided by the law for the expression of an opinion against the sufficiency of the evidence given before him. If a claim was, in his judgment, confirmed by the Act of 1812, he issued to the party a certificate of confirmation, and included the lot in the descriptive list which he was required to furnish the Surveyor-General. If there was a failure to prove the inhabitation, cultivation, or possession to his satisfaction, he simply omitted to include the claim in his list, and he issued no certificate."

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"The acts required to be done when a claim was confirmed, were to be done immediately after the expiration of the time limited for taking the proof; and when we see, from the evidence offered by the plaintiff, that the recorder filed his list of confirmations with the surveyor in October, 1827, near twelve years before Conway, his successor, returned the present claim to that office, we cannot avoid the conclusion that this latter act was not within the scope allowed for such proceeding by the Act of Congress. It is not necessary to maintain that if Hunt, the Recorder who took the proof, had died before he acted upon the claims, his successor could not act upon them; but when he did act, and made out and furnished to the surveyor the list required by law, the conclusion is one which the law draws, that claims not within that list are claims not proved to his satisfaction."

The claim of Gamache was anxiously prosecuted before the department of public lands at Washington during the pendency of this suit, and was there decided by the commissioner in conformity to the decision of the Supreme Court of Missouri; and which decision was confirmed by the Secretary of the Interior in September last. The reasons for this decision are here given in the language of the commissioner in reply to the plaintiffs' counsel, prosecuting the claim.

"The Surveyor-General at St. Louis having declined to approve the survey as made by Brown for Gamache, and to certify the same to the recorder—You apply to this office to give orders to Surveyor-General Clark, 'requiring him to return the *survey of the tract [⁴⁶⁷ of six by forty arpents in the name of John B. Gamache, Sr., or his legal representatives, to the recorder of land titles, and that the recorder be directed to issue to 'you' a certificate of confirmation in the usual form, that 'you' may have the evidence of your title in the usual form for the purpose of prosecuting your rights in the courts having competent jurisdiction."

"In behalf of the representatives of Gamache it is maintained that they are confirmed by the Act of 18th June, 1812.

"The first section of the supplemental Act of 26th of May, 1824, made it the duty of the individual owners or claimants whose lots were confirmed by the Act of 1812 on the ground of inhabitation, cultivation, or possession prior to the 20th of December, 1803, 'to proceed within eighteen months after the passage of the Act of 1824,' to designate their said lots by proving before the recorder of land titles for said State and territory the fact of such inhabitation, cultivation or possession, and the boundaries and extent of each claim, so as to enable the Surveyor-General to distinguish the private from the vacant lots appertaining to the said towns and villages."

"The third section of the said Act of 1824 made it the duty of the recorder to issue a certificate of confirmation for each claim confirmed, but further declares as follows:

"And so soon as the said term shall have expired, he shall furnish the Surveyor-General with a list of the lots so proved to have been inhabited, cultivated or possessed, to serve as his guide in distinguishing them from the vacant lots to be set apart as above described,

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and shall transmit a copy of such list to the Commissioners of the General Land Office."

"A report or list, purporting to contain all the claims proved up under the Act of 1824, was accordingly returned to this office in 1827, but that list does not embrace this particular claim of Gamache for 6×40 arpents within the limits of the Carondelet Commons.

We have no power to look behind that list in order to determine what has or has not been confirmed any more than we could look behind the face of a report of a board of commissioners or of the recorder, which had been confirmed by a law of Congress, and take cognizance of a case not embraced by such report, even if satisfied that it had been omitted by the reporting officer through inadvertence. This is a well-settled principle. (See instructions to register and receiver, 18th April, 1835. 2d part Birchard's Comp. printed laws, instructions and opinions, page 757, &c.)

"As the 8d section of the Act of 26th of May, 1824, then expressly declares that the list to be 468*] furnished by the recorder 'shall serve as a guide' to the Surveyor-General in the execution of the duties devolved on him by the Act, and as it is not shown that the claim in question is embraced by that list, neither that office nor this office has the power to treat the claim in question as confirmed and entitled to an approved survey, and consequently, in my opinion, the commissioner has not the legal ability to comply with your application in the premises."

With the correctness of these decisions of the Supreme Court of Missouri and the Department of Public Lands we entirely concur. Nor will we add any views of our own in support of the state decision, for the reason that the questions here presented are peculiarly local, being limited to the City of St. Louis and a few villages in the State of Missouri, the public at large having no concern with any question presented in this cause. And after due consideration, we here take occasion to say, that although it is in the power of this court, and made its duty, to review all cases coming here from state courts of last resort, in which was drawn in question and construed prejudicial to a party's claim, the Constitution or a law of the United States, or an authority exercised under them, still, in this peculiarly local class of cases asserting titles to town and village lots, confirmed by the Act of 1812, we feel exceedingly indisposed to disturb the state decisions. So far the ability and soundness they manifest have commanded our entire concurrence and respect, and are likely to do so in future. It is proper further to remark that the jury was instructed, at the request of the plaintiffs, that inhabitation and cultivation of a part of the lot, claiming the whole, would be good for the whole within the meaning of the Act of 1812.

"The jury was also instructed at the defendant's request, 'that if the land spoken of by the witnesses as actually cultivated and possessed by Gamache, did not embrace the land now in dispute, they ought to find for the defendants.'"

In regard to these instructions the State Court held that—

"The first instruction given for the defendant, if it stood alone, would be so entirely erroneous as to require a reversal of the judgment. That the jury should be required to find for the defendant, if the cultivation by the elder Gamache was not a cultivation of the precise piece of ground in controversy, would have been so gross a mistake, that neither the court nor the counsel asking the instruction could be supposed to have fallen into it. Accordingly, when we examine the second instruction given for the plaintiff, we find the court telling the jury that the cultivation of a part of a tract, under claim of the whole, was, under the Act of 1812, a cultivation of the whole tract; and, *in looking into the case, we see that [469 the controversy was whether this cultivation of Gamache was not on an entirely different tract from that now claimed to include the premises in dispute. 'We are satisfied that the jury must have understood the question to be, whether the cultivation of Gamache, spoken of by the witnesses, was at any place upon the tract to which his heirs now claim title, or at some place upon an entirely different tract. In this view of the question submitted to the jury, there would be no propriety in reversing the judgment for the instruction given for the defendant.'"

The instructions asked by the plaintiffs, which were refused by the court, all refer to the proceedings in the recorder's office, the effect of which has been considered.

On the whole it is ordered that the judgment is affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Missouri, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court in this cause be, and the same is hereby affirmed, with costs.

AT'g—17 Mo., 310.

Cited—16 How., 512; 1 Flippin, 129; 6 Sawy., 195.

THE STEAMBOAT NEW WORLD, EDWARD MINTURN, WILLIAM MENZIE, AND WILLIAM H. WEBB, Claimants and Appellants,

v.

FREDERICK G. KING.

Admiralty jurisdiction of U. S. Courts—Negligence—injurious escape of steam from steamboat boiler is prima facie evidence of—defendant must disprove—cases examined.

Where a libel was filed, claiming compensation for injuries sustained by a passenger in a steamboat, proceeding from Sacramento to San Francisco, in California, the case is within the admiralty jurisdiction of the courts of the United States. The circumstance that the passenger was a "steamboat man," and as such carried gratuitously, does not deprive him of the right of redress enjoyed by other passengers. It was the custom to carry such persons free.

The master had power to bind the boat by giving such a free passage.

The principle asserted in 14 How., 486, re-affirmed, namely: that "when carriers undertake to convey persons by the agency of steam, public policy and safety require that they should be held to the greatest possible care and diligence."

The theory and cases examined relative to three

degrees of negligence, namely: slight, ordinary and gross.

Skill is required for the proper management of the boilers and machinery of a steamboat; and the failure to exert that skill, either because it is not possessed, or from inattention, is gross negligence.

The 13th section of the Act of Congress, passed on the 7th of July, 1838 (5 Stat. at Large, 308), makes the injurious escape of steam *prima facie* evidence of negligence; and the owners of the boat, in order to escape from responsibility, must prove that there was no negligence.

470*] *The facts in this case, as disclosed by the evidence, do not disprove negligence. On the contrary they show that the boat in question was one of two rival boats which were "doing their best" to get ahead of each other; that efforts had been made to pass; that the engineer of the boat in question was restless, and constantly watching the hindmost boat; and that the owners of the boat have failed to prove that she carried only the small quantity of steam which they alleged.

THIS was an appeal from the District Court of the United States for the Northern District of California.

It was a libel filed by King, complaining of severe personal injury, disabling him for life, from the explosion of the boiler of the steamboat *New World*, while he was a passenger, on her passage from Sacramento to San Francisco, in California.

The District Court decreed for the libellant in \$2,500 damages and costs; and the owners of the boat appealed to this court.

The substance of the evidence is stated in the opinion of the court.

It was argued by *Mr. Cutting* for the appellants, and by *Mr. Mayer* for the appellee.

Points for the appellants:

First. The steamboat *New World* occupied no relation towards the libellant that imposed on her the duty to carry safely, or any duty whatever, as the libellant had not paid, and was not to pay any compensation for his transportation.

1. The master had no power to impose any obligation upon the steamboat, by receiving a passenger without compensation.

It was not within the scope of his authority. (*Grant v. Norway*, 10 Com. Bench R. Mann G. & S., 684, 688, reported also in 2 E. Law and Eq., 337, and 15 Jur., 296; *Butler v. Basing*, 2 C. & P., 618; *Citizens Bank v. Nantucket S. B. Co.*, 2 Story, C. C., 32, 34; *Pope v. Nickerson*, 3 Story, C. C., 475; *Gen. Int. Ins. Co. v. Ruggles*, 12 Wheat., 408; *Middleton v. Fowler et al.*, 1 Salk., 282.)

2. There was no benefit conferred on the steamboat whence any obligation could result.

3. It was not a case of bailment. (Story on Bailm., sec. 2; Kent's Com., Vol. II., p. 558; Ang. on Car., sec. 4.)

4. The libellant assumed the risk of his own transportation.

5. The libellant stands in a less favorable relation than the steamboat's servants, but she would not be liable to them for negligence of their fellow-servants. (*Farwell v. B. & W. R. R. Co.*, 4 Metc., 49; *Hayes v. Western R. R. Co.*, 3 Cush., 270; *Coon v. Syracuse & U. R. R. Co.*, 1 Seld., 493; *S. C.*, 6 Barb., 231; *Priestley v. Fowler*, 3 M. & W., 1.)

6. He stands in a less favorable relation than goods carried under gratuitous bailment of mandate.

471*] *For passengers carried for hire stand in less favored positions than goods.

But the gratuitous mandate imposes only the

slightest diligence, and attaches liability only to gross negligence. (Ang. on Car., sec. 21; Story on Bailm., secs. 140, 174.)

7. He stands in a less favorable relation than slaves transported gratuitously from mere motives of humanity. But the carrier is only liable for gross negligence in their carriage. (*Boyes v. Anderson*, 2 Pet., 156.)

8. In no reported case has any such action been brought, or right of action claimed.

Second. Even if the libellant were to be regarded as a passenger carried for hire, the steamboat would only be responsible for negligence, and would not be responsible for any injury which should happen by reason of any hidden defect in the absence of negligence. (*Ingalls v. Bills*, 9 Metc., 1; *Stokes v. Saltonstall*, 13 Pet., 181.)

But as the libellant was to be carried gratuitously, the steamboat cannot, in any view of the case, be held responsible except for gross negligence. (*Boyes v. Anderson*, 2 Pet., 156; Story on Bailm., sec. 174.)

Third. There was no negligence on the part of the steamboat.

1. The boilers were properly constructed. She was built as a first-class boat. She had been inspected by the State Inspector, and allowed 40 pounds of steam; by the U. S. Inspector, and allowed 35 pounds; and by neither of these inspectors was any fault found with the structure of her boilers. Van Wart and Cook both concur in judgment that the boilers were sufficient.

Lightall is the only witness that intimates a different opinion, and he does not testify that it was usual to have a stay brace, or that it was negligence to omit it. He merely regards it as "a measure of safety," and he then admits, that the "stay," if there, would not have prevented the explosion. It would simply, in his opinion, have made the consequence of the explosion less serious.

2. The boilers were frequently and carefully examined.

No evidence is introduced to controvert this. 3. The engineer employed, and then in charge, was a man of skill and prudence.

This is not denied.

4. The steamboat was not racing.

Mere competition is not of itself negligence, unless recklessly or improperly conducted. (*Barbour, J.*, 18 Pet., 192.)

5. The steamboat was not carrying an improper amount of steam. She was allowed 35 pounds by the lowest certificate; 40 pounds by the certificate of another inspector. She was at the time of the accident carrying only 23 pounds.

No witness testifies that she carried more than that.

This is the only fault that could have contributed to the happening of the explosion.

6. Rosin was not used to generate steam.

Haskell is the only witness that gives evidence tending to establish this. But he does not swear the article he saw was rosin. He admits that he did not see any put on the fire. He was stunned by the accident, and his recollection should not be relied on against the positive testimony of two witnesses.

Mr. Mayer contended that the decree of the District Court was right for these reasons:

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I. The wrong occurred within the range and "influence" of the tide, and was within the admiralty jurisdiction, as now by this court defined. (*Waring v. Clarke*, 5 How., 441; *New Jersey Steamboat Co. v. Merchants' Bank*, 6 How., 844.)

II. The disaster is of itself *prima facie* evidence of negligence, culpable to the degree necessary to attach liability for the damage, and there is no testimony here to countervail that conclusion. (*McKinney v. Neil*, 1 McLean, 540; *Stokes v. Saltonstall*, 18 Pet., 181.)

III. Although the steamboat may not be considered as a "common carrier" in case of a gratuitous service (or mandate, as the Law of Bailment phrases it), there is, nevertheless, even under a gratuitous undertaking, an obligation to have all machinery in proper condition to carry passengers safely, and a responsibility proportionate to the scrupulous care necessary in so hazardous a mode of conveyance. And it might be justly contended that a liability attaches here, if even for the slightest negligence. But gross negligence is shown not only by the conduct of the boat on the occasion, but by the incompleteness, for the perils of the passage, of the machinery. That inadequacy, *per se*, imputes gross negligence. (*McKinney v. Neil*, 1 McLean, 540; *Maurry v. Talmadge*, 2 McLean, 157; *Hale v. Steamboat Company*, 13 Conn., 319; *Fellowes v. Gordon*, 8 B. Mon., 415; Story on Bailm., 125.)

Mr. Justice Curtis delivered the opinion of the court:

This is an appeal from a decree of the District Court of the United States for the Northern District of California, sitting in admiralty. The libel alleges that the appellee was a passenger on board the steamer on a voyage from Sacramento to San Francisco, in June, 1851, and that, while navigating within the ebb and flow of the tide, a boiler flue was exploded [473*] through negligence, *and the appellee grievously scalded by the steam and hot water.

The answer admits that an explosion occurred at the time and place alleged in the libel, and that the appellee was on board and was injured thereby, but denies that he was a passenger for hire, or that the explosion was the consequence of negligence.

The evidence shows that it is customary for the masters of steamboats to permit persons whose usual employment is on board of such boats, to go from place to place free of charge; that the appellee had formerly been employed as a waiter on board this boat; and just before she sailed from Sacramento he applied to the master for a free passage to San Francisco, which was granted to him, and he came on board.

It has been urged that the master had no power to impose any obligation on the steamboat by receiving a passenger without compensation.

But it cannot be necessary that the compensation should be in money, or that it should accrue directly to the owners of the boat. If the master acted under an authority usually exercised by masters of steamboats, if such exercise of authority must be presumed to be known to and acquiesced in by the owners, and the practice is, even indirectly, beneficial to

them, it must be considered to have been a lawful exercise of an authority incident to his command.

It is proved that the custom thus to receive steamboat men is general. The owners must therefore be taken to have known it, and to have acquiesced in it, inasmuch as they did not forbid the master to conform to it. And the fair presumption is, that the custom is one beneficial to themselves. Any privilege generally accorded to persons in a particular employment, tends to render that employment more desirable, and of course to enable the employer more easily and cheaply to obtain men to supply his wants.

It is true the master of a steamboat, like other agents, has not an unlimited authority. He is the agent of the owner to do only what is usually done in the particular employment in which he is engaged. Such is the general result of the authorities. (Smith on Mer. Law, 559; *Grant v. Norway*, 10 Com. B., 688, S. C., 2 Eng. L. and Eq., 837; *Pope v. Nickerson*, 3 Story, 458; *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story, 32.) But different employments may and do have different usages, and consequently confer on the master different powers. And when, as in this case, a usage appears to be general, not unreasonable in itself, and indirectly beneficial to the owner, we are of opinion [*474] the master has power to act under it and bind the owner.

The appellee must be deemed to have been lawfully on board under this general custom.

Whether precisely the same obligations in all respects on the part of the master and owners and their boat, existed in his case, as in that of an ordinary passenger paying fare, we do not find it necessary to determine. In *The Philadelphia and Reading Railroad Company v. Derby*, 14 How., 485, which was a case of gratuitous carriage of a passenger on a railroad, this court said: "When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they should be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence, in such cases, may well deserve the epithet of gross."

We desire to be understood to re-affirm that doctrine, as resting, not only on public policy, but on sound principles of law.

The theory that there are three degrees of negligence, described by the terms slight, ordinary, and gross, has been introduced into the common law from some of the commentators on the Roman law. It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed, or capable of being so. One degree, thus described, not only may be confounded with another, but it is quite impracticable exactly to distinguish them. Their signification necessarily varies according to circumstances, to whose influence the courts have been forced to yield, until there are so many real exceptions that the rules themselves can scarcely be said to have a general operation. In *Storer v. Gorton*, 18 Maine, 177, the Supreme Court of Maine say: "How much care will,

in a given case, relieve a party from the imputation of gross negligence, or what omission will amount to the charge, is necessarily a question of fact, depending on a great variety of circumstances which the law cannot exactly define." *Mr. Justice Story* (Bailments, sec. 11), says: "Indeed, what is common or ordinary diligence is more a matter of fact than of law." If the law furnishes no definition of the terms gross negligence, or ordinary negligence, which can be applied in practice, but leaves it to the jury to determine, in each case, what the duty was, and what omissions amount to a breach of it, it would seem that imperfect and confessedly unsuccessful attempts to define that duty had better be abandoned.

Recently the judges of several courts have **475*** expressed their "disapprobation of these attempts to fix the degrees of diligence by legal definitions, and have complained of the impracticability of applying them." (*Wilson v. Brett*, 11 Mees. & Wels., 113; *Wylde v. Pickford*, 8 *Ib.*, 443, 461, 462; *Hinton v. Dibbin*, 2 Q. B., 646, 651.) It must be confessed that the difficulty in defining gross negligence, which is apparent in perusing such cases as *Tracy et al. v. Wood*, 3 Mass., 182, and *Poster v. The Essex Bank*, 17 Mass., 479, would alone be sufficient to justify these complaints. It may be added that some of the ablest commentators on the Roman law, and on the Civil Code of France, have wholly repudiated this theory of three degrees of diligence, as unfounded in principles of natural justice, useless in practice, and presenting inextricable embarrassments and difficulties. (See *Toullier's Droit Civil*, 6th vol., p. 239, &c.; 11th vol., p. 203, &c.; *Makeldey Man. Du Droit Romain*, 191, &c.)

But whether this term, gross negligence, be used or not, this particular case is one of gross negligence, according to the tests which have been applied to such a case.

In the first place, it is settled, that "the bailee must proportion his care to the injury or loss which is likely to be sustained by any impropriety on his part." (*Story on Bail*, sec. 15.)

It is also settled that if the occupation or employment be one requiring skill, the failure to exert that useful skill, either because it is not possessed, or from inattention, is gross negligence. Thus *Heath, J.*, in *Shields v. Blackburne*, 1 H. Bl., 161, says, "If a man applies to a surgeon to attend him in a disorder for a reward, and the surgeon treats him improperly, there is gross negligence, and the surgeon is liable to an action; the surgeon would also be liable for such negligence if he undertook gratis to attend a sick person, because his situation implies skill in surgery." And *Lord Loughborough* declares that an omission to use skill is gross negligence. *Mr. Justice Story*, although he controverts the doctrine of *Pothier*, that any negligence renders a gratuitous bailee responsible for the loss occasioned by his fault, and also the distinction made by *Sir William Jones*, between an undertaking to carry and an undertaking to do work, yet admits that the responsibility exists when there is a want of due skill, or an omission to exercise it. And the same may be said of *Mr. Justice Porter*, in *Percy v. Millaudon*, 20 Martin, 75. This qualification of the rule is also recognized in *Stanton et al. v. Bell et al.*, 2 Hawks, 145.

That the proper management of the boilers and machinery of a steamboat requires skill, must be admitted. Indeed, by the Act of Congress of August 30, 1852, great and unusual precautions are taken to exclude from this employment all persons who do not possess it. That an omission to exercise this skill vigilantly *and faithfully, endangers, to a [*476 frightful extent, the lives and limbs of great numbers of human beings, the awful destruction of life in our country by the explosions of steam boilers but too painfully proves. We do not hesitate therefore to declare that negligence in the care or management of such boilers, for which skill is necessary, the probable consequences of which negligence is injury and loss of the most disastrous kind, is to be deemed culpable negligence, rendering the owners and the boat liable for damages, even in case of the gratuitous carriage of a passenger. Indeed, as to explosion of boilers and flues, or other dangerous escape of steam on board steamboats, Congress has, in clear terms, excluded all such cases from the operation of a rule requiring gross negligence to be proved to lay the foundation of an action for damages to person or property.

The thirteenth section of the Act of July 7, 1838 (5 Stat. at L., 306), provides: "That in all suits and actions against proprietors of steamboats for injury arising to persons or property from the bursting of the boiler of any steamboat, or the collapse of a flue, or other dangerous escape of steam, the fact of such bursting, collapse, or injurious escape of steam shall be taken as full *prima facie* evidence sufficient to charge the defendant, or those in his employment, with negligence, until he shall show that no negligence has been committed by him or those in his employment."

This case falls within this section; and it is therefore incumbent on the claimants to prove that no negligence has been committed by those in their employment.

Have they proved this? It appears that the disaster happened a short distance above Benicia; that another steamer, called the *Wilson G. Hunt*, was then about a quarter of a mile astern of the *New World*, and that the boat first arriving at Benicia got from twenty-five to fifty passengers. The pilot of the *Hunt* says he hardly knows whether the boats were racing, but both were doing their best, and this is confirmed by the assistant pilot, who says the boats were always supposed to come down as fast as possible; the first boat at Benicia gets from twenty-five to fifty passengers. And he adds that at a particular place called "the slough" the *Hunt* attempted to pass the *New World*. *Fay*, a passenger on board the *New World*, swears, that on two occasions, before reaching "the slough" the *Hunt* attempted to pass the *New World*, and failed; that to his knowledge these boats had been in the habit of contending for the mastery, and on this occasion both were doing their best. The fact that the *Hunt* attempted to pass the *New World* in "the slough" is denied by two of the respondents' witnesses, but they do not meet the testimony of *Fay*, as to the two previous *attempts. [*477 *Haskell*, another passenger, says, "about ten minutes before the explosion I was standing looking at the engine; we saw the engineer was

evidently a little excited, by his running to a little window to look out at the boat behind. He repeated this ten or fifteen times in a very short time." The master, clerk, engineer, assistant engineer, pilot, one fireman, and the steward of the *New World*, were examined on behalf of the claimants. No one of them, save the pilot, denies the fact that the boats were racing. With the exception of the pilot and the engineer, they are wholly silent on the subject. The pilot says they were not racing. The engineer says: "We have had some little strife between us and the *Hunt* as to who should get to *Benicia* first. There was an agreement made that we should go first. I think it was a trip or two before." Considering that the master says nothing of any such agreement, that it does not appear to have been known to any other person on board either boat, that this witness and the pilot were both directly connected with and responsible for the negligence charged, and that the fact of racing is substantially sworn to by two passengers on board the *New World*, and by the pilot and assistant pilot of the *Hunt*, and is not denied by the master of the *New World*, we cannot avoid the conclusion that the fact is proved. And certainly it greatly increases the burden which the Act of Congress has thrown on the claimants. It is possible that those managing a steamboat engaged in a race may use all that care and adopt all those precautions which the dangerous power they employ renders necessary to safety. But it is highly improbable. The excitement engendered by strife for victory is not a fit temper of mind for men on whose judgment, vigilance, coolness and skill the lives of passengers depend. And when a disastrous explosion has occurred in such a strife, this court cannot treat the evidence of those engaged in it, and *prima facie* responsible for its consequences, as sufficient to disprove their own negligence, which the law presumes.

We consider the testimony of the assistant engineer and fireman, who are the only witnesses who speak to the quantity of steam carried, as wholly unsatisfactory. They say the boiler was allowed by the inspector to carry forty pounds to the inch, and that when the explosion occurred, they were carrying but twenty-three pounds. The principal engineer says he does not remember how much steam they had on. The master is silent on the subject, and says nothing as to the speed of the boat. The clear weight of the evidence is that the boat was, to use the language of some of the witnesses, doing its best. We are not convinced that she was carrying only twenty-three pounds, little more than half her allowance. 478*] *This is the only evidence by which the claimants have endeavored to encounter the presumption of negligence. In our opinion it does not disprove it; and consequently the claimants are liable to damages, and the decree of the District Court must be affirmed.

Mr. Justice Daniel dissented.

Mr. Justice Daniel:

From the opinion of the majority of the judges in this case I dissent.

That the appellee in this case has sustained a serious injury cannot, consistently with the
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proofs adduced, be denied, and it is probable that the compensation which has been awarded him may not be more than commensurate with the wrong inflicted upon him, or greater than that for which the appellants were justly responsible. But the only question in my view which this court can properly determine, relates neither to the character nor extent of the injury complained of, nor to the adequacy of the redress which has been decreed. It is a question involving the power of this court to deal with the rights or duties of the parties to this controversy in the attitude in which they are presented to its notice.

This is a proceeding under the admiralty jurisdiction, as vested in the courts of the United States by the Constitution. It is the case of an alleged marine tort. The libel omits to allege that the act constituting the *gravamen* of the complaint, did not occur either *infra corpus comitatus*, nor *infra fauces terra*. It will hardly be denied that the rule of the admiralty in England, at the time of the adoption of the Constitution, confined the jurisdiction of the admiralty within the limits above referred to, or that the admiralty never had in England general or concurrent jurisdiction with the courts of common law, but was restricted to controversies for the trial of which the *paix*, or local jury, could not be obtained. Having on a former occasion investigated extensively the origin and extent of the admiralty powers of the federal courts (see *New Jersey Steam Navigation Company v. Merchants Bank*, 6 How., 844) it is not now my purpose to do more than to refer to that examination, and to maintain my own consistency by the re-assertion of my adherence to the constitutional principles therein propounded, principles by which I am constrained to deny the jurisdiction of this court and of the Circuit Court, in the case before us.

It is true that the libel in this case alleges the injury to have been committed within the ebb and flow of the tide, but it is obvious that such an allegation does not satisfy the description of "an occurrence which to give jurisdiction must be marine or nautical in its character and locality. Although all tides are said to proceed from the action of the moon upon the ocean, it would be a *non sequitur* should the conclusion be attempted that therefore every river subject to tides was an ocean.

It to my view seems manifest that an extension of admiralty jurisdiction over all waters affected by the ebb and flow of the tide, would not merely be a violation of settled and venerable authority, but would necessarily result in the most mischievous interference with the common law and internal and police powers of every community. Take one illustration which may be drawn from subjects within our immediate view.

In the small estuary which traverses the avenue leading to this court room, the tides of the Potomac regularly ebb and flow, although upon the receding of the tide this water-course can be stepped over. Upon the return of the tide there may be seen on this water numerous boys bathing or angling, or passing in canoes. Should a conflict arise amongst these urchins, originating either in collision of canoes or an entangling of fishing lines, or from any similar cause, this would present a case of admiralty jurisdiction.

tion fully as legitimate as that which is made by the libel in the case before us. Yet the corporate authorities of Washington would think strangely no doubt of finding themselves, by the exertion of a great national power designed for national purposes, ousted of their power to keep the peace, and to inflict upon rioters within their notorious limits, the discipline of the work-house.

I am opposed to every assumption of authority by forced implications and constructions. I would construe the Constitution and the statutes by the received acception of words in use at the time of their creation, and in obedience to this rule, I feel bound to express my belief that, in the present and in all similar cases, this court has no jurisdiction under the Constitution of the United States.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of California, and was argued by counsel; on consideration whereof, it is now ordered, adjudged and decreed by this court, that the decree of the said District Court in this cause be, and the same is hereby affirmed, with costs and interest, at the same rate per annum that similar decrees bear in the courts of the State of California.

Cited—20 How., 299; 17 Wall., 374, 383; 1 Otto, 494; 3 Otto, 296; 12 Otto, 455; 1 Cliff., 326; 3 Cliff., 425; 1 Low., 204, 206; 2 Bond., 368; McAll., 107; 6 Ben., 371; Chase., Dec., 151.

480*] *WILLIAM H. SEYMOUR AND DAYTON S. MORGAN, Plaintiffs in Error,

v.

CYRUS H. MCCORMICK.

Patent right—measure of damages for infringement—Reaping machine.

In 1834 McCormick obtained a patent for a reaping machine. This patent expired in 1848.

In 1845 he obtained a patent for an improvement upon his patented machine; and in 1847 another patent for new and useful improvements in the reaping machine.

The principal one of these last was in giving to the raker of the grain a convenient seat upon the machine.

In a suit for violation of the patent of 1847, it was erroneous in the Circuit Court to say that the defendant was responsible in damages to the same extent as if he had pirated the whole machine.

It was also erroneous to lay down as a rule for the measure of damages, the amount of profits which the patentee would have made, if he had constructed and sold each one of the machines which the defendants constructed and sold. There was no evidence to show that the patentee could have constructed and sold any more than he actually did.

The Acts of Congress and the rules for measuring damages, examined and explained.

THIS case was brought up by writ of error from the Circuit Court of the United States for the Northern District of New York.

The manner in which the suit was brought, and the charge of the Circuit Court, which was excepted to, are stated in the opinion of the court. The reporter passes over all other questions which were raised and decided, except those upon which the decision of this court turned.

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It was argued by *Mr. Gillet* for the plaintiffs in error, and by *Messrs. Stevens and Johnson* for the defendants in error. There was also a brief filed by *Mr. Selden* for the plaintiffs in error.

The following points are taken from the brief of *Mr. Gillet*, for the plaintiffs in error:

Sixth. Where the claim on which the suit is founded is for an improvement on old machines, patented or unpatented, the plaintiff is not entitled to recover, as a measure of damages, the mechanical profits that he could make upon the whole machine, including the old part. His damages are limited to the profits on making and vending the improvement patented and infringed.

The plaintiff recited in his declaration and furnished oyer of his old patent of 1834, for a reaping machine, which expired in 1848, and his patent of 1845, which is described as an "improvement upon his patented machine." In his patent of 1847, he claims "new and useful improvements in the reaping machine formerly patented by me," in which he also claims other improvements besides the one in controversy, which is his last claim, and relates to the seat. For the purpose of this suit, the machine described in the patent of 1834 (which had in fact become "public property"), and the improvements in the patent of 1845, and a large portion of those included in that of 1847, the defendants had a perfectly lawful right to use. This covered the whole of the improved reaping machine, except what related to the seat, and its combination with the reel. It cost the defendants to make their machine, which had no seat, about \$64.26. There was no proof to show the extent of the cost of the plaintiff's seat. One was made by Zinck, for \$1. The plaintiff allowed Brown in effect, in 1845, 1846, \$75 each, for making machines without the elevated seat—and he proved on this trial by Blakesley, that it cost him only \$36, and by Dorman, \$37, to make them with it. There can be no pretense that the addition of the seat, and what is covered by the last claim, added much, if anything, to the cost of constructing the improved machine. The plaintiff proved by Blakesley, that the manufacturer's profits on the whole machine, including a \$30 patent fee, was \$74.

It is evident that the manufacturer's profit constituted the principal item of gain in constructing and selling the plaintiff's reaper. The court instructed the jury that this profit on the two old machines, and on that part of the new not in controversy, could be recovered as a part of the plaintiff's "actual damage" for violating the last claim of the patent of 1847. The old machine of 1834 was public property, and everybody had a right to construct and use it. The patents show that it contained the great and fundamental parts, and nearly the whole of the new machine. As the plaintiff had decided not to proceed on his patent of 1845, that was, in effect, public property. By waiving any right to proceed on the first claim of his patent of 1847, the plaintiff limited himself to the seat, combined with the reel. The defendants had a right to make every other part of the improved machine, and having the right, the profits up to that point were lawfully theirs. They had the right to construct the

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whole, save the seat. If a profit could be made upon such construction, it was as clearly theirs as if they had been made upon a machine totally unlike the plaintiff's. There is no law, statute, or otherwise, which prohibits their making and receiving such profits. The court instructed the jury that all these profits belonged to the plaintiff, but pointed to no law showing him entitled to them. The manufacturer's profits were distinct from his patent profits, which he estimated and charged the defendants and his partners generally at \$30. The charge of the court gives him both. It makes the monopoly of a patent confined to an inexpensive improvement carry with it a monopoly of manufacturers' profits upon what is public property, precisely the same as if the whole had been included in the claim on **482*** which the trial was had. *The ruling of the judge allowed the plaintiff damages to as great an extent as if the trial had been on, and had established, the old patents of 1834 and 1845, and on the first claim of that of 1847, as well as on the last. If the defendants pay these damages, there is nothing to prevent the plaintiff suing on the patent of 1845, and on the first claim of that of 1847, because this trial and verdict were confined to the last claim of the latter patent. They were not recovered upon. But the plaintiff was adjudged to enjoy their advantages under the head of manufacturers' profits. But we deny that the patent laws confer a monopoly of profits on anything not actually patented. It would be extending the statute so as to make it cover, in effect, things that the patentee did not invent, and which by law belong to the public at large. This principle would authorize the patentee of an improvement in steamboat machinery, or railroad cars, carding, spinning, weaving and other like machines, to recover on a patent for some trifling improvement of either the entire profits of manufacturing the whole apparatus to which it might be attached.

The judge's rule allows the plaintiff precisely the same damages as if his last claim covered the whole reaping machine, and had been held to be valid. Under his ruling, if the material parts, other than the seat, had been covered by several other patents, the defendants would have been responsible on each, as well as to the plaintiff, for all profits, manufacturing as well as for the patent right. In such a case the plaintiff's rights, as against the defendants, would be precisely as strong as when the latter used what is now public property. If the plaintiff should bring a new suit on his patent of 1845, the recovery on that of 1847 would be no bar, and he might obtain a second manufacturer's profit. The defendants sought to attack the validity of the patent of 1845, but the evidence was ruled out: still the plaintiff was allowed to recover for the manufacturer's profits of the part of the machine covered by this patent, just the same as if it had been a part of the last claim of the patent of 1847. If the defendants had been patentees of the whole machine except the seat, and they had infringed the patent for that, could the plaintiff recover manufacturer's profits on the whole machine? Clearly not. Still the rights of the defendants to make and use all but the seat, are just as strong and legal, when they use what is

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public property, or what is not covered by the last claim of the patent of 1847, as if they exercised them under a patent. The fact that they had or had not a patent for everything but the seat, can neither increase nor diminish the plaintiff's rights to damages; they must rest solely upon his patent, and not upon those of others. The law allows him all the *profit he can make on his patented [**483** improvement, and nothing beyond. The judge's instruction was clearly erroneous, and vitiates the verdict.

Seventh. In estimating the plaintiff's damages for an infringement, his "actual damages" alone are to be considered, and the jury are not authorized to presume that if the defendants had not made and sold machines, "all persons who bought the defendants' machines would necessarily have been obliged to go to the patentee and purchase his machines."

The proof showed that the plaintiff manufactured his machines only at Chicago, in Illinois, and his sales were in the Western States, except a few in Western New York. The defendants manufactured their machines at Brockport, near Rochester, in New York, and sold them there, in Canada, and some at the west, as proved. It was proved by Hanna—"The demand within my knowledge has been unparalleled, the manufacturer oftentimes not being able to supply the demand at certain points." The plaintiff offered no proof tending to show that he could and did supply all the demands for his machine, and could have furnished more if called for. In the absence of this evidence, and in direct conflict with the oath of the plaintiff's own witness, who was his superintendent, the court instructed the jury, that as a matter of law they were to presume that if the defendants had not constructed and sold any machines, the plaintiff would have manufactured and sold machines to the same persons to whom the defendants had sold. Hence, the jury were instructed to presume "in the judgment of the law" what was grossly improbable, and what the plaintiff himself had actually disproved. The law does not presume that all the persons who purchased of the defendants would have purchased of the plaintiff, because the law does not presume absurdities, and what is substantially a physical impossibility; nor does it presume, without evidence, that the plaintiff had introduced a witness who had sworn falsely. This part of the charge is clearly erroneous; the court should have submitted this matter to the jury, to pass on as a question of fact.

(Mr. Stevens' eighth point was relative to the following exception which had been taken by the defendants below, namely):

To that part of the charge which states, "the general rule is that the plaintiff, if he has made out his right to recover, is entitled to the actual damages he has sustained by reason of the infringement; and those damages may be determined by ascertaining the profits which, in judgment of law, he would have made, provided the defendants had not interfered with his rights. That view proceeds upon the principle that if the defendants had not interfered with the patentee, all persons who bought the defendants' machines would necessarily [**484** have been obliged to go to the patentee and

purchase his machine," the defendants' counsel excepted.

Eighth. The tenth exception cannot be sustained. The exception is to that part of the charge which states that the rule of damages is, "that the plaintiff is entitled to recover the actual damages he has sustained by reason of the infringement." Those damages may be determined by ascertaining the profits which the plaintiff would have made if the defendants had not interfered with his rights.

It is submitted that this is the correct rule of damages in any case; but in this case its correctness cannot be doubted. The defendants, with a full knowledge of plaintiff's rights, intentionally violated them. They were intentionally wrong-doers, and were therefore bound to pay the plaintiff all the damage he has sustained by their tortious acts, just as much as they would be bound to pay him the full value of a horse, or any other chattel, of which they had tortiously deprived him.

It was, indeed, contended on the trial, that defendants were only bound to pay such profits as they had made by this intentional piracy.

Without stopping to discuss the question whether there may not be considerations in a suit in equity, where the defendants ignorantly infringed a patent, which might limit the damages in accordance with the rule contended for by the defendants, it is respectfully submitted, that in a suit at law, where the defendants have willfully, knowingly, and intentionally, pirated the invention of the patentee, and appropriated it to their own use, the rule of damages laid down by the court in this case is correct.

An infringer can afford to sell the machine patented at a less profit than the patentee can.

He has spent no time, exercised no intellect, in excoGITating the discovery or invention.

He has spent no time nor money in procuring the patent and bringing it into public use. Any other rule of damages, therefore, than that laid down by the court, would do great injustice to the patentee.

According to the rule contended for by defendants, if they had sold the reapers made by them for simply what it cost to construct them, or had given them away although it deprived the patentee of the profits which he might have made upon those reapers, yet he could recover no damages.

But the defendant's counsel did not request the court to charge that the rule of damages was different from that stated by the court. They simply excepted to the charge of the 485*] court "in that respect, without giving any reasons or stating how otherwise they desired the court to charge, in that regard.

As to the rule of the damages, see *Pierson v. Eagle Screw Company*, 8 Story, 402, 410; *Allen v. Blunt*, 2 Wood. & M., 128, 446, 447.

Mr. Justice Grier delivered the opinion of the court:

The plaintiff below, Cyrus H. McCormick, brought this action against the plaintiffs in error, Seymour & Morgan, for the infringement of his patent right. The declaration consisted of two counts.

The first alleged that the plaintiff was the true and original inventor of certain new and useful improvements in the machine the reap-

ing all kinds of small grain, for which he obtained letters patent on the 21st of June, 1834. And moreover, that the plaintiff was the inventor of certain improvements upon the aforesaid patented reaping machine for which he obtained letters patent on the 31st day of January, 1845. And it charged that the defendant had made three hundred reaping machines which infringed the inventions and improvements, fourthly and fifthly claimed in the schedule or specification of the last-named letters patent.

The second count alleged that the plaintiff was the first inventor of certain other improvements upon his said reaping machine before patented, for which he obtained letters patent on the 28d day of October, 1847. And that the defendant manufactured and constructed three hundred machines embracing the principles of the last-named invention and improvements. The defendants pleaded not guilty, and the case being called for trial in October, 1851, they prayed a continuance of the cause on account of the absence of certain witnesses material to their defense against the charge laid in the first count, to wit: the infringement of the patent of 1845.

The court intimated an opinion that the affidavit was sufficient to put off the trial of the cause, whereupon the plaintiff's counsel stated to the court that rather than have the trial put off, they would not on said trial seek to recover against the defendant on account of any alleged infringement or violation by the defendants of the plaintiff's rights under his letters patent bearing date January 31st, 1845, set forth in his declaration, but would proceed solely for a violation of the rights secured to him by his letters patent bearing date October 28d, 1847, set forth in his declaration, under the last claim specified in that patent relating to the seat for the raker.

The trial then proceeded on the last count in the declaration for the infringement by defendants of this last patent, and testimony offered *to show that the plaintiff was not the [486 original and first inventor of the reaping machine as described in his patents of 1834 and 1845, was rejected.

Numerous exceptions were taken by defendants in the course of the trial and to various instructions contained in the charge of the court. Most of these involve no general or important legal principle, and could not be understood without prolix statements with regard to the facts of the case and the structure of the peculiar machines. To notice them in detail would be both tedious and unprofitable. We deem it sufficient, therefore, to say that the defendants have failed to support their exceptions as to the rulings of the court concerning the testimony, and that the charge of the learned judge is an able and correct exposition of the law as applicable to the case, with the exception of the points which we propose now to examine, and which are contained in the following portion of the charge:

"The only remaining question is that of damages. The rule of law on this subject is a very simple one. The only difficulty that can exist is in the application of it to the evidence in the case. The general rule is that the plaintiff, if he has made out his right to recover, is entitled to the actual damages he has sustained by

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reason of the infringement, and those damages may be determined by ascertaining the profits which in judgment of law he would have made, provided the defendants had not interfered with his rights.

That view proceeds upon the principle that if the defendants had not interfered with the patentee, all persons who bought the defendants' machines would necessarily have been obliged to go to the patentee and purchase his machine. That is the principle on which the profits that the patentee might have made out of the machines thus unlawfully constructed, presenting a ground that may aid the jury in arriving at the damages which the patentee has sustained.

It has been suggested by the counsel for the defendants, that inasmuch as the claims of the plaintiff in question here are simply for improvements upon his old reaping machine and not for an entire machine and every part of it, the damages should be limited in proportion to the value of the improvements thus made, and that therefore a distinction exists, in regard to the rule of damages, between an infringement of an entire machine and an infringement of a mere improvement on a machine. I do not assent to this distinction. On the contrary, according to my view of the law regulating the measure of damages in cases of this kind, the rule which is to govern is the same whether the patent covers an entire machine or an improvement on a machine. Those who choose to use the old machine have a right to use it without **487**] *incurring any responsibility; but if they engraft on it the improvement secured to the patentee, and use the machine with that improvement, they have deprived the patentee of the fruits of his invention, the same as if he had invented the entire machine; because it is his improvement that gives value to the machine on account of the public demand for it. The old instrument is abandoned, and the public call for the improved instrument, and the whole instrument, with the improvement upon it, belongs to the patentee. Any person has a right to use the old machine; and if an inventor engrafs upon an old machine, which he has a right to use, an improvement that makes it superior to anything of the kind for the accomplishment of its purposes, he is entitled to the benefit of the operation of the machine under all circumstances with the improvement engrafted upon it, to the same degree in which the original inventor is entitled to the old machine.

There are some *data*, furnished by the counsel on both sides, which it is proper the jury should take into view in ascertaining the damages, provided they arrive at this question in the case. It is conceded that just three hundred machines have been made by the defendants, of the description to which I have called your attention, and testimony has been gone into on both sides for the purpose of showing the cost of the machines, and the prices at which they sold. In order to ascertain the profits accruing to the party who makes machines of this description, you must first ascertain the cost of the materials and labor, and the interest on the capital used in the manufacture of the machines. You must also take into account the expenses to which the manufacturer is subjected in putting them into market, such

as that of agencies and transportation, also of insurance; and where the article is sold on credit, a deduction must also be made for bad debts. All these things must be taken into account, in order to bring into the cost every element that properly goes to constitute it in the hands of the manufacturer. When you have ascertained the aggregate sum of the cost, deduct it from the price paid by the purchaser, and you have the net profit on each machine. By this process you are enabled to approximate to something like the actual loss that the patentee sustains in a case where his right has been violated by persons interfering with him and putting into market his improvement."

The plaintiffs in error complain that these rules with regard to damages, as thus laid down by the court, are incorrect, and have produced a verdict for most ruinous damages, far beyond anything justified by the facts of the case. 1. Because the jury were instructed that it is a legal presumption that if defendant had *not made and sold machines, all per- [**488** sons who bought the defendant's machines would necessarily have been compelled to go to the patentee and purchase his machines. That this principle was enunciated as a binding principle of law, although the plaintiff below had given no evidence to show that he could have made and sold a single machine more than he did, or was injured in any way by the competition of the defendants, or hindered from selling all he made or could make. And second, because the jury were instructed that the measure of damages for infringing a pretended improvement on a machine in public use is the same as if the defendant had pirated the whole machine and every improvement on it previously made, and as a consequence that the plaintiff below had a right to recover as great damages for the infringement of the patent in his second count as if he had proceeded on both counts of his declaration and shown the infringement of all the patents claimed, and that in consequence of these instructions they have been amerced in damages to the enormous sum of \$17,306.66, and with costs to nearly the round sum of \$20,000.

We are of opinion that the plaintiffs in error have just reason of complaint as regards these instructions and their consequent result.

The first Patent Act of 1790 made the infringer of a Patent liable to "forfeit and pay to the patentee such damages as should be assessed by a jury; and, moreover, to forfeit to the person aggrieved the infringing machine."

The Act of 1793 enacted "that the infringer should forfeit and pay to the patentee a sum equal to three times the price for which the patentee has usually sold or licensed to other persons the use of said invention." Here the price of a license is assumed to be a just measure of single damages, and the forfeiture by way of penalty is fixed at treble that sum. But as experience began to show that some inventions or discoveries had their chief value in a monopoly of use by the inventor, and not in a sale of licenses, the value of a license could not be made a universal rule, as a measure of damages. The Act of 17th of April, 1800, changed the rule, and compelled the infringer "to forfeit and pay to the the patentee a sum equal to three times the actual damages sustained by

such patentee." This Act continued in force till 1836, when the Act now in force was passed.

Experience had shown the very great injustice of a horizontal rule equally affecting all cases, without regard to their peculiar merits. The defendant who acted in ignorance or good faith, claiming under a junior patent, was made liable to the same penalty with the wanton and malicious pirate. This rule was manifestly unjust. For there is no good reason why taking **489**] a "man's property in an invention should be trebly punished, while the measure of damages as to other property is single and actual damages. It is true, where the injury is wanton or malicious, a jury may inflict vindictive or exemplary damages, not to recompense the plaintiff, but to punish the defendant.

In order to obviate this injustice, the Patent Act of 1836 confines the jury to the assessment of "actual damages." The power to inflict vindictive or punitive damages is committed to the discretion and judgment of the court within the limit of trebling the actual damages found by the jury.

It must be apparent to the most superficial observer of the immense variety of patents issued every day, that there cannot, in the nature of things, be any one rule of damages which will equally apply to all cases. The mode of ascertaining actual damages must necessarily depend on the peculiar nature of the monopoly granted. A man who invents or discovers a new composition of matter, such as vulcanized India rubber, or a valuable medicine, may find his profit to consist in a close monopoly, forbidding anyone to compete with him in the market, the patentee being himself able to supply the whole demand at his own price. If he should grant licenses to all who might desire to manufacture his composition, mutual competition might destroy the value of each license. This may be the case, also, where the patentee is the inventor of an entire new machine. If any person could use the invention or discovery by paying what a jury might suppose to be the fair value of a license, it is plain that competition would destroy the whole value of the monopoly. In such cases the profit of the infringer may be the only criterion of the actual damage of the patentee. But one who invents some improvement in the machinery of a mill could not claim that the profits of the whole mill should be the measure of damages for the use of his improvement. And where the profit of the patentee consists neither in the exclusive use of the thing invented or discovered, nor in the monopoly of making it for others to use, it is evident that this rule could not apply. The case of Simpson's patent for a turn-out in a railroad may be cited as an example. It was the interest of the patentee that all railroads should use his invention, provided they paid him the price of his license. He could not make his profit by selling it as a complete and separate machine. An infringer of such a patent could not be liable to damages to the amount of the profits of his railroad, nor could the actual damages to the patentee be measured by any known ratio of the profits on the road. The only actual damage which the patentee has suffered in such a case is the non-payment of the

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price which he has put on his license, with interest, and no *more. There may be **[490** cases, as where the thing has been used but for a short time, in which the jury should find less than that sum; and there may be cases where, from some peculiar circumstance, the patentee may show actual damage to a larger amount. Of this a jury must judge from the evidence, under instructions from the court that they can find only such damages as have actually been proved to be sustained. Where an inventor finds it profitable to exercise his monopoly by selling licenses to make or use his improvement, he has himself fixed the average of his actual damage, when his invention has been used without his license. If he claims anything above that amount, he is bound to substantiate his claim by clear and distinct evidence. When he has himself established the market value of his improvement, as separate and distinct from the other machinery with which it is connected, he can have no claim in justice or equity to make the profits of the whole machine the measure of his demand. It is only where, from the peculiar circumstances of the case, no other rule can be found, that the defendant's profits become the criterion of the plaintiff's loss. Actual damages must be actually proved, and cannot be assumed as a legal inference from any facts which amount not to actual proof of the fact. What a patentee "would have made, if the infringer had not interfered with his rights," is a question of fact and not "a judgment of law." The question is not what speculatively he may have lost, but what actually he did lose. It is not a "judgment of law" or necessary legal inference, that if all the manufacturers of steam engines and locomotives, who have built and sold engines with a patented cut-off, or steam whistle, had not made such engines, that therefore all the purchasers of engines would have employed the patentee of the cut-off, or whistle; and that consequently such patentee is entitled to all the profits made in the manufacture of such steam engines by those who may have used his improvement without his license. Such a rule of damages would be better entitled to the epithet of "speculative," "imaginary," or "fanciful," than that of "actual."

If the measure of damages be the same whether a patent be for an entire machine or for some improvement in some part of it, then it follows that each one who has patented an improvement in any portion of a steam engine or other complex machines may recover the whole profits arising from the skill, labor, material and capital employed in making the whole machine, and the unfortunate mechanic may be compelled to pay treble his whole profits to each of a dozen or more several inventors of some small improvement in the engine he has built. By this doctrine even the smallest part is made equal to *the whole, and "actual damages" to **[491** the plaintiff may be converted into an unlimited series of penalties on the defendant.

We think, therefore, that it is a very grave error to instruct a jury, "that as to the measure of damages the same rule is to govern, whether the patent covers an entire machine or an improvement on a machine."

It appears, from the evidence in this case, that McCormick sold licenses to use his original patent of 1834 for \$20 each. He sold licenses to

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the defendants to make and vend machines containing all his improvements to any extent for \$30 for each machine, or at an average of \$10 for each of his three patents. The defendants made and sold many hundred machines, and paid that price and no more. They refused to pay for the last three hundred machines under a belief that the plaintiff was not the original inventor of this last improvement, whereby a seat for the raker was provided on the machine, so that he could ride, and not be compelled to walk as before. Beyond the refusal to pay the usual license price, the plaintiff showed no actual damage. The jury gave a verdict for nearly double the amount demanded for the use of three several patents, in a suit where the defendant was charged with violating one only, and that for an improvement of small importance when compared with the whole machine. This enormous and ruinous verdict is but a corollary or necessary consequence from the instructions given in that portion of the charge of the court on which we have been commenting, and of the doctrines therein asserted, and to which this court cannot give their assent or concurrence.

The judgment of the Circuit Court is reversed, with a venire de novo.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Northern District of New York, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to award a *venire facias de novo*.

Rev'g—2 Blatchf., 240.

Cited—20 How., 333; 23 How., 489; 14 Wall., 650; 19 Wall., 617; 3 Otto, 70; 15 Otto, 195; 1 Flippin, 423; 2 Bond, 33; 3 Wall., Jr., 342; 4 Sawy., 234; 5 Sawy., 611; 10 Biss., 449; 14 Blatchf., 22, 142; 1 Holmes, 90.

492*] *HENRIETTA AMIS, Executrix, AND WILLIAM PERKINS, Executor of JUNIUS AMIS, Deceased, Appellants,

v.

DAVID MYERS.

Injunction to prevent sale of slaves taken in execution.

Where a complainant filed a bill on the equity side of the Circuit Court, for an injunction to prevent the sale of slaves which had been taken in execution as the property of another person, the evidence shows that they were the property of the complainant, and the Circuit Court was directed to make the injunction perpetual.

THIS was an appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

Junius Amis filed his bill under the following circumstances:

The respondent, David Myers, having obtained a judgment against William D. Amis, issued execution thereon and caused to be

seized seven slaves. The complainant, Junius Amis, thereupon filed his bill, claiming these slaves as his property, and praying an injunction to arrest the sale of them. He made David Myers and W. F. Wagner, the marshal, parties defendant to the bill. The injunction was afterwards granted.

David Myers appeared and filed his answer. He admitted the issuance of the execution as alleged, and he admitted the marshal's seizure of the property as alleged, and the advertisement for sale under the process; but he denied the complainant's title, and denied all interest in him, legal or equitable, concerning the said slaves. And the defendant further charged that these slaves were purchased by William D. Amis, of Nathaniel Hill, in New Orleans, for the sum of \$5,000; that they were delivered to him and taken by him to the plantation on which he resided, in the parish of Madison, where they remained until the levy aforesaid.

The Circuit Court, upon the final hearing upon bill, answer, depositions and proofs, dissolved the injunction and dismissed the bill with costs. The complainant appealed to this court, and having died, his executor and executrix were made parties.

It was argued by *Messrs. Gould and Lawrence* for the appellants, and by *Mr. Baxter* for the appellee.

There being no point of law involved in the case, the reporter does not deem it expedient to insert the arguments upon the question of ownership, as shown by the evidence.

Mr. Justice Campbell delivered the opinion of the court:

The plaintiff filed his bill in the Circuit Court of the United States for the Eastern District of Louisiana, to restrain the sale of certain slaves taken in execution of a judgment of that court, in favor of the defendant against William D. Amis.

*The case of the plaintiff is, that [**493** the slaves are his lawful property, and are not subject to the execution of the defendant. The defendant denies this allegation and insists that the property in the slaves is vested in his debtor.

The evidence shows that the slaves were purchased in New Orleans, by the defendant in the execution. He provided the purchase money by procuring the acceptance and discount of a draft at thirty days' date, by a mercantile firm, upon the promise of sending funds for its payment at its maturity. He was disabled from doing this by the occurrence of facts that are detailed in the evidence, and the plaintiff, for his relief, caused the draft to be paid by his own factor, and agreed to take the slaves as his property.

The bill of sale, given to the defendant in execution, did not contain the name of the vendee, but a blank space was left for the insertion of the name. When this arrangement took place, the plaintiff's name was inserted and the paper given to him. The slaves have been at his plantation, and although William D. Amis resides there, no act of mastership is shown, and he denies having any interest in the slaves.

We think this testimony establishes the case of the plaintiff.

It is proper to notice that this case is not one of equitable cognizance. The plaintiff had a clear and adequate remedy at law, under the Code of Practice of Louisiana. (C. P., 298, sec. 7.)

It is not usual for this court to take an exception of this nature on its own motion, and where no objection has been made by the defendant; but this case is one so clearly beyond the limits of the equitable jurisdiction of the Circuit Court, that the fact is noticed that it may not serve as a precedent.

The decree of the Circuit Court is reversed, and the cause remanded, with directions to enter a decree to perpetuate the injunction.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to perpetuate the injunction granted in this cause.

494*] *JOSEPH GUITARD, FREDERICK STEUDEMAN AND MARY, HIS WIFE: AND GEORGE BROWN AND JULIA, HIS WIFE, Plaintiffs in Error,

v.

HENRY STODDARD.

Missouri land claims—acts confirming title to town lots and commons—construction of.

The Act of Congress, passed on the 13th of June, 1812 (2 Stat. at L., 748), entitled *An Act for the settlement of land claims in Missouri*, confirmed the rights, titles, and claims to town or village lots, out lots, common field lots and commons, in, adjoining and belonging to the several towns and villages therein named (including St. Louis), which lots had been inhabited, cultivated or possessed, prior to the 20th of December, 1803.

This confirmation was absolute, depending only upon the facts of inhabitation, cultivation or possession, prior to the day named. It was not necessary for the confirmees to have received from the Spanish government a grant or survey, or permission to cultivate the land.

In 1824 Congress passed a supplementary Act (4 Stat. at L., 65), making it the duty of claimants of town and village lots to designate them by proving before the recorder the fact of inhabitation, the boundaries, &c., and directing the recorder to issue certificates thereof. But no forfeiture was imposed for non-compliance, nor did the government, by that Act, impair the effect and operation of the Act of 1812. Claimants may still establish, by parol evidence, the facts of inhabitation, &c.

In the Act of 1812 the surveyor was directed to survey and mark the out boundary lines of the towns or villages, so as to include the out lots, common field lots, and commons. This was done. Whether a claimant can recover land lying outside

NOTE.—Missouri private land claims. See note to Les Bois v. Bramell, 4 How., 449.

That if the jury find the right to a lot of land comes within the purview of the Act of 1812, the neglect to procure its survey under Act of 1824 cannot impair that right. Explained in *Savignac v. Garrison*, 18 How., 436.

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of this line, or whether the evidence in this case is sufficient to establish the plaintiffs' title, this court does not now decide.

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of Missouri.

It was a petition in the nature of an ejectment brought by the plaintiffs in error, against Stoddard, in the St. Louis Court of Common Pleas. Stoddard, who was a citizen of Ohio, removed it into the Circuit Court of the United States.

The ejectment was for the following lot of ground lying in the City of St. Louis, namely: commencing at a point on the north side of Laclede Avenue, five feet fifty-three inches east from the junction of Laclede and Leffingwell avenues, it being the southeast corner of block No. 24, in what is known as the "Stoddard addition" to the City of St. Louis; runs thence north parallel to Leffingwell Avenue one hundred and seventy-two feet six inches to a point; thence west along a line parallel to Laclede Avenue one hundred and twenty-five feet to a point; thence south along a line parallel to Leffingwell Avenue one hundred and seventy-two feet six inches to the line of Laclede Avenue; thence east along that line one hundred and twenty-five feet to the beginning; it being part of block No. 24, in what is known as the Stoddard addition to St. Louis.

On the trial the jury, under the instructions of the court, found a verdict for the defendant. The bill of exceptions explains the whole nature of the case, and as it is short, it is here inserted, as follows:

*Be it remembered, that on the 6th [*495 day of May, 1858, came on the above-entitled cause to be tried, when the plaintiff introduced the following parol evidence, to wit: that from a period long prior to the 20th December, 1803, to wit: from 1785 or 1786, to the period when the common fence fell down, which was six or seven years before the change of government, Paul Guitard, who was then an inhabitant of St. Louis, claimed and cultivated a piece of land in what was then known as the "Cul-de-sac" prairie, near St. Louis, which land was one arpent wide in front on the east, and forty arpents long towards the west. There were several persons who cultivated lands in the "Cul-de-sac" commencing on the south extreme of the prairie; the first was Matard; then going north, the next was Guion; the next, or third, was Tabean; the fourth, Joachim Boy; the fifth, Madame Vachard; the sixth, Madame Dubriel; the seventh, Madame Verdon; the eighth, Noise; the ninth, Yosti; the tenth, La Rochella; the eleventh, Madame Camp; the twelfth, Paul Guitard. The "Cul-de-sac" fields laid at the end of the St. Louis prairie, forty arpent fields on the west, and they commenced about where Pratte Avenue now is. The "Cul-de-sac" field of Madame Camp was the north land of that part of what is called Chouteau mill tract, west from the St. Louis prairie fields, and the north line of the Chouteau mill tract was the north line of Madame Camp's Cul-de-sac field; and the same line was the south line of Paul Guitard's Cul-de-sac field. The "Cul-de-sac," which means "end of a sac," was formed by the hills on each side north and south, and the hills on the west. The

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lands cultivated there were called lands of the "Cul-de-sac."

There were other prairies near St. Louis, to wit: the St. Louis or Big Mound prairie, the Grand prairie, and Barrier des Noyer prairie. In all of these the lands were cultivated in strips by different individuals, and they were all protected by the same fence; there was but one fence, which commenced at the half moon just north of the old Spanish town, ran thence west to a little beyond Third Street, thence south-west to the fort to a little south of the court house, thence westwardly around the St. Louis and Cul-de-sac fields, to the east line of the Barrier des Noyer fields, thence south along that east line, and east around the St. Louis commons to the river. This fence was a common fence, and was kept up by those who cultivated the fields in the prairies, one cultivator making and mending part, and another, another part, under the supervision and direction of a man who was called a syndic. This fence kept the cattle and stock inside the commons and away from the fields that were cultivated. The St. Louis prairie fields, the Grand prairie field, the Barrier des Noyer prairie fields, and the Cul-de-sac prairie fields, were all *worked at the same time, until the common fence fell down and was neglected to be repaired, and Paul Guitard cultivated the land adjoining and north of the said Chouteau mill tract until the common fence fell down. His cultivation was towards the west on the hill, and he did not cultivate the land on the very eastern end, because it was rather low ground there. The cultivation of Guitard, starting from the hill, went west towards the middle of the piece of land; but how far it commenced from the eastern end, or how far it extended towards the west, was not proved. It was called Guitard's Cul-de-sac field from the west end of the St. Louis prairie fields to the west end of the Chouteau mill tract, which was the west line of the Cul-de-sac fields, now near the rock spring. The land sued for was proved to fall within one arpent in width, north of the Chouteau mill tract, and forty arpents in depth or length west from the St. Louis prairie fields; but whether it was a part of the very spot cultivated by Guitard was not proved. The plaintiffs introduced a deed from Paul Guitard which conveyed all his property and rights of property in St. Louis County, to his grandson, Vincent Guitard, but this specific claim was not mentioned; the deed was dated the 11th of January, 1823, and he died in 1823. Vincent Guitard died in 1836, leaving but three children, who are the plaintiffs and the sole representatives of their father. Vincent Guitard never in any way disposed of this land. Paul Guitard never had any concession for this land from the Spanish authorities; he never presented any claim he had to it under the Act of 1812, to the recorder of land titles, nor made any claim for it before any board of commissioners. His grandson Vincent, nor none of the family, ever presented any claim to it before the recorder of land titles, under the Act of the 26th of May, 1824, nor was the land ever surveyed either by the Spanish or American government, as a field lot. The defendant introduced a confirmation and patent, by virtue of the Act of the 4th of July, 1836, to Mordecai Bell's representatives,

and a survey of the United States which included the land in controversy and a regular chain of title to defendant. He also introduced map X, purporting to contain the out boundary lines of the Surveyor-General, at St. Louis, projected under the first section of the Act of the 18th of June, 1812, and it was proved that the land described in the declaration, but not the whole forty arpents claimed by plaintiff, lies within said out boundary lines. Plaintiff introduced an experienced surveyor, who stated that in his opinion the out boundary line, as projected on map X, was not correctly run under the Act of 1812; that said out boundary line should have been run so as to include the out lots, common field lots, and commons, in, adjoining and belonging *to St. Louis, [*497 which he thought it did not do. It did not include the Grand prairie fields or the Barrier des Noyer fields, nor the Cul-de-sac fields, either as they purport to be located on the township plat of the township in which St. Louis lies, nor as proved in this suit, except about one third of their length as proved on the eastern end, nor does it include all of the commons of St. Louis; that in his opinion an out boundary line run under the Act of 1812, so as to include the out lots, common field lots, and commons of St. Louis, would necessarily include the out lots, common field lots, in all the prairie fields as laid down on the township plat and commons. And such survey would also necessarily include land that was neither out, common field lot, or commons.

Agreement.

It was agreed that in any court to which this action might be carried, map X and township plat, above alluded to, might be introduced and used without including them in this bill of exceptions.

It is also agreed that the property in dispute is worth more than two thousand dollars, exclusive of costs. This was all the evidence in the case, and thereupon the plaintiffs asked of the court the following instructions, namely:

Plaintiff's instructions:

1. The Act of Congress of 18th June, 1812, is in its terms a grant, and confirms the right, title and claim of all town lots or village lots, out lots and common field lots, in, adjoining and belonging to such towns and villages as are mentioned in the Act, to those inhabitants of the towns and villages or to their legal representatives who inhabited, cultivated or possessed such lots, rightfully claiming them prior to the 20th December, 1803. And the principal deputy-surveyor of the Territory of Missouri was required by said Act to run an out boundary of the towns and villages mentioned in said Act, so as to include the out lots, common field lots, and commons thereto respectively belonging, which out boundary line should be one continuous line, and not separate surveys of the town and lots, and should include the out lots, common field lots, and commons, and said towns and villages.

2. A common field lot, as intended by said Act of Congress, is a piece of land of larger or smaller dimensions, as the case may be, according to ancient cultivation, lying alongside of, and parallel to, other similar pieces of land, and claimed or cultivated under the protection of a common fence by those who inhabited said

towns or villages prior to the 20th December, 1803; and said pieces of land might not have been conceded or surveyed by any French or Spanish authority, or surveyed officially by the United States as a common field lot.

498*] *3. If, then, the jury believe, from the evidence, that the land sued for formed part of a common field lot, as just defined in instruction 2, and that said common field lot was rightfully claimed, and in part or altogether cultivated prior to the 20th December, 1803, by Paul Guitard, the plaintiffs are entitled to recover; which were refused, to which plaintiffs at the time excepted, and defendant asked the following instructions:

Defendant's instructions:

1. If the jury believe, from the evidence, that the cultivation by Paul Guitard, testified to by the witnesses, was on a tract of land called a Cul-de-sac common field, and if the jury shall also believe, from the testimony, that the Cul-de-sac common fields, including the one cultivated by Paul Guitard, were at a place to the southwest from the premises sued for, and that neither of said Cul-de-sac common fields include the premises in question, then the plaintiff cannot recover in this action.

2. If the land sued for is within and forms a part of the tract confirmed to Mordecai Bell, or his legal representatives, and within the official survey of said Mordecai Bell tract, then the defendant has shown a title in him paramount to the title of the plaintiff, and the latter cannot recover.

3. There is no evidence that Paul Guitard, under whom the plaintiff derives and claims title to the premises in question, cultivated any out lot or common field lot, nor that anyone existed at the place where the cultivation that has been spoken of by plaintiffs' witnesses, existed, nor had the Act of 1812 application to this land, so far as Paul Guitard and those claiming under him are concerned. The plaintiff, therefore, cannot recover in this action.

4. If the out boundary line of the Town of St. Louis run under the Act of Congress of 18th June, 1812, as shown by the official survey and plat, marked X, read in evidence, includes the land in controversy, then the plaintiff cannot recover. Which were given by the court; and the court of its own motion gave the following:

Instruction by the court: "The court also instructed the jury, that there having been no concession nor grant, nor survey, nor permission to settle or cultivate, or possess the land claimed by Paul Guitard, to said Guitard, under and by the Spanish authorities or government; and no location of said claim by or under said government, nor under the French Government, and no proof having been made at any time by said Paul Guitard, or those claiming under him, or any inhabitation, cultivation, or possession, or of the location and extent of said claim, either under the provisions of the Act of the 18th June, 1812, or those of the Act of the 26th May, 1824, either before the recorder of land **499*]** titles or other United States authority; and there having been no survey or location of said land by or under the authority of the United States, the said plaintiffs cannot now set up said claim and locate it, and prove its extent and inhabitation and cultivation by

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parol evidence merely, and therefore cannot recover in this action;" to which plaintiffs also excepted at the time, and here now tender this their bill of exceptions, and pray that it be signed and sealed and made part of the record in this cause; which is done accordingly.

R. W. WELLS. [SEAL.]

Upon this bill of exceptions, the case came up to this court and was argued by *Messrs. Williams and Geyer* for the plaintiffs in error, and by *Mr. Johnson* for the defendant in error. Upon that side there was also a brief by *Mr. Ewing*.

The following notice of the points made on behalf of the plaintiff in error is taken from the brief of *Mr. Geyer*:

It being admitted on the record that the premises in controversy were within the confirmation to Mordecai Bell, the instruction numbered two was decisive against the plaintiff; and the instruction numbered three decided the whole case in favor of the defendant. So that the additional instruction was wholly unnecessary to a decision of the cause. It furnishes, however, the construction given by the Circuit Court to the Acts of 18th June, 1812, and 26th May, 1824, on which the decision against the title of the plaintiff is founded—a construction opposed to that uniformly given to the same Acts, by the Supreme Court of Missouri, and presents to this court a question upon the decision of which depend the titles to many lots of great value in and near the towns and villages named in those Acts, and especially the now City of St. Louis.

On behalf of several persons interested in the question, but not parties to the record, I submit that the construction given by the Circuit Court to the Acts before mentioned, is erroneous.

1. The first section of the Act of 13th June, 1812 (Land Law, Vol. I. p. 216), is *proprio vigore*, a confirmation of the rights, titles and claims to all town or village lots, out lots, common field lots and commons, in or belonging to the towns and villages named, which had been inhabited, cultivated or possessed, prior to the 20th December, 1803, to the inhabitants of said towns and villages, according to their several right or rights in common thereto.

2. The Act does not refer such claims to the recorder or any other tribunal for examination, report or adjudication, nor does it require or contemplate the exhibition of such claim, or the proof of inhabitation, cultivation or possession, before any officer or authority of the United States, for any purpose.

*3. No concession, grant, survey, per-[***500** mission to settle, or other documentary evidence of title, from the French or Spanish Government, is necessary to maintain a title to any lot or commons under the Act of 1812; the confirmation is made by the Act solely upon the inhabitation, cultivation, or possession, prior to 20th December, 1803.

4. The legal title to the lots and commons, confirmed by the Act of 13th June, 1812, became vested on that day in the inhabitants of the respective towns and villages, "according to their several right or rights in common thereto," leaving it to them to prove, orally or otherwise, the only facts required by the Act

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of 1812, of inhabitation, cultivation or possession, prior to the 20th December, 1803.

5. The Act of the 26th May, 1824 (Land Laws, Vol. I., p. 397), does not annex conditions to the confirmations by the first section of the Act of 18th June, 1812; those who availed themselves of that Act, and "designated their lots" by making the proof required, obtained a certificate, which served as *prima facie* evidence of a confirmation, not by the recorder, but by the Act of 1812. Those who failed to appear and designate their lots obtained no new evidence of title, but they did not forfeit that which was acquired twelve years before by the Act of 1812.

REFERENCES. Letters.—C. B. Penrose, Commissioner, to Secretary of the Treasury; Thos. F. Riddick, Secretary of Commissioners, to the Chairman of the Committee of Public Lands, H. R.; Gales and Seaton's State Papers, Public Lands, Vol. II., pp. 446, 451.

Acts of Congress.—Land Laws, Vol. I., Senate ed., 1838; 2d March, 1805, ch. 74, p. 122; 28th February, 1806, ch. 79, p. 132; 21st April, 1806, ch. 84, 138; 2d March, 1807, ch. 91, p. 153; 13th June, 1812, ch. 140, p. 216; 2d March, 1813, ch. 153, p. 280; 12th April, 1814, ch. 162, p. 242; 29th April, 1816, ch. 197, p. 280; 26th May, 1824, ch. 311, p. 397; 27th January, 1831, ch. 406, p. 478; 4th July, 1846, ch. 505, p. 557.

Cases.—*Foster & Elam v. Neilson*, 2 Pet., 253; *United States v. Percheman*, 7 Pet., 51; *Strother v. Lucas*, 12 Pet., 410; *Vasseur v. Benton*, 1 Mo., 212; *Lajoie v. Primm*, 3 Mo., 368; *Janis v. Gurno*, 4 Ib., 458; *Gurno v. Janis*, 6 Ib., 390; *Trotter v. St. Louis Public Schools*, 9 Ib., 69; *Biehler et al. v. Counce, Ib.*, 347; *Machlot v. Dubruel, Ib.*, 477; *Montgomery & Co. v. Landusky, Ib.*, 705; *Page v. Scheibel*, 11 Mo., 167; *Harrison v. Page*, 16 Ib., 182; *Kissell v. St. Louis Public Schools, Ib.*, 553; *Gamache v. Piquignot*, 17 Ib., 310; *Soulard v. Clarke*, MSS.

The Act of 18th June, 1812, is the first in which the village claims are mentioned as a class; the previous Acts provide only for the 501* investigation of claims and a future confirmation upon the proof of certain facts. Thus the first section of the Act of 2d March, 1805 (Land Laws, Vol. I., p. 122), providing as to one class of claims, declares that, when proved, "they shall be confirmed;" the second section, in reference to the claims of settlers, declares that the "tract of land" proved to have been inhabited and cultivated as required "shall be granted." The first section of the Act of 1812, in reference to the village claims, declares that they "shall be, and are hereby confirmed." The language of the Act of 1805 is precisely that of the English version of the Florida Treaty, which was construed to be executory, in *Foster & Elam v. Neilson*, 2 Pet., 253. That of the Act of 1812 is quite as emphatic as the Spanish version of the same clause of the same Treaty, which is translated, "shall remain ratified and confirmed," and held to be a present ratification and confirmation in *United States v. Percheman*, 7 Pet., 51.

Again, the third section of the Act of 3d June, 1812, provides that every donation claim embraced in the report of the commissioners, and not confirmed on account of some specified cause, "shall be confirmed," and that certain

other claims, to the extent of 800 arpents, "shall be confirmed."

The Acts of the 12th April, 1814 (Land Laws, Vol. I., p. 242); 29th April, 1816 (*Ib.*, 280); and 4th July, 1836 (*Ib.*, 557), are Acts confirming claims recommended for confirmation by the recorder or commissioners. The first declares that the claimants "shall be, and they are hereby confirmed in their claims;" the second, that the claims recommended for confirmation be, and the same are hereby confirmed; in the last, the same language is employed in confirming the decisions in favor of the claimants.

In every case where it is declared that claims "shall be confirmed," provision is made for an investigation and adjudication. None such is made by the Act of 1812, in relation to the village claims confirmed by the first section. By the fourth section the recorder is required to extract from the books of the commissioners the donation claims directed to be confirmed by the third section. By the eighth section the powers and duties of the commissioners are conferred upon him in relation to donation claims filed under the seventh section, and the claims which had been theretofore filed and not decided on by the commissioners.

It is true that the recorder did examine and report for confirmation many village claims that were confirmed by the Act of June, 1812, and that the report was confirmed by the Act of 29th April, 1816. The confirmation furnished convenient evidence of title, but it is neither conclusive nor indispensable. Proof of inhabitation, cultivation or possession, is all that the *law requires, and when made, estab- [502] lishes a title from the 18th June, 1812, which is superior to a confirmation by the Act of April, 1816, unaccompanied by evidence of inhabitation, cultivation or possession, prior to 20th December, 1803. (See *Vasseur v. Benton*, 1 Mo., 212, 296; *Page v. Scheibel*, 11 Ib., 167; *Harrison v. Page*, 16 Ib., 182.)

The information upon which the Act of June, 1812, was based, was contained in letters addressed to the Secretary of the Treasury by Mr. Penrose, one of the commissioners, and one addressed to the chairman of the committee on public lands by Mr. Riddick, Secretary of the Board, which had just then closed its labors and made report, under the provisions of the several Acts of Congress for the adjustment of land claims. The letters were written at Washington, dated 20th, 24th, and 26th March, 1812, and are published in Gales & Seaton's edition of State Papers, Public Lands, Vol. II., pp. 447 to 451.

The first letter of Mr. Penrose contains a classification of the claims not finally confirmed. Class 8th embraces claims for out or field lots, as they are termed, which he says "should be confirmed, recorded or not recorded, if those not recorded do not interfere with claims confirmed; all these tracts have been possessed from fifteen to fifty years." Class 9th—"the commons." Class tenth—"town or village lots." He says: "It would probably be best to confirm the town generally to the inhabitants, and if there be any vacant lots, grant them for public schools."

In his second letter, he says: "The five following classes will include nearly all such claims as have sufficient merit to be confirmed."

.... "Class 5th" embraces claims for towns or villages, then common fields or field lots and their commons, either recorded or not recorded." Mr. Penrose says: "By the spirit of the ordinances all these claims would have been confirmed or granted."

The letter of Mr. Riddick (the Secretary) arranges the land claims into 49 classes. The last (49th) embraces "villages, commons, common fields, and lands adjacent, given to the inhabitants individually for cultivation, possessed prior to the 20th December, 1808."

Mr. Riddick says: "The foregoing table or list is intended to show the claims of Louisiana in all the variety of shades in which it is possible for the claimants to place them, out of which a selection may be made of such as are not yet provided for by law; but nevertheless 'ought in justice to be confirmed or granted' to the claimant."

After some suggestions in respect to the other classes, the letter proceeds: "The forty-second, forty-third and forty-fourth classes 503" *have great merit, and ought to be provided for. It is believed that no actual settlement was made in Louisiana without the express permission of a proper Spanish officer. In fact, the known vigilance of that government was such as to prevent an idea of that kind being entertained a moment. Even the subjects of Spain, old residents of the country, were not permitted to travel from one village to another, a distance of not more than twenty miles, without obtaining from the commandant a passport, in which was specially stated the road to be traveled, going and returning. Under these circumstances, it is impossible that any settlements could have been made without the knowledge of the government."

"The forty-ninth class will comprise nearly one fourth in number of all the claims of the Territory of Louisiana, and if confirmed at once by the outer lines of a survey to be made by the principal deputy, would give general satisfaction, and save the United States a deal of useless investigation into subjects that are merely matters of individual dispute."

"The United States can claim no rights over the same, except a few solitary village lots, and inconsiderable vacant spots of little value, which might be given to the inhabitants for the support of schools."

"The villages established prior to the 20th December, 1808, are as follows, to wit: 'In St. Charles District, St. Charles and Portage des Sioux; in St. Louis District, St. Louis, St. Ferdinand, Maria des Liards, and Carondelet; in St. Genevieve District, St. Genevieve and New Bourbon; in New Madrid District, New Madrid and Little Prairie; in Arkansas District, Arkansas.'"

These letters suggest every provision contained in the first two sections of the Act of June, 1812, the confirmation of the claims of the inhabitants to in lots, out lots, common field lots and commons, the survey of an out boundary, and the reservation of vacant lots for the support of schools. They show also the reason why no title paper was required, and no investigation or adjudication provided for, but the claims confirmed at once by force of the Act alone.

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The Act supplementary to the Act of 13th June, 1812, approved 26th May, 1824 (Land Laws, Vol. I., p. 397), and the further supplement thereto, approved 27th January, 1831 (*Id.*, 478), show that the Act of 1812 was understood by Congress to be a confirmation of the village claims *proprio vigore*. The first requires the owners of lots "which were confirmed by the Act of June, 1812, on the ground of inhabitation, cultivation or possession, to designate their respective lots by proving before the recorder the fact of such inhabitation, &c., within eighteen months. The last is [*504] a quitclaim by the United States in favor of the inhabitants of the several towns and villages to the lots and commons confirmed to them respectively by the Act of 13th June, 1812."

It was not the object of the supplementary Act of 1824 to institute an investigation of village claims, or to require or authorize an adjudication of the rights of claimants. It embraces no unconfirmed claims, and of those confirmed only such as it recognizes to have been confirmed by the Act of 1812.

These confirmations had been made without any record or documentary evidence by which it could be ascertained what lots had been confirmed, their extent and boundaries; and because these facts depended on parol evidence, the surveyor-general could not distinguish the private from the public lots. This evil it was the object of the Act of 1824 to remedy as far as practicable, and therefore it provides that the owners of lots confirmed by the Act of 1812 (and none other, confirmed or unconfirmed) shall, within a limited period, designate their lots by proof of inhabitation, &c., and their extent and boundaries, "so as to enable the Surveyor-General to distinguish the private from the vacant lots," or, as it is expressed in the third section, "to serve as his guide in distinguishing them" (the confirmed lots) "from the vacant lots to be set apart as above described," that is, for the use of schools.

The recorder is directed to issue a certificate of confirmation for each claim confirmed, that is, for each claim which, in his opinion, shall have been proved to have been confirmed twelve years before, by force of the Act of 13th June, 1812, and it has been held that the certificate is *prima facie* evidence of such confirmation to the person named in it. (*Janis v. Gurno*, 4 Mo., 458), but it may be rebutted; and if it is proved that the lot was inhabited, cultivated or possessed by another person prior to the 20th December, 1808, that title is the best. The Act of 1824 does not declare the consequence of a failure by an owner to make the proof required and certainly cannot be construed to divest the title vested by the Act of 1812. (*Gurno v. Janis*, 6 Mo., 380; *Page v. Scheibel*, 11 *Id.*, 167; *Harrison v. Page*, 16 *Id.*, 182; *Montgomery v. Landusky*, 9 *Id.*, 705.)

A construction of the Act of the 13th June 1812, was for the first time given by the Supreme Court of Missouri, in 1823, in the case of *Vasseur v. Benton*, 1 Mo., 212, 296.

(The counsel then examined that case particularly, and also the cases of *Lajoie v. Prima*, 1 Mo., 868; *Janis v. Gurno*, 4 *Id.*, 458; *Gurno v. Janis*, 6 *Id.*, 380; *Biehler v. Coones*, 9 *Id.*, 347; *Montgomery v. Landusky*, *Id.*, 705; *Page v.*

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Scheibel, 11 *Ib.*, 167; *Harrison v. Page*, 16 *Ib.*, 505*] 182; *Russell v. St. Louis Public Schools*, *Ib.*, 558; *Gamache v. Piquignot*, 17 *Ib.*, 810; *Soulard v. Clarke*, MS., March, 1854.)

Mr. Ewing made the following points for the defendant in error:

1st. It appears that the claim of the individual inhabitant is confined to the bounds of the village or town. The plaintiffs cannot claim anything under this Act except a town lot, out lot, common field lot, or commons belonging to St. Louis. The first question, therefore, is, does St. Louis, its common fields or commons, within the provisions of the above-named Act, include the land in controversy. It was never intended by that Act that the claim of each inhabitant to the town lot, out lot, common field lot, or commons, should be separately set apart and severed from the national domain, by survey or otherwise; but that the "out bounds" of the town, with its appurtenant common fields and commons, should be surveyed and severed from the national domain by a regularly constituted officer, and then that each inhabitant should have secured to him his rights, whatever they might be, within the bounds of the town. It was the duty of the town authorities to attend to procuring the survey, and in its execution to guard the interests of the town, and with them the rights of the individual inhabitants.

The law directs that the survey be made "as soon as may be," so that the rights of the town and its inhabitants being defined, all others entitled may assert their claims. It would not do to allow a claim like that to the commons of St. Louis to remain unmarked, indefinite, hovering like a moving cloud over and around the adjacent titles. It must therefore be surveyed and its limits defined "as soon as may be." This was accordingly done. The precise date of the survey is not given, but it was in or prior to 1817, in which year the plat was filed in the General Land Office, pursuant to the provisions of the Act above cited. That survey has been acquiesced in for thirty-seven years, and lands have been purchased and titles acquired and transmitted conformably to it for more than a generation. The survey was made by an authorized officer of the United States upon the one side, in the presence and with the actual or implied assent of the city authorities and the interested citizens on the other; and it is now much too late to question it in any quarter. The evidence on which it is now assailed is the opinion of an experienced surveyor, who thinks the out boundary line of the city ought to have been so projected as to include the land in controversy. It is not probable that he is better informed as to the state of the city and its appurtenant commons in 1812 than the public **506*** lic surveyor who projected the "out boundary line in 1816, and the public authorities of the city and the interested inhabitants who at that time witnessed and acquiesced in the said out boundary. But too much time has elapsed—the acquiescence has been too long to admit of evidence or question on the subject of this out boundary, even if the evidence were otherwise entitled to consideration.

2d. But waving this objection, the plaintiffs show no claim whatever under the statute.

The language of the first section, so far as
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it touches the rights of individuals, is somewhat vague and indefinite. It provides that lots which "have been inhabited, cultivated or possessed prior to the 20th day of December, 1803, shall be, and the same are hereby confirmed to the inhabitants of the respective towns or villages aforesaid, according to their several right or rights in common thereto." But it does not admit of a construction, which would give to the inhabitants of a town lands which they had occupied and cultivated many years before 1803, and which they had before that time abandoned. The expression, as I have said, is not clear, but the tense of the verb "have been inhabited" implies a continuing inhabitation, &c., down to the time named, December 20th, 1803. The more brief and common expression "were inhabited prior," &c., would convey distinctly the idea that "inhabitation," &c., at any time prior to that date was sufficient. But the word used to transfer title is, I think, decisive of the question—"shall be, and is hereby confirmed to," &c. The term "confirmation," implies *proprio vigore*, an existing title or claim on which it is to operate—it can have no effect whatever on an inhabitation, cultivation or possession, which existed in the indefinite past, but which had been abandoned and was as if it had never existed at the time of the confirmation.

But the second section of the Act removes all possible doubt on the subject. The survey having been directed by the first section, the second goes on to provide, "that all town and village lots, out lots, or common field lots, included in such surveys, which are not rightfully owned or claimed by private individuals . . . shall be, and the same are hereby reserved for the support of schools. Showing that there must be a present subsisting claim or ownership at the time of the passage of the law. Nothing which was abandoned, prior to its passage, is intended to be restored by it. It saves subsisting rights or claims only.

Whatever possession was in Paul Guitard of the land in question prior to 1797 was abandoned, when the common fence fell down and was abandoned by the town, namely: 1796-97. From that time until the commencement of this suit in 1853, a period of nearly sixty years, no claim has been set up to these **507** lands, either by the city or the inhabitants. Twenty years after the fields, once inclosed by the common fence, were thrown open and abandoned, the boundary of the city, its out lots and commons, was settled by the city authorities and a public officer of the United States, and a record duly made thereof in the proper department of the government. The city has ever since acquiesced in its reputed boundary. Private individuals have acquiesced; and it has never yet been disturbed. I submit that it is too late to disturb it now, and unsettle titles which have for a full generation rested undisturbed upon it.

I ought, perhaps, also to notice the singularly unsatisfactory kind of title set up by the plaintiffs in their ancestor, Paul Guitard. They say he cultivated and claimed. But how or by what title did he claim? And where did he possess and cultivate? It might be possible to prove that a flock of crows lighted on the scrub oaks in the Cul-de-sac sixty years ago, and flew

away again, but it would be hard to prove the particular tree on which any one individual crow lighted. The proof is here equally unsatisfactory. There is no more trace left in the one case than in the other; no line drawn, stake set, tree marked, or stone planted, no ancient pile of rubbish to mark the spot claimed by Guitard or any other inhabitant out of the surveyed bounds of the town.

Mr. Justice Campbell delivered the opinion of the court:

The plaintiffs claim a lot of ground in the City of St. Louis, as representatives of Paul Guitard, an ancient inhabitant of that city, under a confirmation in the Act of Congress of the 13th of June, 1812, for the settlement of land claims in Missouri. (2 Stat. at L., 748.)

The record shows that Guitard, from 1785-6 till the common fence which surrounded and protected the field lots and commons of that city was thrown down, in 1797 or 1798, claimed and cultivated a parcel of land, one arpent in width and forty in depth, in the Cul-de-sac prairie. The tract claimed was called Guitard's Cul-de-sac field to its whole extent, and was in the usual form of field lots in that village. His cultivation did not extend over the whole claim, nor was it ascertained whether the portion sued for was within that part cultivated. There were eleven other lots of the same description, claimed and cultivated at that period by different persons in the Cul-de-sac prairie lying together, that of Guitard's being to the north of the others. The land sued for is within the survey directed by the first section of the Act referred to. The defendant produced a patent from the United States for the land in dispute; but as the case was determined upon the title **508*** of the plaintiffs, that becomes of "no importance. The Circuit Court instructed the jury, "That there having been no concession, nor grant, nor survey, nor permission to cultivate or possess the land claimed by Paul Guitard to said Guitard under and by the Spanish authorities or government; and no location of said claim by or under said government, nor under the French government, and no proof having been made at any time by said Paul Guitard, or those claiming under him, of any inhabitation, cultivation or possession, or of the location and extent of said claim, either under the provisions of the Act of 1812 or those of the Act of the 26th of May, 1824, either before the recorder of land titles or other United States authority; and there having been no survey or location of said land, by or under the authority of the United States, the said plaintiffs cannot now set up said claim and locate it, and prove its extent and inhabitation and cultivation by parol evidence merely." This instruction comprehends the entire case, and the examination of this will render it unnecessary to consider those given or refused upon the motions of the parties to the suit.

The Act of the 13th of June, 1812, declares "that the rights, titles, claims to town or village lots, out lots, common field lots, and commons in, adjoining, and belonging to the several towns and villages named in the Act, including St. Louis, which lots have been inhabited, cultivated or possessed prior to the 20th of December, 1803, shall be, and they are here-

by confirmed to the inhabitants of the respective towns or villages aforesaid, according to their several right or rights in common thereto."

This Act has been repeatedly under the consideration of this court, and to ascertain what has been decided upon it will facilitate the present inquiry. In *Chouteau v. Eckhart*, 2 How., 345, the defendant relied upon the title of the village of St. Charles to the *locus in quo*, as being a part of the commons of that village, and confirmed to it by the Act of June, 1812. In that case, the right of the village was established from a concession made by the Lieutenant Governor of Upper Louisiana, and a formal survey by the Spanish authority. The judgment of this court was, that a title of this description was confirmed by the Act of 1812, and that this confirmation excluded a Spanish concession of an earlier date, which had been confirmed by a subsequent Act of Congress.

In the case of *Mackay v. Dillon*, 4 How., 421, the defendant defended under the claim of St. Louis to its commons, and produced evidence of a Spanish concession, of a private survey which had been presented to the Board of Commissioners, and of proof having been made before the recorder of land titles. Whether the private survey made in 1806, and submitted to the "government, was conclusive of boundary, was the question before the court. *Mr. Justice Catron*, in delivering the opinion of the court, says, "By the first section of the Act of 1812 Congress confirmed the claim to commons adjoining and belonging to St. Louis, with similar claims made by other towns. But no extent or boundaries were given to show what land was granted; nor is there anything in the Act of 1812 from which a court of justice can legally declare that the land, set forth in the survey and proved as commons by witnesses in 1806, is the precise land Congress granted: in other words, the Act did not adopt the evidence laid before the board for any purpose; and the boundaries of claims thus confirmed were designedly, as we suppose, left open for the settlement of the respective claimants by litigation in courts of justice or otherwise."

Again, in the case of *Les Bois v. Bramell*, the same learned judge says of this Act, "that this was a general confirmation of the common to the town as a community, no one ever doubted, so far as the confirmation operated on the lands of the United States."

The questions settled by this court are that the Act of 1812 is a present operative grant of all the interest of the United States, in the property comprised in the Act, and that the right of the grantee was not dependent upon the *factum* of a survey under the Spanish government.

No question before this has been submitted to the court upon the interpretation to be given to the "rights, titles and claims" which were the subject of the confirmation of the United States.

The instruction given to the jury by the Circuit Court implies that the confirmee, before he can acquire a standing in court, must originally have had or must subsequently have placed upon his title or claim an additional mark of a public authority besides this Act of Congress; that he must evince his right or claim by some

concession, survey, or permission to settle, cultivate or possess, or some recognition of his claim under the provisions of some Act of Congress by some officer of the Executive Department, indicative of its location and extent. The laxity of the legislation in the Act of 1812 is painfully evident, when the fact is declared that the large and growing cities of the State of Missouri have their site upon the land comprehended in this confirmation. Nevertheless, an attempt to correct the mischief would probably create more confusion and disorder than the Act has produced.

The Act, in the form in which it exists, was adopted by Congress upon the solicitation and counsel of citizens of Missouri, interested in the subject and well acquainted with the conditions of its population. The towns and villages named in it were then, and for many years continued to be, small, and the property of no great importance. During this time conflicting rights and pretensions were adjusted, facts necessary to sustain claims to property ascertained, and the business and intercourse of the inhabitants accommodated to its conditions. The Act itself, with all the circumstances of the inhabitants before and at the time of its passage, have formed the subject of legal judgments and professional opinions upon which mighty interests have grown up and now repose. This court fully appreciates the danger of disturbing those interests and of contradicting those opinions and judgments.

The Act of 1812 makes no requisition for a concession, survey, permission to settle, cultivate or possess, or of any location by a public authority as the basis of the right, title and claim, upon which its confirmatory provisions operate. It may be very true that there could have been originally no legitimate right or claim without some such authority. Congress, however, in this Act, was not dealing with written or formal evidences of right. Such claims in Missouri have been provided for by other Acts. These pretensions to town and village lots formed a residuum of a mass of rights, titles and claims, which Congress was advised could be equitably and summarily disposed of by the abandonment of its own rights to the property, and a reference of the whole subject to the parties concerned. Congress afforded no means of authenticating the rights, titles and claims of the several confirmees. No Board was appointed in the Act to receive the evidence nor to adjust contradictory pretensions.

No officer was appointed to survey or to locate any individual right. All the facts requisite to sustain the confirmation—what were village or town lots, out lots, common field lots, or commons—what were the conditions of inhabitation, cultivation or possession, to bring the claimant within the Act, were referred to the judicial tribunals. The Act has been most carefully and patiently considered in the Supreme Court of Missouri, and conclusions have been promulgated, which comprehend nearly all the questions which can arise upon it.

In *Vasseur v. Benton*, 1 Mo., that court says, "we are of opinion that the claims to town or village lots, which had been inhabited, cultivated or possessed, prior to the 20th of December, 1803, are by the express words of the Act *ipso facto* confirmed as to the right of the

United States." In *Lajoie v. Primm*, 3 Mo., 368, the court says, "the great object of the Act was to quiet the villages in their titles to property (so far as the government was concerned) which had been acquired in many instances by possession merely, under an express or implied permission to settle, and which had passed from hand to hand without any formal conveyance. In such cases possession was the only thing to which they could look; and taking it for granted that those who were found in possession at the time the country was ceded, or who had been last in possession prior thereto, was the rightful owners—the confirmation was intended for their benefit." In *Puge v. Scheibel*, 11 Mo., 167, the same court says, "the whole history of the progress of settlements in the French villages, so far as it has been developed in the cases which have come up to this court, shows that the villagers did not venture to take possession of the lots, either for cultivation or inhabitation, without a formal permission of the Lieutenant-Governor, or the commandant of the post. These permissions, it is also probable, were most generally in writing, and accompanied by a survey made by an officer selected and authorized by the government.

But the title of the claimants under this government does not depend upon the existence or proof of any such documents. Congress did not think proper to require it. In all probability, the fact that possession, inhabitation and cultivation could not exist under the former government without such previous permission from the authorities of that government, was known to the framers of the Act of 1812, and constituted the prominent reason for dispensing with any proof of this character in order to make out a title under that Act. However this may be, the Act requires no such proof, but confirms the title upon possession, inhabitation or cultivation alone, without regard to the legality of the origin of such title."

We have quoted these portions of the reports of those cases to express our concurrence in the conclusions they present.

We shall now inquire whether it was necessary for the confirmee to present the evidence of his claim under the Act of 1824 (4 Stat. at L., 65), supplementary to the Act of 1812.

This Act makes it the duty of the claimants of town and village lots "to proceed, within eighteen months after the passage thereof, to designate them by proving the fact of inhabitation, &c., and the boundaries and extent of each claim, so as to enable the surveyor-general to distinguish the private from the vacant lots." No forfeiture was imposed for a non-compliance. The confirmee by a compliance obtained a recognition of his boundaries from the United States, and consequently evidence against every person intruding, or claiming from the government *ex post facto*. The government did not by that Act impair the effect and operation of its Act of 1812.

Under the Act of 1812 each confirmee was compelled, whenever his title was disputed, to adduce proof of the conditions upon which the confirmation depended. As the facts of inhabitation, possession and cultivation at [§ 12] a designated period, are facts *in pais*, it followed as a matter of course that parol evidence is admissible to establish them. In the case of

Hickie v. Starke, 1 Pet., 98, a question arose upon an Act of Congress which confirmed to "actual settlers" within a ceded territory all the grants legally executed prior to a designated day, and this court held that the fact of "a settlement on that day" must be established, and proof of occupancy and cultivation was adduced. In *The City of Mobile v. Eslava*, 16 Pet., 235, certain water lots were confirmed to the proprietors of the front lots adjacent thereto, who had improved them before the passage of the Act of Congress, and this court sustained the title upon parol proof of location and improvements. The court said "being proprietor of the front lot and having improved the water lot opposite and east of Water Street, constitute the conditions on which the right, if any, under the statute, vests. In his charge to the jury, the judge laid down these conditions in clear terms; and instructed the jury, if the facts brought the defendant within them, that they should find against the plaintiffs. The jury did so find, and this is conclusive of the facts of the case."

The question of boundary under the Act of 1812, as it was decided in *Mackay v. Dillon*, was left open to the settlement of the respective claimants by litigation, in the courts of justice, or otherwise. Nor has this court, in any case, decided that statutes, which operate to confirm an existing and recognized claim or title with ascertained boundaries, or boundaries which could be ascertained, are inoperative without a survey, or made one necessary to the perfection of the title. A survey, approved by the United States, and accepted by the confirmee, is always important to the confirmee; for, as is said by the court in *Menard's Heirs v. Massey*, 8 How., 294, it is conclusive evidence as against the United States, that the land granted by the confirmation of Congress was the same described and bounded by the survey, unless an appeal was taken by either party or an opposing claimant to the Commissioner of the Land Office. This consideration depends upon the fact that the claimant and the United States were parties to the selection of the land; for, as they agreed to the survey, they are mutually bound and respectively estopped."

The cases of *Harrison v. Page*, 16 Mo., 182; *Gamache v. Piquinot*, 17 Mo., 310, which has been affirmed at the present session of this court, and *Soulard v. Clarke*, are in harmony with the views we have expressed upon the latter branch of the instructions of the Circuit Court.

We think it proper to state, that we express no opinion upon the effect of the evidence to establish the plaintiff's title as a subsisting title, and none upon the claim to such of the land as [513*] lies "beyond the boundary line, settled by the survey of the United States under the first section of the Act of 1812.

The judgment of the Circuit Court is reversed and the cause remanded.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Missouri, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said

Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to award a *venire facias de novo*.

Cited—18 How., 137; 1 Black, 601; McAll., 217.

JAMES IRWIN, *Appellant*.

v.

THE UNITED STATES.

Contract—construction of, for use of water conveyed through pipes—equal amounts—two pipes, different distances.

On the 6th November, 1836, W. F. Hamilton, William V. Robinson and wife by deed, conveyed to the United States "the right and privilege to use, divert and carry away from the fountain spring, by which the woolen factory of the said Hamilton & Robinson is now supplied, so much water as will pass through a pipe or tube of equal diameter with one that shall convey the water from the said spring, upon the same level therewith, to the factory of the said grantors, and to proceed from a common cistern or head to be erected by the said United States, and to convey and conduct the same by tubes or pipes, through the premises of the said grantors in a direct line, &c., &c."

The distance to which the United States wished to carry their share of the water being much greater than that of the other party, it was necessary, according to the principles of hydraulics, to lay down pipes of a larger bore than those of the other party, in order to obtain one half of the water.

The grantors were present when the pipes were laid down in this way, and made no objection. It will not do for an assignee, whose deed recognizes the title of the United States to one half of the water, now to disturb the arrangement.

Under the circumstances, the construction to be given to the deed is, that the United States purchased a right to one half of the water, and had a right to lay down such pipes as were necessary to secure that object.

THIS was an appeal from the Circuit Court of the United States for the Western District of Pennsylvania, sitting as a court of equity.

The facts were these:

On the 6th November, 1836, W. F. Hamilton, William V. Robinson and wife, by deed, conveyed to the United States "the right and privilege, to use, divert and carry away from the fountain spring by which the woolen factory of the said Hamilton & Robinson is now supplied, so much water as will pass through *a pipe or tube of equal diameter with [514 one that shall convey the water from the said spring, upon the same level therewith, to the factory of the said grantors, and to proceed from a common cistern or head to be erected by the said United States, and to convey and conduct the same, by tubes or pipes, through the premises of the said grantors in a direct line, or as nearly as practicable thereto; and the privilege of entering upon the premises of the said grantors for laying, and when necessary, altering the said pipes, or repairing them; also the privilege of erecting and repairing the said cistern or reservoir, or other erection as may be deemed necessary for preserving the said water for the use aforesaid, and all other rights and privileges in common with said grantors, their heirs and assigns."

The United States proceeded to lay down the

Howe & Co.

pipes in the manner described in the following testimony, which was given by Mr. Bates:

Giles S. Bates being produced on part of complainant, and sworn, says: I was employed at the United States arsenal, at Lawrenceville, Alleghany County, Pennsylvania, for about sixteen years; I ceased to be employed there about the last of June, 1852. I know the spring from which the arsenal is supplied with water, on the land of Samuel H. Kellar; it is the same spring from which Mr. James Irwin's factory is supplied; the distance from the spring to the reservoir of the arsenal is five hundred and forty-seven yards or thereabouts; the ground is somewhat broken or uneven. There are three ravines; the first ravine, from summit to summit, is about two hundred feet wide, and from twenty-five to thirty feet deep; the second is about one hundred feet wide and about fifteen feet deep; the third is about fifty feet wide and from eight to ten feet deep, that is the width and depth at the point where the United States pipes pass; the pipes follow the inequalities of the ground; they are about three feet below the surface of the ground, from that to four feet; the pipe from the spring to the reservoir is two and a half bore pipe; the copper pipe connecting the iron pipe with the cistern is two inches and five eighths, and about one foot long; the hole through the body of the cistern is one inch in diameter; the copper pipe is bolted to the cistern by a flange; the hole through which the water passes to supply Mr. Irwin's works is the same size as the one through which it passes to supply the arsenal, and the two holes are on the same level. I was in the employment of the United States when the pipes referred to for the supply of the arsenal were laid; I was present most of the time while they were laying them; they are the same pipes which are now in use; they have been in use since 1837. I saw Mr. William V. Robinson [515] present on two occasions *when the pipes were being laid; he was present with Colonel Baker; I heard him express no dissatisfaction; they appeared to have a perfect understanding in the arrangement, and that arrangement is the one now in use. I was and am still under the impression that the copper pipe was an inch one originally, but I am not positive; with that exception the arrangement is now as it was then. I do not know of any change in the size of the pipe since; some pipes were put down to secure the air valve, but no alteration in the size of the pipe; any deposits in the pipes collect in the ravines, and when the air gets into the pipes from the cistern it has to be drawn out of these air valves in order to fill the pipes; the amount of water discharged at the reservoir would fill a three-quarter inch pipe. I have had partial charge for some time of the work; have been frequently at the spring; assisted to clear the pipes of air and to fill them. The ground where the United States pipe crosses from the ground of Mr. Irwin is about fifteen feet higher than where the pipe discharges its contents at Mr. Irwin's factory; the ground through which the pipe passes from the spring to Mr. Irwin's factory is a regular slope. The distance from the spring to where the United States pipe passes from Mr. Irwin's land is greater than from the spring to Mr. Irwin's factory; it is hardly one

third of the distance to the reservoir; the body or rim of the cistern through which the inch hole passes, is about seven eighths thick.

Question. When the United States arsenal and Mr. Irwin's factory are both in operation, what is the relative amount of water drawn off by the pipes of each?

I believe the amount to be about equal.

Cross-Examined I do not know that the ravines spoken of would make any difference in the flow of the water, provided there was a sufficient head at the spring to exclude the air from the pipe; if air was admitted into the pipe, I am of opinion that the water would still continue to flow, but to a limited extent.

We can see the water flowing from the United States pipe into the reservoir. When the reservoir was first established, the pipe discharged about four feet from the bottom of the reservoir, and I have frequently seen the water discharging into the reservoir from the pipe. That mode of discharging was discontinued between seven and eight years ago. It discharged through a brass cock, two-inch bore. The United States used the water for ornamental purposes on the parade at interviews for a number of years, when the supply of water would permit. The centers of the holes in the cistern from which the water is taken to the reservoir and to Mr. Irwin's factory, are on the same level, and the centers of the pipes are on the same level, but the difference *in the diameter of the [516] pipes throws the United States pipe about three fourths of an inch below Mr. Irwin's pipe. The diameter of Mr. Irwin's pipe is an inch bore, I should judge.

Direct. I think the deposit of sediment in the pipe in the ravines would obstruct the water, unless there was a sufficient draft in the pipe to draw it out. I know that sediment has collected in the pipe in the bottom of the large ravine. The sediment was a kind of sand, oxide of iron, and of a muddy nature.

Cross examined. I only know of sediment having collected in the pipe once so as to require opening during the time I was at the arsenal. The air valves spoken of were constructed to insure a continuous flow of water, and in order to draw off the foul air and allow the water to flow; and they answered the purpose of their construction. The discharge of the water into the reservoir from the two-inch cock is from a half to three quarters of an inch. If the pipe used by the United States had been of lead instead of iron, the obstruction from sediment would probably not have been as great. There is quite a sediment comes from the water of this spring. We used it in our boilers at the public works, and found it quite objectionable from the accumulation of sediment—of fine sand. We have been compelled to clean out the reservoir from sediment, but I cannot say whether it has been necessary to clean out the cistern at the spring or not.

Direct. The flow of water mentioned as coming from the brass cock at the reservoir was the entire supply received from the spring.

G. S. BATES.

On the 13th of January, 1842, Robinson & Hamilton conveyed their interest to James Caldwell, whose interest was conveyed by the sheriff to William Black, in December, 1843.

On the 30th of January, 1848, Black con-

veyed to Irwin (the appellant) by deed, reciting all the mesne conveyances, and among them the deed from William F. Hamilton and William V. Robinson and wife, "to the United States of America, for privilege of one half the spring, &c., dated 26th November, A. D. 1836, and recorded in Book C, 3d, p. 480."

On the 16th of January, 1852, the said James Irwin (now appellant) gave the notice to Major Bell, of the Alleghany arsenal, alleging that the government have in use a pipe to convey the water from the spring to the arsenal, "which is over four times the capacity of that contracted for." . . . "That unless some satisfactory proposition be made by the government within thirty days, I will cut off the pipe referred to."

Instead of a proposition to purchase, the United States exhibited their bill, and obtained an injunction.

§ 17*] *The bill sets forth the agreement, &c.

And claims that after the parties have respectively drawn off their several shares, by holes or tubes inserted in said vessel, of equal diameter and on the same level, they may then carry away the water by a pipe or pipes of such size and diameter as they may respectively think proper to adopt.

It further charges that the defendant, at the time of his purchase, knew the extent of the complainants' right, under their said deed, and was well aware that it conferred on them a right to one half of the water of said spring.

The answer admits the agreement, and asserts that although the complainants were permitted by the said Hamilton & Robinson to lay down their pipes of a dimension far exceeding those which had been at any time used to convey the said water to their factory, the same was permitted because the said grantors were not carrying on business at the said factory, or using the said water for the purposes thereof, and with the understanding that the license thus temporarily accorded should not be taken to operate in any way to the enlargement of the rights of the complainants, or to the prejudice of those of the grantors; that the defendant was not advised, at the time of his purchase, of the dimensions of the complainants' pipes, or that they were exceeding their rights, and had no means of ascertaining the same, but was induced to suppose, from the dimensions of the vent or orifice, that the pipes which were concealed from view were entirely correspondent therewith:

And further, that the recital in defendant's deed is not to be taken either as an interpretation of the original grant, or the admission of a right, on the part of complainants, to one half of the water, or as operating, or intended to operate, as an enlargement of the grant, because no part of the said water was used by the party under whom he claims, and the said conveyance is set forth merely as a part of the chain of title, and with express reference to the deed itself, and the record thereof, for the details, both of which manifestly show that the same was a misdescription or a mistake of the scrivener in the recital thereof, and no way affecting the conveyance to the defendant, which is of the whole interest of the grantor:

And further, that although the immediate grantor may have labored under such an im-

pression, neither he nor the defendant, who is his assignee, is to be concluded or affected by any mistake in regard to his rights in a conveyance to which the complainants were neither parties or privies.

The answer further admits that the complainants did enter and construct a common vessel or reservoir, as alleged—that the same was pierced with two circular holes, of equal diameter *and elevation, for the use of [*518 the respective parties, and that the complainants did proceed to lay through the premises of the grantors a pipe for the conveyance of the water from one of the said holes or orifices.

It denies, however, that the said cistern was pierced at any time with any tubes whatever, or that complainants laid down, through the premises of the grantors, any pipes or tubes of a dimension corresponding with either of the said holes or orifices, or of equal diameter with the tubes or pipes which were used for supplying the works or factory of the grantors; but avers, to the contrary, that although the pipe or tube which was then used and continued to be used, for the purpose of supplying the factory of the grantors, has at no time exceeded the diameter of one inch, and has conformed precisely to the position and level of one of the said holes or orifices, the said complainants have laid down and are now using, through the premises of the defendant, a tube of the diameter of two and a half inches, with a capacity more than six times that of the tube used by the defendant, and not conforming in its level or elevation with either of the orifices aforesaid, but affixed to the exterior circumference or rim of the said cistern in such manner as to extend below the said orifice, and to increase the weight or head of water about seven eighths of an inch over and above that of the defendant.

The above are the material facts of the answer.

To this answer a general replication was filed, and the cause sent to an examiner; and on the 19th of November, 1852, the cause came on to be heard on bill, answer, exhibits, replication and testimony, and was argued by counsel, and upon consideration thereof, the court awarded a perpetual injunction against the defendant, as prayed, with costs.

Whereupon the defendant entered this appeal from the said decree.

It was argued by *Messrs. Wylie and Ritchie*, upon a brief prepared by *Mr. Irwin*, for the appellant, and by *Mr. Cushing* (Attorney-General) for the United States.

The following extracts from the brief filed by the counsel for the appellant, will show their views:

The learned judge who decided the case below was of opinion that the words of the deed imported a conveyance of one half of the water.

It is most certain, however—and so much is admitted by the learned judge himself—that there is nothing in the terms of the deed, or, to use his own language, "in so many words," to convey such an interest.

*It is not less certain that if such was [*519 the intent of the parties, it might have been precisely indicated by the obvious, easy and familiar form of expression which the occasion would naturally and almost necessarily have suggested.

And the presumption is, that it would have been so indicated, instead of either resorting to a standard which was erroneous, or clouding the meaning with a periphrasis.

It is a part of the case, however, that a tube or pipe leading to the arsenal of the complainants, of equal diameter, with that used to convey the water to the factory of the grantors, will not deliver more than a fractional part of the water conveyed by the latter; and that this is the result of a law of hydraulics which every man, and certainly every agent of the government, is bound to know.

It is also to be taken as a part of the case that the localities of the several properties, and the distance to which the water was to be conveyed, or at all events to the premises of the grantees, were well understood by the parties, and of course a plea of ignorance of the facts would be as unavailable to the complainants, as the more discreditable plea of ignorance of a natural law.

It is incontrovertible, therefore, that if only a fractional part of the water delivered to the grantors could be conveyed by the means agreed on, to the premises of the grantees, then it was just that portion, and no more, that was intended to be conveyed to the complainants.

Nor is it any answer to say that the grant would be rendered illusory, and the object of the grantee defeated thereby. There is nothing in the deed to indicate either the quantity of water required, or the purpose for which it was destined, and although it might be convenient or even necessary for the government to enlarge the supply, this court can make no new contract for the parties by the substitution of terms which they have not thought proper to use. There is no ambiguity in the language, and in such case it is a maxim of the law that no construction can be made against the words. And yet it is by such a process of change and substitution that it is now sought to escape from the consequences of what is considered a hard bargain for the government.

The effect, moreover, of the departure, on the part of the complainants, from the terms of the contract, and the simple and easy rule which it prescribes, is to produce irregularity in the flow, and to render everything uncertain. No witness, examined by the government, has undertaken to speak with any degree of precision in regard to the comparative quantities of water drawn through the two pipes. They suppose **520*** them to be "near or about equal," but they admit that "the flow of water through the complainants' pipe is much greater at some times than at others, and that this does occur frequently;" and that "at times the complainants' pipe draws more water than that of the defendant, and at times it loses, so that the quantity drawn by both pipes is near about equal."

The facts of irregularity and occasional advantage are thus admitted, in connection with the liability to abuse, and the impossibility of precise measurement, and of course of detection or correction—an objection which led the Supreme Court of Pennsylvania to hold, in the case cited from Wharton, that a circular aperture could not be substituted for a square.

It is sufficient, however, for our case—even though the court were right in their construction of the deed—that the arrangement was

such as to deprive us of our share of the water at any time. We are entitled to it at all times. We are not to be put off with a mere average—a principle which would authorize the government to take the whole of the water for one half the year, provided it allowed us the whole for the other.

But there is another violation of the contract—supposing even the construction of the court to be the correct one—in the position of the copper adjutage, as well as in the level and inclination of the distributing pipes. The deed provides that the complainants' pipe shall be upon the same level with that which shall convey the water to the factory of the grantors. The copper adjutage is, however, seven eighths of an inch below, while the point of discharge is lower by at least sixty, perhaps one hundred, feet, thus conferring the twofold advantage of a greater head and a more rapid chute.

Supposing, however, that the water was, by the terms of the contract, to be gaged by equal orifices, it has been settled, as already shown, by the Supreme Court of Pennsylvania, in the case of *The Schuylkill Navigation Co. v. Moore*, that no artificial contrivance can be resorted to, for the purpose of increasing the volume of discharge at the point of delivery.

It remains, then, only to consider the supplementary reasons by which it is sought to supply any possible insufficiency in the terms of the contract. They are,

1st. The construction supposed to have been given to it by the parties themselves, as shown by the assertion of a larger right in the laying of the present pipes with the knowledge and without any objection on the part of one of the grantors; and,

2d. The recital in the deed of William Black to the defendant.

I pass over the suggestion in regard to the rule that the "words are to be taken most strongly against the grantor," which is hinted *at as a possible though unnecessary [**521**] resort in the present case. That rule, which is one of great rigor, applies only to cases of ambiguity in the words, or where the exposition is necessary to give them effect, and is only to be resorted to when all other rules of exposition fail. (3 Kent's Com., 556.) And it is now superseded by the more reasonable practice of giving to the language its just sense, and searching for its precise meaning. (*Ibid.*)

To the argument, however, drawn from the fact that the present pipes were laid without objection, I reply.

1st. That there is no ambiguity which would authorize an appeal to the acts of the parties themselves for the purpose of giving a construction to their contract. In the case even of a patent ambiguity the deed must speak for itself. It is not pretended that there is any which is latent, and which parol evidence might therefore raise and remove.

2d. That the evidence shows that the factory never went into operation after the purchase by the United States, and no inference is therefore to be drawn to the prejudice of the defendant from the acquiescence of the grantors. If such inference might thus be drawn, then by the same process the rights of the grantors might be taken as altogether abdicated by mere non-user, and a mere temporary parol license without

consideration, be regarded as an absolute conveyance of the entire fee.

3d. That the right, being an incorporeal one, could only pass by grant or prescription, which presupposes it. (*Callen v. Hocker*, 1 Rawle, 108.)

4th. That the evidence shows further that the copper pipe was a one-inch bore originally; while, on the other hand, there is no evidence that either the grantors or their assigns were ever advised of the change.

Then as to the recital in the deed, the answer is,

1st. That the conveyance is of the whole interest held by Black, which was the entire estate of the original grantors; and the recital is not even a description of the property intended to be conveyed, but a mere enumeration of sundry deeds with a reference, for their contents, to the records themselves, which exhibit a clear case of mistake.

2d. That if the said Black was even mistaken as to the extent of his right, it was entirely "*res inter alias acta*," and cannot either compromise that right or enlarge the terms of a grant made to a third person, between whom and the immediate grantor or defendant there was no priority whatever. And,

3d. That the inference that the defendant knew that he was buying only one half of the water right, is entirely gratuitous, neither warranted by any evidence in the cause nor by any *522* just view of the law. The conveyance was of the whole estate of the grantors, &c., and there is no lawyer who would not have advised him that it would pass, notwithstanding a mistake in his references or a misdescription of any of his deeds.

Mr. Cushing (Attorney-General) contended that the title deed to the United States shows they are entitled to the use of one half of the water; the title paper of the appellant, Irwin, shows the same; the proof shows that the pipes of the United States and of the appellant convey an equal quantity of water, and that the threat of the appellant to cut away the pipe was without any just cause, designed, as the bill charges, to compel the United States to purchase of the said Irwin the residue of the water at an exorbitant price.

Mr. Justice Grier delivered the opinion of the court:

The appellant, James Irwin, was respondent below to a bill filed by the United States, in the nature of a bill "*quia timet*," in which Irwin was charged with threatening to cut off certain pipes conveying water to the United States Arsenal, near Pittsburgh. The whole merits of the case are involved in the construction to be put on a certain deed under which the United States claimed to have a right to "one half of the water" delivered from a certain spring or reservoir. The parties both claim under William F. Hamilton and W. V. Robinson, who conveyed to the United States "the right and privilege to use, divert and carry away from the fountain spring, &c., by which the woolen factory of grantors is now supplied, so much water as will pass through a pipe or tube of equal diameter, with one that shall convey the water from the said spring, upon the same level therewith, to the factory of said grantors, and to proceed from a common cistern or head to be

erected by the said United States, and to convey and conduct the same through the premises of the said grantors, &c.

This grant to the United States was made in November, 1836, for the consideration of \$2,500. Without stating, in so many words, that the water from the common cistern is to be divided equally, or each to have one half, this deed points out a mode of equal distribution at the cistern. The water is to be delivered to each by a pipe or tube of equal diameter at the same level. The mode of conducting it by either party to the place of its use is not prescribed. Each might have had his share delivered into a tank or cistern of his own placed alongside of the common cistern, which would have been probably the best plan. The United States were permitted to conduct their share of the water through the lands of the grantors "by *tubes or pipes" without any restric- *523* tion as to the size of them. The distance from the common cistern to the arsenal of the United States, where their share of the water was to be conducted, is four times as great as that to the grantors' premises. Owing to friction, and other causes, explained by the witnesses, it was proved that the flow of water in equal tubes is in the inverse ratio of the squares of the distances. Hence an orifice or tube capable of receiving and passing equal quantities at the fountain-head, if continued of the same size to the place of delivery, would have distributed to the United States about one sixteenth and to the vendors fifteen sixteenths. In fact, from the unevenness of the ground over which the water must necessarily flow to the arsenal, and the quantity of deposit made in its course, such a construction of the contract would leave the United States very frequently, if not always, without any water at all.

The grantors in the deed had no intention of overreaching the grantees, by taking advantage of their want of knowledge of the science of hydraulics, or claiming a construction of their deed which would give their grantees nothing, and thus allow the grantors to again extort from the necessities of the government a double price.

Robinson, one of the grantors, was examined by the appellant as a witness, and swore that one half the water was sold, and one half reserved, "that such was the agreement." This was the practical (and only reasonable) construction put on the grant by both parties at the time it was made; and accordingly the officers of the United States proceeded to make a common cistern and to ascertain the size of two tubes sufficient to convey the whole water held in common, and distribute it equally—leaving the vendors to convey their share in pipes of any size they saw fit, they used pipes to convey the water to the arsenal of such size as was deemed necessary from the distance and nature of the ground. The vendors looked on, assisted and acquiesced in all that was done. If the deed were ambiguous, and capable of a construction which would permit one party to overreach and defraud the other; if there were no such rule of law as that which gives a construction to a deed most favorable to the grantee; yet we have here a practical construction by the vendor and vendee made on the ground, and acquiesced in for sixteen years.

The appellant's deed from an assignee of the original vendors, carefully refers to this sale to the United States, as a sale "of one half of the water." We are of opinion, therefore, that a reasonable construction of the deed to the United States, having reference to the principles of hydraulics, necessarily requires that each party should have half the water, and conduct it in such pipes as they see fit and proper; and also, **524*** [that assuming the deed to be capable of the construction contended for, the parties to it have construed it honestly and correctly; and that this practical construction having been acquiesced in by all parties interested for sixteen years, is conclusive. The appellant, whose deed purports to convey to him but one half the water, cannot now claim to put a new construction on the grant to the appellees which would give them nothing for the large consideration paid, and the appellant all for nothing. However plausible and astute the reasoning may be, on which such a claim is founded, it does not recommend itself on the ground of justice or equity.]

The judgment of the Circuit Court is therefore affirmed, with costs.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Western District of Pennsylvania, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed.

TIMOTHY FANNING, *Appellant*,

v.

CHARLES GREGOIRE AND CHARLES BOGG. *

Construction of ferry license—not exclusive of all others.

In 1838 the Legislature of the Territory of Iowa authorized Fanning, his heirs and assigns, to establish and keep a ferry across the Mississippi River, at the Town of Dubuque, for the term of twenty years; and enacted further, that no court or board of county commissioners should authorize any person to keep a ferry within the limits of the Town of Dubuque.

In 1840 Fanning was authorized to keep a horse ferryboat instead of a steamboat.

In 1847 the General Assembly of the State of Iowa passed an Act to incorporate the City of Dubuque, the fifteenth section of which enacted that the "city council shall have power to license and establish ferries across the Mississippi River, from said city to the opposite shore, and to fix the rates of the same."

In 1851 the Mayor of Dubuque, acting by the authority of the city council, granted a license to Gregoire (whose agent Bogg was) to keep a ferry for six years from the 1st of April, 1852, upon certain payments and conditions.

The right granted to Fanning was not exclusive of such a license as this. The prohibition to license another ferry did not extend to the Legislature nor to the city council, to whom the Legislature had delegated its power.

Nor was it necessary for the city council to act, by an ordinance in the case. Corporations can make contracts through their agents without the formalities which the old rules of law required.

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THIS was an appeal from the District Court of the United States for the District of Iowa.

*It originated in the State Court, [**525** called the District Court of the County of Dubuque, and was transferred to the District Court of the United States, at the instance of Gregoire and Bogg, the defendants. Gregoire was a citizen and resident of Missouri, and Bogg of Illinois.]

The facts in the case are stated in the opinion of the court. The District Court dismissed the petition of Fanning, with costs, upon the ground that his ferry franchise was not exclusive; whereupon he appealed to this court.

It was argued by *Mr. Wilson* for the appellant, and by *Mr. Platt Smith* for the appellees.

The points made by *Mr. Wilson* were the following:

The Act of the Legislature of Iowa, entitled "An Act to authorize Timothy Fanning to establish and keep a ferry across the Mississippi River at the Town of Dubuque," approved December 14th, 1838, gave said Fanning an exclusive right as against any other ferry not established by a direct Act of the Legislature. See that Act in Vol. 1st of Iowa Statutes, pages 205 and 206.

By the word "court," in the first line of the 2d section of said Act, is meant, Webster's definition of the word, "any jurisdiction, civil, military or ecclesiastical." (See Webster's Dictionary, definition of "court.")

It did not mean a judicial tribunal. The Legislature uses the word as defined by Webster. See Iowa Laws, Vol. 1st, pp. 208, 209, where it is applied to a tribunal which could have no judicial power. (See Act of Congress organizing Iowa, published in the same book, p. 34, sec. 9.)

The authority, by virtue of which the defendants claim the right to carry on a ferry at the same place where Fanning's ferry is established, is derived from a contract between the Mayor and Aldermen of the City of Dubuque, of the one part, and A. L. Gregoire, of the other; the city authorities claim to derive this power from the 15th section of an Act of the Legislature of Iowa, to incorporate and establish the City of Dubuque, approved February 24, 1847.

If Fanning's charter was not exclusive, as contended for, and if the city authorities could establish and license another, they can only do so in the manner prescribed by the Act creating the city, to wit: by ordinance. (See sec. 15 of said city charter.)

Sec. 20 of said city charter provides that every ordinance of said city, before it shall be of any force or validity, or in any manner binding on the inhabitants thereof, or others, shall be signed by the mayor and published in one or more newspapers in said city at least six days.

The ferry of defendants was established by contract, and not by ordinance.

*"A corporation can act only in [**526** the manner prescribed by the Act creating it." (*Ch. J. Marshall, in Head & Amory v. Prov. Ins. Co.*, 2 Cranch, 127, 1 Cond., 371; 4 Wheat., 518, 4 Cond., 528; 12 Wheat., 64; 4 Pet., 152; 8 Wheat., 338; 2 Scam., 187.)

The Act of City Council of Dubuque estab-

lishing the ferry, which the defendants claim to carry on, was null and void, and confers upon them no ferry franchise, and the plaintiff's right to maintain this action follows, as a matter of course.

"The owner of an old established ferry has a right of action against him who, in his neighborhood, keeps a free ferry, or a ferry not authorized by the proper tribunal, whereby an injury accrues to the owner of the established ferry." (*Long v. Beard*, 3 Murph., 57.)

Mr. Smith divided his argument into the two following heads:

1. That the Legislature of Iowa had no right to grant such an exclusive right as the one contended for. The argument upon this head is omitted for want of room.

2. But admit the power of the Legislature to confine the traveling public to horse boat accommodation, still the words of the Act do not give an exclusive right; there are no words of exclusion expressed, and none should be implied. The Act by express terms prohibits courts and boards of commissioners from granting other ferry rights, *expressio unius est exclusio alterius*. The Legislature were not excluded from giving the City of Dubuque a right to license another ferry.

It is a well settled principle of law, that in construing government grants, the courts will construe them most strongly against the grantee, and in favor of the grantor; that if the terms of the grant are ambiguous, or admit of different meanings, that meaning which is most favorable to the government will be adopted, and no right or privilege will be deemed to be surrendered by implication. (2 Bl. Com., 347; 1 Kent's Com., 460.)

This proposition is sustained by numerous and well-adjudged cases. In the of *Charles River Bridge v. Warren Bridge et al.*, 11 Pet., 420, Ch. J. Taney says: "The rule of construction in such cases is well settled, both in England and by the decisions of our own tribunals. In 2 Barn. & Adol., 793 (22 Eng. Com. Law, 185), in the case of *The Proprietors of the Stour-bridge Canal v. Wheely et al.*, the court says, 'The canal having been made under an Act of Parliament, the rights of the plaintiffs are derived entirely from that Act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which [527*] are expressed in the statute; and *the rule of construction in all such cases is now fully established to be this: that any ambiguity in the terms of the contract must operate against the adventurers, and in favor of the public, and the plaintiffs can claim nothing that is not clearly given them by the Act.' And the doctrine thus laid down is abundantly sustained by the authorities referred to in this decision. But we are not now left to determine for the first time the rule by which public grants are to be construed in this country. The subject has already been considered in this court, and the rule of construction, abovesated, fully established. In the case of *The United States v. Arredondo*, 6 Pet., 691, the leading cases upon this subject are collected together by the learned judge who delivered the opinion of the court, and the principle recognized, that in grants by the public nothing passes by implication."

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"When a corporation alleges that a state has surrendered for seventy years its power of improvement and public accommodation, in a great and important line of travel, the community have a right to insist 'that its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear.' The continued existence of a government would be of no great value, if, by implications or presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation; and the functions it was designed to perform transferred to the hands of privileged corporations. The rule of construction announced by the court in 4 Pet., 514, was not confined to the taxing power; nor is it so limited in the opinion delivered. On the contrary, it was distinctly placed on the ground that the interests of the community were concerned in preserving undiminished the power then in question; and whenever any power of the state is said to be surrendered or diminished, whether it be the taxing power or any other affecting the public interest, the same principle applies, and the rule of construction must be the same. No one will question that the interests of the great body of the state would, in this instance, be affected by the surrender of this line of travel to a single corporation, with the right to exact toll and exclude competition for seventy years. While the rights of private property are safely guarded, we must not forget that the community also have rights, and that the happiness and wellbeing of every citizen depend on their faithful preservation."

In the case of *The Mohawk Bridge Co. v. The Utica and Schenectady Railroad Co.*, 6 Paige's Ch., 554, it is held that "the grant to a corporation of the right to erect a toll bridge across a river, without any restriction as to the right of the *Legislature to grant a similar [*528] privilege to others, does not deprive a future Legislature of the power to authorize the erection of another toll bridge across the same river so near to the first as to divert a part of the travel which would have crossed the river on the first bridge if the last had not been erected."

"Grants of exclusive privileges, being in derogation of public rights belonging to the State, or to its citizens generally, must be construed strictly, and with reference to the intent and particular objects of the grant."

In the case of *Burrett v. Stockton Railway Co.*, 40 Eng. Com. Law, 208, the court held that, "Where the language of an Act of Parliament, obtained by a company for imposing a rate of toll upon the public, is ambiguous, or will admit of different meanings, that construction is to be adopted which is most favorable to the public." And the court refer to the general principle laid down by Lord Ellenborough, in his judgment in *Güdart v. Gladstone*, 11 East, 675 (an action for Liverpool dock dues), who there says: "If the words would fairly admit of different meanings, it would be right to adopt that which is more favorable to the interest of the public and against that of the company; because the company, in haggaining with the public, ought to take care to express distinctly what payments they are to receive, and because the public ought not to be

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charged unless it be clear that it was so intended." In the case of *The Leeds and Liverpool Canal v. Hustler*, 1 B. & C., 424 (8 Eng. Com. Law, 118), the court say: "Those who seek to impose a burden upon the public should take care that their claim rests upon plain and unambiguous language." All these cases are decided on the principle that government grants are construed strictly against the grantee, and in favor of the grantor.

In the case of *Dyer v. Tuscaloosa Bridge Co.*, 2 Ala., 305, the court hold, that a grant of a ferry over a public water-course, and for the convenience of the community, is not such an exclusive grant as necessarily implies that the government will not directly or indirectly interfere with it by the creation of a rival franchise or otherwise.

See, also, the case of *The Cayuga Bridge Co. v. Magee*, 2 Paige's Ch., 119, where it is laid down, "that acts in derogation of common right, must be construed strictly against the grantee, according to the principles of the common law."

But there is another ground on which this case might be rested with safety. It is a well-settled principle of law, that statutes *in pari materia* are to be construed together; that the different statutes are to be construed as one; that they must be viewed together in all their parts; and if, by any fair construction, the whole can stand together, it is the duty of the **529** court to put that construction upon them. (*U. S. v. Freeman*, 3 How., 564.) In which case the court say: "The correct rule of interpretation is, that if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them, and it is an established rule of law, that all acts *in pari materia* are to be taken together, as if they were one law. (Doug., 30; 2 Term R. 387, 586; M. & S., 210.) If a thing contained in a subsequent statute, be within the reason of a former statute, it shall be taken to be within the meaning of that statute (Lord Raym., 1028); and if it can be gathered from a subsequent statute *in pari materia*, what meaning the Legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute. (*Morris v. Mellin*, 6 B. & C., 454; 7 *Id.*, 99.)"

This mode of construing statutes is so old and well settled as to make the citation of further authorities unnecessary. It is very obvious, by applying these principles to the present case, that courts and boards of county commissioners were enumerated as the tribunals prohibited from granting ferry rights. The Legislature reserved the right of granting a like franchise to any other person whenever the public good required it. In pursuance of this reserved right, the Legislature delegated the power of licensing ferries to the city council. The council, by this Act, were made the proper judges of the necessity of other ferries, and in fact were constituted the guardians of the public interest in this respect, and when the city council have exercised this power and granted a license, no tribunal is authorized to revise or annul their proceeding on the ground that no necessity existed for another ferry. This court has no more power to inquire into and revise

the action of the city council, in this respect, than it has to declare war or issue a proclamation for the conquest of Cuba or Canada. The power of granting franchises is a political and police regulation, resting exclusively with the Legislature. The Legislature is the judge of the number of ferries required for public accommodation, and the city council, when acting under a delegated authority from the Legislature, possess the same power, which is not examinable by any other department of the government except to ascertain whether the power has been properly delegated. (See *Salem & Hamburg Turnpike Co. v. Lyme*, 18 Conn., 456.)

The omission of the word "exclusive," which word the Legislature well understood and freely used in various other charters granted at the same term of the Legislature, is a very significant circumstance in this case.

In the case of *Harrison v. The State*, 9 Mo., 526, where "in the repeal of one city [**530** charter and the adoption of another, in a provision with regard to ferry charters the word "exclusive," which was employed in the first one, was dropped in the second. The court say that "according to the charter of 1839 the city authorities were invested with exclusive power within the city to license and regulate the keeping of ferries; but in the charter of 1843, which was in force when this indictment was found, the word "exclusive" is omitted, with the design, as we must presume, of leaving this subject upon the same basis with the other subjects of city taxation.

"The question whether a law be void for its repugnancy to the constitution is a question which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other. (*Fletcher v. Peck*, 6 Cranch, 87, 131, 2 Cond., 317.)

If any Act of Congress or of the Legislature of a state violates the constitutional provisions, it is unquestionably void; if, on the other hand, the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law within the general scope of their constitutional power, the court cannot pronounce it to be void merely because it is in their judgment contrary to the principles of natural justice. If the Legislature pursue the authority delegated to them, their acts are valid; if they transgress the boundaries of that authority, their acts are invalid. (*Iredell, J., in Calder v. Bull*, 3 Dall., 386; 1 Cond. Rep., U. S., 184 n.)

But these different rules of construction all point one way. They all require the court to construe the charter favorably to the public and strictly against the grantee. Nothing can be taken by implication or construction.

Mr. Justice McLean delivered the opinion of the court:

This is an appeal from the District Court of the United States for the District of Iowa.

The plaintiff filed his petition in the District Court of the County of Dubuque, stating that by an Act of the Legislative Assembly of the Territory of Iowa, approved the 14th of December, 1838, he was authorized to establish

and keep a ferry across the Mississippi, at the Town of Dubuque, and depart from and land at any place on the public landing of said town for the term of twenty years from the passage of said Act; and that the Act provided that no court or board of county commissioners should authorize any other person to keep a ferry within the limits of the town; that the petitioner was required, within two years from the passage of the Act, to use for said ferry a good and sufficient steam ferryboat; that a sufficient number of flat boats were also required to be kept with a competent number of hands to work them, so as to convey across the River Mississippi persons and property as might be required; that a horse ferryboat, by an amendatory act, was substituted for a steam ferryboat.

And the plaintiff avers, that the above Acts of the Legislature conferred on him the exclusive privilege of ferrying across the river at the above place during the twenty years named in the Act. And he avers that in all things he has complied with the requirements of the above Acts, and that in doing so, he has incurred great expense; that at the commencement his ferry yielded little or no profit; but he persevered in keeping it up, hoping to be remunerated for his expense in its future profits.

He represents that the defendants, confederating with others to defraud him of his ferry right, have placed upon the ferry at the Town of Dubuque a steam ferryboat for the transportation of passengers, &c., and charges them for such transportation, &c., and claim that they have a right to do so, although the twenty years of the plaintiff's grant have not yet expired. He therefore prays for an injunction, &c.

At the appearance term of said court the defendants represented that one of them was a citizen of the State of Missouri, and the other a citizen of the State of Illinois; that the matter in controversy exceeds \$500, and they pray that the said action may be removed to the next District Court of the United States, to be held in the northern division of the district of the State of Iowa, and gave the security required by law; and the cause was removed to the District Court.

The defendants, in their answer, admit that the plaintiff has a charter to ferry across the River Mississippi at Dubuque, but they deny that it secures to him an exclusive right. And they say that their steam ferryboat was put on and is run by them in accordance with a contract made with the City of Dubuque, authorizing the running of said boat for six years, from the 1st day of April, 1852; and they say that in running said boat they do not interfere with the right of the plaintiff other than such interference as is necessarily the result of a fair competition.

And the defendants say that the City of Dubuque entered into said contract with the said Gregoire by virtue of the power vested in the council by the fifteenth section of an Act to incorporate and establish the City of Dubuque, of the 24th of February, 1847.

The Act granting the ferry right to the plaintiff bears date the 14th of December, 1838. The first section provides, "that Timothy Fanning, his heirs and assigns, be, and they are hereby authorized, to establish and keep a ferry

across the Mississippi River, at the Town of Dubuque, in the County of Dubuque, and to depart from, and land at any place on the public landing of said town, which was set apart for public purposes by Act of Congress approved the 3d of July, 1836, for the term of twenty years from the passage of the Act."

The second section declared, "that no court or board of county commissioners shall authorize any person (unless as herein provided for by this Act) to keep a ferry within the limits of the Town of Dubuque." The conditions annexed were, that Fanning, his heirs and assigns, should, within two years from the passage of the Act, procure a sufficient steam ferryboat, and shall keep flat boats and a sufficient number of hands for the accommodation of the public. On failure to do so, proof being made to the satisfaction of the county commissioner or the county court, the charter should be declared to be void.

By the Act of July 24th, 1840, a horse boat was substituted for the steam ferryboat.

The right of the defendants arises under a contract made between the City of Dubuque and Charles Gregoire, the 11th of November, 1851; in which it was agreed by the corporation of the city, "in consideration of the covenants and stipulations hereinafter enumerated, have granted a license to Gregoire to keep a ferry across the Mississippi River, opposite the City of Dubuque, for six years from the first day of April next; it being understood that the city grant all the right it has and no more, with the privilege to land at any point opposite the city that he may choose."

Gregoire agreed to pay the city the sum of \$100 annually, and to provide for said ferry a good and substantial steam ferryboat, of sufficient capacity and dimensions to accommodate the traveling community, and to keep the same in good repair. And if the city should wish to grant the said franchise to any railroad before the expiration of the lease, they reserved the power to do so.

By the fifteenth section of the Act incorporating the city, power is given to the city council to license and establish ferries across the Mississippi River, from the City of Dubuque to the opposite shore, to fix the rates of the same, and to impose reasonable fines and penalties for the violation of such laws and ordinances. This Act was approved the 24th of February, 1847.

It is objected by the plaintiff's counsel, that the license set up by the defendants cannot avail them, as there is no ordinance of the council granting a ferry license to them, and that the council can only act under their corporate powers in that way.

That the council have legislative powers in regard to the police of the city is admitted, but it does not follow that a contract may not be made under their sanction by the mayor, as was done in this case. The contract was in writing, and contained stipulations in regard to the public accommodation, which were important. The old rule was, that a corporation can make no contract which shall bind it except under its seal. That doctrine has long since been overruled, and it is now fully established, that the agents of a corporation may bind it by parol.

A license having been given, which according to its terms must be considered binding on the corporation, it is unnecessary to look into the acts of the council regulating ferries, as they are not important, as regards the question of power. If the form of the license had been laid down in the city charter, or the mode of granting it, a conformity to such a regulation would be required, but no such provision is found in the charter. Regulations are made by ordinances, but as to them, beyond the granting of a license in this case, we need not inquire.

The principal question in the case is, whether the right granted to Fanning is exclusive.

The language used in the Territorial Act, it is argued, would seem to authorize an inference, that the right was intended to be exclusive. The right was given for twenty years to Fanning and his heirs, subject to the conditions expressed. An ordinary license is not granted to a man and his heirs. But it is said the beginning of the second section is somewhat explicit on this point. It provides, "that no court or board of county commissioners, shall authorize any other person (unless as hereinafter provided for by this Act) to keep a ferry within the limits of the Town of Dubuque."

The condition provided for, in the Act above referred to, is any neglect on the part of Fanning or his heirs, which shall incur a forfeiture of his right. The prohibition on the court and the board of county commissioners to grant a license for another ferry, it is urged, would seem to show an intent to make the grant exclusive. And that the reason for this might be found in the alleged fact, that when the ferry was first established, a considerable expenditure was required, and little or no profit was realized for some years. But all the judges present except one, held that the grant was not intended to be exclusive. In their opinion this view is sustained by the consideration that, although the County Court and county commissioners were prohibited from granting another license at 534*] Dubuque, yet this *prohibition did not apply to the Legislature; and as it had the power to authorize another ferry, the general authority to the council to "license and establish ferries across the Mississippi River at the city," enabled the corporation, in the exercise of its discretion, to grant a license, as the Legislature might have done.

This power was clearly given to the city, and it may be exercised, unless the grant of Fanning be exclusive.

The board of commissioners has been established, and the Legislature has substituted in its place, for the purpose of licensing ferries at Dubuque, the city council, and it is contended that this change of the power ought not to affect the rights of the plaintiff. The restriction on the commissioners of the county does not apply, in terms, to the city council; and the court think it cannot be made to apply by implication. The license to Gregoire was granted thirteen years after the grant to the plaintiff. And it may well be presumed, from the increase of the city at Dubuque, and the great increase of the line of trade through it, that additional ferry privileges were wanted. Of this the granting power was the proper judge.

The exclusive right set up must be clearly

expressed or necessarily inferred, and the court think, that neither the one nor the other is found in the grant of the plaintiff, nor in the circumstances connected with it.

The argument that the free navigation of the Mississippi River, guaranteed by the Ordinance of 1787, or any right which may be supposed to arise from the exercise of the commercial power of Congress, does not apply in this case. Neither of these interfere with the police power of the States, in granting ferry licenses. When navigable rivers, within the commercial power of the Union, may be obstructed, one or both of these powers may be invoked.

The decree of the District Court is affirmed, with costs.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Iowa, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said District Court in this cause be, and the same is hereby affirmed, with costs.

Cited—23 How. 437; 1 Black., 630, 634; 14 Otto, 527; McAll., 377-380, 395, 578.

*MARY E. BARNEY, By her next [*535 friend, MAXWELL WOODRULL, *Appellant*,

v.

DAVID SAUNDERS, ROGER C. WEIGHTMAN, AND SAMUEL C. BARNEY.

Two trustees—administrator and guardian—rules for settling accounts of.

There were two trustees of real and personal estate for the benefit of a minor. One of the trustees was also administrator *de bonis non* upon the estate of the father of the minor, and the other trustee was appointed guardian to the minor.

When the minor arrived at the proper age, and the accounts came to be settled, the following rules ought to have been applied:

The trustees ought not to have been charged with an amount of money which the administrator trustee had paid himself as commission. That item was allowed by the Orphans' Court, and its correctness cannot be reviewed, collaterally, by another court.

Nor ought the trustees to have been charged with allowances made to the guardian trustee. The guardian's accounts also were cognizable by the Orphans' Court. Having power under the will to receive a portion of the income, the guardian's receipts were valid to the trustees.

The trustees were properly allowed and credited by five per cent. on the principal of the personal estate, and ten per cent. on the income.

Under the circumstances of this case, the trustees ought not to have been charged upon the principle of six months' rests and compound interest.

The trustees ought to have been charged with all gains, as with those arising from usurious loans, unknown friends, or otherwise.

The trustees ought not to have been credited with the amount of a sum of money, deposited with a private banking house, and lost by its failure, so far as related to the capital of the estate, but ought to have been credited for so much of the loss as arose from the deposit of current collections of income.

THIS was an appeal from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington.

The facts in the case are stated in the opinion of the court.

It was argued by *Messrs. Chilton and Linton* for the appellant, and by *Messrs. Lawrence and Bradley* for the appellees.

The points made by the counsel for the appellant were the following:

I. That the trustees should have been charged with the thirty-five shares of Bank of Metropolis stock and the dividends accruing thereupon, alleged to have been sold in 1836 by defendant, D. Saunders, to satisfy his commission as administrator *de bonis non* of Edward DeKraft, he not being entitled to such commission, and not having the right to sell the bank stock without the order of the Orphans' Court.

Dorsey's Testamentary Laws of Maryland, 90, secs. 8, 4; Hill on Trustees, 481; 4 Ves., 497; *Poeck v. Reddington*, 5 Ves., 799; 2 Story's Eq., 1263; *Pierson v. Shore*, 1 Atk., 480; 5 Pct., 562; 5 Gill. & J., 60-64; *Gist v. Cockey and Fendall*, 7 Harr. & J., 135; *McPherson v. Israel*, 5 Gill. & J., 63, 64; 12 *Id.*, 84.

II. That the trustees should not have been [*536] credited by the *sums of money alleged to have been paid R. C. Weightman, as guardian of plaintiff in error. That the will of Edward DeKraft creating the trust did not give the trustees such power or authority, nor was the same warranted by the facts of the case. The trustees should have invested said moneys in bank or other stocks, or put the same out at interest upon good and sufficient security, as directed by the will.

Hill on Trust., 395, 400, 402, 574; 1 Rop. on Leg., 568; Dorsey's Testamentary Laws of Md., 114, sec. 8, p. 115, sec. 13; *Brodeux v. Thompson*, 2 Har. & G., 120; 3 Harr. & J., 268; Hat. & Weems, 85-110.

III. That the trustees should not have been allowed and credited by five per cent. on the principal of the personal estate, and ten per cent. on the income, as was done by the auditor. That they should not be allowed any commission at all, either upon the principal or income of the estate. That in any event they should not be credited by any commission upon the amount of principal never collected—upon the amount of the bank and other stocks. (*Winder v. Diffenderffer*, 2 Bland., 207; *Miller v. Beverly*, *Beverly v. Miller*, 4 Hen. & Mun., 420; *Ringgold v. Ringgold*, 1 Har. & G., 11, 109; *Gwynn v. Dorsey*, 4 Gill. & J., 460; 3 *Id.*, 348; Harland's Account, 5 Rawle, 323.)

IV. That the auditor did not charge the trustees upon the principle of six months' rest and compound interest. (*De Peyster v. Clarkson et al.*, 2 Wend., 77; *Schieffelin v. Stewart*, 1 Johns. Ch., 620; *Garniss v. Gardiner*, 1 Edwards' Ch., 130; Harland's Accounts, 5 Rawle, 323; 2 Story's Eq., 517-521; Tucker's Com., 457; *Raphael v. Boehm*, 11 Ves., 92; *Ringgold v. Ringgold*, 1 Har. & G., 11; *Wright v. Wright*, 2 McC., 185; *Voorhees v. Stoothoff*, 6 Halst., 145; *Tebbs v. Carpenter*, 1 Madd., 305; *Duncomb v. Duncomb*, 1 Johns. Ch., 508; 5 Johns. Ch., 497.)

V. That the trustees should have been charged by the auditor with all gains, as with those arising from usurious loans, unknown friends, or otherwise. (2 Story, secs. 1210, 1211, 1261; *Holton v. Bern*, 3 Stu., 88, note; 1 Johns. Ch., 625; 4 *Id.*, 284, 308; 2 Kent's Com.,

230; Story on Cont., 485; Hill on Trust., 383; *Walker v. Symonds*, 3 Swans., 58.)

VI. That the trustees should not have been credited by the loan to Fowler & Co. or any part thereof. (Hill on Trust., 388-378, 404; 2 Story's Eq., 509-516; *Tebbs v. Carpenter*, 1 Madd., 305; 3 P. Wms., 100, note; *Ringgold v. Ringgold*, 1 Har. & G., 12; 1 McCord's Ch., 250, 495.)

*VII. That the trustees, Saunders [*537] and Weightman, should have been dismissed, and others appointed in their place.

The points made by the counsel for the appellees were the following:

First. The court was right in not charging the trustees with the thirty-five shares of the Bank of the Metropolis, sold by Saunders, administrator *de bonis non*, to pay his commission.

1. Administration was necessary in order to pass the trust property to the trustees. This gave the right to commissions.

2. The maximum of ten per cent. can be exceeded.

3. The allowance to Saunders was in April, 1836, and the final allowance to the administratrix, who did not settle the whole estate, was in 1846, and it should have been taken from that account.

4. The allowance of seven and a half per cent. to the administratrix inured to the benefit of the complainant, she being her only child.

5. The allowance to Saunders was made by the Orphans' Court before the money was paid over to the trustees, and is conclusive.

In addition to the authorities cited by the auditor, see *Jones v. Slockett*, 2 Bland's Ch., 416.

Second. The trustees were properly credited with the amount paid to R. C. Weightman, as guardian.

1. His accounts as guardian were not before the auditor for settlement and examination. The parties and their counsel were there, and the auditor certifies to the court, "the guardianship trust of Mr. Weightman has been settled, as was admitted before me by the counsel of both parties."

2. Under the will, the guardian had the right to receive the three fourths of the income.

3. The object of the trust was to provide for the maintenance and education of his daughter. If the accounts of the guardian are to be considered in evidence, they show that this was the only fund out of which these objects could have been satisfied. No charge is made in them for these objects.

4. His accounts, as guardian, are open for revision in the Orphans' Court.

Third. The allowance of five per cent. on the personal estate, and ten per cent. on the income, is right.

1. It is the rule in most of the States to allow commissions to trustees. (*Boyd v. Hawkins*, 2 Dev. Eq., 334.)

The cases on this point have been collected with care, and will be found in the Notes of American Cases—to the case of *Robinson v. Pett*, 2 White & Tudor's Eq. Cas., 353 and the following:

*2. The rule has been long settled in [*538] Maryland; and,

3. It has been fully adopted by the Circuit Court of the District of Columbia.

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Fourth. The court has charged the defendants with interest, making annual rests. There is no appeal by the defendants; but if that point is open, they will insist that no interest ought to have been charged against them.

The liability of a trustee to pay interest depends upon the money being held or appropriated according to, or in violation of, the purposes of the trust. Sandford, 404; and the principle is, that he should be charged with what he did make or might lawfully have made. (*McNair v. Ragland*, 1 Dev. Eq., 517, 524; *Sparhawk v. Buel*, 9 Vt., 42, 82.)

The general rule is to allow a trustee (having power to invest) a reasonable discretion, and for simple neglect to charge simple interest until the investment is made, and only for an intentional violation of duty, or a corrupt use of the money, to make rests, or, according to the circumstances, compound the interest as the measure of profits are undisclosed. (5 Johns. Ch., 517; 4 Barb. Sup. Ct., 649; 2 W. & S., 565; 1 Pick., 528, *note*; 10 Pick., 104; 1 Rob., Va., 213; 5 Dana, 78, 132; 12 Ala., 355; 6 Ga., 271; 2 Dev. & Bat., 339; 4 Humph., 215; 6 Halst., 145; 1 Har. & G., 80; 3 Gill & J., 342.)

The English rule is essentially the same.

Fifth. There is no exception upon which the complainant's fifth point can rest. If it is now open, the defendants rest on the view taken by the auditor.

Sixth. The trustees were entitled to credit for the deposit with Fowler & Co.

The facts in regard to this deposit will be found in the answers of the defendants Saunders and Weightman, in the evidence.

The substance is, that by the will the trustees were to invest the income in bank or other stocks, or good security, with power to sell the real estate and invest the proceeds in other real estate, bank or other stocks, and if in real estate, that was to be in some of the cities north or east of the City of Washington. In 1838, the banks in the city had suspended specie payments. Their charters were about to expire, and the several laws were passed, to which reference is made.

The trustees had a discretion. They also had a right to retain a sum to meet the contingencies of the estate. One of the original loans was in part repaid, and the ordinary income was coming in. They consulted counsel. Acting under his advice, and exercising **539*** a sound discretion, they deposited *the fund with bankers in good credit, on an agreement to allow the depositors six per cent. It was a deposit, not a loan—a deposit awaiting investment—a deposit where their own funds and those of other discreet business men was made—a deposit of funds received from accruing income of the estate in small sums, and in money not bankable, at a period of great irregularity and pressure in the money market; and a deposit where such funds were earning money instead of being idle. The auditor credited a portion only. The court allowed the whole sum.

If the trustees acted in good faith, exercised a sound discretion, kept the money, or deposited it from necessity or convenience, used ordinary care and diligence in the mode of keeping it, acted under the advice of counsel, and were actuated by a sincere desire to promote

the interest of the trust estate, they are not to be charged with the loss.

They can only be charged in a case of clear negligence, perversion of the trust, or willful default. (*Morley v. Morley*, 2 Ch. Cas., 2; *Knight v. Earl of Plymouth*, 3 Atk., 480; *Jones v. Lewis*, 2 Ves., Sr., 240; 5 Ves., 144; *Roseth v. Howell*, 3 Ves., 564; Amb., 419; *Thompson v. Brown*, 4 Johns. Ch., 628, 629; 10 Pet., 568, 569; 3 Gill & J., 341; 11 Gill & J., 208; 8 Gill, 403, 428-430, and cases therein cited.)

Mr. Justice Grier delivered the opinion of the court:

The complainant, Mary E. Barney, is the only daughter of Edward De Kraft, who devised all his real estate and the residue of his personal estate to respondents, Saunders and Weightman (together with Joseph Pearson, since dead), on the following trusts:

1st. To permit the widow to enjoy during the life or widowhood certain portions of the trust estate. 2d. In trust to receive the rents, interest, dividends, &c., and to pay over quarterly to his widow, until his daughter Mary arrived at the age of 18, three fourths of the said rents and profits for the support and maintenance of herself and daughter, and,

3d. To lay out and invest the residue of the said rents and profits, &c., with the annual produce thereof, from time to time, in bank or other stocks or in good security.

4th. At the death of the widow, the trustees to hold the estate with its increase for the sole and separate use of the daughter; and with numerous other provisions not necessary to be stated, for the purposes of this case.

The widow of the testator refused to take under the will, and claimed her legal rights; the executors also renounced, and letters of administration, with the will annexed, were granted to the widow.

*Mrs. DeKraft died in October, 1834, [*540 leaving the complainant, her only child, then about four years of age. At her death the trustees went into possession of the trust estate. Saunders, one of the trustees, took out letters of administration *de bonis non* to the estate of DeKraft; received the assets of the estate, which remained unconverted, and transferred them to himself and Weightman, as trustees.

In 1836, Weightman was appointed guardian of the person and property of the complainant.

Besides the real estate, consisting of four houses in the city, the personal property transferred to the trustees, in mortgages and stocks, amounted to about \$17,000.

The complainant intermarried with Lieut. Barney, in 1847, and attained the age of 18, in August, 1848. In March, 1849, the bill in this case was filed, charging the trustees with divers breaches of trust, demanding their removal: an account of the trust estate, and the appointment of a receiver. The respondents filed their answer, and an account, which was referred to a master or auditor, who made report in October, 1850.

Numerous exceptions were made to this report by the complainant, which were overruled by the court below, to whose judgment this appeal is taken.

We shall notice those only which have been

urged by the counsel in this court. The first is,

"I. That the trustees should have been charged with the thirty-five shares of Bank of the Metropolis stock and the dividends accruing thereupon, alleged to have been sold in 1836 by defendant, D. Saunders, to satisfy his commission as administrator *de bonis non* of Edward DeKraft, he not being entitled to such commission, and not having the right to sell the bank stock without the order of the Orphans' Court."

The acts of D. Saunders, as administrator *de bonis non* of DeKraft, are not the subject of review in this suit. He settled his account as administrator in the Orphans' Court, and the allowances made there cannot be reviewed collaterally in another court, in a suit in which a different trust is involved. The appellant may possibly have good reason to complain that her estate has been almost devoured by the accumulation of percentages it has been compelled to pay to the numerous hands through which it has passed, but must have her remedy, if any, by demanding a review of the accounts in the court which has, in the exercise of its jurisdiction, allowed them. We are of opinion, therefore, that this exception has not been sustained.

II. The second exception is to the allowance of a credit to the trustees for sums paid to Weightman, as guardian of the complainant. 541*] *What has been said in reference to the first exception will apply to this. Weightman's accounts, as guardian, were not before the auditor for settlement; and the guardian being entitled under the will to receive a portion (not to exceed three fourths) of the income, and apply it, if necessary, to the maintenance and education of his ward, his receipts would be good and valid vouchers to the trustees.

The guardian's account is open for revision in the Orphans' Court, on the petition of the complainant.

While on this subject, we would take the opportunity to remark, on the impropriety of appointing persons to trusts, however high their personal character may be, who are allowed to pay from their right hand into their left; as where A, as administrator, has to settle an account with A as trustee; and B, as trustee, to deal with B as guardian. To instance the present case: Saunders, the trustee, whose duty it was to scrutinize the accounts of the administrator *de bonis non*, from whom they receive the trust estate, is himself appointed administrator, and thus left without a check, or anyone to call him to strict account except his co-trustee, for many years, and until the ward comes of age. Weightman, the other trustee, is appointed guardian, being the only person who for many years could call to account the trustees for any negligence, mismanagement or fraud. Thus the estate of the infant is left at the mercy of chance, the solvency or insolvency, the negligence or fraud of the trustees for sixteen years or more, with no one to call them to account. That the persons appointed in this particular case were highly honorable men, is true; but the same rule should be applied in all cases. If the estate of the infant in this case has been so fortunate as to escape, it is an accident or exception, which cannot affect the

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propriety of a general rule. Experience has shown that the estates of orphans are more frequently wasted and lost by the carelessness of good-natured and honorable men who undertake to act as trustees, than by the fraud and cupidity of men of a different character.

Such appointments, we are aware, are generally made on *ex-parte* applications, and without objection. But in all cases the court, exercising this important power, should remember that orphans are under their special protection, and should make no appointments of guardians of their estates without due inquiry and proper information.

III. The third exception is,

"That the trustees should not have been allowed and credited by five per cent. on the principal of the personal estate, and ten per cent. on the income, as was done by the auditor; that they should not be allowed any commission at all, either upon the *prin- [542 cipal or income of the estate; that in any event they should not be credited by any commission upon the amount of principal never collected, upon the amount of bank and other stocks."

In England, courts of equity adhere to the principle which has its origin in the Roman law, "that a trustee shall not profit by his trust," and therefore that a trustee shall have no allowance for his care and trouble. A different rule prevails generally, if not universally, in this country. Here it is considered just and reasonable that a trustee should receive a fair compensation for his services; and in most cases it is gauged by a certain percentage on the amount of the estate. The allowances made by the auditor in this case are, we believe, such as are customary in similar cases, in Maryland and this district, where the trustee has performed his duties with honor and integrity. But on principles of policy as well as morality, and in order to insure a faithful and honest execution of a trust, as far as practicable, it would be inexpedient to allow a trustee who has acted dishonestly or fraudulently the same compensation with him who has acted uprightly in all respects. And there may be cases where negligence and want of care may amount to a want of good faith in the execution of the trust as little deserving of compensation as absolute fraud. If trustees, having a large estate to invest and accumulate for the benefit of an infant, for a number of years, will keep no books of account, make out no annual or other account of their trust estate; if they risk the trust funds in their own speculations; lend them to their relations without security; and in other ways show a reckless disregard of the duties which they have assumed, they can have but small claim on a court of equity for compensation in any shape or to any amount.

But while the court agree in these principles, they are equally divided in opinion as to the application of them to the present case. The decision of the auditor and the court below on this exception must therefore stand affirmed.

IV. The fourth exception is, "that the auditor did not charge the trustees upon the principle of six months' rest and compound interest."

On the subject of compounding interest on trustees, there is, and indeed could not well be, any uniform rule which could justly apply to

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all cases. When a trust to invest has been grossly and willfully neglected; where the funds have been used by the trustees in their own business, or profits made of which they give no account, interest is compounded as a punishment, or as a measure of damage for undisclosed profits and in place of them. For mere neglect to invest, simple interest only is generally imposed. Six months' rests have been **543**] made only *where the amounts received were large, and such as could be easily and at all times invested.

The auditor in this case has made yearly rests. In calculating the interest on the loans, he says, "it has been charged upon the days on which it became due, first applied to the disbursements, and the balance struck at the end of each year and interest calculated on such balances while unemployed, but such interest has not been carried into the receipts of the succeeding year, but into a separate column, and the aggregate of interest for all the years on these balances is added to the principal at the foot of the account. In this I have followed the rule in *Grernbury's* case, 1 Wash., 246, and Leigh, 348."

In this way he alleges, that "compound interest is in effect given on the loans, and simple interest upon the annual balances, while they were uninvested, allowing a month after the termination of each rest to make the investment."

As the sums received by the trustees in this case were small, and as three fourths of the annual income were liable to be called for by the guardian for the use of his ward, we are of opinion the auditor has stated the account in this respect with fairness and discretion. The fourth exception is therefore not sustained.

V. The fifth exception is, "that the trustees should have been charged by the auditor with all gains, as with those arising from usurious loans, unknown friends, or otherwise."

It is a well-settled principle of equity, that wherever a trustee, or one standing in a fiduciary character, deals with the trust estate for his own personal profit, he shall account to the *cestui que trust* for all the gain which he has made. If he uses the trust money in speculations, dangerous though profitable, the risk will be his own, but the profit will inure to the *cestui que trust*. Such a rule, though rigid, is necessary to prevent malversation. (See *Docker v. Somes*, 2 My. & K., 655.)

The money used in purchase of the house, having been settled by the transfer of the same to the complainant, the subject matter of the present exception has been confined to the usurious interest received. It amounts only to the sum of \$66.00. The auditor and the court erred in not charging that sum to the accountants. They cannot be allowed to aver that the profits made on the trust funds should be put in their own pockets, because they were unlawful gains, for fear that the conscience of the *cestui que trust* should be defiled by a participation in them. To indulge trustees in such an obliquity of conscience, would be holding out immunity for misconduct and an inducement to speculate with the trust funds, and put them in peril.

544] *This exception is therefore sustained.

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VI. The sixth exception is, "that the trustees should not have been credited by the loan to Fowler & Co. or any part thereof."

This is the most important point in the case.

The facts affecting it are reported by the auditor, as follows:

"C. S. Fowler & Co. were brokers in this city, dealing in exchange, loans, and all the usual business of such an establishment; and in addition, issued notes which formed a part of the circulating medium of the city. They also received deposits and allowed interest at six per cent., permitting the depositor to check on the amount to his credit at pleasure. The establishment was in good credit in 1841, and up to the failure, in the early part of 1842, many of the business men of the city deposited their funds with them. On the 22d of May, 1841, Mr. Saunders placed with Fowler & Co. \$1,181 under the following agreement, entered in a pass or check book:

"CITY OF WASHINGTON, 22 May, 1841.

We hereby agree with D. Saunders, acting trustee of Edw. De Kraft's estate, to receive his deposits and to allow him six per cent. interest thereon, he to check at will.

C. S. FOWLER & Co."

And an account was opened in said pass book, headed thus:

"Dr.—C. S. Fowler & Co. in account with D. Saunders, acting trustee of Edw. De Kraft's estate—Cr." Other sums were afterwards added, and on the 3d of February, 1842, when the last was made, they amounted to \$5,277.88, and the checks to \$2,306.69; to the 1st of December, 1841, the checks amounted to \$1,812, and the deposits to \$3,133.88, leaving \$1,825.83 undrawn in the hands of Fowler & Co. The sums received, from Cooper, and left with Fowler & Co., amounted to \$1,876, and the other sums placed with them prior to the 1st of December, 1841, to \$1,261.88, within \$50.12 of the amount checked out up to this time.

The first sum paid in (\$1,181) was a payment made on the same 22d of May, by Cooper, on account of the principal and interest due on his mortgage. The \$1,700 paid on the 17th of August was also a part of Cooper's debt. The \$800 paid in, on the third of February, was a part of Jones's mortgage debt. The residue is supposed to have been the current collections of the trustees from rents, dividends, &c.

"On the 14th March, 1842, Fowler & Co. failed. No interest had been calculated or paid. The account was balanced after the failure, when \$2,970.96 were found standing to the credit of Saunders, as acting trustee. It is a total loss. The *credit of Fowler & Co. [**545** was good up to the time of their failure."

Before placing the trust fund with Fowler & Co., the trustee took the opinion of counsel, whether they could safely do so. It was in evidence, also, that at any time within the last ten years \$2,000 or \$3,000 could have been safely loaned on mortgage of real estate in this city.

By the decision of the auditor the trustees were charged with those portions of the Fowler deposit which were composed of the original capital paid in by Cooper before December, and the residue of that loss, composed of their current annual collections and of Jones's

payment in February, on account of the original debt, was allowed as a credit.

The court below overruled this decision of the auditor, and ordered the charge against the trustees of \$2,521.53, on this account, to be stricken out. We are of opinion that the court below erred in making this correction of the auditor's report.

The reasons given by the auditor, including the peculiar facts of the case and the principles of law applicable to them, are well stated in his report, and we fully concur in their correctness. It will be only necessary to state them.

"The sums placed by D. Saunders, as acting trustee, with Fowler & Co., were of two descriptions—original capital, and current collections. Cooper's and Jones's payments were of the former description. 1. As to those, the general rule seems to be that a trustee, though compensated for his services, is bound to take no greater care of the trust funds than a prudent man would of his own. (2 Story's Eq., sec. 1268.) But at the same time, if the line of his duty is prescribed, he must, according to Mr. Lewin (p. 413), "strictly pursue it, without swerving to the right hand or the left," and if he fail to do so, and keep funds, which ought to be invested, longer on deposit than necessary, and loss occur, he must bear the loss. Whatever doubt may be entertained as to the duty of the trustees in this case, to invest the surplus annual income beyond the fourth, it is thought there can be no doubt as to their obligation to re-invest the original loans and debts of the testator when paid in. If this be so, then were these sums paid by Cooper and Jones to the trustees, and by them placed with Fowler & Co., a loan or deposit with them. They were repayable with interest at pleasure.

It looks very much like a loan, payable with interest, on demand. And if a loan, clearly the trustees are liable, because made without security of any description. The directions of the will are to invest on some security "in bank or other stocks, mortgages or other good security," words which exclude personal security. But the trustees, in their answers, 546*] deny it was a loan, *and state that these sums were deposits made to await a fit opportunity of investment.

Assuming them to be such, the proof is that mortgages could be obtained at any time in this city. But trustees shall be allowed a reasonable time to select investments. What is a reasonable time? Five months have been held to be an unreasonable time to keep money on deposit. Cooper's first payment was left with Fowler & Co. nearly ten months before the failure, from May, 1841, to March, 1842, and his second, seven months, from August to March. Jones's was left February 3, 1842—not quite six weeks before the failure. Cooper's would seem to have been on deposit waiting for investment too long, and therefore I have charged the trustees with those sums, deducting the arrear of interest due from him, and deeming three months not to be an unreasonable time to be allowed for selecting investments, have charged interest from that time. By that rule, Jones's payment of original capital would not be chargeable to the trustees.

We concur also in the decision of the auditor as to his refusal to charge the trustees with the

balance arising from current collections and the payment of Jones, made within six weeks of the failure. The trust funds were deposited where the accountants deposited their own private funds. The trust funds were not mingled with their own. Other prudent and discreet men made deposits with the same bankers. The advice of counsel was taken. There was no reason to suspect the solvency of the bankers. On the whole, we do not think the trustees have acted with such want of prudence or discretion as to render them liable for the loss of this portion of the funds.

VII. As the whole trust estate has been delivered over to the *cestui que trust*, and as the trustees hold only the bare legal estate for the purpose of protecting the complainant in the enjoyment of it from the debts and control of her husband, the exception taken to the action of the court below in refusing to remove them, becomes of no importance, and has not been insisted on.

The decree of the court below is therefore reversed, as to the fifth and sixth exceptions above stated—and affirmed as to the residue; and the record remitted to the court below, with directions to amend the decree in conformity with this decision.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington, and was argued by counsel; on consideration whereof, it is now *here ordered, ad- [*547 judged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, for further proceedings to be had therein in conformity to the opinion of this court

DANIEL R. SOUTHARD, SAMUEL D. TOMPKINS, WILLIAM L. THOMPSON, MATILDA BURKS, JOSEPH R. TUNSTALL, JOHN BURKS, JAMES BURKS, SAMUEL BURKS, CHARLES BURKS, AND MARY BURKS (the last four named by WILLIAM L. THOMPSON, their next friend),

GILBERT C. RUSSELL.

Bill of review—not maintainable on evidence newly discovered, to impeach witness, nor where cumulative and collateral, nor to correct decree after decision on appeal.

A bill of review, in a chancery case, cannot be maintained where the newly discovered evidence, upon which the bill purports to be founded, goes to impeach the character of witnesses examined in the original suit.

Nor can it be maintained where the newly discovered evidence is merely cumulative, and relates

NOTE.—Bill of review, nature of; when may be brought; who may maintain; time within which; what it should contain. See note to Bank of U. S. v. Ritchie, 8 Pet., 128.

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to a collateral fact in the issue, not of itself, if admitted, by any means decisive or controlling; such as the question of adequacy of price, when the main question was, whether a deed was a deed of sale or a mortgage.

Where a case is decided by an appellate court, and a mandate is sent down to the court below to carry out the decree, a bill of review will not lie in the court below to correct errors of law alleged on the face of the decree. Resort must be had to the appellate court.

Nor will a bill of review lie founded on newly discovered evidence, after the publication or decree below, where a decision has taken place on an appeal, unless the right is reserved in the decree of the appellate court, or permission be given on an application to that court directly for the purpose.

THIS was an appeal from the Circuit Court of the United States for the District of Kentucky, sitting as a court of equity.

Being a continuation of the case of *Russell v. Southard et al.*, reported in 12 How., 189, it is proper to take it up from the point where that report left it.

In 12 How., 159, it is said: "After the opinion of the court was pronounced, a motion was made on behalf of the appellees for a rehearing and to remand the cause to the Circuit Court for further preparation and proof, upon the ground that new and material evidence had been discovered since the case was heard and decided in that court. Sundry affidavits were filed, showing the nature of the evidence which was said to have been discovered."

The reporter abstained from stating the substance of these affidavits in consequence of the following order, which was indorsed upon them in the handwriting of *Mr. Chief Justice Taney*:

"The court direct me to say, that these affidavits are not to be inserted in the report, as they implicate the character of individuals 548*] *who can have no opportunity of offering testimony in their defense. The reporter will merely state, in general terms, that affidavits were filed to support the motion."

As the present case turned chiefly upon the contents of these affidavits (which were made the groundwork for the bill of review) it becomes necessary to state them now. They were affidavits to sustain the two following points:

1. That Dr. Wood, a witness for Russell, was bribed either by him or his attorney, Stewart; that Wood had in his possession a note given to him by Stewart for about \$300, then past due; that Wood had applied to a person named Addison to collect it for him, and left the note in his possession for that purpose; and that Wood had confessed to James J. Dozier, Esq., that the note had been given to him for his testimony in the case.

2. The following affidavit of George Hancock:

"I, George Hancock, state that some short time previous to the sale by Col. Gilbert C. Russell, of his farm, near Louisville, to James Southard, he offered to sell it to me for five thousand dollars, and he made the same offer to my sister, Mrs. Preston. I thought it a speculation, and would have bought it but for the reputation the place bore for being extremely sickly. He also explained to me the reason why he had given so large a price for the place, which it is not deemed necessary here to state, and which satisfied me that he knew he was

giving much more than its value, at the time he made the purchase.

GEORGE HANCOCK."

Upon these affidavits, the motion for a rehearing was made and overruled; the opinion of the court, overruling the motion, being recorded in 12 How., 158.

The mandate went down to the Circuit Court, and was there filed at May Term, 1853. The Circuit Court decreed that the conveyance from Russell to Southard was a mortgage, and that Russell was entitled to redeem; and in further pursuance of the opinion of the Supreme Court that the case was not then in a condition for a final decree in respect to the other defendants, it was remanded to the rules.

At the same term, namely: in June, 1852, Southard and the other appellants moved the court for leave to file a bill of review of the decree rendered at the present term, and in support of the motion presented their bill, and read the following documents, namely:

The affidavits of James Guthrie, Willett Clarke, Daniel S. Rapelge, U. E. Ewing, Thomas G. Addison, George Hancock, Charles M. Truston, John P. Oldham, J. C. Johnston, D. F. Clark, and R. F. Baird, and a paper purporting to be an extract *from a letter [*549 from Russell to J. W. Wing, and a copy of the deed from G. C. Russell to Joseph B. Stewart. And the said Russell, by his counsel, opposed the motion, and objected that the grounds made out were insufficient, and read in his behalf the documents which follow: The affidavits of Elias R. Deering, Elijah C. Clark, Robert F. Baird, J. B. Stewart, Philip Richardson, and of Robert F. Baird, a copy of the record of *Burks v. Southard*, and a copy of the opinion of the Supreme Court of the United States upon a new hearing, with the affidavits attached thereto.

After argument, the court gave leave to the complainants to file their bill of review; whereupon the defendant, Russell, moved the court to strike from the bill all that portion relating to champerty and all that portion relating to the explanation of the evidence of J. C. Johnston, by the introduction of his affidavits, and all other parts of said bill which is designed to explain the evidence already in the original record. The court overruled the motion, but reserved all the questions of the competency and effect of the matters the defendant moved to have stricken from the bill, to be decided when they may be made in the progress of the cause, or on the final hearing thereof.

In September, 1852, Russell filed his answer.

The substance of the bill and answer are stated in the opinion of the court.

In May, 1853, the Circuit Court dismissed the bill with costs, upon the ground that "there is not sufficient cause for setting aside said decree of the Supreme Court of the United States, entered here, according to the mandate of said Supreme Court."

From this decree the complainants appealed to this court.

It was submitted on a printed argument by *Mr. Nicholas* for the appellants. On the part of the appellees, it was argued, orally, by *Mr. Johnson*, and in print by *Messrs. Robertson and Morehead*.

Mr. Nicholas reviewed the case as it stood

upon the former testimony, with a view of showing the value of that now introduced for the first time. The only parts of the argument which can be noticed in this report are those which related to the two subjects mentioned in the opinion of the court, namely:

1. The new evidence of Mr. Hancock relating to the inadequacy of price.

2. The bribery of Dr. Wood, by Russell, the original complainant.

1. The substance of Hancock's testimony is given above in the affidavit, which was filed for a rehearing.

(Upon this point, Mr. Nicholas' argument was as follows):

550*] *Hancock's testimony presents two questions; first, its materiality; second, its admissibility as newly discovered proof.

1. No single fact could shed so much clear light on the case as the offer to sell, and the anxiety to sell at \$5,000. It furnishes an unerring key to the interpretation of the contemporaneous written proposition made by R. to S. Thus interpreted, it shows his willingness, in a manner neither to be mistaken or misrepresented, to take about \$6,000; one sixth cash, balance in produce, bagging, &c., payable in one to five years. It shows conclusively that R.'s witnesses are mistaken in their estimate of the then value, or at least of its vendible value. But whether so mistaken or not, it neutralizes the effect of all such testimony, by showing the price R. was willing to take, and had for months been endeavoring to obtain. If he were willing and anxious to make an unconditional sale at \$5,000, it is easy to understand his willingness to make a conditional one at the price paid by S. Taken in connection with the other strong facts and circumstances, it overthrows and outweighs the testimony of Wood and Johnston, even if the latter were unambiguous. Dr. Johnston is not more intelligent or respectable than Hancock. The recollections of one respectable witness, and another, of doubtful character, would never be allowed to disturb a twenty years possession, and contradict a solemn written agreement, corroborated, as it is, by so many and such strong facts and circumstances.

The vast importance of this testimony affords most satisfactory reason for believing that it was wholly unknown to S. before the original decree, even if the accidental manner in which it recently came to his knowledge, were not satisfactorily explained, as it is by Hancock.

2. Does this testimony alone afford sufficient ground for opening and setting aside the decree?

It presents a new fact, not directly put in issue or attempted to be proved, yet, if known, might have been proved under the issue. It is not mere cumulative proof upon a point before in contest, but a new fact, which, in aid of the old facts, conclusively proves a sale, the main matter in issue.

Can parol proof be used for this purpose?

In applying the authorities about to be cited, let it be remembered that this parol proof is offered, not to disturb, but to quiet long possession; not to impair, but confirm a written title; not to oppose full satisfactory proof, but to contradict the weakest of all proof—parol proof of confessions, and that, too, resting on the doubtful meaning of one witness and the

doubtful veracity of another, which has been allowed to rewrite a written contract and contradict a possession of twenty years. It is the *mere opposing of new parol to the old [*551 parol proof. It also aids to fix the otherwise doubtful construction of a muniment of title or contemporaneous written document. When the authorities are thus scanned, it will be found that we are more than sustained, and that our right to the review upon the single testimony of Hancock alone, is clearly made out.

The recognized right to review a decree upon newly discovered testimony, is coeval with the court of chancery.

The ordinance of Lord Bacon, made to define the right and regulate its exercise, says: "No bill of review shall be admitted on any new proof which might have been used, when the decree was made. Nevertheless, upon new proof that has come to light after decree made, which could not possibly have been used at the time when decree passed, a bill of review may be grounded."

This ordinance was explained or construed (2 Freem., 31) thus: "When a matter of fact was particularly in issue before the former hearing, though you have new proof of that matter, upon that you shall never have a bill of review. But where a new fact is alleged, that was not at the former hearing, there it may be ground for a bill of review."

The ordinance, as construed in 2 Freeman, was recognized and adopted at an early day in Kentucky. (*Respess v. McClanahan*, Hard., 346.) The adoption is accompanied with the following pertinent remarks: "There is an important difference between discovery of a matter of fact, which, though it existed at former hearing, was not then known to the party, or which was not alleged or put in issue by either party; and the discovery of new witnesses or proof of a matter or fact which was then known or in issue. In the former case, the party not knowing the fact, and it not being particularly in issue, there was nothing to put him on the search, either of the fact or the evidence of the fact; and therefore the presumption is in his favor, that as the matter made for him, his failure to show the matter was not owing to his negligence or fault."

The cases in which this right of review has been acted on or recognized in England and this country are too numerous for citation.

Judge Story's Eq. Jur. 326, 327, thus gives the rule: "The new matter must be relevant and material, and such as, if known, might probably have produced a different determination. But it must be such as the party, by the use of reasonable diligence, could not have known, for laches or negligence destroys the title to relief."

In Daniel's Ch., 1734, the rule is given thus: "The matter must not only be new, but material, and such as would clearly *entitle plaintiff [*552 iff to a decree, or would raise a question of so much nicety and difficulty, as to be a fit subject of judgment in the cause." (*Ord v. Noel*, 6 Madd., 137; *Blake v. Foster*, 2 Mos., 257.)

In *Kennedy v. Ball*, Little Sel. Cas., 127, it was held that "When a review is asked on account of discovery of a fact not put in issue, it should not be granted, unless that fact, when combined with the other proof in the cause, would produce a change in the decree."

In *Talbott v. Todd*, 5 Dana, 194, it is held to be one of the grounds for review, "where new matter has been discovered, though it lies in parol, if not put in issue or determined by the court."

No case has been found which says parol proof is not admissible to prove the new matter allowed by the rule. The absence of any such expressed exception in the ordinance and its commentaries, demonstrate that such exception is no part of the rule. The cases and *dicta* in Kentucky and elsewhere which say, that when the matter was before particularly in issue or contested, the new proof must be of an unerring character, as record or writing, need not be noticed, for they have no application. They are, in truth, a relaxation of the first member of the rule, as given in the ordinance, and in 2 Freeman, taken restrictedly, and have no bearing on the second or latter branch of the rule.

It, however, may not be amiss to refer to *Wood v. Mann*, 2 Sumn., 332, where Judge Story, after a careful review of authorities, as to the admissibility of cumulative parol proof, upon a matter before in issue, says: "Upon bills of review, for newly discovered evidence, parol evidence to facts is not necessarily prohibited by any general practice or rule of law." Again, at p. 334, he thus gives the result of his examination of the authorities and of his own consideration of the subject: "That there is no universal or absolute rule which prohibits the court from allowing the introduction of newly discovered evidence of witnesses to facts in issue in the cause, after the hearing. But the allowance is not a matter of right in the party, but of sound discretion in the court, to be exercised sparingly and cautiously, and only under circumstances which demonstrate it to be indispensable to the merits and justice of the cause."

In *Ocean Ins. Co. v. Fields*, 2 Story, 59, the same learned judge decided: "Although a court of equity will not ordinarily grant relief, in cases after verdict, where mere cumulative evidence of fraud, or of any other fact is discovered; yet it will, where the defense was imperfectly made out, from the want of distinct proof, which is afterward discovered, although there were circumstances of suspicion."

553*] *He says: "I do not know that it ever has been decided, that when the defense has been imperfectly made out at the trial, from the defect of real and substantial proofs, although there were some circumstances of a doubtful character, some presumptions of a loose, indefinite bearing before the jury, and afterward newly discovered evidence has come out, full, direct and positive, to the very gist of the controversy, a court of equity will not interfere and grant relief and sustain a bill to bring forth and try the force and validity of the new evidence. The disposition of the courts is not to encourage new litigation in cases of this sort; but, at the same time, not to assert their own incompetency to grant relief, if a very strong case can be made *a fortiori*; all reasoning upon such a point must be powerfully increased in strength, where it is applied to a case which is composed and concocted of the darkest ingredients of fraud, if not of crime."

As it appears from these two decisions, that there is no general rule to exclude mere cumu-

lative parol proof in all cases, there can be no doubt of its admissibility in a case like this, where it is offered to establish a most material fact, not before contested or "specially in issue." The attention of the court is particularly invited to *Ocean Ins. Co. v. Fields*, with another view. Should the court, contrary to expectation, feel unwilling, from any technical reason, to set aside the decree under the charge of fraud, then that case is full authority for allowing Hancock's testimony, if for no other reason, because it would then afford the only available means of frustrating the iniquity perpetrated through Wood's bribed testimony, this case being also "composed and concocted of the darkest ingredients of fraud and crime."

All the authorities concur, that the rule for granting a review (or awarding new trial out of chancery) is substantially the same as that for granting a new trial at law, upon the ground of newly discovered testimony. In *Talbott v. Todd*, 5 Dana, 196, it was held, "that the powers which a court of common law may exercise during the term in granting a new trial upon the discovery of new matter, may be exercised by a court of chancery after the term."

In *Langford's Adm. v. Collier*, 1 A. K. Marsh, 237, a bill for a new trial at law was sustained upon discovery, since the term, of parol proof of confessions by Collier, he having obtained the verdict upon such proof of confessions by Langford. Held, opinion by Ch. J. Boyle, that, "in general when proper for courts of law to grant a new trial during the term, it is equally proper for chancery to grant new trial on same grounds arising after the term."

*The distinction made in both courts, §554 is between merely cumulative evidence to a point before in contest, and proof of a new matter or fact not before contested, but bearing materially on the original issue. The distinction is well expounded in *Waller v. Graves*, 20 Conn., 305: "If new evidence is merely cumulative, no new trial, unless effect be to render clear what was equivocal or uncertain. By cumulative evidence is meant additional evidence of same general character, to some fact or point, which was subject of proof before. Evidence of distinct and independent facts of different character, though it may tend to establish some ground of defense or relate to some issue, is not cumulative within the rule."

So, also, in *Chatfield v. Lathrop*, 6 Pick., 417, "Cumulative evidence is such as tends to support the same fact, which was before attempted to be proved." *Barker v. French*, 18 Vt., 460, new trial granted for newly discovered cumulative evidence, because it made a doubtful case clear.

Gardner v. Mitchell, 6 Pick., 114. Action for breach of warranty in the sale of oil, testimony by both parties, as to quality. Motion for new trial, on ground of evidence newly discovered, of admission by plaintiff, that oil was of proper quality. This, held to be a new fact, not cumulative, and the evidence being nearly balanced, a new trial was granted.

If *Daniel v. Daniel*, 2 Litt., 52, be cited on the other side, it will be found, on examination, to be either a *felo-de-se*, or inaccurate in the statement of the turning point, or erroneous for not attending to the distinction as to what is and what is not cumulative proof, so accurately de-

fined in *Waller v. Graves*, 20 Conn., and so distinctly recognized by *Respass v. McClanahan*, Hard., and numerous other cases. *Daniel v. Daniel*, itself distinctly recognizes, as one of the grounds for awarding new trial at law out of chancery, "the discovery of new evidence, relevant to a point not put in issue, for want of proof to sustain it." The true meaning of "putting in issue," was either mistaken by the court, or the true ground of decision is misstated.

In *Talbot v. Todd*, 5 Dana, 197, it was decided that a party who seeks to open a decree upon discovery of new matter, is not held to very strict proof, either as to his former ignorance or as to his industry in making inquiries which might have led to the discovery. In *Young v. Keighty*, 16 Ves., 350, it was said by Lord Eldon, that though the fact were known before decree, yet if the evidence to prove it were only discovered afterward, "though some contradiction appears in the cases, there is no authority that the new evidence would not be sufficient ground for review."

555*] "We have no need for either of these cases. They are merely cited to prevent any possible doubt on that score. The vast importance of Hancock's testimony is the most satisfactory evidence that Southard could not have been apprised of it, or it would most certainly have been used by him. Even if he had suspected the fact, he could not have found the proof but by interrogating every man who he supposed had been in Louisville and its vicinity at the time of the sale. Indeed, when the suit was brought, if not during its whole pendency, Hancock resided in another county.

We have thus, by what is supposed to be an overabundant array of authority, established the right to use Hancock's testimony in any aspect of the case that can possibly be taken. We cannot doubt the disposition of the court to go as far that way as legal authority will allow, for the attainment of justice in a case like this. We have already proved the effect of his testimony is to clearly show Southard's right to a decree.

2. The second point of *Mr. Nicholas'* argument was to show that the former decree would not have been rendered unless the court had faith in Wood's testimony; and that as Wood was now shown, by new evidence, to have been bribed, his testimony was destroyed, and consequently the foundation of the decree was swept away.

Mr. Nicholas inferred the bribery of Dr. Wood for the following reasons, which must be merely stated, without the deductions from them:

1. That Stewart's note to Wood bore date on the very day when the deposition was taken.

2. That no proof whatever was brought of the alleged consideration of the note, namely: Wood's former medical services to Russell's slaves, and money loaned to Wing. On the contrary, that the allegation was disproved by the non-production of the account which was said to be certified by Wing; by Wood's never having sued on the demand, or made a claim when he knew of the sale of the farm and removal of the stock and negroes; by the extraordinary conduct of Russell in thus promptly assuming a debt which was barred by the Stat-

ute of Limitations; by Wood's former evidence when he said that he knew from Russell himself that Wing was his agent, and had contracted debts for him, whereas if this debt had existed he would have said so.

(*Mr. Nicholas* then proceeded in this branch of his argument, as follows):

But it is contended, that the decree ought not to be set aside for this fraud, because the only effect of establishing the fraud is to impeach the bribed witness, and that the rule is, you can *never open a decree to impeach a wit- ***556** dess. For this they rely on *Respass v. McClanahan*, Hardin, 846.

It is sufficient answer to this objection, that it is not the witness alone, or principally, whom we impeach, but Russell and Stewart, whom we impeach for fraud in obtaining the decree, by means of the bribed witness. No rule of law or policy is violated in permitting us to do this, merely because the witness also is incidentally but necessarily assailed. If such were the rule, this case is all sufficient to prove that the rule is based neither on justice nor policy, and ought therefore to be wholly disregarded, or so restricted as not to apply to a case like this. But such is not the rule. Neither is this case of *Respass v. McClanahan* an authority to prove it, or if it be, then the case cannot be relied on, because it is sustained by no authority. The case contains merely a *dictum* that the conviction of perjury of the witness, on whose testimony the verdict was rendered, is one of the exceptions to the general rule, that the Chancellor will not award a new trial to let in new witnesses to a contested point. The case does not say, nor has any authority ever said, that the testimony of a witness can in no way be so assailed, unless you first convict him of perjury; for instance, where the perjury was made with the knowledge or at the solicitation of the plaintiff, much less where it was procured by him through bribery. Still less does *Respass v. McClanahan* or any other authority say, that either at law or by bill of review you cannot have a new trial or a decree opened, by showing with newly discovered testimony, either the incompetency of the witness, or by new matter so contradicting him as to prove his perjury. Bribery goes to his competency as well as credibility. It may not be one of the established exceptions which, like interest, will exclude the witness altogether from the jury, because the jury is the more appropriate tribunal for determining the question of bribery, and is in no danger of improper influence from the testimony of a bribed witness. But what judge would hesitate in instructing the jury, that if they believed the bribery they ought to disregard his testimony? Neither would a chancellor hesitate, if it were necessary to justice so to act in sustaining an exception to the deposition of a bribed witness, and ruling it out of the cause. It would be singular, indeed, if interest to the amount of a dollar should render a witness incompetent, while a bribe to the amount of hundreds would have no such effect. Many witnesses, if they could be heard, would be believed by court and jury, though interested to the amount of thousands; but neither would regard the testimony of a witness who had received a bribe to the amount of only \$5.00. If, therefore, there be any technical rule which

557*] limits incompetency to *the interested, and will not include the bribed witness, yet every principle of justice and sound policy requires that they should be considered as, at least, on the same footing, in fixing the rule as to what should be considered ground for a new trial, or in setting aside a decree for fraud. The law goes upon the broad general principle, that litigants must sustain their cases by disinterested testimony, and if an interested witness is palmed upon the court, is treated as a fraud, for which the verdict will be set aside. A bribed witness is an interested witness; his own self-interest is used, not only to give him directly an undue bias, but he infamously sells a falsehood and commits willful perjury for a reward. The true character of witnesses *quoad* this subject, must therefore stand on the same footing; or rather, that is the most favorable view that can be taken for Russell.

In *Talbott v. Todd*, 5 Dana, 196, the court properly says: "The same power which a court of law may exercise during the term in granting a new trial for the discovery of new matter may be exercised by the Chancellor after the term." All the authorities concur, that the powers of the Chancellor to award a new trial and sustain a bill of review are identical.

In *McFarland v. Clark*, 9 Dana, 186, where a witness denied a receipt given by her, the court ordered a new trial on the ground of surprise, though the effect of the new testimony was to impeach the witness. This, too, though, as *Ch. J. Robertson* says, in delivering the opinion of the court: "It has often been decided, that a new trial should not be awarded merely on the ground of discovery of testimony to impeach a witness. But surprise is altogether a different ground for a new trial. It does not, like discovery, imply negligence. That the new testimony may impeach a witness, is not material." Cannot we here equally rely upon this ground of surprise? The bribery was a fact locked up in the knowledge of Stewart and the witness. No amount of vigilance or diligence would have enabled Southard to prove the fact, until it accidentally leaked out, in consequence of Wood's necessities having driven him to try to sell the note. Or can we not with much better reason contend that bribery is "altogether a different ground," and a much more satisfactory one for a new hearing; and therefore, the fact that the witness is also impeached, "is not material." For no degree of negligence whatever can be imputed to Southard, whereas it was incautious to trust the proving of the receipt to the witness of the other party. (See, also, *Miller v. Field*, 8 A. K. Marsh., 109, a strong case to same effect.)

Allen v. Young, 6 Mon., 186, opinion by *Ch. J. Bibb*: a new trial was awarded, because of **558*** the infamous character of the "witness, as disclosed in his own testimony. Though the court conceded that to determine the credibility of a witness was the peculiar province of the jury, yet it said: "It is due to the pure administration of justice, to example and effect in society, that a verdict, based exclusively upon the testimony of confession, sworn to by an infamous witness, should not stand."

Thurmond v. Durham, 8 Yerg., 106: new trial will be ordered in chancery, where the verdict was obtained by accident, or by the

fraud or misconduct of the opposite party, without any negligence in the other.

Peterson v. Barry, 4 Binn., 481: new trial ordered, because of surprise in proof of payment by two witnesses strongly suspected of having been tampered with.

Fabrilius v. Cock, 8 Burr., 1771: new trial ordered, on after-discovered testimony, to show the demand fictitious and supported by perjury procured by subordination.

Niles v. Brackett, 15 Mass., 878: new trial ordered, where interest of witness was known to party producing him, and not to the other party.

Chatfield v. Lathrop, 6 Pick., 418: new trial ordered, where witness, on his *voir dire*, denied interest, and it was afterwards discovered that he had an interest. (See, also, *Durant v. Ashmore*, 2 Richm., 184, and 2 Bay, 520.)

George v. Pierce, 7 Mod., 81: new trial refused at law on affidavit that material witness had said he had received a guinea to stifle the truth, *sed per uniam*; "his affidavit who got the guinea would be something, but his saying so is nothing."

Ocean Ins. Co. v. Field, 2 Story, 59: The bill was sustained for new trial upon the discovery of testimony that the vessel had been fraudulently sunk, though the effect of the new testimony was necessarily to impeach the witnesses, who had proved on the trial a *bona fide* loss.

The case of *Tilly v. Wharton*, 2 Vern., 878, 419, is the only one in which the point was ever directly made and decided, whether a conviction of perjury or forgery was necessary, before the Chancellor would award a new trial or set aside a decree on the ground of newly discovered testimony, as to the perjury or forgery; and there it was ultimately decided that such conviction was not necessary. That case was thus: verdict and judgment on bond and bill to subject real assets. Defendant insisted bond was forged, and made strong proof. That, however, being the point tried at law, the court would not enter on the proof thereof, saying, if the witnesses had been convicted of perjury, or the party of forgery, that might have been a ground of relief in equity, especially since the proceeding by attain had *become in a manner impracticable. [**559** But upon appeal to the House of Lords, a new trial was directed, and the bond found to be forged. Though the report does not say so, yet the presumption is, that according to uniform usage, the decision of the lords was given upon the advice of the twelve judges. The case was one of cumulative proof, merely upon the points of perjury and forgery, which were the very points contested in the trial before the jury; yet, even in that kind of case, the Chancellor said, a conviction of perjury or forgery would have entitled the party to a new trial, and it was awarded by the lords, even without such conviction. But even the Chancellor gives no intimation that, if the proof offered had been new matter, and the perjury and forgery had not been contested before the jury, that then a conviction would have been necessary to let in the proof. The more modern decisions show that he would have been wrong, if he had so decided; similar proof has frequently been let in, without any previous conviction. In *Cod-*

drington v. Webb, 2 Vern., 240, a new trial was awarded by the *Chancellor* upon the ground of surprise, and upon the charge that the bond was forged, without any allegation of conviction for perjury or forgery. And in *Attorney General v. Turner*, Ambler, 587, after there had been two verdicts and a decree establishing a will, Lord Hardwicke awarded a new trial on the discovery of a letter written by a witness who proved the will, to one of the trustees, requesting not to be summoned as a witness, because he knew the testator was insane. The new trial resulting in a verdict in favor of the heir at law, the former verdict and decree were set aside, and possession of the estate ordered to be delivered to the heir at law. This, too, without a suggestion even as to the necessity of a conviction of perjury against the witness.

In this case, though the general character of Peter Wood for veracity was in contest in the original suit, yet the fact of the bribery was in no way brought in issue. We have therefore a right to use it as original matter newly discovered, to impeach his testimony as greatly within the principle decided in *Tilly v. Wharton*, 2 Vern., or as a substantive ground of fraud against Russell in obtaining the decree.

(The remainder of Mr. Nichols' argument on this head is omitted for want of room.)

The argument of the counsel for the appellee, so far as it related to the points decided by the court, was as follows:

In arguing the case, we will first briefly consider the law which must govern the decision of it. As Southard's Bill of Review does not question the correctness of the opinion of this court on the original record, but relies altogether on an alleged discovery *of evidence since the date of the first decree in the Circuit Court—an inquiry into the correctness of the decision sought to be reviewed would be superfluous and impertinent.

Though a decree may be set aside for fraud in obtaining it, the proper proceeding in such a case is, not by a bill of review, but by an original bill in the nature of a bill of review.

A bill of review and a bill for a new trial of an action depend on the same principles, and are governed by analogous rules of practice; and neither of them, as we insist, can be maintained on the extraneous ground of a discovery of new testimony, unless the complaining party had been vigilant in the preparation of the original suit, and could not, by proper diligence, have made the discovery in time to make it available on the trial—nor unless the discovered testimony will prove a fact which, had it been proved before or on the hearing of the original case, would have produced an essentially different judgment or decree—nor unless the new evidence be either documentary, or if oral, shall establish a fact not before in issue for want of knowledge of the existence of the fact or of the proof of it. This is the long and well-settled doctrine in Kentucky. (See *Respass, &c.*, v. *McClanahan*, Hard., 347; *Eccles v. Shackelford*, 1 Litt., 35; *Yancy v. Doerner*, 5 Ib., 10; *Findley v. Nancy*, 3 Mon., 403; *Hendrix's Heirs v. Clay*, 2 A. K. Marsh., 465; *Respass, &c.*, v. *McClanahan*, Ib., 379; *Daniel v. Daniel*, 2 J. J. Marsh., 52; *Hunt v. Boyier*, 1 Ib., 487; *Brewer v. Bowman*, 3 Ib., 493; *Ewing v. Price*, Ib., 522.) This doctrine is as rational everywhere as

it is authoritative in Kentucky; and we think that it is generally recognized and maintained wherever the equitable jurisprudence of England prevails. It is co-existent with the ordinances of *Chancellor Bacon*, of which that one applying to bills of review on extraneous ground has been, from the year of its promulgation, interpreted as requiring either new matter not before litigated, or record or written evidence decisive of a fact involved in the former issue, and of the existence of which memorial the complaining party was, without his own fault or negligence, ignorant, until it was too late to use it to prevent the decree sought to be reviewed. (See *Hinde's Practice*, 58; *Gilbert's For. Rom.*, 186; *Story's Eq. Pl.* 433, 434, a. 8; *Taylor v. Sharp*, 3 P. Wms., 371; *Norris v. Le Neve*, 3 Atk., 38, 34; 2 Madd. Ch., 537; *Patridge v. Osborne*, 5 Russ., 195; *Wiser v. Blachly*, 2 Johns. Ch., 491; *Livingston v. Hubbs*, 3 Ib., 167.)

Discovery of additional witnesses, or of cumulative or explanatory evidence, "by the swearing of witnesses," has never been adjudged a sufficient ground for a bill of review, or for a new trial of an action. The rule applied by most of the foregoing authorities, and virtually recognized in all of them, is dictated *by §561 obvious considerations of policy, security and justice. A relaxation of it so as to allow a new trial or review, on the alleged discovery of corroborative or explanatory testimony by witnesses, would open the door to fraud, subornation and perjury, and would not only encourage negligence, but would lead to vexatious uncertainty and delay in litigation.

As to the discovery of new "matter," or written evidence, the law is also prudently stringent in requiring that such matter or evidence shall clearly make the case conclusive in favor of the party seeking to use it; and moreover, that the court shall be well satisfied that the non-discovery of it opportunely was not the result of a neglect of proper inquiry or reasonable diligence. (*Young v. Keighly*, 16 Ves., 325; 2 & 3 Johns., *supra*; *Findley v. Nancy*, *supra*, and some of the other cases cited.)

Nor will a review or a new trial be granted for the purpose of impeaching a witness. (*Barret v. Belshie*, 4 Bibb, 349; *Bunn v. Hoyt*, 3 Johns., 255; *Duryee v. Dennison*, 5 Ib., 250; *Huish v. Sheldon*, Sayre, 27; *Ford v. Tilly*, 2 Salk., 653; *Turner v. Pearte*, 1 T. R., 717; *White v. Fussell*, 1 Ves. & B., 151.)

We respectfully submit the question, whether the principles recognized and the rules established by the foregoing citations, and many other concurrent authorities, do not clearly and conclusively sustain the decree dismissing Southard's bill of review, and which he now seeks to reverse? We suggest, *in limine*, that the bill should not be construed as intending to impeach the original decree as having been obtained by fraud. The only distinct allegation in it on that subject is, that Stewart (one of Russell's attorneys) fraudulently bribed Dr. Wood to give his deposition. There is no allegation that Wood's testimony was false, or that, without his testimony, Russell would not have succeeded in this court. Nor does the bill anywhere intimate what portion of Wood's evidence was false, or in what respect. And, could the bill be understood as

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sufficiently impeaching the decree for fraud in obtaining it, an original bill, and not a bill of review, was the proper remedy. If, therefore, it be Southard's purpose both to impeach the decree for fraud, and also, on the discovery of new testimony, to open it for review, we submit the question whether those incongruous objects can be united availably in a bill of review.

But we cannot admit that either the allegation of false swearing or of the perjury of a witness is ground for a bill impeaching a judgment or decree for fraud; nor have we seen a case in which it was ever adjudged that the subornation of false testimony by the successful party was such fraud in the judgment or decree as would lay the foundation for an original bill for setting it aside. Although it **562*** might be gravely questioned on principle, yet it has been said, that while a bill of review or for a new trial will not be maintained on an allegation that the decree or judgment was obtained by the false swearing of a material witness, yet a subsequent conviction of the witness for the imputed perjury may be ground for a review or new trial. But whenever alleged perjury is the ground for relief, legal conviction and conclusive proof of it by the record are, at the same time, required as indispensable. And this is dictated by the same policy which forbids new trials or reviews for impeaching witnesses by other witnesses. (*Respass v. McClanahan*, and *Brewer v. Bowman*, *supra*.) Whilst, therefore, we doubt whether, on well-established principle or policy, even a conviction of perjury is, *per se*, sufficient cause for a new trial or review, we cannot doubt that imputed perjury, without conviction, is not sufficient in any case.

Simply obtaining a decree on a groundless claim and on false allegations, and even false proof, by a party knowing that his claim is unjust, and that his allegation and proof are untrue, has never been adjudged to be a fraud on the other party, for which he could be relieved from the decree by a bill of review, or an original bill impeaching it for fraud. (*Bell v. Rucker*, 4 B. Mon., 453; *Brunk v. Means*, 11 *Id.*, 219.)

If procuring a decree by false allegations, known by the party making them to be untrue, and also by availing himself of false testimony, knowing that it was not true, be not, in judgment of law, such a fraud on the other party as to subject the decree to nullification or even review, why should the fact that the same party, who knowingly alleged the falsehood, induced the false witness to prove it, make a case of remediable fraud?

But if, in all this, we are mistaken, we insist, as already suggested, that there is, in this case, neither proof nor allegation that Dr. Wood's testimony was either totally or partially false; although Southard, as proved by the depositions of Jos. C. Baird, and of R. F. Baird, and of E. Clark, and of Deering, and of W. J. Clark, made elaborate and sinister efforts to seduce Wood, and fraudulently extract from him something inconsistent with the truth of his deposition, his failure was so signal as to reflect corroborative credit on Wood's testimony. In the original case, Southard made a desperate effort to impeach Wood's tes-

timony. In that he failed. This court, in its opinion, said that he should be deemed credible, and moreover said that his statements were intrinsically probable, and were also corroborated by other facts in the record. The assault now made upon him, and on the attorney of Russell, is but a renewed effort to impeach testimony that was accredited, and considered by this court in its original decision.

*Could this forlorn hope succeed, [**563** the only effect of the success would be to deprive Russell of Wood's testimony. The setting aside of the decree would not follow as a necessary or even a probable consequence. If there be enough still remaining to sustain that decree, it will stand. And that there would be enough, we feel perfectly satisfied. The gross inadequacy of consideration—the defeasance and its accompanying circumstances—the peculiar and extraordinary means employed to disguise the true character of the contract—the condition and objects of Russell—the character, business and conduct of the Southards—the allegations, evasions, inconsistencies, and falsehoods of the answer of D. R. Southard—Johnson's testimony, proving, as this court said, a mortgage—these and other considerations, independently of Wood's testimony, are amply sufficient to sustain the former opinion of this court, as shown by that opinion itself, and by abundant citations of recognized principles and adjudged cases in our former brief.

Then the allegations as to Wood and Stewart, had they even been sufficiently explicit to impute subornation and perjury, and had they been also proved, would not have amounted to vitiating and available fraud in obtaining the original decree, which could not be annulled or changed on that ground by an original bill impeaching it for fraud. This matter consequently is, in effect, only an impeachment of the credibility of a witness; and which, had it been possible, would have been ostensibly effected by the swearing, and perhaps perjury, of other witnesses, and by corruption and foul combination. But, though means extraordinary and discreditable have been employed to destroy Wood's credibility, the only circumstance which could, in any degree, tend to throw the slightest shade on the truth of his testimony is the fact that about the time he gave his deposition, Mr. Stewart executed his note to him for \$280. Is it proved, or can this court judicially presume that the consideration was corrupt? Or can the court presume that Wood was bribed by that note to fabricate false testimony? Would not this be not only uncharitable, but unreasonable and unjust, in the absence even of any explanatory circumstance? But Russell, in answering the charge of bribery, peremptorily denies its truth, and affirms that his manager (Winn) had, among other liabilities incurred by him in managing the farm, presented him with an account due Dr. Wood for medical services, and also for a small sum loaned to him by Wood; that, never having been able to pay that debt, he directed Stewart to adjust it by note before he should require Wood to testify to the facts which he had learned that he could prove by him; and also to adjust a demand which Dr. Smith held against him for a larger amount;

564*] *and that Stewart accordingly executed the note for \$280 to Wood, but did not settle Smith's debt, because that was in litigation. Now, Southard having made Russell a witness, and there being no inconsistency or improbability in his response, it should not be gratuitously assumed to be false. It is more-over not only uncontradicted, but intrinsically probable. The medical account for \$126, with legal interest for about twenty-one years, would, together with less than \$10 loaned, amount, at the date of the note, to \$280. Dr. Smith proves that Stewart did speak to him about settling his debt. This is corroborative of the answer. And though Smith did not know that Wood had rendered professional services to Russell's numerous slaves while under Winn's charge, he himself having been generally their regular physician, yet it is quite probable, nevertheless, that he did, as Winn informed Russell, and as the latter seems to have believed and acknowledged. But, as before suggested, if Russell owed Wood nothing, Stewart's note to him, even if given to induce him to testify, would not prove that he testified falsely or in what respect. It has been not very unusual, as in the *Gardiner* case, to pay witnesses a bonus for subjecting themselves to the inconvenience and responsibility of proving the truth. In its worst aspect, the utmost effect of this matter would be to impair Wood's credibility, which cannot be done by a bill of review.

Our view of this matter, therefore, is: 1. That an original bill could not set aside the decree for the alleged subornation of a witness. 2. That the same cause would be insufficient to maintain a bill of review, unless the witness had been convicted of perjury, and that it may be doubted whether even conviction would make a sufficient cause. That the bill in this case does not allege that Dr. Wood's testimony was false, nor intimate in what respect; and that, therefore, on this point it is radically defective and wholly insufficient. 4. That there is no proof that his testimony was untrue in any particular, but that, on the contrary, its perfect purity and truth, in every essential matter, are strongly fortified by the constancy and emphasis with which, drunk or sober, in defiance of corrupt combinations and strong temptations to seduce him into renunciation of some portion of it, or into some purchased or inadvertent declaration or admission inconsistent with it, he has adhered to and reiterated the truth of it at all times and under all circumstances. 5. That, without Wood's testimony, the decree was proper, and would have been just what it is. 6. That the object of the bill of review is to impeach Wood's credibility, which cannot now be allowed, and if allowable, has been entirely frustrated, and would be unavailing to Southard had he succeeded in his purpose.

565*] *The credit of witnesses is not to be impeached after hearing and decree. Such applications for an examination to the credit of a witness are always regarded with great jealousy, and they are to be made before the hearing. (*White v. Russell*, 1 V. & B., 151.) "There would be no end of suits if the indulgence asked for in this case were permitted." (*Livingston v. Hubbs*, 3 Johns. Ch., 126.)

The alleged discovery of Hancock's testi-

mony, and of Oldham's as to Talbot's Alabama property, and of a mistake, either by this court or by the witness himself, as to Dr. Johnson's testimony, are all plainly insufficient. These three distinct allegations are all in the same category. Each alike depends on the question whether a discovery, after decree, of new witnesses concerning a matter previously litigated and adjudged between the same parties, is good ground for a bill of review: for what was the value of the land conveyed by Russell to Southard, and whether this conveyance was a conditional sale or mortgage, were the principal questions involved in the original suit, and the testimony of Hancock and Oldham applies only to the first, and that of Johnson is merely explanatory of his former deposition as to the last of these litigated matters. The foregoing citations conclusively show that no such cumulative evidence by witnesses is sufficient for upholding a bill of review. "No witnesses which were or might have been examined to anything in issue in the original cause, shall be examined to any matter on the bill of review, unless it be to some matter happening subsequent, which was not before in issue, or upon matter of record or writing, not known before. Where matter of fact was particularly in issue before the former hearing, though you may have new proof of that matter, upon that you shall never have a bill of review." (*Hinde's Prac.*, 50; 2 Freem., 81; 1 Harr. Ch., 141.) "This court, after the most careful research, cannot find one case reported in which a bill of review has been allowed on the discovery of new witnesses to prove a fact which had before been in issue; although there are many where bills of review have been sustained on the discovery of records and other writings relating to the title which was generally put in issue. The distinction is very material. Written evidence cannot be easily corrupted; and if it had been discovered before the former hearing, the presumption is strong that it would have been produced to prevent further litigation and expense. New witnesses, it is granted, may also be discovered without subornation, but they may easily be procured by it, and the danger of admitting them renders it highly impolitic." "If, then, whenever a new witness or witnesses can, honestly or by subornation, be found whose testimony may probably change a decree in chancery or *an award, a bill of review [**566** is received, when will there be an end of litigation? And particularly, will it not render our contests for land almost literally endless? What stability or certainty can there be in the tenure of property? The dangers and mischief to society are too great to be endured." (*Respass v. McClanahan &c.*, Hardin, *supra.*) "The rule is well settled, that to sustain a bill for a review or new trial at law, the evidence, if it applies to points formerly in issue, must be of such a permanent nature and unerring character as to preponderate greatly or have a decisive influence upon the evidence which is to be overturned by it." (*Findley v. Nancy*, *supra.*) "The nature of newly discovered evidence must be different from that of the mere accumulation of witnesses to a litigated fact." (*Livingston v. Hubbs*, *supra.*) Such is the familiar doctrine to be found in the books *sparsim*, and without authoritative deviation or question since the

days of *Chancellor Bacon*. It concludes the case as to the discoveries we are now considering. Besides they, when scrutinized, amount to nothing which, if admitted, could affect the decree.

Hancock's memory is indistinct and uncertain—see his affidavit and his two depositions—all vague and materially varying as to facts and dates. Moreover, he was not in Kentucky between the 1st of July, 1827, and the date of the conveyance from Russell to Southard. The same depositions prove that Russell was not in Kentucky during that year, until after the 8th of July. Consequently, if Russell made an offer to sell to Hancock, it was since, and probably more than a year since he conveyed to Southard; and therefore, if he ever proposed such sale it was of the equity of redemption, which was in fact worth more than \$5,000.

Mr. Justice Nelson delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of the United States for the District of Kentucky.

The present defendant, Russell, filed a bill in the court below in 1847, against the present complainant, Southard, and others, for the purpose of having the deed of a large and valuable farm or plantation, and a defeasance on refunding the purchase money executed at the same time, declared to be a mortgage; and that the complainant be permitted to redeem on such terms and conditions as the court might direct. The cause went to a hearing on the pleadings and proofs, and a decree was entered May Term, 1849, dismissing the bill. Whereupon the complainant appealed to this court, and after argument, the decree of the court below was reversed, the court holding the deed and defeasance to be **567***) a mortgage; and that *the complainant had a right to redeem, remanding the cause to the court below, with directions to enter a decree for the complainant, and for further proceedings in conformity to the opinion of the court. The case and opinion of this court will be found in 12 How., 139.

The main question litigated in the cause, both in the court below and in this, was whether or not the transaction, the decree and defeasance, was a conditional sale to become absolute on the failure to refund the purchase money within the time, or a security for the loan of money. The case was severely contested in the court below, some seventy witnesses having been examined, as appears from the original record; and was very fully argued by counsel and considered by this court, as may be seen by a reference to the report of the case.

On the coming down of the mandate from this court to the court below, and the entry of a decree in conformity thereto, the defendants filed a bill of review, which having been entertained by the court, the cause went to a hearing on the pleadings and proofs; and after argument the court dismissed the bill. The case is now before us on an appeal from that decree. Between forty and fifty witnesses have been examined upon the issues in this bill of review; but we do not deem it material to go into the evidence, except as it respects one or two particulars, which are mainly relied on as ground for interfering with the former decree. The

learned counsel for the appellant, in a very able argument laid before us, frankly and properly admits, that so far as it regards the newly discovered evidence produced, the case rests mainly upon the alleged bribery of one of the material witnesses for the complainant in the original suit, Dr. Wood; and upon the evidence of Hancock, who had not before been a witness. It is claimed that this evidence is of such a nature and character, when taken in connection with the original case, as to be controlling and decisive of the original suit in favor of the defendants; and that it is competent and admissible as newly discovered facts bearing upon the main issue in that case, within the established doctrine concerning proceedings in bills of review.

It is important, therefore, to ascertain with some exactness the character and effect of this evidence when taken alone; and also, when viewed in connection with the evidence in the former case.

The bill of review charges, upon information and belief, that Stewart (who was one of the solicitors for the complainant in the original bill) obtained by means of bribery the testimony of Dr. Wood, a material witness in the cause, and upon the faith of whose evidence this court was induced to render its decision *on **[568]** the appeal; that said Stewart gave to the witness his note for the sum of \$280; and that this fact first came to the knowledge of the complainants since the decree.

The answer sets forth, that this note was given by Stewart under the following circumstances: the defendant, on his return to the State of Kentucky, in the fall of 1827, ascertained that his overseer, Winn, who was his agent in charge of the farm or plantation in question, had greatly involved him in debt, and among the list of creditors furnished by said overseer were Doctors Smith and Wood. That afterwards, when he brought his suit for the redemption of the mortgage, he left with the said Stewart a list of the names by whom he believed he could prove the facts necessary to sustain his bill; and among others were the names of Doctors Wood and Smith. That he was subsequently informed by Stewart that each of these two witnesses claimed a debt against him; and that Wood had exhibited an account certified by said Winn, his overseer, for medical services and borrowed money; and knowing that any account signed by Winn was correct, the defendant authorized his solicitor to execute a note for the same as his agent: and to do the same thing in respect to Dr. Smith, after ascertaining what was really and truly due to him.

That he was afterwards informed by said Stewart, he had executed a note to Doctor Wood to the amount of \$280, which included his account, together with the interest. That said Stewart also informed him he would have given a similar obligation to Doctor Smith, but on reference to a record of a suit of said Smith against the defendant in Louisville Chancery Court, it appeared doubtful if any further sum was due to him. Thus the facts stand upon the pleadings.

The proofs in the case, as far as they go, sustain the answer. They consist altogether of admissions drawn from Wood by persons in

the service of Southard, the complainant, employed with the express view of extorting them by the temptation of reward, and by the use of the most unscrupulous and unjustifiable means. A deliberate and corrupt conspiracy was formed, at the instance of Southard, for the purpose of obtaining from Wood an admission that this note was given as an inducement to a consideration for his testimony in the original suit; but in the several conversations detailed, and admissions thus insidiously procured, Wood persisted in the assertion that the note was given as a consideration principally for medical services rendered to the slaves of Russell on the plantation in question. If any doubt could exist as to the truth of the circumstances under which this note was given, as *declared* by Wood, his *consistency in the numerous conversations into which he was decoyed, unconsciously, by the conspirators, should remove it. If not founded in fact, the consistency is strange and unaccountable, considering the character of the persons employed to entrap him, and the unscrupulous and unprincipled appliances used to accomplish a different result, namely: the obtaining an admission that the note was given as the wages of his former testimony. He was surrounded by professed friends for this purpose, and intoxicating liquors freely used, the more readily to entrap him. An attempt has been made to invalidate this explanation by the testimony of Doctor Smith, who states that he was the general physician of the plantation, and that, in his opinion, services to the amount claimed by Wood could not have been rendered at the time without his knowledge; but this negative testimony, whatever weight may properly be given to it, is not sufficient to overcome the answer and corroborating circumstances to which we have referred. It is matter of opinion and conjecture; and that, too, after the lapse of some twenty-five years. Winn, the overseer, who might have cleared up any doubt upon the question, is dead.

One line of proof and of argument on the part of the complainant in the original suit, to show that the transaction was a mortgage and not a conditional sale, was the great inadequacy of price. A good deal of evidence was furnished on both sides upon this point. The item of newly discovered evidence, besides that already noticed, is the testimony of Hancock, who states that Russell, in a conversation with him in the fore part of the year 1827, as near as he could recollect, offered to sell to him the plantation for the sum of \$5,000. This is claimed to be material, from its bearing upon the question of adequacy of price, Southard having paid nearly this amount.

Without expressing any opinion as to the influence this fact, if produced on the original hearing, might have had, it is sufficient to say, that it does not come within any rule of chancery proceedings as laying a foundation for, much less as evidence in support of, a bill of review.

The rule as laid down by *Chancellor Kent* (3 J. Ch., 124), is, that newly discovered evidence, which goes to impeach the character of witnesses examined in the original suit, or the discovery of cumulative witnesses to a litigated fact, is not sufficient. It must be different, and

of a very decided and controlling character. (3 J. J. Marsh., 492; 6 Madd., 127; Story's Eq. Pl., sec. 413.)

The soundness of this rule is too apparent to require argument, for, if otherwise, there would scarcely be an end to litigation in chancery cases, and a temptation would be held out to *tamper with witnesses for the purpose [*570 of supplying defects of proof in the original cause.

A distinction has been taken where the newly discovered evidence is in writing, or matter of record. In such case, it is said, a review may be granted, notwithstanding the fact to which the evidence relates may have been in issue before; but otherwise, if the evidence rests in parol proof. (1 Dev. & Batt., 108, 110.)

Applying these rules to the case before us, it is quite apparent that the decree below dismissing the bill was right, and should be upheld. The utmost effect that can be claimed for the newly discovered evidence is: 1. The impeachment of the testimony of Doctor Wood in the original suit; and 2. A cumulative witness upon a collateral question in that suit, which was the inadequacy of the price paid; a fact, it is true, bearing upon the main issue in the former controversy, but somewhat remotely.

As it respects the first—the impeachment of Wood—the means disclosed in the record resorted to by the complainant, Southard, strongly exemplify the soundness of the rule that excludes this sort of evidence as a foundation for a bill of review, and the danger of relaxing it by any nice or refined exceptions. And as to the second—the evidence of Hancock—it is excluded, on the ground, not only that it is merely cumulative evidence, but relates to a collateral fact in the issue, not of itself, if admitted, by any means decisive or controlling. If newly discovered evidence of this character could lay a foundation for a bill of review, it is manifest that one might be obtained in most of the important and severely litigated cases in courts of chancery.

There is another question involved in this case, not noticed on the argument, but which we deem it proper not to overlook.

As already stated, the decree sought to be set aside by this bill of review in the court below was entered in pursuance of the mandate of this court, on an appeal in the original suit. It is therefore the decree of this court, and not that primarily entered by the court below, that is sought to be interfered with.

The better opinion is, that a bill of review will not lie at all for errors of law alleged on the face of the decree after the judgment of the appellate court. These may be corrected by a direct application to that court, which would amend, as matter of course, any error of the kind that might have occurred in entering the decree.

Nor will a bill of review lie in the case of newly discovered evidence after the publication, or decree below, where a decision has taken place on an appeal, unless the right is reserved in the *decree of the appellate court, or per. [*571 mission be given on an application to that court directly for the purpose. This appears to be the practice of the Court of Chancery and House of Lords, in England; and we think it founded in principles essential to the proper

administration of the law, and to a reasonable termination of litigation between parties in chancery suits. (1 Vern., 416; 2 Paige, 45; 1 McCord's Ch., 22, 29, 30; 3 J. J. Marsh., 492; 1 Hen. & Mun., 13; Miltford's Pl., 88; Cooper's Pl., 92; Story's Eq. Pl., sec. 408.) Neither of these prerequisites to the filing of the bill before us have been observed.

We think the decree of the court below, dismissing the bill of review, was right, and ought to be affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Kentucky, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

S. C.—12 How., 139.
Cited—1 Black., 499.

WILLIAM J. SLICER, LAWRENCE
SLICER, WILLIAM CROMWELL
SLICER, AND MARCELLA SLICER, min-
ors, by their Father and next Friend, WILL-
IAM J. SLICER, AND MARTHA VIRGINIA
BERKLEY, JEREMIAH BERRY, AND
THOMAS CROMWELL BERRY, Appel-
lants,

v.

THE BANK OF PITTSBURG.

*Adverse possession under irregular proceedings
on mortgage—no redemption allowed.*

Where there was mortgage of land in the City of Pittsburgh, Pennsylvania, the mortgagee caused a writ of *scire facias* to be issued from the Court of Common Pleas, there being no chancery court in that State. There was no regular judgment entered upon the docket, but a writ of *levari facias* was issued, under which the mortgaged property was levied upon and sold. The mortgagee, the Bank of Pittsburgh, became the purchaser.

This took place in 1820.

In 1836, the court ordered the record to be amended by entering up the judgment regularly, and by altering the date of the *scire facias*.

Although the judgment in 1820 was not regularly entered up, yet it was confessed before a prothonotary, who had power to take the confession. The docket upon which the judgment should have been regularly entered, being lost, the entry must be presumed to have been made.

Moreover, the court had power to amend its record in 1836.

Even if there had been no judgment, the mortgagor or his heirs could not have availed themselves of the defect in the proceedings, after the property had been adversely and quietly held for so long a time.

572*] **T**HIS was an appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

The facts of the case are stated in the opinion of the court.

It was argued by **Mr. T. Fox Alden** and **Mr. Johnson** for the appellants, and by **Messrs. Hepburn** and **Locomis** for the appellee.

The points made by the counsel for the appellants were the following:

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1. That a proceeding of *scire facias sur mortgage*, in Pennsylvania, is literally a bill of equity to foreclose the equity of redemption, and forfeit the estate of the mortgagor. (Dunlop's Dig., 81, Act of 1705.)

2. That the proceedings being in the nature of a bill in equity to foreclose the mortgage, the principles of equity, in that particular branch of chancery proceedings, are alone applicable. Self-evident.

3. That amendments of judgments of common law, with all the authorities authorizing the entries of judgments *nunc pro tunc*, can in no case be applicable to amendments of decrees in equity, for foreclosure, because the reason of the law does not apply in such case, but *a converso*.

4. That while the bill to foreclose the equity of redemption is pending, the equitable bar, by analogy, does not run any more than the statute would run, while suit at law was pending. (1 Powell on Mort., 320.)

5. When it has been shown that suit was instituted, it is incumbent on the party wishing to avoid the effect of the principle of *lis pendens*, to show that the cause was legally terminated. (18 How., 832.)

6. The issuing of final process, void on the face of the record, does not terminate suit, at law; still less is it to be construed in equity in such manner as to forfeit the estate of the mortgagor. Needs no authority.

7. No release of the equity of redemption, by express parol agreement, or by implication, arising from the acts of a distressed debtor, or mortgagor, in waiving inquisition, or notice, or appraisement, can compromise his rights as mortgagor, and work a forfeiture of his estate, when his solemn covenant, contained in his condition of absolute sale in his mortgage, will not be permitted to have such effect.

8. That estoppels, either at law or equity, are only allowable to advance justice, never in equity, to work a forfeiture of estate.

9. That presumptions are not allowed at law or equity, against fact, *a fortiori*, in equity, when such allowance would defeat an estate, the favorite of equity. (11 How., 360.)

*10. The confession of judgment, by [*573] warrant of attorney, in Pennsylvania, is not a judgment of record, until the confession of judgment is duly entered by the proper officer of record; still less is the parol declaration of any defendant, that he had confessed judgment evidence of a judgment in Pennsylvania.

11. If such parol admission of the confession of a judgment is tantamount to the entry of a judgment in Pennsylvania, it must be a judgment for every purpose.

12. That the respondents cannot avail themselves of the amendment in this case, on the motion of Mr. Bradford, as they repudiate his acts as unauthorized by them, and further, without notice to Mr. Cromwell. (Coke Litt., 803 a., 352 b.; Bull. N. P., 233; 1 Wash. C. C., 70; 11 Wheat., 286; 9 Cow., 274; 4 Metc., 384; 9 Wend., 147; 6 Ad. & Ell., 469; 10 Ib., 90; 5 W. & S., 306.)

13. That even if the amendment of judgment was regular, it did not, and could not, sanctify a void execution and sale. (4 Wend., 678, 474, 480; 1 Stark. Ev., 283; 12 Johns., 213; 1 M. & P., 236.)

14. That if such judgment was regular, and within the powers of the court, it was interlocutory in its nature, the proceedings being in the nature of a bill of foreclosure, &c., and the defendants having been in possession of the mortgaged premises for sixteen years, would either have to account in equity for the reception of the profits, or have the same liquidated by action at law.

15. Laches, either at law or equity, when both parties are *in pari delictu*, are available by neither; and in this case it was the fault of respondents, if they did not press their mortgage to the foreclosure of the equity of redemption.

From which preceding propositions, if established, we contend that it flows as a legal consequence:

1st. That there was no judgment of the court, which would authorize a writ of *levari facias*.

2d. The sale, therefore, being void, the equity of redemption still exists, and the mortgagee is bound to account for rents and profits, and if he paid his debt, is bound to reconvey the mortgaged premises, or pay the value thereof on such equitable principles as the court may determine to be just and equitable to all parties.

The points on the part of the appellees were the following:

I. The *levari facias*, upon which the mortgaged premises were sold, was issued upon and fully warranted by a legal and valid judgment, confessed by Thomas Cromwell on the 13th day of September, A. D. 1820, to the plaintiff [574*] in the action **sci. fa. sur mortgage*, No. 136, August Term, 1820 (*The Bank of Pittsburg v. Cromwell*), for the sum of \$21,740.40. Of this the complainants have exhibited record evidence in the certificate of Edward Campbell, Jr., Prothonotary of the Court of Common Pleas of Alleghany County, which may be found on page 17 of the record. That confession of judgment is a part of the record of which he certifies a full exemplification, and is correctly and rightfully certified as a part of the record. (*Reed v. Hamet*, 4 Watts, 441; *Lewis v. Smith*, 2 S. & R., 142; *Shaw v. Boyd*, 12 Pa., 216; *Weatherhead's Lessee v. Baskerville*, 11 How., 360; 7 S. & R., 206; *Railroad Co. v. Howard*, 18 How., 881; *Cook v. Gilbert*, 8 S. & R., 568; *Wilkins v. Anderson*, 1 Jones, 399; *Sererenge v. Dayton*, 4 Wash. C. C., 698.)

II. If the entry of the judgment confessed by Cromwell in favor of the Bank (upon a docket of the court) were requisite to its validity as a judgment, and material to the power and authority of the sheriff in acting upon the *levari facias*, by virtue of which the mortgaged premises were sold, it being the duty of the prothonotary to make an entry of the judgment upon a docket of the court, and the rough docket of 1820 having been lost, it will, after the lapse of thirty years, be presumed in favor of the validity of the proceedings, and for the protection of purchasers at a public judicial sale; that such entry was made by the prothonotary in pursuance of his duty upon the docket now lost. (*Shaw v. Boyd*, 12 Pa., 216; *Owen v. Simpson*, 3 Watts, 88; *DeHaas v. Bunn*, 2 Barr, 338, 339; *Demarest v. Wynkoop*, 3 Johns Ch., 129, 146; 2 Pet., 162, 168.)

III. The amendment made by the prothno-

tary, in the case of *The Bank of Pittsburg v. Thomas Cromwell*, No. 136, August Term, 1820, by order of the court, on the 14th day of December, A. D. 1835, in the words and figures following, to wit:—

“September, 13th, 1820, judgment confessed per writing filed, signed by defendant for the sum of \$21,740.40, besides costs of suit, a release of all errors, without any stay of execution, and that the plaintiff shall have execution by *levari facias* by November Term, 1820.

H. H. PETERSON, Prothonotary.”
—was the legitimate exercise of an undoubted discretionary power, vested in the court, and is not the subject of revision in the Supreme Court of Pennsylvania, nor can its validity be properly questioned collaterally in the courts of the United States. (*Mara v. Quin*, 6 T. R. 1, 6, 7; *Murray v. Cooper*, 6 S. & R., 126, 127; *Ordronaux v. Prady*, 6 S. & R., 510; *Mar. Ins. *Co. v. Hodgson*, 6 Cranch, 217; [*575] *Griffeth v. Ogle*, 1 Binn., 172, 173; 1 Bur., 148, 226; *Owen v. Simpson*, 3 Watts, 87–89; *Maus v. Maus*, 5 Watts, 319; *DeHaas v. Bunn*, 2 Barr, 335–339; *Rhoads v. Commonwealth*, 3 Harr., 273, 276, 277; *Strickler v. Overton*, 3 Barr, 823; *Clymer v. Thomas*, 7 S. & R., 178, 180; *Chirac v. Reinicker*, 11 Wheat., 302; *Hamilton v. Hamilton*, 4 Barr, 193; *Latahaw v. Steinman*, 11 S. & R., 357, 358.)

IV. The exhibit marked “B.” filed with complainants’ bill, and prayed to be taken as a part of said bill, shows (page 9 of the record) a judgment in the case of *The Bank of Pittsburg v. Cromwell*, entered the 13th of September, 1820, for the sum of \$21,740.40, which fully authorized the *levari facias* and subsequent proceedings, estops the complainants from controverting its verity or validity, and is, in this proceeding, conclusive upon the rights of the parties. (*Rhoads v. Commonwealth*, 3 Harr., 273, 276, 277; *Strickler v. Overton*, 3 Barr, 825; *Mar. Ins. Co. v. Hodgson*, 6 Cranch, 217; *Chirac v. Reinicker*, 11 Wheat., 302; *U. S. v. Nourse*, 9 Pet., 8–28; *Voorhees v. Bank of the U. S.*, 10 Pet., 450, 478; *Elliott v. Piercet*, 1 Pet., 329, 340; *Thompson v. Tolmie*, 2 Pet., 157; *Clymer v. Thomas*, 7 S. & R., 178; *Levy v. Union Canal Co.*, 5 Watts, 105; *Hauer’s Appeal*, 5 W. & S., 275; *Drexel’s Appeal*, 6 Barr, 273; *Davidson v. Thornton*, 7 Barr, 181.)

The amendment cannot be collaterally impeached, though no notice is given to defendant. (*Robinson v. Zollinger*, 9 Watts, 170; *Tarbox v. Hays*, 6 Ib., 398.)

V. The complainants are, in equity, estopped from having the relief prayed in their bill, by the appearance of Thomas Cromwell before the prothonotary of Alleghany County, on the 13th of September, 1820, and confessing judgment before that officer in favor of the Bank of Pittsburg for the sum of \$21,740.40, besides costs, with a release of all errors, without stay of execution, and that plaintiff (the Bank of Pittsburg) have execution by *levari facias* to November Term, 1820—by the entry signed by him (page 16 of the record) on the *levari facias* which recites a valid judgment warranting the sale of the mortgaged premises commanded by said writ—by his subsequent acquiescence, for the period of thirty years, in the sale, without objection or complaint, especially after the expenditure of immense sums in improvement.

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and a great consequent enhancement in the value of the property. (*Dezell v. Odell*, 3 Hill, 215-219; 6 Adol. & Ell., 475; 33 Eng. Com. Law, 117; 10 Adol. & Ell., 90; 37 Eng. Com. Law, 58; *Hamilton v. Hamilton*, 4 Barr, 193; *Robinson v. Justice*, 2 Penn., 22; *Epley v. Withero*, 7 Watts, 163; *Carr v. Wallace*, 7 Ib., 400; 10 Barr, 530; 1 Story's Eq. Jur., sec. 387.) 576*] *VI. The Bank, and those claiming under it, having held the possession of the mortgaged premises for a period exceeding thirty years, without account for rents, issues and profits—without claim for such account by the mortgagor—without admission by the Bank during that entire period that it possessed a mortgage title only—the mortgagor and those claiming under him have lost the right of redemption and claim to account; and the title of the mortgagee and those claiming under the mortgagee, has become absolute in equity, whether the Bank entered as mortgagee or vendee. (2 Story's Eq. Jur., secs. 1028 a, 1520, and authorities there cited; *Moore v. Cable*, 1 Johns. Ch., 320; *Hughes v. Edwards*, 9 Wheat., 489, 497, 498; *Dezler v. Arnold*, 1 Sumn., C. C., 109; *Rafferty v. King*, 1 Keen, 602, 609, 610, 616, 617; *Demarest v. Wynkoop*, 3 Johns. Ch., 185; Story's Eq. Pl., 757; *Strimpler v. Roberts*, 6 Harr., 302; *Elemendorf v. Taylor*, 10 Wheat., 168; *Underwood v. Lord Courtown*, 2 Sch. & Lef., 71; *Dikeman v. Parish*, 6 Barr, 211; 1 Powell on Mortg., 302 a. n., 1.)

Mr. Justice McLean delivered the opinion of the court:

This is an appeal from the decree of the Circuit Court for the Western District of Pennsylvania.

The complainants represented in their bill that their ancestor, Thomas Cromwell, was seized of a tract of land, containing 170 acres, situate in the County of Alleghany, at or nearly adjoining the City of Alleghany, and also a certain lot of land situate in the City of Pittsburgh, which were mortgaged by the said Cromwell to secure a debt of \$21,000 which he owed to the Bank of Pittsburgh. That the Bank, on the 9th of June, 1820, caused a writ of *scire facias* to issue on the mortgage in the Court of Common Pleas, which had jurisdiction of the case, a service of which was accepted by the said Cromwell in writing, but that said writ was never legally returned. That without any judgment on the mortgage a writ of *levari facias* was issued, and the lands mortgaged were levied on and sold, and the Bank became the purchaser.

That on the 1st of December, 1835, the Bank, by its attorney, Bradford, moved the court for a rule that Thomas Cromwell, the defendant, to show cause on the second Monday of December, why the record of the case should not be amended on the docket, so that the judgment, which appears among the papers, should be entered as of September 13th, 1820. The rule was granted, and on the 14th of December, 1835, the same was made absolute, and judgment, *nunc pro tunc*, entered in favor of the Bank by the prothonotary of the court. 577*] *And on the 16th of March, 1836, the said Bradford moved that the *scire facias*, which had been issued should be amended, by inserting the 18th of September, 1820, instead

of the 13th of May of the same year, so as to conform to the judgment, and the motion was granted and the amendment made.

The judgment entered on the papers was as follows: The Bank of Pittsburgh *scire facias*. "In my proper person I this day appeared before the prothonotary in his office, and confessed judgment to the plaintiff for \$21,740.40, besides costs, with release of all errors, without stay of execution, and by that the plaintiff shall have execution by *levari facias* to November Term, 1820:" signed, Thomas Cromwell—which paper the clerk states was filed September 13th, 1820. This paper is alleged to be in the handwriting of the attorney, but the signature is admitted to be Cromwell's.

This authority, it is alleged, did not authorize the entry of a judgment, and that it was no part of the record, and cannot show the judgment, it being no more than parol proof; which cannot be received to establish a judgment, unless it be shown that the book containing the original entry had been lost.

The Bank is alleged to have been in possession, by itself and tenants, of the property sold; and that there being no judgment, the proceedings on the *scire facias* are void, and that in equity the Bank could only be considered as a mortgagee and compelled to account for the rents and profits, and be decreed to release the mortgage on receiving the money and interest on the debt due to the Bank as aforesaid.

The complainants are shown to be the heirs of Thomas Cromwell.

The Bank, in its answer, admits the facts as set forth in the bill as to the debt, the mortgage, the issuing of the *scire facias*, the judgment and the sale of the premises, &c., and alleges their validity under the laws of Pennsylvania. That the mortgage having been produced and the property sold, which, before the year 1829, was sold, and conveyed by the Bank to different individuals, and that it has ever since been in the hands of innocent purchasers; and it alleges there is no right of redemption under the circumstances, and it prays that the bill may be dismissed at the cost of the complainants.

From the proceedings in this case it appears, that the records of the court, where the proceedings on the mortgage were had, are kept loosely, and differently from the judicial records of the courts of common law in England or in this country. But the usage must constitute the law, under such circumstances, as a requirement of the forms observed elsewhere would affect titles under judicial sales to a ruinous extent.

*By the Judiciary Act of Pennsylv. [*578 vania, of the 18th of April, 1791, it is provided that prothonotaries shall have the power to sign all judgments, writs or process, &c., as they had for those purposes when they were justices of the court. Before this statute it appears that one of the justices of the court, having possession of the seal, signed all writs and judgments, took bail, &c., and performed the duties of prothonotary. And under the above statute, the prothonotary still exercises many judicial functions.

The confession of judgment with release of errors, and the agreement that execution should issue returnable to November term ensuing,

evinced a desire on the part of the mortgagor, to remove every obstruction to a speedy recovery of the demand by the Bank. The *scire facias* was returned to August Term, 1820. This mode of procedure on a mortgage was authorized by a statute, and was intended as a substitute for a bill in chancery, there being no such court in Pennsylvania.

The objection to this judgment is, that it was not entered upon the minutes kept by the prothonotary. It is in proof that these minutes or dockets were not carefully preserved by the prothonotary, and that the one which this entry should have been made is lost, but there is no positive proof that any such entry was made.

The prothonotary took the confession of the judgment in writing, and there can be no doubt he had power to do so. By the practice of the common pleas, it seems the judgment is entered sometimes on the declaration, at others on a paper filed in the cause. From the entry of judgment the prothonotary is enabled to make out the record in form when called for, but unless required, the proceedings are never made out at length. For this purpose it would seem that the paper filed, containing the confession of a judgment by the defendant, would afford more certainty than the abbreviated manner in which it was usually entered.

In *Reed v. Hamet*, 4 Watts, 441, the court say that judgments by confession, on the appearance of the party in the office, taken by the prothonotary, though not universal, have, from time immemorial, been frequent, and their validity has never been questioned.

Confession of judgment is a part of the record when made out, and it may be copied from the papers in the case. (*Cooper v. Gillett*, 8 S. & R., 588; *McCalmont v. Peters*, 13 S. & R., 196; *Lewis v. Smith*, 2 S. & R., 142; *Shaw v. Boyd*, 12 Pa., 216; 7 S. & R., 206.)

The docket being lost, under the circumstances the court would, if necessary, presume §79*] the entry of the judgment was made on it. This presumption would rest upon the fact that judgment was confessed with the release of all errors, and an agreement that execution should issue by the mortgagor, which execution did issue and on which the land was sold, shortly after which the mortgagor surrendered the possession and an acquiescence by him and his heirs for thirty years, would afford ample ground to presume that the prothonotary had performed the clerical duty of entering the judgment on the docket.

But the court had the power to make the amendment, which they did make, and which removed the objection, by causing the judgment to be entered *nunc pro tunc*. This was a duty discharged by the court, in the exercise of a discretion, which no court can revise. (*Clymer v. Thomas*, 7 S. & R., 178, 180; *Chirac v. Reinicker*, 11 Wheat., 402; *Lalshaw v. Stainman*, 11 S. & R., 857, 858; *Walden v. Craig*, 9 Wheat., 576.)

If there had been no judgment, under the circumstances, the complainants could have no right to redeem the premises.

The complainants file their bill to redeem the land, as mortgagors, which, by the improvements and the general increase of the value of real estate where the property is situated, has become of great value. Thirty years have

elapsed since it was sold, under the appearance, at least, of judicial authority. The property was purchased by the Bank for less than the amount of the debt. By the confession of judgment, with a release of all errors, and an agreement that execution should be issued, the mortgagor did all he could to facilitate the proceedings and to secure a speedy sale of the premises. The Bank, it seems, in the course of some six or nine years, sold the property in lots to different purchasers, for something more, perhaps, than its original debt and interest. For nearly twenty five years the purchasers have been in possession of the property, improving it and enjoying it as their own.

No dissatisfaction was expressed by the mortgagor, who voluntarily relinquished the possession, and none appears to have been expressed by his heirs, until the commencement of this suit. For thirty years the mortgagee and its grantees have been in possession of the property, no claim of right being set up for the equity of redemption, or on any other account. Under such circumstances a court of equity could give no relief had there been no legal judgment.

“Twenty years undisturbed possession, without any admission of holding under the mortgage, or treating it as a mortgage during that period, is a bar to a bill to redeem. But if within that period there be any account, or solemn acknowledgment of the mortgage as subsisting, it is otherwise. (*Dexter v. Arnold*, 1 Sumn. C. C., 109.)

*A mortgagor cannot redeem after a [*580 lapse of twenty years, after forfeiture and possession, no interest having been paid in the mean time, and no circumstances appearing to account for the neglect. (*Hughes v. Edwards*, 9 Wheat., 489.) Where the mortgagee brings his bill of foreclosure, the mortgage will, after the same length of time, be presumed to have been discharged unless there be circumstances to repel the presumption, as payment of interest, a promise to pay, an acknowledgment by the mortgagor that the mortgage is still existing, and the like. (*Ib.*)

In every point of view in which the case may be considered, it is clear that there is no ground of equity, on which the complainants can have relief.

The decree of the Circuit Court is affirmed, with costs.

ORDER.

This cause came to be heard on the transcript of the record from the Circuit Court of the United States for the Western District of Pennsylvania, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

CHARLES B. CALVERT and GEORGE H. CALVERT, *Plaintiffs in Error*,

v.

JOSEPH H. BRADLEY and BENJAMIN F. MIDDLETON.

One of joint tenants, lessors, cannot maintain action on covenants of lease—Liability of mortgagor of leasehold, not in possession, examined.

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Where a lease was made by several owners of a house, reserving rent to each one in proportion to his interest, and there was a covenant on the part of the lessee that he would keep the premises in good repair and surrender them in like repair, this covenant was joint as respects the lessors, and one of them (or two representing one interest) cannot maintain an action for the breach of it by the lessee.

The question examined, whether a mortgagee of a leasehold interest, remaining out of possession, is liable upon the covenants of the lease. The English and American cases reviewed and compared with the decisions of this court upon kindred points. But the court abstains from an express decision, which is rendered unnecessary by the application of the principle first above mentioned to the case in hand.

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington.

It was an action of covenant brought by the Calverts against Bradley and Middleton, who were the assignees of the unexpired term and property in the house for the purpose of paying **581*** the *creditors of the lessee. The lease was of the property called the National Hotel, in Washington, owned as follows:

	Shares.
George H. Calvert and Charles B. Calvert, jointly	205
Roger C. Weightman	66
Philip Otterback	22
William A. Bradley	20
Robert Wallach, represented by his guardian, Alexander Hunter,	2
Total shares	315

All of the above-named persons signed the lease.

The history of the case and the manner in which it came up are set forth in the opinion of the court.

It was argued by **Mr. Wylie** for the plaintiffs in error, and by **Messrs. Bradley and Lawrence** for the defendants.

The points made by the counsel for the plaintiffs in error were the following:

Two questions arise out of the record for the decision of this court:

First. Whether the plaintiffs have brought their action in proper form, without joining with the other covenantees.

Second. Whether the defendants, being assignees of the term, and having accepted the same for the purpose of fulfilling a trust, are liable on the covenants of the lease, as other assignees would be.

First point. In this case the covenant was with the covenantees jointly and severally; but as the two Calverts were the only parties whose interest in the property, and whose demise was joint, it was probably the intention of the parties that the term "jointly," in the covenants, was intended to apply to their case, and that as to all the rest the covenants were to be several. That construction, at least, will render all parts of the instrument consistent.

There is a distinction as to these terms "jointly and severally," when applied to covenantees, and when applied to covenantors. Covenantors may bind themselves jointly and severally, and they will be so bound, because that is their contract. But covenantees must bring their actions jointly or severally, according as their

interests are joint or several. The rule is laid down by Lord Denman in *Foley v. Addenbrooke*, 4 A. & E., 205, 206, in the following terms: "But the result of the cases appears to be this: that where the legal interest and cause of action of the covenantees are several, they should sue separately, though the covenant be joint in terms; but the several interest and the several ground of action must distinctly appear, as in the case of covenants *to pay separate [*582 rents to tenants in common upon demises by them."

So in *James v. Emery*, 8 Taunt., 244, it was said by *Ch. J. Gibbs*: "The principle is well known, and fully established, that if the interest be joint, the action must be joint, although the words of the covenant be several; and if the interest be several, the covenant will be several, although the terms of it be joint."

The more recent decisions all refer to *Slingsby's* case, 5 Rep., 18, 19, as the leading authority on this question; then to *Anderson v. Martindale*, 1 East, 497; *Eccleston v. Clipham*, 1 Saund., 158; *Wilkinson v. Lloyd*, 2 Mod., 82, besides the cases already referred to; *S. P. in Slater v. Magraw*, 12 G. & J., 265.

The rule, as above established, is subject to modification where one of the covenantees possesses no beneficial interest, in which case the action must be joint: for though the covenant be separate, the legal interest is joint. (*Anderson v. Martindale*, 1 East, 497; *Southcote v. Hoare*, 3 Taunt., 87; *Scott v. Godwin*, 1 Bos. & P., 67; which explains the decision in the case of *Bradburn v. Botfield*, 14 Mees. & W., 550.)

Second point. The question is whether a party who accepts an assignment of lease in a deed of trust, as a security for money lent, or debt incurred, is liable upon the covenants in the lease, as he would be if the assignment were absolute, though he has never occupied the premises in fact.

On this question the decision in *Eaton v. Jacques*, Douglas, 460, is directly adverse to the plaintiffs in this cause.

That decision, however, was at the time not acquiesced in by other judges, or by the profession, and has since been repeatedly overruled, and stands alone and unsustained by any other authority. (See the case of *Williams v. Bosanquet*, 1 Brod. & B., 238; *Platt on Cov.*, 3 Law. Lib., 488; *Taylor's Land. & Tenant*, 223; *Turner v. Richardson*, 7 East, 344; *Walter v. Cronly*, 14 Wend., 63.)

The doctrine of *Eaton v. Jacques* has been followed in New York (see 4 Kent's Com., 153, 154), but the doctrine of that case was repudiated as to the District of Columbia in the cases of *Stelle v. Carroll*, 12 Pet., 201; and *Van Ness v. Hyatt*, 13 Ib., 294.

Again, these trustees might themselves have sold and conveyed the leasehold interest in question. Suppose that had been done, would not the purchaser have taken the interest, subject to all the covenants in the lease? That cannot be questioned. If so, then the trustees must have held the lease in the same manner themselves; for they could not have assigned the lease *subject to a burden from [*583 which it was exempt whilst in their own hands.

Finally; how does the question stand in reference to considerations of justice and equity?

Suppose the lease had been one of great value. Blackwell chose to incur debts, and to make an assignment of all his property in the world, not only to secure particular favored creditors for debts already incurred, but for all liabilities which he might afterwards incur to them. The deed of trust is recorded, and protects this property from the just obligations imposed by the covenants in the lease. He holds the property by permission of the trustees from year to year, until the lease is about to expire, when he absconds, and abandons the premises in a dilapidated condition. The trustees then come forward, and under their deed of trust take possession of all the property on the premises, sell it, and pay the favored creditors in full from the proceeds; but because the lease is about to expire, they repudiate that, together with its covenants, because it was unprofitable to perform them. They had received and accepted the lease when it was made, and when it was valuable; but when it was about to expire they reject it, because to hold it, and perform its covenants, or to sell it, would be no longer to their advantage.

The points made by the counsel for the defendants in error were the following:

First. That the action is improperly brought, and the first vice in the pleading being in the plaintiffs' declaration, on general demurrer, the judgment of the court must be affirmed.

Second. Failing in this, they maintain that the matters set up in the second and third pleas, are properly pleadable to this action, and furnish a complete bar to plaintiffs' recovery.

First. As to the first general point, they say:

1. The action on the covenant to repair, in this demise, should have been a joint action by all the landlords.

If the covenant is expressly joint, the action must be joint; and if it be joint and several, or several only in the terms of it, yet, if the interest be joint, and the cause of action be joint, the action must be joint. (*Slingsby's case*, 5 Co., 18 [6]; *Eccleston v. Cliphsham*, 1 Saund., 153; 2 Keb., 338, 339, 347, 385; *Spencer v. Durant*, Comb., 115; 1 Show., 8; *Johnson v. Wilson*, Willes, 248; 7 Mod., 345; *Saunders v. Johnson*, Skin, 401; *Hopkinson v. Lee*, 14 Law J., N. S. 101; *Anderson v. Martindale*, 1 East, 497; *Kingdom v. Jones*, T. Jones, 150.)

And the reason is clearly given in *Anderson v. Martindale*, 1 East, 500, where the court say: If both parties were allowed to bring separate actions for the same interest, where only *584*] one *duty was to be performed, which of them ought to recover for the non-performance of the covenant?

If the covenant is equivocal, the interest of the parties will determine the right of action, and make it joint or several, as the interest and cause of action is joint or several. (*Sheppard's Touchstone*, by Preston, 166.)

If tenants in common make a lease to another, rendering to them a certain rent during the term, "the tenants in common shall have an action of debt against the lessee, and not divers actions, for that the action is in the personality. (Littleton, sec. 316.) And this because the demise is joint; but if the demise were several, whether in the same instrument or not, the action must be several for the rent, because the interest and cause of action is several. (*Wilkin-*

son v. Hall, 1 Bing. N. C., 713; 1 Scott, 675.)

The action must be joint in all matters that concern the tenements in common (and where the injury complained of is entire and indivisible) action on the case for nuisance, &c., detinue of charters—*warrantia chartarum*; case for ploughing lands whereby cattle were hurt; trespass for breaking into their house; breaking their inclosure or fences; feeding, wasting or defouling their grass; cutting down their timber; fishing in their piscary, &c.; because in these cases, though their estates are several, yet the damages survive to all; and it would be unreasonable to bring several actions for one single trespass; so if there be two tenants in common, and they make a bailiff, and one of them dies, the survivor shall have an action of account, for the action given to them for the arrearages of rent was joint. (See Archbold's Civil Plead., tit. Joinder of Plaintiffs, 54, and the cases cited; Bac. Abr., Dub. ed., 1786, tit. Joint Tenants and Tenants in Common, let. K., and cases cited.)

Bacon says: A makes a lease in which the lessee covenants to repair; lessor grants his reversion by several moieties to several persons, and lessee assigns to J. S. In an action of covenant by the grantees of the reversion for not repairing, the question was, if two tenants in common of reversion, could join in bringing an action of covenant against the assignee. And it was held, that they could and ought to join in this case, being a mere personal action according to Littleton's rule, which was held general, without relation to any privity of contract; and that the covenant being indivisible, the wrong and damages could not be distributed, because uncertain;" and he cites the same cases that Archbold does. Archbold says, after speaking of the several cases of personal actions in which they must join, and enumerating the cases in which they need not join, "But in all other actions where that which is sued for is not distributable, as in *covenant for [*585*] not repairing where the damages are not distributable because uncertain, tenants in common must join in the action."

In *Foley v. Addenbrooke*, 4 Q. B., 207, 3 G. & D., 64, Lord Denman says, "The result of the cases appears to be this, that when the legal interest and cause of action of the covenantees are several, they should sue separately, though the covenant be joint in its terms; but the several interest and several ground of action must distinctly appear."

And in *Bradburne v. Botfield*, 14 M. & W., 574, Parke, B., delivering the opinion of the court, says: "It becomes unnecessary to decide whether one of several tenants in common, lessors, could sue on a covenant with all to repair, as to which there is no decisive authority either way. That all could sue is perfectly clear;" and he cites the cases referred to by Bacon and Archbold. (See, also, *Simpson v. Clayton*, per Tindal, Ch. J., 4 Bing. N. C., 781, and *Wakefield v. Brown*, Q. B., Trin. T. 1846, 7 Law Times, 450.)

These two cases of *Foley v. Addenbrooke*, and *Bradburne v. Botfield*, are cases in point, and show that if there are covenants which are joint and several in the same instrument, and there is any one act or thing to be done for the

redress of which they may all join, and there are covenants where they may sue severally, then the action for a breach of that covenant in which all may join, must be a joint action, and the action for the breach of any covenant when all cannot join, must be a separate action. (See, also, *Sorsbie v. Park*, 12 M. & W., 146, and see the query put by Parke, B., at p. 566, 14 M. & W.) "If there is a demise by one tenant in common as to his moiety, and a demise by the other tenant in common as to the other moiety, by the same instrument, and there is a covenant to repair, I want you to show that each may sue separately."

In this case the covenants are joint and several; they all may join in an action for repairs; they all may join for a failure to pay taxes; they are all jointly interested in the possession and mode of enjoyment; the covenant for repairs affects only the reversioners' possession and enjoyment, not the title; it is a joint and several demise, and the covenant is to them jointly and severally for a thing which is not distributable. They must join.

The non-joinder of plaintiffs on oyer may be taken advantage of on the plea of *non est factum*, and is for the court. (*Eccleston v. Cliphsham*, 1 Saund., 154, n. 1.)

Second. The matters set up in the second and third pleas are properly pleadable in bar.

First plea. It is a conveyance of a leasehold interest to third parties upon trust to secure a debt.

586*] *The possession is to remain in the assignor until default, and he is to pay the rent.

The assignment is not signed or sealed by the assignees, and they never took possession.

Second plea. The plaintiffs themselves took possession before the expiration of the term, and on the default of the assignor, and offered the premises for rent, and made alterations and repairs before the expiration of the term.

It is a trust, and not simply a mortgage. It is a confidence, not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land, and to the person touching the land. (Co. Litt., 272, b.) While a mortgage is a debt by specialty (2 Atk., 435), secured by a pledge of lands of which the legal ownership is vested in the creditor, but of which in equity the debtor and those claiming under him remain the actual owner until foreclosure. (Coote on Mort., 1.)

Here is a special trust, ministerial in its character (Lewin on Trusts, 21, 22), in which the trustee holds the legal estate with a power to sell and convey for the benefit of the debtor and creditor. He takes no interest personally in the land. He has no right to the possession, except for the mere purposes of sale; he has no right to the rents, issues, profits or other income from the land. In all this he differs from a mortgagee.

He is a mere agent of both parties, as a means of holding and transmitting the title to others.

Can he be bound personally by the covenant of those from whom his authority emanates?

But it is said he is a mortgagee of a leasehold interest, and as such, is bound by a covenant to repair the mortgaged premises. And for this *Williams v. Bosanquet*, 1 Bro. & Bing., 238, is relied upon. It is undoubtedly true that that case has overruled *Eaton v. Jacques*, 2

Doug., 456, and is to be taken as the law of England at this day.

Eaton v. Jacques was decided 10th November, 1783. It proceeded on the ground that it was not an assignment of all the mortgagor's estate, title, right, &c.

Williams v. Bosanquet goes upon the ground that privity of estate existed by acceptance of the assignment, which it affirms to be equal to possession, and privity of contract by the assignment of a contract made with the lessee and his assigns, and thus all the estate, right, title, &c., of the mortgagee passed by the assignment.

"The American doctrine," says Mr. Greenleaf, note 1, p. 101, to the 2d vol. of his edition of Cruise, "as now generally settled, both at law and in equity, is, that as to all the world except the mortgagee the freehold remains in the mortgagor as it existed *prior to the [*587 mortgage." Of course he retains all his civil rights and relations as a freeholder, and may maintain any action for an injury to his possession or inheritance as before. And he cites numerous cases in Maine, Massachusetts, Connecticut, New York, Pennsylvania, and Maryland.

At page 110, note to Tit. 15, Mortgage, ch. 11, sec. 14, referring to the cases of *Eaton v. Jacques*, and *Bosanquet v. Williams*: "It is well settled, as a general doctrine, that a mere legal ownership does not make the party liable, in cases like those supposed in the text, without some evidence of his possession, also, or of his actual entry." It is clearly settled in the law of shipping, and he cites numerous cases, to which reference is here made, that fully sustain his proposition. And he proceeds to show that *Williams v. Bosanquet* rests on purely technical grounds. Reference is made to the whole note.

The case cited in that note from 4 Leigh, 69, went upon the ground that the parties came into equity, seeking to avail themselves of the trust, and the court decided they must take it charged with the burdens upon it.

In addition to the cases referred to in these notes, see the Maryland cases, viz.:

Payment of the mortgage debt re-invests the mortgagor with his title without release. (*Paxson's Lessee v. Paul*, 3 H. & McH., 400.)

The mortgagor's interest is subject to the attachment law of 1795. (*Campbell v. Morris*, 8 H. & McH., 535, 561, 562, 576.)

Being condemned and sold under execution, the purchaser has a right to redeem. (*Ford et al v. Philpot*, 5 H. & J., 812, and see the reasoning of the Chancellor in this case.) The mortgagor is the substantial owner, and so long as the equity of redemption lasts, may dispose of the property as he pleases.

Unless there is an agreement to the contrary, the mortgagee has a right to the possession of the mortgaged property, and trespass will not lie against him for taking it. (*Jamieson v. Bruce*, 6 G. & J., 72.)

But the mortgagee has an interest in the subject matter not absolute, but only commensurate with the object contemplated by the mortgage, the security of the debt. (*Evans v. Merriken*, 8 G. & J., 39.)

The devisees of the mortgagor have a right to call on the executor to redeem out of the surplus over specific legacies. (*Gibson v. McCormick*, 10 G. & J., 66.)

The interest of the mortgagee passes to his executor; that of the mortgagor to the heir. (*Chase v. Lockerman*, 11 G. & J., 185.)

These cases clearly establish the proposition **588*** of Lord Mansfield, *in *Eaton v. Jacques*, that the whole estate, right and interest, do not pass by the assignment of the lease, by way of mortgage.

They are supposed to be in conflict with *Stelle v. Carroll*, 12 Pet., 205, and *Van Ness v. Hyatt*, 13 Pet., 294-300.

As to the first; it only affirms the common-law doctrine that there can be no dower in an equitable estate.

As to the second; it affirms the common-law doctrine that legal estates only are subject to execution at law. But the case referred to at p. 300, as a manuscript case, and which is supposed to be the case of *Harris v. Alcock*, 10 G. & J., 226, shows that where there is judgment against a party having an equitable interest, and an execution issued and returned *nulla bona*, the judgment creditor may, through a court of equity, reach the equitable interests.

Again. The assignee of a lease by way of mortgage, where there is a covenant such as exists in this case, cannot be in, by privity of estate. (*Astor v. Hoyt*, 5 Wend., 603.) His liability arises solely from privity of estate—not of contract. (*Wilton v. Cronly*, 14 Wend., 63; and see *Platt on Cov.*, 493, 494, and cases in notes *v* and *t*.) He is liable, therefore, only for acts during his possession. (*Platt*, 494 and 503, and cases cited.)

Here the claim is for the whole period of the lease to the bringing of the suit. It is a covenant to keep in repair. It must be to keep it so while in his possession.

The third plea sets up, that the acts of plaintiff prevented or dispensed with any obligation of the defendants to repair.

As between the original parties, the duty can only be discharged by a release under seal. The assignee is in a different position. (*Platt*, 493, 494.) He may avoid it by assignment.

Here the assignment is by deed poll. The obligation of the assignee may be released by parol. A surrender of the premises without a release would be sufficient. The interference of the landlord, or any acts of ownership, by which the possession and enjoyment were prevented or impaired—especially the taking possession, offering to rent, and proceeding to make the repairs and such alterations as the landlord saw fit—amount to a waiver.

Third Point. This is an action of covenant. The foundation of such an action is the seal of the covenants.

The action will not lie on a deed poll against the grantee. (*Platt on Cov.*, 10-18, inclusive.)

Comyn on Land, and Ten., 273, citing *Mills v. Harris*, from Bayley, J., London, October sittings, 1820.

An action on the case by the lessee will lie against the assignee, but covenant will not lie. **589*** Here there was neither a sealing by the assignees, nor any possession under the lease; covenant will not lie.

The judgment of the Circuit Court was therefore right.

Mr. Wylie, in reply:

1st Point. The cause of action was several, because the interests were several. The inter-

ests being several, the covenants in the lease, it must follow, were several also. If the covenants were several, and they were broken, the breach and the cause of action must therefore be several. It would be a solecism to say that the cause of action was joint, upon a covenant, when the interests were several and the covenants several. The breach of the covenant and the cause of action must follow the quality of the covenant. If that be joint, the breach of it is joint; if it be several the breach of it is several.

The lessors were tenants in common of the premises in question. Tenants in common are joint but in one respect. They have neither the unity of time, nor of title, nor of interest; but only the unity of possession. They can join, therefore, in an action only when there has been an injury to their united possession; as in the case of trespass, waste, &c.

The breach of the covenant complained of in the present action, was an injury only to the interests of the several lessors, and not to their possession; and their interests being several the covenants and the breach of them must be several. The case of *Bradburne v. Botfield*, 14 M. & W., 574, which is so confidently relied upon by the defense, was decided upon an entirely different point. In that case the covenant was construed to be joint, because, as to one of the interests, there were trustees, and these trustees as well as their *cestuis que trust*, were parties to the demise and the covenant. Now, if the covenant had been construed to be several in that case, then these trustees and their *cestuis que trust* might have sued for the same breach, and it would have been impossible to tell for which of them judgment could be rendered. The question was, "What was to be done with the Foleys," and if both the trustees and their beneficiaries could sue separately for the same injury, then would follow the absurdity that "the whole was not equal to all its parts." And in the conclusion of the opinion delivered, the court expressly disclaim to decide the question now under examination. The very point was decided in *Wilkinson v. Loyd*, 2 Mod., 82. (See, also, notes *A* and *B* to *Ecceleston v. Clipham*, 1 Saund., 153; *James v. Emory*, 8 Taunt., 244; *Scott v. Godwin*, 1 Bos. & P., 67; 9 A. & E., 222.)

2d Point. The authorities already referred to leave no ground to doubt as to what is the doctrine of the common law on this *point. ***590** There can no longer be any question about that. The only question (if it can be a question at all) is, whether the common law, or some other law that we know nothing of, is the law of the District of Columbia. In some of the States this doctrine of the common law has been changed by express enactment, and in others the common law has been abrogated by a gradual course of judicial construction. But in this district there has been no enactment on the subject; nor has there been any gradual course of judicial construction to undermine and wear away the settled doctrines of the common law. And this court, in *Stelle v. Carroll*, and *Van Ness v. Hyatt*, already cited, has shown its determination to uphold the common law, against the invasion of new principles and doctrines, which had succeeded in driving out the common law from some of the States of the Union.

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Maryland is one of the States in which the common law has in this respect been changed by statute, since its cession to the United States of this portion of the District of Columbia; and the authorities of that State are therefore not to be considered in this case.

As to the position that an assignee of a lease is not liable on the covenants to repair, contained in it, that is a new doctrine, against which it is hardly necessary to refer to authorities.

Mr. Justice Daniel delivered the opinion of the court:

The plaintiffs brought their action of covenant, in the court above mentioned, against the defendants, to recover of them in damages the value of repairs made by the plaintiffs upon certain property in the City of Washington, known as the National Hotel, which had been, on the 17th of April, 1844, leased by the plaintiffs, together with Roger C. Weightman, Philip Otterback, William A. Bradley, and Robert Wallach, to Samuel S. Coleman, for the term of five years. This property was owned by the lessors in shares varying in number as to the several owners; and by the covenant in the deed of demise, the rent was reserved and made payable to the owners severally in proportion to their respective interests, the interests of the plaintiffs only in the shares owned by them being joint. In addition to the covenant on the part of the lessee for payment to each of the lessors of his separate proportion of the rent, there is a covenant by the lessee for the payment of the taxes and assessments which might become due upon the premises during the term, and a further covenant that he would, during the same time, "keep the said hotel with the messuages and appurtenances in like good order and condition as when he received the same, and would, at the expiration of the said term, surrender them in like good repair." On the 1st of January, 1847, the lessee, Coleman, assigned all **591*** his interest in the lease to Cornelius W. Blackwell, who entered and took possession of the premises. On the 17th of February, 1848, Blackwell, by deed poll, conveying to the defendants, Bradley and Middleton, all the goods, chattels, household stuffs, and furniture then upon the premises, together with the good will of the said hotel and business, and the rest and residue of the unexpired term and lease of said Blackwell in the premises—upon trust to permit the said Blackwell to remain in possession and enjoyment of the property until he should fail to pay and satisfy certain notes and responsibilities specified in the instrument; but upon the failure of Blackwell to pay and satisfy those notes and responsibilities, the trustees were to take possession of the property conveyed to them, and to make sale thereof at public auction for the purposes in the deed specified. Blackwell remained in possession after the execution of the deed to the defendants, until the 6th of March, 1849, when he absconded, leaving a portion of the rent of the premises in arrear. The property having been thus abandoned by the tenant, an agreement was entered into between the owners of the property and the defendants, that a distress shall not be levied for the rent in arrear, but that the defendant should sell the effects of

Blackwell left upon the premises, and from the proceeds thereof should pay the rent up to the 1st of May, 1849—the defendants refusing to claim or accept any title to, or interest in, the unexpired portion of the lease, or to take possession of the demised premises. In this state of things the plaintiffs, being the largest shareholders in those premises, proceeded to take possession of and to occupy them, and to put upon them such repairs as by them were deemed necessary, and have continued to hold and occupy them up to the institution of this suit. The action was brought by the plaintiffs alone, and in their own names, to recover their proportion of the damages alleged by them to have been incurred by the breach of the covenant for repairs contained in the lease to Coleman, which was assigned to Blackwell, and by the latter to the defendants by the deed poll of February 17th, 1848.

To the declaration of the plaintiffs the defendants pleaded four separate pleas. To the 3d and 4th of these pleas the defendants demurred, and as it was upon the questions of law raised by the demurrer to these pleas, that the judgment of the court was given, we deem it unnecessary to take notice of those on which issues of fact were taken. The 3d and 4th pleas present substantially the averments that the deed from Blackwell to the defendants was simply and properly a deed of trust made for the security of certain debts and liabilities of Blackwell, therein enumerated; and giving power to the defendants in the *event [**592** of the failure on the part of Blackwell to pay and satisfy those responsibilities, to take possession of the subjects of the trust and dispose of them for the purposes of the deed. That this deed was not in law a full assignment of the term of Blackwell in the demised premises, and never was accepted as such, but on the contrary was always refused by the defendants as such; and that the plaintiffs, by their own acts, would have rendered an acceptance and occupation by the defendants, as assignees of the term, impracticable, if such had been their wish and intention, inasmuch as the plaintiffs themselves had, upon the absconding of Blackwell, the assignee of Coleman, entered upon and occupied the demised premises, and held and occupied the same up to the institution of this action; and had, during that occupancy and of their own will, made such repairs upon the premises as to the plaintiffs has seemed proper or convenient.

Upon the pleadings in this case two questions are presented for consideration; and comprising, as they do, the entire law of the case, its decision depends necessarily upon the answer to be given to those questions.

The first is, whether the plaintiffs in error, as parties to the deed of covenant on which they have declared, can maintain their action without joining with them as co-plaintiffs the other covenantees.

The second is, whether the defendants in error, in virtue of the legal effect and operation of the deed to them from Blackwell, the assignee of Coleman, and without having entered upon the premises in that deed mentioned, except in the mode and for the purposes in the 3d and 4th pleas of the defendants set forth, and admitted by the demurrer, were bound for

the fulfillment of all the covenants in the lease to Coleman, as regular assignees would have been.

The affirmative of both these questions is insisted upon by the plaintiffs.

The converse as to both is asserted by the defendants, who contend as to the first, that the covenants for repairs declared on and of which profert is made, is essentially a joint contract, by and with all the covenantees, and could not be sued upon by them severally; and that the demurrer to the 8d and 4th pleas, reaching back to and affecting the first vice in the pleadings, shows upon the face of the declaration, and of the instrument set out *in hæc verba*, a restriction upon the plaintiffs to a joint interest, or a joint cause of action only with all their associates in the lease.

2. That the deed from Blackwell to the defendants, being a conveyance of a leasehold interest in the nature of a trust for the security of a debt, by the terms of which conveyance 593* the "grantor was to remain in possession till default of payment, and the grantees not having entered into possession of the demised premises, which were entered upon and held by the plaintiffs themselves, the defendants could not be bound, under the covenant for repairs, to the premises never in their possession, and over which they exercised no control.

The second of the questions above mentioned, as presented by the pleadings, will be first adverted to. This question involves the much controverted and variously decided doctrine as to the responsibility of the mortgagee of leasehold property, pledged as security for a debt, but of which the mortgagee has never had possession, for the performance of all the covenants to the fulfillment whereof a regular assignee of the lease would be bound.

With regard to the law of England, as now settled, there seems to be no room for doubt that the assignee of a term although by way of mortgage or as a security for the payment of money, would be liable under all the covenants of the original lessee. In the case of *Eaton v. Jacques*, reported in the 2d Vol. of Douglas, p. 456, this subject was treated by Lord Mansfield with his characteristic clearness and force; and with the strong support of *Justices Willes*, *Ashurst* and *Buller*, he decided that the assignee of a lease by way of mortgage or as a mere security for money, and who had not possession, is not bound for or by the covenants of the lessee. The language of his Lordship in this case is exceedingly clear. "In leases," said he, "the lessee, being a party to the original contract, continues always liable notwithstanding any assignment; the assignee is only liable in respect of his possession of the thing. He bears the burden while he enjoys the benefit, and no longer; and if the whole is not passed, if a day only is reserved, he is not liable. To do justice, it is necessary to understand things as they really are, and construe instruments according to the intent of the parties. What is the effect of this instrument between the parties? The lessor is a stranger to it. He shall not be injured, but he is not entitled to any benefit under it. Can we shut our eyes and say it is an absolute conveyance? It was a mere security, and it was not, nor ever is meant that possession shall be taken until the

default of payment and the money has been demanded. The legal forfeiture has only accrued six months, and if the mortgagee had wanted possession he could not have entered *via facti*. He must have brought an ejectment. This was the understanding of the parties, and is not contrary to any rule of law." The same doctrine was sanctioned in the case of *Walker v. Reeves*, to be found in a note in Douglas, Vol. II., p. 461. But by the more recent case of *Williams v. Bosanquet*, it has been decided that when a "party takes an assignment of [594] a lease by way of mortgage as a security for money lent, the whole interest passes to him, and he becomes liable on the covenant for the payment of the rent, though he never occupied or became possessed in fact. This decision of *Williams v. Bosanquet* is founded on the interpretation put upon the language of Littleton in the fifty-ninth and sixty-sixth sections of the treatise on Tenures—in the former of which that writer remarks, "that it is to be understood that in a lease for years by deed or without deed, there needs no livery of seisin to be made to the lessee, but he may enter when he will, by force of the same lease;" and in the latter, "also if a man letteth land to another for term of years, albeit the lessor dieth before the lessee entereth into the tenements, yet he may enter into the same after the death of the lessor, because the lessee by force of the lease hath right presently to have the tenements according to the force of the lease." And the reason, says Lord Coke, in his commentary upon these sections, is, "because the interest of the term doth pass and rest in the lessee before the entry, and therefore the death of the lessor cannot devert that which was vested before." True it is, he says, "that to many purposes he is not tenant for years until he enter, as a release to him is not good to increase his estate before entry" (Co. Litt., 46, b.) Again it is said by this commentator, that "a release which inures by way of enlarging an estate cannot work without possession; but by this is not to be understood that the lessee hath but a naked right, for then he could not grant it over; but seeing he hath *entire term* before entry, he may grant it over, albeit for want of actual possession he is not capable of a release to enlarge his estate." Whatever these positions and the qualifications accompanying them may by different minds be thought to import, it is manifest, from the reasoning and the references of the court in the case of *Williams v. Bosanquet*, that from them have been deduced the doctrine ruled in that case, and which must be regarded as the settled law of the English courts, with respect to the liabilities of assignees of leasehold estate. But clearly as this doctrine may have been established in England, it is very far from having received the uniform sanction of the several courts of this country, nor are we aware that it has been announced as the settled law by this court. Professor Greenleaf, in his edition of Cruise, Title 15, Mortgage, sec. 13, 16, p. 111, inclines very decidedly to the doctrine in *Eaton v. Jacques*. After citing the cases of *Jackson v. Willard*, 4 Johns., 41; of *Whit v. Bond*, 16 Mass., 400; *Waters v. Stewart*, 1 Cain. Cas., 47; *Cushing v. Hurd*, 4 Pick., 253, ruling the doctrine that a mortgagee out of

possession has no interest which can be sold under **595***] der execution, but that the equity of *redemption remaining in the mortgagor is real estate, which may be extended or sold for his debts; and farther, that the mortgagee derives no profit from the land until actual entry or other exertion of exclusive ownership, previous to which the mortgagor takes the rents and profits without liability to account, Mr. Greenleaf comes to the following conclusion, namely: "On these grounds it has been held here as the better opinion, that the mortgagee of a term of years, who has not taken possession, has not all the legal right, title and interest of the mortgagor, and therefore is not to be treated as a complete assignee so as to be chargeable on the real covenants of the assignor."

In the case of *Astor v. Hoyt*, reported in the 5th of Wend., 603, decided after the case of *Williams v. Bosanquet*, and in which the latter case was considered and commented upon, the Supreme Court of New York, upon the principle that the mortgagor is the owner of the property mortgaged against all the world, subject only to the lien of the mortgagee, declare the law to be, "that a mortgagee of a term not in possession, cannot be considered as an assignee, but if he takes possession of the mortgaged premises he has the estate, *cum onere*. In the case of *Walton v. Cronly's Administrator*, in the 14th of Wend., p. 63, upon the same interpretation of the rights of the mortgagor, which was given in the former case, it was ruled that a mortgagee who has not taken possession of the demised premises, is not liable for rent, and that the law in this respect is in New York different from what it is in England. It is contended on behalf of the plaintiff in error, that the doctrine in *Eaton v. Jacques*, and in the several decisions from the state courts in conformity therewith, is inconsistent with that laid down by this court in the cases of *Stelle v. Carroll*, in the 12th of Pet., 201, and of *Van Ness v. Hyatt et al.*, in the 18th of Pet., 294. With regard to this position it may be remarked, that the questions brought directly to the view of the court, and regularly and necessarily passed upon in these cases, did not relate to the rights and responsibilities of the assignee of a term, or to what it was requisite should be done for the completion of the one or the other. Giving every just latitude to these decisions, all that can be said to have been ruled by the former is, that by the common law a wife is not dowerable of an equity of redemption; and by the latter, that an equitable interest cannot be levied upon by an execution at law. This court, therefore, cannot properly be understood as having, in the cases of *Stelle v. Carroll* and *Van Ness v. Hyatt*, established any principle which is conclusive upon the grounds of defense set up by the third and fourth pleas of the defendants. Nor do we feel called upon, in the present case, to settle that principle; for let it be supposed that **596***] such a principle has *been most explicitly ruled by this court, still that supposition leaves open the inquiry, how far the establishment of such a principle can avail the plaintiffs in the relation in which they stand to the other covenantees in the deed from Coleman. In other words, whether the covenant for repairs,

contained in that deed, was not essentially a joint covenant; one in which the interest was joint as to all the grantees, and with respect to which, therefore, no one of them, or other portion less than the whole, could maintain an action.

The doctrines upon the subjects of joint and several interests under a deed, and of the necessity or propriety for conformity with remedies for enforcing those interests to the nature of the interests themselves, have been maintained by a course of decision as unbroken and perspicuous, perhaps, as those upon which any other rule or principle can be shown to rest. They will be found to be the doctrines of reason and common sense.

Beginning with *Windham's case*, 3d Reports, part 5th, 6 a, 6 b, it is said that joint words will be taken respectively and severally, 1st. With respect to the several interests of the grantors. 2d. In respect of the several interests of the grantees. 3d. In respect to, that the grant cannot take effect but at several times. 4th. In respect to the incapacity and impossibility of the grantees to take jointly. 5th. In respect of the cause of the grant or *ratione subjecte materie*. The next case which we will notice, is *Slingsby's case* in the same volume, 18 a, 18 b, decided in the Exchequer. In this case it was ruled that a covenant with several *et cum qualibet* and *qualibet eorum*, is a several covenant only where there are several interests. Where the interest is joint the words *cum qualibet et qualibet eorum* are void, and the covenant is joint. In the case of *Eccleston and Wife v. Cliphsham*, the law is stated, that although a covenant be joint and several in the terms of it, yet if the interest and cause of action be joint, the action must be brought by all the covenantees. And on the other hand, if the interest and cause of action be several, the action may be brought by one only. (1 Saund., 153.) The learned annotator upon Sir Edmund Saunders, in his note to the case of *Eccleston v. Cliphsham* has collected a number of cases to this point and others which go to show that where there are several joint covenantees, and one of them shall sue alone without averring that the others are dead, the defendant may take advantage of the variance at the trial, and that the principle applicable to such a case is different from that which prevails where the action is brought against one of several joint covenantors or obligors who can avail themselves of the irregularity by plea in abatement only. The same rule with regard to the construction of covenants and to the legal rights and *position **597**] of the parties thereto in courts of law may be seen in the cases of *Anderson v. Martindale*, 1 East, 497; *Withers v. Bircham*, 3 B. & C., 255; *James v. Emery*, 5 Price, 583.

It remains now to be ascertained how far the parties to the case before us come within the influence of principles so clearly defined, and so uniformly maintained in the construction of covenants and in settling the legal consequences flowing from that interpretation. The instrument on which the plaintiffs instituted their suit was a lease from the plaintiffs and various other persons interested in different proportions in the property demised, and by the terms of which lease rent was reserved and made payable to the several owners of the premises in the

proportion of their respective interests. So far as the reservation and payment of rent to the covenantees, according to their several interest, made a part of the lease, the contract was several, and each of the covenantees could sue separately for his portion of the rent expressly reserved to him. But in this same lease there is a covenant between the proprietors and the lessee, that the latter shall keep the premises in good and tenantable repair, and shall return the same to those proprietors in the like condition, and it is upon this covenant or for the breach thereof that the action of the plaintiffs has been brought. Is this a joint or several covenant? It has been contended that it is not joint, because its stipulations are with the several covenantees jointly and severally. But the answer to this position is this: Are not all the covenantees interested in the preservation of the property demised, and is any one or a greater portion of them exclusively and separately interested in its preservation? And would not the dilapidation or destruction of that property inevitable affect and impair the interests of all, however it might and necessarily would so affect them in unequal amounts?

It would seem difficult to imagine a condition of parties from which an instance of joint interests could stand out in more prominent relief. This conclusion, so obvious upon the authority of reason, is sustained by express adjudications upon covenants essentially the same with that on which the plaintiffs in this case have sued.

The case of *Foley v. Addenbrooke*, 4 Ad. & Ell., 197. The declaration in covenant, stated that Foley and Whitby had demised to Addenbrooke, lands and iron mines of one undivided moiety, of which Foley was seised in fee; Addenbrooke covenanting with Foley and Whitby and their heirs to erect and work furnaces and to repair the premises and work the mines; that Foley was dead, and plaintiff, Foley's heir, and breaches were assigned as committed since the death of Foley; that Adden-
598*] brooke, "and since his death his executors, had not worked the mines effectually, nor repaired the premises, nor left them in repair. To this declaration it was pleaded, that Whitby, one of the tenants in common, and one of the covenantees, who was not joined in the action, still survived. This plea was sustained upon special demurrer, and Lord Denman, in delivering the opinion of the court, says: "In the present case the covenants for breach, of which the action is brought, are such as to give to the covenantees a joint interest in the performance of them; and the terms of the indenture are such that it seems clear that the covenantees might have maintained a joint action for the breach of any of them. Upon this point the case of *Kitchen v. Buckley*, 1 Lev., 109, is a clear authority; and the case of *Petrie v. Bury*, 3 B. & C., 358, shows that if the covenantees could sue jointly, they are bound to do so."

The case of *Bradburne v. Botfield*, in the Exchequer, reported in the 14th of Mees. & W., was an action of covenant upon a lease by seven different lessors jointly, according to their several rights and interests in certain coal mines, to the defendant, yielding and paying certain rents to the lessors respectively, and to their

respective heirs and assigns, according to their several and respective estates, rights and interests in the premises; and the defendant covenanted with all the above parties and with each and every of them, their and each and every of their heirs, executors, administrators and assigns, to repair the premises, and to surrender them in good repair to the lessors, their heirs and assigns respectively at the end of the term. The declaration then deduced to the plaintiff a title to the moiety of one of the lessors, and alleged as breaches the non repair of the premises and the improper working the mines. To this declaration it was pleaded, that one of the original lessors, who had survived all the other covenantees, was still living. It was held, upon demurrer, that the covenants for repairs and for working the mines were in their nature joint and not several, and that the surviving covenantee ought to have brought the action. Baron Parke, who delivered the opinion of the court, thus speaks: "We have looked, since the argument, into the lease now set out on oyer, and into all the authorities cited for the plaintiff, and are still of opinion that he cannot recover upon the covenants stated in the declaration. It is impossible to strike out the name of any covenantee, and all the covenantees must therefore necessarily sue upon some covenant; and there appear to us to be no covenants in the lease which are of a joint nature, if those declared upon are not, or which would be in gross, if the persons entitled to the legal estate had had alone demised; for all relate to and affect the quality of the subject of the demise, or to the mode of enjoying of it."

*We regard the cases just cited as [*599 directly in point, and as conclusive against the claim of the plaintiffs to maintain an action upon the covenant for repairs in the lease to Coleman, apart from and independently of the other covenantees in that lease jointly and inseparably interested in that covenant with the plaintiffs. We therefore approve the judgment of the Circuit Court, that the plaintiffs take nothing by their writ and declaration, but that the defendants recover against them their costs about their defense sustained, as by the said court was adjudged; and we order the said judgment of the Circuit Court to be affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the Circuit Court in this cause be, and the same is hereby affirmed, with costs.

SAMUEL H. EARLY, *Plaintiff in Error*,
v.

JOHN ROGERS JR., and JOSEPH ROGERS,
Survivors, &c., of ROGERS & BROTHERS,
Defendants.

Whether attachment from state court can obstruct collection of debt by U. S. Court—Practice—Jurisdiction.

Where a controverted case was, by agreement of the parties, entered settled, and the terms of settlement were that the debtor should pay by a limited day, and the creditor agreed to receive a less sum than that for which he had obtained a judgment; and the debtor failed to pay on the day limited, the original judgment became revived in full force.

The original judgment having omitted to name interest, and this court having affirmed the judgment as it stood, it was proper for the court below to issue an execution for the amount of the judgment and costs, leaving out interest.

Where the debtor alleged that process of attachment had been laid in his hands as garnishee, attaching the debt which he owed to the creditor in question; and moved the court to stay execution until the rights of the parties could be settled in the State Court which had issued the attachment, and the court refused so to do, this refusal is not the subject of review by this court. The motion was addressed to the discretion of the court below, which will take care that no injustice shall be done to any party.

This court expresses no opinion, at present, upon the two points, namely:

1. Whether an attachment from a State Court can obstruct the collection of a debt by the process of the courts of the United States; or,

2. Whether a writ of error was the proper mode of bringing the present question before this court.

THIS case was brought up by writ of error from the District Court of the United States for the Western District of Virginia. **600*** On the 29th of June, 1849, John Rogers, jr., and Joseph Rogers, of Cincinnati, and citizens of the State of Ohio, survivors of the firm of Rogers & Brothers, the deceased partner of which was Alfred Rogers, late of St Louis, in Missouri, sued Samuel H. Early in the District Court of the United States for the Western District of Virginia.

Early filed a plea in abatement, setting forth certain writs of foreign attachment against Rogers and Rogers, as non-resident defendants, and against himself and others, as home defendants. This plea was afterwards withdrawn, and the general issue pleaded.

At September Term, 1850, the cause came on for trial, when a verdict was found for the plaintiffs in the sum of \$12,115, on which verdict the following judgment was entered:

Judgment: Came again the parties by their attorneys, and thereupon came also the jury impaneled and sworn in this cause, in pursuance of their adjournment, and having retired to their chamber, after some hours returned into court, and upon their oaths do say, that they find the issues for the plaintiffs, and assess their damages to \$12,115. Whereupon the defendant moved the court to set aside the said verdict, and award him a new trial in the premises; which motion, being argued and considered, is overruled. Therefore it is considered by this court, that the plaintiffs recover against the defendants the damages aforesaid, in the form aforesaid ascertained, and their costs about their suit by them in this behalf expended; and the said defendant in mercy, &c.

A bill of exceptions having been taken by Early, the case was brought up to this court.

At December Term, 1851, the case was entered "settled" upon the docket of this court, the following agreement filed, and judgment entered, namely:

Agreement. In order to put an end to the litigation between the above parties, and as a compromise, the matters in difference between
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them, that Samuel H. Early shall pay to the said John Rogers and Joseph Rogers, between this and the first day of September next, the sum of \$10,000, which sum of \$10,000 the said John Rogers and Joseph Rogers agree to receive of the said Samuel H. Early in full satisfaction and discharge of the original judgment entered against the said Early for the sum of about \$12,500, in said District Court of the United States for the Western District of Virginia, and in full satisfaction and discharge of all claims and demands which said John Rogers and Joseph Rogers held against said Early in any account arising out of the dealings on which said litigation is founded.

*And it is further agreed, that the original judgment rendered in said District Court of the United States for the Western District of Virginia, and which is taken up to the Supreme Court of the United States on a writ of error, which is now pending in that court, may be entered *affirmed* in said Supreme Court at its present session, subject to the above agreement; that is, the judgment, although affirmed, shall not be obligatory for more than the above sum of \$10,000, to be paid as aforesaid; and as soon as that sum is paid, the said judgment shall be entered *satisfied*, provided the amount is paid on or before the first day of September next. Costs to be paid by Early.

May 18th, 1852.

SAMUEL H. EARLY,
By CHARLES FOX, his attorney.
JOHN ROGERS,
JOSEPH ROGERS,
By JAMES F. MELINE, their attorney.

ORDER.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs, in conformity to the preceding stipulations; and that the said plaintiffs recover against the said defendant, Samuel H. Early, \$129.52 for their costs herein expended, and have execution therefor.

Upon the going down of the mandate an execution was issued by the District Court, in January, 1853, as follows:

Amount of judgment,	\$12,115.00
Costs in District Court,	246.50
Interest from the 7th of December, 1850,	
the date of the writ of error issued by the Supreme Court, to the 7th of December, 1851, date of the mandate,	751.60
Cases in Supreme Court,	129.52
Cost of writ of execution,	3.37

In April, 1853, a motion was made by Rogers to amend the judgment for \$12,115, by adding "with interest till paid," but this motion was overruled.

At the same term, and on the motion of Samuel H. Early, a rule was awarded him returnable here forthwith against John Rogers, Jr., and Joseph H. Rogers, requiring them to show cause why the execution heretofore sued out on the mandate of the Supreme Court of the United States, awarded on a judgment of the said Supreme Court in favor of said John and Joseph Rogers [*602] against said Samuel H. Early, which execution bears date of the 11th of January,

1853, and was returnable at March rules, 1853, shall not be quashed. And also to show cause why execution on the said judgment of the said Supreme Court should not be limited to the sum of \$10,000, with interest thereon from the 1st of September, 1852, and the costs; and also why the same shall not be stayed until the further order of the court, on account of certain attachments and suggestions.

Whereupon the said John Rogers, Jr., and Joseph H. Rogers appeared in answer to the said rule, and the evidence and arguments of counsel being heard, it is considered by the court that the said execution be quashed, but that the said John Rogers, Jr., and Joseph H. Rogers be allowed to sue out their execution against the said Early for the sum of \$12,115, and \$246.56 costs of the judgment in this court, and \$129.52, the costs in the Supreme Court aforesaid, but without interest, and without damages on said sums.

Mem.—That on the trial of the said rule, the said Samuel H. Early tendered a bill of exceptions to opinions of the court delivered on the said trial, in the following words and figures, to wit:

Bill of exceptions.—The bill of exceptions contained eight records of cases of attachments, and concluded as follows:

Whereupon, on consideration of said rules to show cause why the execution should not be limited to the sum of \$10,000, principal of said judgment, &c.; and why execution should not be stayed, &c.; the court was of opinion to discharge and disallow each of said rules, which was done accordingly; to each of which opinions and judgments of the court the defendant, Early, by his counsel, excepts, and prays that then his exceptions may be signed, sealed and reserved to him.

JOHN W. BROCKENBROUGH, [SEAL.]

Upon this bill of exceptions the case came up to this court, and was argued by *Mr. Mason*, for the plaintiff in error, and by *Mr. Shase* for the defendants in error.

Mr. Mason, for the plaintiff in error, made the following points:

The errors complained of, and for which it is now asked to reverse the last judgment of the court below, are:

First. Because the execution should have been limited to the sum of \$10,000, or to be discharged by payment of that sum, under the agreement of the parties.

Second. Execution should have been stayed until the attachments set out in the bill of exceptions were finally disposed of.

603*] *On the first point—

In allowing execution in the court below, that court was necessarily constrained to construe the contract between the parties of the 18th of May, 1852, on which the affirmance of the judgment was rendered by the Supreme Court.

It is recited in this contract (pp. 12, 13, of the printed record), that as “a compromise of the matters in difference,” between the parties, it was agreed that Early should pay to Rogers the sum of \$10,000 on or before a given day, and which sum the latter agreed to receive, “in full satisfaction and discharge of the original judgment,” &c., and “in full satisfaction and

discharge of all claims and demands,” which Rogers held against Early, “arising out of the dealings on which said litigation is founded;” and further, that the original judgment on which an appeal was then depending in the Supreme Court should “be entered, affirmed, subject to the above agreement.” This is the whole contract. What follows is, on its face, only explanatory, and should not have been construed to convert the time of payment into a penalty or forfeiture.

The contract must be construed as a whole, and the intention of the parties thus gathered, is to be carried into effect.

It is submitted, that it was not the agreement of the parties that so heavy a forfeiture as the sum of \$2,115 should be incurred on a compromise merely by failure to pay at the day, nor is it in any manner susceptible of such construction, unless it be taken from the last clause in the nature of a proviso. But this clause does not necessarily require such construction; referring it to the contract, it relates to the entering of satisfaction on the judgment and to that only, so that the explanatory *addendum* would read thus: the judgment, although affirmed, shall not be obligatory for more than the above sum of \$10,000, to be paid as aforesaid, and the judgment shall be entered satisfied if that sum is paid on the day appointed for its payment herein above.

In support of this view, I refer to Story's Equity, Vol. II., secs. 18, 14, where the principle is stated, “that whenever a penalty is inserted merely to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument, and the penalty is deemed only an accessory,” &c.

On the first point, then, it is respectfully submitted that the judgment should be reversed, because execution was allowed for a sum exceeding that stipulated in the contract of the parties, and subject to which contract the judgment had been affirmed.

*On the second point—

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It is submitted, that no execution should have issued until the attachment set out in the bill of exceptions had been disposed of.

By the statutes of Virginia the attaching creditors obtained a lien on the property of their debtor from the time the process was served, and the garnishee (Early) could not pay to the defendant in error, without violating the law, and subjecting himself to the risk of paying twice. (Code of Va., 1849, p. 603, secs. 11, 12; p. 605, sec. 17.)

So entirely is the garnishee protected, in cases of attachment, from the action of the absent debtor, that he is not even responsible for interest, whilst, pending the attachment, he is restrained from parting with the effects in his hands. (1 Sergeant on Attachments, 169; *Fitzgerald v. Caldwell*, 2 Dall., 215; S. C., 4 N. 351; *Willings v. Consequa*, 1 Pet. C. C. 172; *Erskine v. Staley*, 13 Leigh, 406.)

The reason why the garnishee is protected from interest is, that he is not allowed to part with the principal until the rights of parties are settled under the attachment.

In allowing these attachments from a State Court to be regarded by the Federal Court, when asked to direct execution to be issued against

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the garnishee, there is no collision between the respective judiciaries. Far less is the action of the Federal Court made subordinate to that of the state. The citizen is fully subject to the process of each, on matters within their respective jurisdictions; and although it were conceded that the State Court must yield, when a Federal Court has taken jurisdiction properly, yet this must be in a case when the right litigated, or the nature of the controversy is the same in both courts, and where, unless one jurisdiction was paramount, there would arise collision. Such is in no manner the case here. The Federal Court, in disallowing executions, because of the pendency of these attachments, decides only that the judgment creditor is not entitled to execution, because, since the judgment was rendered, other rights had intervened—rights not asserted to question or challenge the authority which rendered the judgment, but, in fact, affirming such authority, and relying upon it.

The judgment against Early, established a property in Rogers, which property the creditors of the latter, through the State Court, seek to subject to payment of their debts, and they may do this without the slightest interference with the authority of the court that rendered the judgment.

I am informed by counsel on the other side, that he shall ask the court to correct the judgment of affirmance, so as to allow *interest on the amount of the verdict, from its date. On this I have to say, that if it be error, it was error in the judgment of the court below, and from which there is no appeal, and of course cannot be corrected here.

But if I am right in my construction of the contract, under which the judgment was affirmed, the parties have waived the interest, which the law of Virginia would attach to a verdict, by agreeing to a sum without interest.

Mr. Chase, for the defendants in error, said that the questions presented were these:

I. The sum of \$10,000 not having been paid by the 1st of September, 1852, according to the terms of the affirmance agreement, are the judgment plaintiffs entitled to the full amount of the judgment affirmed?

II. Can the proceedings in the State Court be set up to arrest the action of the federal court in enforcing its own judgment by its own process?

III. There is a third point which arises, both on the writ of error and on motion, namely: are the judgment plaintiffs entitled to interest on the amount of the judgment affirmed, and from what time?

I. The answer to the first question depends on the terms of the agreement. That hardly seems to admit of two interpretations. It consists of two parts. The first stipulates that Early shall pay to Rogers & Rogers \$10,000 by the first of September, which sum, so paid, the latter agree to receive in full satisfaction of the original judgment; the second expresses the same understanding in somewhat a different phraseology: the judgment is to be affirmed, but is not to be obligatory for more than \$10,000, on payment of which sum satisfaction is to be entered, provided the amount is paid on or before the 1st of September next.

Under the agreement the judgment was af-

firmed. This judgment was for \$12,115. Early had a right to have it satisfied by payment of \$10,000 by the 1st September. He did not exercise that right, and therefore lost it. No later payment than on the 1st of September would avail him, and he has offered none.

It is claimed that the stipulation for the affirmance of the judgment, upon agreement to accept a less sum in satisfaction, if paid by a certain day, operates as a stipulation for a penalty, and ought not to be enforced. This is by no means so. The original judgment was for a balance of account. Rogers & Rogers were pressed for money, and anxious for early payment. They were willing to accept a part soon, rather than risk the collection of [*606 the whole by process in the uncertain future. Hence their agreement. The whole was no more than their due. The agreement to accept part was conditional. Early not having fulfilled the condition, they are justly entitled to the whole.

II. The answer to the second question depends on the effect to be given to the various proceedings in the State Court.

All these suits, except two, were commenced after the institution of the suit in the District Court, and it is quite certain that the pendency of these constitutes no objection to the enforcement of the judgment of the court. *Wallace v. McConnell*, 13 Pet., 186, is in point.

Of the two suits commenced prior to that of Rogers and Rogers, the first (Wilson's) has been prosecuted to final decree, 20th November, 1851 (Record, p. 28), against Rogers for the debt, and against William Shrewsbury for payment, which decree seems to have been satisfied, as the record shows a judgment on a forthcoming bond against Shrewsbury and Lewis. There is nothing to show, and no ground to suppose, that Early can be made liable for anything in this suit in any event.

The other suit (Sargent's) was commenced by issuing the subpoenas on the 15th of June, but there is nothing to show when process was served on Early. The bill was not filed until July. Nothing has been done in this cause beyond the mere filing of the bill; and the court will not presume, without proof, that process was served on Early so as to fix any liability on him. (2 Rob. Prac., 201.)

But if both suits had been commenced, and process in both had been served on Early prior to the commencement of the suit against him in the District Court, it would have made no difference, and for several reasons:

1. An attachment does not create a lien, but a mere contingent liability, which can only become fixed after judgment or decree, in the principal suit, and in case, also, that the debt due from the garnishee has not been previously extinguished otherwise than by his voluntary act. (*Ex-parte Foster*, 2 Story, 151, 152; *Embree v. Hanna*, 5 Johns., 101.)

2. If a defendant would avail himself of a pending attachment against a subsequent suit for the debt attached, he must plead the pendency of the attachment in abatement. (*Wallace v. McConnell*, 13 Pet., 151.) After issue joined it is too late to plead in abatement. (*Payne v. Grimm*, 2 Munf., 297; *May v. State Bank*, 2 Rob., 56.)

3. In the present case, Early waived all objec-

tions to the proceeding in the District Court growing out of the pending of the attachment suits. The record shows that he did plead the pending of some of these suits in abatement, **607*** and voluntarily *withdrew the plea and joined issue. (Record, 57.) He was fully aware, also, of the attachments when he consented to the affirmance of the judgment, and it would be unreasonable to allow him to avail himself of grounds to evade payment, which, when he positively engaged to pay, he must have been understood to waive; for otherwise his engagements would amount to nothing.

III. We claim that the court below erred in not correcting the judgment, by allowing interest on the verdict, and ask that this error may be corrected. The original omission of interest in the judgment was, doubtless, a clerical error. The verdict was for the balance of an account. The Code of Virginia is express, that "if a verdict be rendered hereafter, which does not allow interest, the sum thereby found shall bear interest from its date, whether the cause of action arose heretofore, or shall arise hereafter, and judgment shall be entered accordingly. (Code of Virginia, 1849, ch. 177, sec. 14, p. 673.)

As the whole case is before the court upon the writ of error, the court may, and we think should, correct this manifest error. At all events the court will allow interest upon the amount of the judgment, either from the date of the verdict or from the affirmance, by way of damages. (Rule 18.)

If defendant attached wishes to exempt himself from interest, he must bring the money in to court. (3 Rob. Prac., 205, 206, and cases there cited.)

Mr. Justice Campbell delivered the opinion of the court:

The defendants (Rogers & Co.), on the 27th of May, 1852, recovered in this court against the plaintiff a judgment, in the following words:

"In order to put an end to the litigation between the above parties, and as a compromise the matters in difference between them, that said Samuel H. Early shall pay to the said John Rogers and Joseph Rogers, between this and the first day of September next, the sum of ten thousand dollars, which sum of ten thousand dollars the said John Rogers and Joseph Rogers agree to receive of the said Samuel H. Early, in full satisfaction and discharge of the original judgment entered against the said Early for the sum of about \$12,500, in said District Court of the United States for the Western District of Virginia, and in full satisfaction and discharge of all claims and demands which said John Rogers and Joseph Rogers held against said Early in any account arising out of the dealings on which said litigation is founded.

And it is further agreed, that the original judgment rendered in said District Court of the United States for the Western District of Virginia, **608*** and which is taken up to the Supreme Court of the United States on a writ of error, which is now pending in that court, may be entered affirmed in said Supreme Court at its present session, subject to the above agreement; that is, the judgment, although affirmed, shall not be obligatory for more than the above sum of ten thousand dollars, to be paid as

aforesaid; and as soon as that sum is paid, the said judgment shall be entered satisfied, provided the amount is paid on or before the said first day of September next. Costs to be paid by Early.

May 18th, 1852.

SAMUEL H. EARLY,
By CHARLES FOX, his attorney.
JOHN ROGERS,
JOSEPH ROGERS,
By JAMES F. MELINE, their attorney.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and the same is hereby affirmed, with costs, in conformity to the preceding stipulations; and that the said plaintiffs recover against the said defendant, Samuel H. Early, one hundred and twenty-nine dollars and fifty-two cents for their costs herein expended, and have execution therefor.

May 27th ————."

The mandate of this court was issued in October, 1852, and spread upon the records of the District Court for the Western District of Virginia. In January, 1853, an execution issued returnable to the March rules of that year. At the April Term of that court, the plaintiff, Early, obtained a rule against Rogers & Co., requiring them to show cause why the execution so sued out should not be quashed: and also why execution on the said judgment of the said Supreme Court should not be limited to the sum of \$10,000, with interest thereon from the 1st day of September, 1852, and the costs; and also why the same shall not be stayed until the further order of the court, on account of certain attachments and suggestions. Whereupon the court ordered the execution to be quashed, but that the said Rogers & Co. be allowed to sue out their execution against said Early for the principal sum of \$12,115, with costs, but without interest or damages.

The writ of error has been taken to bring this order awarding the execution to this court. We think the District Judge interpreted the agreement of the parties and the judgment of this court upon it, correctly. The parties made the reduction of the judgment to \$10,000 dependent upon a condition, *which [**609** has not been fulfilled. The plaintiff in error had obliged himself to comply with this condition, or to lose his claim for a deduction. We think the award of execution, for the amount contained in the order, was proper.

The motion to stay the execution, founded upon the fact that creditors of Rogers & Co. had attached this debt, by service of garnishment on the plaintiff in the State Courts, was addressed to the legal discretion of the District Court, and its judgment is not revisable by this court.

The mere levy of an attachment upon an existing debt, by a creditor, does not authorize the garnishee to claim an exemption from the pursuit of his creditor. The Attachment Acts make no such provision for his benefit. It is the duty of the court wherein the suit against the garnishee by his creditor may be pending, upon a proper representation of the facts, to take measures that no injustice shall grow out of the double vexation. The court should ascertain if the attachment is prosecuted for a *bona fide* debt, without collusion with the

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debtor, for an amount corresponding to the debt, that no mischief to the security of the debt will follow from a delay, and such other facts as may be necessary for the protection and security of the creditor. An order of the court to suspend, or to delay the creditor's suit, or his execution in whole or for a part, could be then made upon such conditions as would do no wrong to anyone.

It is apparent that such inquiries are proper only for the court of original jurisdiction, in the exercise of the equity powers over proceedings and suitors before it, with the view to fulfill its great duty of administering justice in every case. We do not perceive in this record evidence that the district judge has exercised his discretion unwisely.

We do not express any opinion upon the questions whether a writ of error was the proper remedy to bring this order before us, nor whether attachments could be levied from the State Court upon a judgment or claim in the course of collection in the courts of the United States. Accepting the case as it has been made by the parties, and has been argued at the bar, our conclusion is.

There is no error in the record, and the judgment is affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Virginia, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and the same is hereby affirmed, with costs.

Cited—20 How., 556; 5 Otto, 484; 1 Flippin., 206.

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WILLIAM EARLY, Plaintiff in Error,
v.

JOHN DOE, on the demise of RHODA E. HOMANS.

Notice of tax sale—length of time—"twelve weeks" is eighty-four days.

Where the language of the statute was "That public notice of the time and place of the sale of real property for taxes due to the corporation of the City of Washington shall be given by advertisement inserted in some newspaper published in said city, once in each week for at least twelve successive weeks," it must be advertised for twelve full weeks, or eighty-four days.

Therefore, where property was sold after being advertised for only eighty-two days, the sale was illegal, and conveyed no title.

THIS case, came up by writ of error from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington.

It was an ejectment brought by Rhoda E. Homans, to recover that part of lot number four, in square number seven hundred and thirty, in the City of Washington; beginning for the same at a point on the line of A Street south, at the distance of thirty-two feet from the north east corner of said square; and running thence due west with the line of said street, fifty feet and five inches; thence due south, fifty feet; thence due east, fifty feet and five inches; thence fifty feet to the place of be-

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ginning; and also into three messuages or tenements with the appurtenances situated thereon, in the county above named.

Upon the trial, the plaintiff showed title in herself, and the defendant made title under a tax sale, when the jury, under the instructions of the court, found a verdict for the plaintiff. The following bill of exceptions explains the case:

Defendant's bill of Exceptions.

At the trial of the above cause, after the plaintiff's lessor had shown a legal title in herself, a devisee of D. Homans, who died in August, 1850, to the fifty feet five inches of ground fronting on A Street by fifty feet deep, a part of lot 4, in square 730, in Washington City, with the houses thereon, being the premises described in the declaration; entitling her, as admitted *prima facie*, to recover the same as such devisee, and that the defendant held possession thereof at the commencement of this action. The defendant thereupon, to maintain the issue on his part, offered evidence of a tax title from the Corporation of the City of Washington, to sustain which, and to show that the requirements of the Act of 26th May, 1824, had been complied with, proved the notice of the time and place of the tax sale to have been given by the city collector, [*611 by advertisement in the National Intelligencer, in the following words:

"COLLECTOR'S OFFICE, CITY HALL, }
August 25th, 1848. }

On Wednesday, the 15th day of November next, the annexed list of property will be sold by public auction, at the City Hall in the City Hall in the city of Washington, to satisfy the corporation of said city for taxes due thereon as stated, unless the said taxes be previously paid to the collector, with such expenses and fees as may have accrued at the time of payment." And amongst other property so advertised was the following:

730 Pt. 4 fronting 50 ft. 5 in. and improvement on A Street, and 50 ft. deep, ly- ing next to the eastern 32 ft. of said lot.	No. of Sqr.
	No. of Lot.
Daniel Homans. 1845. 1846. 1847. 934. 934. 934.	Assessed to.
	Taxes.
339.25	Total.

And the insertion of said advertisement was on the following days:

Saturday, 26th Aug., 1848.
 " 2d Sept., "
 " 9th "
 Thursday, 14th "
 " 21st "
 Saturday, 30th "
 " 7th Oct., "
 " 14th "
 " 21st "
 " 28th "
 " 4th Nov., "
 " 11th "
 Wednesday, 15th "

And that on such last day above mentioned, the said sale took place and the defendant became the purchaser of said premises for \$55. Whereupon the plaintiff prayed the opinion and instruction of the court to the jury, "that the said sale was invalid and of no effect, and passed no title to the defendant in the premises in question; because a period of twelve full and complete weeks had not intervened between the 26th August, the time of the first advertised notice of said sale, and the 15th November, 1848, the day or time of said sale, but a period of eleven weeks and four days only;" which opinion and direction the court gave as prayed for by the plaintiff, to which opinion and direction of the court to the jury, the defendant, by his counsel, prayed leave to except, and that the court would sign and seal these his bill of exceptions, according to the form §12*] of the statute in such cases made and provided, which is accordingly done this 17th day of May, 1853.

JAS. S. MORSELL, [SEAL.]
 JAS. DUNLOP, [SEAL.]

Test: JNO. A. SMITH, Clerk.

Upon this exception the case came up to this court and was argued by *Mr. Lawrence* for the plaintiff in error, and by *Messrs. Redin and Woodward* for the defendant in error.

Mr. Lawrence:

The only question in this case is, whether the words of the Act of 26th May (4 Stat. at L., 75), "inserted in some newspaper published in said city, once in each week for at least twelve successive weeks," are to be understood as requiring the full period of eighty-four days between the first and last advertisement, or as requiring an insertion once in each of twelve successive weeks.

A week is a definite period of time, beginning on Sunday and ending on Saturday (4 Pet., 361); and insertions of notice on Monday and the Saturday week following, were held to fulfill the requirement of "one in each week," although thirteen days intervened between the two.

It is maintained, for the plaintiff in error, that if there are twelve insertions of the notice in any part of each of twelve successive weeks, that is sufficient.

The counsel for the defendant in error contended that the notice was insufficient.

The last charter of the city of the 17th May, 1848, makes no change in the period of notice and the manner of giving it; they are still regulated by the Act of 26th May, 1824.

The words of the second section of that Act are, "that public notice of the time and place

of the sale of all real property for taxes due the Corporation of the City of Washington, shall be given in all cases hereafter by advertisement, inserted in some newspaper, published in said city, once in each week, for at least twelve successive weeks; in which advertisement shall be stated the number of the lot," &c.

The facts. The first insertion was on Saturday, the 16th August, 1848; the last, on Wednesday, the 15th November, the day of the sale, being a period of eighty-two days only, including both days, namely: the day on which the notice first appeared, and the day of sale.

The eleventh week ended, either on Friday, the 10th of November, or on Saturday, the 11th, according as the week is made to commence on the day on which the notice first appears, or on the first succeeding Sunday thereafter. The twelfth week *could not expire un- [*613 til Friday the 17th, or Saturday the 18th November, and the earliest days on which the sale could have been made was one of those days. It was made on the previous Wednesday, the 15th November, before the twelve weeks had expired.

By the charter of 1812, it was directed that the notice should "be given, by advertising, at least six months, where the property belongs to persons residing out of the United States; three months, where it belongs to persons residing in the United States, but out of the District of Columbia; and six weeks, where it belongs to persons residing within the district."

The charter of 1820, superadded to the period of notice, the further requisition of weekly insertions of the advertisement "once a week, for at least six months, three months, or six weeks," according to the residence of the owner. (Section 12.)

The Act of 1824 changed the period of notice from months to weeks, but retained the further requirement of weekly insertions, "once in each week, for at least twelve successive weeks."

There are, then, two requirements, as to notice, by the Act of 1824: 1st, twelve weeks' notice; and 2d, the insertion of the advertisement once in each of those twelve weeks.

The full period of twelve weeks' notice must be given. In *Runkendorff v. Taylor*, 4 Pet., 361 the court say: "A week is a definite period of time, commencing on Sunday and ending on Saturday;" and, being thus composed of seven days, twelve weeks cannot consist of less than eighty-four days. And that case sanctions the idea, that the whole period of twelve weeks should elapse before the sale. Whether the week be made to commence on the day on which the notice is first published, and to end on the seventh day thereafter; or to begin on the Sunday following the first day of the notice, and end on the succeeding Saturday, is immaterial in this case; the result—not twelve weeks' notice—is the same on either mode of computation. The first insertion was on Saturday, the 26th August. If the week commenced on that day and ended on the following Friday, there are but eighty-two days, including both day of notice and day of sale. If it began on Sunday, the 27th, and ended on the succeeding Saturday, there would be but

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eighty-one days, including both. And if the true rule be to include the day on which the notice first appears, and to exclude the day of sale, there would still be but the same eighty-one days—eleven weeks and four days.

The expression in the Act of 1824 is "once in each week, for at least twelve successive weeks," not merely once in each week, but once in each week "for" twelve weeks during or through that certain space of time; and not §14*) merely for twelve *weeks, but for "at least" twelve successive weeks, not less than that whole period.

The notice, according to *Rokendorff v. Taylor*, may be inserted on any day in each of those twelve weeks, on the last day of the eleventh week and the first day of the twelfth week. But that rule was not meant, as the corporation officers seem to have supposed, to authorize the collector to abridge the period of notice; to insert one advertisement in each of the first eleven weeks and a twelfth on the fourth day after the end of the eleventh week, and to sell on that day and before the twelfth week had fully expired. The corporation by-law followed the words of the Act of Congress. The collector has no dispensing power.

All the analogies require the full term. As the familiar instance of six months' notice to quit or four months' notice of publication against non-residents under our Acts of Assembly; four or six whole months, less will not do. In all judicial sales, either by sheriff or trustee, the period of notice is usually prescribed, and the full term must be given. And as to these tax sales. The fourth point in Pratt and the Corporation, 8 Wheat., 681, as seen in the record, was whether sufficient notice had been given. After the first insertion of the advertisement, the amount of the taxes was changed without any change in the day of sale, so that the full period of notice was not given after such change. The sale was adjudged bad.

So in *Pope & Hamner v. Headen*, 5 Ala., 438. The law required "ninety days' notice" of the sale, to be published in some newspaper. The advertisement was dated the 1st of November, 1839, and was then handed to the publisher of the newspaper; was inserted therein weekly from the 6th of November, which was the first day of publication, until the 29th of January, 1840, and the sale took place on the 3rd of February, 1840. Between the date of the advertisement and the day of sale there were more than ninety days; but between the first day of the publication and the day of sale there were but eighty-nine days, excluding, as the court did there, the first, and including the last day. The date of the advertisement and the handing of it to the publisher within time were considered by the court; but the sale was held to be clearly void.

In our case, counting from the date of the advertisement, the 25th of August instead of the 26th, the day of its publication, and even including the day of its date, and also the day of sale, there are not eighty-four days, but eighty-three only.

See, also, *Lyon et al. v. Hunt et al.*, 11 Ala., 295, for a full collection of the cases.

It is not enough to give twelve or more insertions of the advertisement. *It may be continued twice or thrice a week, or even

daily. In the early charters the corporation began simply with the period of notice: six weeks, three months, six months. Weekly insertions were first superadded by the charter of 1820, and have been continued by the Act of 1824. But the law is not satisfied by a compliance with that requisite merely. Each requirement of the law must be observed. Here both, namely: "twelve weeks at least," and weekly insertions, are essential to the validity of the sale. The non-observance of either destroys it, as much so as the omission of both.

Neither of these requirements can, as to the other, be deemed the primary requisite. If either could be so considered, it would be the period of notice rather than the number of insertions.

It is purely a matter of positive law. The rules are arbitrary; eleven weeks and four days might have answered just as well as twelve weeks; but the statute says twelve weeks, meaning twelve full or whole weeks. The language is clear and express; there is no room for construction or discretion. In 8 Wheat., 687, *Judge Johnson* asks: "What have we to do with such inquiries in cases of positive enactment?"

The Act means that notice of the sale shall be given by publication for at least twelve weeks prior to the day of sale, which notice shall also be published once in each of those twelve weeks. The object in naming the period of notice was to give the owner time for paying the taxes; and in requiring weekly insertions, to afford him a better opportunity of seeing the advertisement of sale.

These sales are nowhere regarded with favor, but are everywhere tested by the strictest rules. They are penal, lead to forfeiture of estate, and whatever is prescribed to give them validity must, and ought to be, observed, and has always been required. (4 Wheat., 77; 6 Wheat., 119; 6 Pet., 328; 9 How., 248.)

It is idle for the officer or collector of the corporation to be speculating and refining in this way. Why not give the legal notice? Where is the inconvenience in giving three or four days' more notice, or waiting a few days longer for the taxes?

They will not be lost by the avoidance of the sale. The corporation has the power to reassess the taxes on the same property. (Act of 1824, sec. 8.)

Mr. Justice Wayne delivered the opinion of the court:

This is an ejectment suit for part of lot No. 4, in square No. 730, in the City of Washington.

The only question raised by counsel in the argument of the case here, is, whether where property has been assessed for taxes, it can be considered as having been regularly advertised and *regularly sold, if it shall be sold before [*616 twelve full weeks (or eighty-four days) have passed from the date of the first advertisement. Eighty-four days' advertisement were not given when the property in dispute in this case was sold. Upon the trial in the Circuit Court, the plaintiff in that court prayed its instruction to the jury in these words: "That the said sale was invalid and of no effect, and passed no title to the defendant in the premises in ques-

tion; because a period of twelve full weeks had not intervened between the 26th of August, the time of the first advertised notice of sale, and the 15th of November, 1848, the day or time of sale, but a period of eleven weeks and four days only." The court gave the instruction accordingly. The defendant's counsel excepted to the same. The court, upon his prayer, allowed it, and the case is regularly here by writ of error.

It appears that the notice for sale of the property in dispute was inserted in the National Intelligencer twelve times in successive weeks, the first insertion being on Saturday, the 26th of August, and the last on the 15th of November, the day of sale. Including the 26th of August as one of the days of the notice, and the 15th of November necessarily as another, we find that the notice was given only for eighty-two days. The language of the statute regulating the notice to be given, is in these words: "That public notice of the time and place of the sale of all real property for taxes due the corporation of the City of Washington, shall be given hereafter, by advertisement, inserted in some newspaper published in said city, once in each week, for at least twelve successive weeks." Now, the first week following the date of the advertisement expired with the next Friday, the 10th of November, and if the computation is carried out, it will be found that the twelfth week expired on the 17th of November. But the sale was made two days before, on the 15th of November, the last insertion of the notice being on the day of sale.

So there were eleven insertions of the notice in the newspaper in different weeks (making, with the first, twelve) after the expiration of the week from the first insertion, and the point to be settled is, whether the statute means that twelve insertions in successive weeks is sufficient notice, without respect to the number of days in twelve weeks. We do not doubt if the statute had been "once in each week for twelve successive weeks," a previous notice of the particular day of sale having been given to the owner of the property, that it might very well be concluded, that twelve notices in different successive weeks, though the last insertion of the notice for sale was on the day of sale, was sufficient. But when the legislator has used the words, for at least twelve successive weeks [§17] we cannot doubt that the words, at least as they would do in common parlance, mean a duration of the time that there is in twelve successive weeks, or eighty-four days. Every statute must be construed from the words in it, and that construction is to be preferred which gives to all of them an operative meaning. Our construction of the statute under review gives to every word its meaning. The other leaves out of consideration the words "for at least," which mean a space of time comprehended within twelve successive weeks, or eighty-four days. The preposition *for*, means of itself duration when it is put in connection with time, and as all of us use it in that way, in our every-day conversation, it can not be presumed that the legislator, in making this statute, did not mean to use it in the same way. Twelve successive weeks is as definite a designation of time, according to our division of it as can be made. When we say that

anything may be done in twelve weeks, or that it shall not be done for twelve weeks, after the happening of a fact which is to precede it, we mean that it may be done in twelve weeks, or eighty-four days, or as the case may be, that it shall not be done before. The notice for sale, in this instance, was the fact which was to precede the time for sale, and that is neither qualified nor in any way lessened by the words "once a week," which precede in this statute those which follow them, "for at least twelve successive weeks." We think that the court did not err in refusing to give to the jury the instruction which was asked by the defendant upon the trial of this case.

The construction of the statute will be recognized to be in harmony with that policy of the law which experience has established to protect the ownerships of property from divestiture by statutory sales, where there has not been a substantial compliance with the law, by which a public officer is empowered to sell it.

Property is liable to be sold on account of an undischarged obligation of the owner of it to the public or to his creditors. But it can only be done in either case where there has been a substantial compliance with the prerequisites of the sale, as those are fixed by law. Any assumption by the officer appointed to make the sale, or disregard of them, the law discountenances. He may not do anything of himself, and must do all as he is directed by the law under which he acts. He may not, by any misconstruction of it, anticipate the time for sale within which the owner of the property may prevent a sale of it, by paying the demand against him, and the expenses which may have been incurred from his not having done so before. This the law always presumes that the owner may do, until a sale has been made. He may arrest the uplifted hammer of the auctioneer *when the cry for sale is made, [§18 if it be done before a *bona fide* bid has been made. The authority of the officer to sell is, as it was in this case, "unless the taxes be previously paid to the collector, with such expenses as may have accrued at the time of payment." There is a difference, it is true, in the strictness required in a tax sale, and that of a sale made under judgment and execution; but in both, the same rule applies as to the full notice of time which the law requires to be given for the sale. "In deciding upon tax land titles, great strictness has always been observed. The collector's proceedings are closely scanned. The purchaser is bound to inquire whether he has done so or not. He buys at his peril, and can not sustain his title without showing the authority of the collector and the regularity of his proceedings."

This court said, in *Williams v. Peyton*, 4 Wheat., 77, that the authority given to a collector to sell land for the non-payment of the direct tax, "is a naked power not coupled with an interest. In all such cases the law requires that every prerequisite to the exercise of that power must precede its exercise, that the agent must pursue that power or his act will not be sustained by it. Again, in *Ronkendorf's case*, 4 Pet., 849, this court repeated that in an *ex parte* proceeding, as a sale of lands for taxes, under a special authority, great strictness is required. An individual cannot be divested of

his property against his consent, until every substantial requisite of the law has been complied with. The proof of the regularity of the collector's proceedings devolves upon the person who claims under the collector's sale. At an earlier day, the court decided, in *Stead's Executors v. Course*, 4 Cranch, 408: A collector selling lands for taxes, must act in conformity with the law from which his power is derived; and the purchaser is bound to inquire whether he has so acted. It is incumbent upon the vendee to prove the authority to sell. (See, also, *McClung v. Ross*, 5 Wheat., 116; *Thatcher v. Powell*, 6 Wheat., 119.) The decisions made by this court are full as to the circumstances under which tax titles may be set aside. We recommend also the perusal of the case of *Lyon et al. v. Burt et al.*, in 11 Ala., cited by the counsel for the defendant in error; and to all of the cases cited in the opinion of Chief Justice Collier. It is not necessary for us to extend this opinion farther in citing cases upon tax sales. So far as we know, the law upon the subject is the same throughout the United States, and where differences exist they have occurred from a different phraseology in statutes, and not from any discordance in the views of judges in respect to the common law to be applied in tax sales.

See 4 Cranch, 403; 9 Cranch, 64; 1 Scam., 619*] 335; 1 Bibb, 295; *5 Mass., 403; 4 Dec. & Bal., 363; 3 Ohio, 232; 2 Ohio, 378; 3 Yeates, 284; 2 Yeates, 100; 13 S. & R., 208; 4 Dec. & Bal., 386; 5 Wheat., 116; 6 Wheat., 119; 1 Yeates, 800; 3 Monroe, 271; 1 Tyler 295; 14 Mass., 177; 8 Wheat., 681; 15 Mass., 144; Green., 339; Taylor N. C. 480; 3 Hawks, 283; 1 Gilm., 26; 10 Wend., 846; 18 Johns., 441; 5 Ala., 438. I have not the reports of the Supreme Court of Georgia at hand to cite from them any cases of tax sales, if any have been decided by it, but I know that the decisions of the courts in that State are the same as those stated in this opinion and in the cases cited.

We affirm the judgment of the Circuit Court.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

Cited—1 McCrary, 7.

CRUZ CERVANTES, Appellant,

v.

THE UNITED STATES.

Judgment of District Court reversed, for its record not showing its jurisdiction.

Upon an appeal from the District Court of the United States for the Northern District of California, where it did not appear, from the proceedings, whether the land claimed was within the Northern or Southern District, this court will reverse the judgment of the District Court and remand the

case for the purpose of making its jurisdiction apparent (if it should have any), and of correcting any other matter of form or substance which may be necessary.

THIS was an appeal from the District Court of the United States for Northern California.

In February, 1852, Cervantes filed before the Board of Commissioners to ascertain and settle the private land claims in California, the following claim:

Cruz Cervantes, a citizen of said State, gives notice that he claims, by virtue of a grant from the Mexican nation, a tract of land situated in the County of Santa Clara, in said State, and known by the name of San Joaquin or Rosa Morada, with the boundaries described in the grant thereof, to wit: on one side the arroyo of San Felipe; on the second side, the hills or mountains *of San Joaquin; on the [*620 third, the arroyo of Santa Anna, and on the fourth, a line drawn through the plain of San Juan.

Said land was conceded to claimant by a grant issued on the 1st of April, 1836, by Don Nicolas Gutierrez, superior political chief *ad interim* of California, and thereby authorized to grant lands in the name and on behalf of the Mexican nation. On the 18th February, 1841, judicial possession was given to claimant by Juan Miguel Anzar, Judge of First Instance of that jurisdiction.

Said land has been occupied by claimant, according to law and the directions contained in said grant, and is now held by him in quiet possession.

There is no conflicting grant to said land, or any part thereof, in the knowledge of claimant.

Said land has never been surveyed, but its boundaries are natural and well known, and may be easily traced. It is supposed to contain the quantity of two *sitios de ganado mayor*, more or less.

A copy and translation of said grant, and a copy of said act of judicial possession, are herewith presented, and the originals are ready to be produced and proved, as may be required.

On the 3d of August, 1852, Commissioner Harvy J. Thornton delivered the opinion of the board, declaring the claim valid.

In July, 1853, the following notice was issued:

CRUZ CERVANTES, Claimant,

v.

UNITED STATES.

ATTORNEY-GENERAL'S OFFICE,
WASHINGTON, D. C., July 11th, 1853. }

You will please take notice that the appeal in the above case from the decision of the commissioners, to ascertain and settle the private land claims in the State of California to the District Court of the United States, for the Northern District of California, will be prosecuted by the United States.

C. CUSHING,

Attorney-General United States.
To the Clerk of the District Court of the United States for the Northern District of California, San Francisco.

At a special term of the District Court of the United States of America, for the Northern District of California, held at the Court House in the City of San Francisco, on Monday, the thirty-first day of October, in the year of our

Lord one thousand eight hundred and fifty-three.

Present, the Honorable Ogden Hoffman, District Judge.

THE UNITED STATES, Appellants, }

v.

CRUZ CERVANTES, Appellee. }

This cause coming on to be heard at the above-stated term, on appeal from the final decision of the commissioners to ascertain and **621*** settle private land claims in the State of California, under the Act of Congress approved 3d of March, 1851, upon the transcript of the proceedings and decision, and the papers and evidence on which said decision was founded; and it appearing to the court that said transcript had been duly and regularly filed in pursuance of the 12th section of the Act of Congress, approved August 31st, 1852.

And the argument of counsel for the United States and for the claimant being heard, it is ordered, adjudged and decreed that the decision of the said commissioners be in all things reversed and annulled; and that the said claim be held invalid and rejected.

(Signed) OGDEN HOFFMAN,
U. S. District Judge.

Cervantes appealed from this decree to this court, which appeal was allowed.

It was argued by **Mr. William Carey Jones** for the appellant, when

Mr. Justice McLean delivered the following opinion of the court:

It does not appear, from the proceedings before the District Court, that the land claimed is within the Northern Judicial District of California. This is necessary to give that court jurisdiction. It can exercise no power over any claim, where the land lies in the Southern Judicial District of the same state.

This court has often held, unless the jurisdiction of the Circuit or District Court appear in the record, the judgment of such court may be reversed on a writ of error. It is therefore important, that in dealing with land titles, the jurisdiction of the inferior court should appear in the proceeding.

From a map of the State of California, recently published, it appears the land claimed in this case lies in the Southern District, and if so, no jurisdiction attached to the court where the proceeding was instituted.

For the purpose of correcting the proceeding in this respect, the decision of the District Court is reversed, and the cause is remanded to that court with leave to amend the proceeding in regard to the jurisdiction of the District Court, and to any other matter of form or substance which may be necessary.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of California, and it not appearing therefrom that **622*** the land claimed is within the Northern Judicial District of California, it is, on consideration thereof, now here ordered and decreed by this court, that the decree of the said District Court in this cause be, and the same is hereby reversed; and that this cause be, and the same is hereby remanded to the

said District Court, with leave to amend the proceedings in regard to the jurisdiction of the said District Court, and also in regard to any other matter of form or substance which may be necessary.

JOHN C. DESHLER

v.

GEORGE C. DODGE.

Assignee can maintain replevin in Circuit Court for bank notes, although assignor could not.

The eleventh section of the Judiciary Act of 1789, says, "nor shall any District or Circuit Court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange."

This clause has no application to the case of a suit by the assignee of a chose in action to recover possession of the thing in specie, or damages for its wrongful caption or detention.

Therefore, where an assignee of a package of bank notes brought on action of replevin for the package, the action can be maintained in the Circuit Court, although the assignor could not himself have sued in that court.

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of Ohio.

It was an action of replevin brought by Deshler, a resident and citizen of the State of New York, against Dodge, a citizen and resident of the State of Ohio.

The proceedings in the case were these:

In March, 1853, Deshler filed in the Circuit Court of the United States for the District of Ohio the following *præcipe* and affidavit:

Præcipe. Issue a writ of replevin for the following goods and chattels, to wit: a quantity of bank bills, of various denominations, consisting of fives, tens, twenties and fifties, given for the payment, in the aggregate, of the sum of \$10,580, being the same bank bills taken by the said George C. Dodge, from the City Bank of Cleveland, on the 26th of March, 1853. Also another quantity of bank bills, of various denominations, consisting of ones, twos, threes, fours, fives, tens, twenties, fifties and hundreds, and given for the payment, in the aggregate, for the sum of \$7,965, being the same bank bills taken by the said George C. Dodge, from the Merchants' Bank of Cleveland, on the 26th of March, A. D. 1853. Also another quantity of bank bills, of various denominations, consisting of ones, twos, *threes, fives, tens, twenties, [***623** fifties and hundreds, and given for the payment, in the aggregate, of the sum of \$9,216, being the same bank bills taken by the said George C. Dodge from the Canal Bank of Cleveland, on the 26th of March, A. D. 1853. Also another quantity of bank bills, of various denominations, consisting of ones, twos, threes, fives, tens, twenties, fifties and hundreds, and given for the payment, in the aggregate, of the sum of \$11,220, being the same bank bills taken by the said George C. Dodge, from the Commercial Bank of Cleveland, on the 26th of March, A. D. 1853.

Affidavit. John G. Deshler, plaintiff in the

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case in the annexed *præcipe* named, being first duly sworn does depose and say: that he has good right to the possession of the goods and chattels described in the annexed *præcipe*, and that the same are wrongfully detained by the said George C. Dodge, named as defendant in the said *præcipe*; and that the said goods and chattels were not taken in execution on any judgment against the said John G. Deshler, nor for the payment of any tax, fine or amercement assessed against the said Deshler, nor by virtue of any writ of replevin, or any other mesne or final process whatsoever issued against the said Deshler. Said Deshler further makes oath and says, that he is a citizen and resident of the State of New York, and that the said George C. Dodge is a citizen and a resident of the State of Ohio.

U. S. America, District of Ohio, ss.

JOHN G. DESHLER.

The writ was issued accordingly, and served by the marshal. The property was appraised at \$38,592. Deshler gave the usual replevin bond.

At April Term, 1858, Dodge made the following motion:

And now comes the said George C. Dodge, by R. P. Spalding, his attorney, and moves the court for a rule on the plaintiff to show cause, during the present term, why the said suit should not stand dismissed, for all and singular the reasons following, to wit:

1st. Because there is no sufficient affidavit filed by plaintiff as a predicate for the writ of replevin.

2d. Because it does not comport with sound public policy, that any portion of the revenue of the State should be arrested, at the instance of the taxpayers, or other person for his benefit, and taken from the hands of the collector, through the instrumentality of the writ of replevin.

3d. Because the several bank bills in the writ specified were assigned to the plaintiff by said several banks in the City of Cleveland, for the sole purpose of instituting suit in this court. **624*]** *4th. Because said assignment from said banks to said John G. Deshler was colorable merely, and operates as a fraud upon the Act of Congress of September 24, 1789, establishing the judicial courts of the United States.

5th. Because this court is debarred taking jurisdiction of this case by a provision contained in the eleventh section of said Act of Congress of September 24, 1789, in the words following: "Nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of any assignee, unless a suit might have been prosecuted in such court, to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange." It being admitted, for the purposes of this motion, that the said John G. Deshler derived all his right to said bank notes from an assignment in writing made to him by the Commercial Bank, the Merchants' Bank, the City Bank, and the Canal Bank of Cleveland, all corporate bodies in the State of Ohio, after the seizure of the said bank bills, by the said George C. Dodge, as treasurer of Cuyahoga County, to satisfy sundry taxes assessed against said banks.

R. P. SPALDING,
Attorney for defendant.

In August, 1858, the court overruled the motion, but permitted the defendant to set up the same matter, by plea.

At the same term, the plaintiff, Deshler, filed his declaration, and Dodge filed the following plea:

And the said George C. Dodge, in his own proper person, comes and says, that this court ought not to have or take further cognizance of the action aforesaid, because he says that on the day and year in the said declaration mentioned, to wit: on the twenty-sixth of March, in the year one thousand eight hundred and fifty-three, he, the said George C. Dodge, was acting as treasurer of the County of Cuyahoga, in the State of Ohio, and as such treasurer on the day and year last mentioned, at Cleveland, in the County of Cuyahoga aforesaid, held in his hands for collection the tax duplicate of said County of Cuyahoga, for the year one thousand eight hundred and fifty-two, upon which tax duplicate sundry large amounts of taxes stood assessed against the several banks in the plaintiff's declaration mentioned, to wit: against the City Bank of Cleveland, the Merchants' Bank of Cleveland, the Canal Bank of Cleveland, and the Commercial Bank of Cleveland, which said taxes, with a large amount of penalty thereon, were then due and unpaid; and it then and there became, and was the official duty of the said George C. Dodge, as such treasurer, to distrain a sufficient amount of bank bills belonging to said Banks and in their possession *(respectively), to satisfy the [**625** said taxes and penalties, amounting in the aggregate to a large sum of money, to wit: to the sum of \$38,981. And the said George C. Dodge did in fact, then and there, to wit: on the twenty-sixth of March, in the year one thousand eight hundred and fifty-three, at the City of Cleveland, in the County of Cuyahoga aforesaid, enter into said banks and take and distrain from them, respectively, the amount of taxes and penalty as aforesaid, to wit: from the City Bank of Cleveland he took and distrained the sum of \$10,580 in bank bills of various denominations, consisting of fives, tens, twenties, and fifties, the same being at the time said distress was made the exclusive property of said City Bank of Cleveland. From the Merchants' Bank of Cleveland he took and distrained the sum of \$7,965 in bank bills of various denominations, consisting of ones, twos, threes, fours, fives, tens, twenties, fifties and hundreds, the same being at the time said distress was made the exclusive property of said Merchants' Bank of Cleveland. From the Canal Bank of Cleveland he took and distrained the sum of \$9,216 in bank bills of various denominations, consisting of ones, twos, threes, fives, tens, twenties, fifties, and hundreds, the same being at the time said distress was made the exclusive property of said Canal Bank of Cleveland. And from the Commercial Bank of Cleveland he took and distrained the sum of \$11,220 in bank bills of various denominations, consisting of ones, twos, threes, fives, tens, twenties, fifties, and hundreds, the same being at the time said distress was made the exclusive property of said Commercial Bank of Cleveland. And the said George C. Dodge, having thus, then and there taken and distrained said bank bills, being all and singular the bank

bills in the plaintiff's declaration set forth and described, immediately, to wit: on the twenty-sixth day of March, in the year one thousand eight hundred and fifty-three aforesaid, removed said several bank bills from said several banks, respectively, to a place of security, to wit; to the vault of the Cleveland Insurance Company, where the same were specially deposited by the said George C. Dodge, and where the same in fact remained to the credit of the said George C. Dodge as a special deposit, until they were afterwards seized and taken by force of the writ of replevin issued at the instance of the said John G. Deshler, plaintiff in this suit.

And the said George C. Dodge further saith, that on the same 26th of March, A. D. 1853, but after the said George C. Dodge had so as aforesaid distrained, and taken away from §261 *the possession and keeping of the said several banks hereinbefore mentioned, the said bank bills above mentioned, and after he had deposited the same for safe keeping in the vault of the Cleveland Insurance Company in manner aforesaid, the said several Banks above mentioned, all of which were incorporated by the laws of the State of Ohio to transact a general banking business in said City of Cleveland, in the County of Cuyahoga aforesaid, and not elsewhere, and all of which in fact were at the time said taxes were assessed, and at the time the said bank bills were so as aforesaid distrained for the payment of said taxes, transacting a general banking business in the City of Cleveland aforesaid, entered into an arrangement with the said John G. Deshler, the plaintiff in this suit, who claims to be a citizen and resident in the State of New York; whereby the said several banks by written instruments of assignment, bearing date on the said 26th of March, A. D. 1853, and executed in behalf of said Banks by their cashiers or other agents duly authorized by the directors of the same, sold, assigned, and transferred to the said John G. Deshler, plaintiff in this suit, all and singular the bank bills so as aforesaid taken and distrained by the said George C. Dodge, and which said bank bills were, by the express terms of said several assignments in writing, declared to be then, and at the time of the execution of said several instruments of assignment, in the possession of George C. Dodge, Treasurer of the County of Cuyahoga, in the State of Ohio.

And the said George C. Dodge further saith, that before and at the time of the taking and distraining said several Bank bills for the payment of said taxes and penalties assessed as aforesaid against said several banks, he, the said John G. Deshler, had no right of property in, or claim to, the possession of said several bank bills whatsoever, but that all the pretended right, interest, and claim of the said John G. Deshler thereto arose under and by virtue of said several instruments of assignments, executed and delivered long after said Bank bills had been taken and distrained by the said George C. Dodge, as Treasurer as aforesaid, in satisfaction of the taxes and penalty so due as aforesaid from said Banks, and while the said bank bills were on special deposit in the vault of the said Cleveland Insurance Company to the credit of the said George C. Dodge, treas-

urer as aforesaid. And the said George C. Dodge further saith, that he is a citizen of and resident in the State of Ohio, and was such at the time when this suit was instituted; and that all and singular said Banks are corporate bodies of said State of Ohio, and have not now and never had any legal existence except within the limits of said State. And so the said George C. Dodge pleads, and *says, that said §27 supposed causes of action are not within the jurisdiction of this court, and this he is ready to verify; whereof he prays judgment whether this court can or will take further cognizance of the action aforesaid. GEORGE C. DODGE.

This plea was verified by affidavit.

The plaintiff demurred to this plea, when the court overruled the demurrer and sustained the plea upon the ground, "that the matters therein contained are sufficient in law to preclude the said Deshler from having and maintaining said action against the said Dodge in this court, and that the court has no jurisdiction of the same."

Deshler sued out a writ of error, and brought the case up to this court.

It was argued by *Mr. Stanberry* for the plaintiff in error, and by *Messrs. Spalding and Pugh* for the defendant.

Mr. Stanberry:

Only one question is made in this case, and that is, whether replevin will lie to recover the possession of certain bank notes, payable to bearer, wrongfully detained by the defendant, the plaintiff claiming as owner of the notes by purchase and assignment from former owners of them, not capable of suing in the courts of the United States.

The decision in the court below was adverse to the plaintiff on the ground that the case was within the eleventh section of the Judiciary Act.

That section denies to the circuit courts of the United States cognizance of any suit to recover the contents of any promissory note, or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the contents, if no assignment had been made, except in cases of foreign bills of exchange.

This section restricts the right of suit given by the Constitution, in reference to citizenship—must therefore be construed strictly, and be confined to the very cases within the restriction.

To make the restriction apply, these things must concur:

1. A plaintiff claiming as assignee of a chose in action.
2. A suit for the contents of such chose in action.
3. An assignor who could not have maintained the suit for the contents.

1. The plaintiff here is not the assignee of a chose in action within the meaning of this section.

The subject matter was bank notes, payable on demand to bearer. Such a chose passes by delivery.

There is no promisee named in the contract, no named person with whom and to whom the contract or promise was made.

*The promise is original to every §28 holder in succession.

Although there happened to be a written assignment in this case, yet that is only evidence of a sale. Just as in a bill of sale of goods, or any chattel, the purchaser is not made an assignee by taking written evidence of his purchase. He takes as purchaser, as owner, a *jus in rem*, not *ad re*.

2. No suit for contents.

The suit is for a thing in *specie*, in *rem*, not on the contract, not against the banks who made the notes, not against anyone liable on the contract.

A suit for the contents of a note must be a suit to recover the thing promised to be paid by the note; not for the note, but something contained within it.

Such a suit destroys the chose in action; it reduces it to a chose in possession, *transit in rem adjudicatam*.

But this suit is not for the contents, it is not on the contract, or against anyone liable in virtue of the contract. It does not, when judgment is recovered, merge the chose, for it remains a chose in action after judgment and recovery.

Finally; this suit is not within the intent of the Act, not within the mischief to be prevented. That intent is clearly to restrain the construction of domestic contracts to the domestic forum, so as to ensure the application of the *lex loci contractus*, in cases where in its inception the contract was made in a state and between citizens of the same state. The exception in favor of foreign bills of exchange proves the rule to be as stated.

This suit not being on the contract, nor against the promisor, but only to recover a thing in the hands of a wrong-doer, does not come at all within the reason of the rule.

The plaintiff will rely on the following cases: *Bank of Kentucky v. Wister et al.*, 2 Pet., 324. It was held, in this case, that in an action for or upon a bank note, payable to bearer, against the bank, it is sufficient if the holder or plaintiff is entitled to sue in the federal courts, without regard to the character of any former holder; and that such a note is payable to anybody, and is not affected by the disabilities of the nominal payee.

Bullard v. Bell, 1 Mas., 251, held that the eleventh section only applies to actions founded on choses in action by an assignee, and that a bank note, payable to A B or bearer, whether A B were a fictitious person or not, was not within the Act, and that the promise was in law made to each holder as an original promisee. In this case the action was upon the note against a stockholder individually liable.

Smith et al. v. Kernochen, 7 How., 198, was an ejectment by an assignee of a mortgage, from a mortgagor not competent to sue in United States courts. The objection was that [629*] the *assignment was merely colorable. Neither counsel nor court suggested any objection under the eleventh section.

The Brig Sarah Ann, 2 Sumn., 211. This case is to the point, that the sale and assignment of a chattel by a person out of possession is not the sale of a chose in action, but is the sale of the thing itself, and passes the title, whether the subject matter is in the hands of a lawful depositary or of a wrong-doer. (24 Pick., 95.)

HOWARD 16.

In all the cases relied upon by the counsel for the defendant in error, the action was for the contents of the chose against the maker or debtor, in virtue of his contract or debt, and not, as in the case at bar, for the specific thing, and against a mere tortious holder.

The following notice of the view, taken by the counsel for the defendant in error, is from the brief of *Mr. Spalding*:

But one point is made by defendant to sustain the judgment of the court below, to wit:

The assignment, made by the several banks named in the pleadings, of the bank bills in question to the plaintiff, after the same had been distrained for taxes by the defendant, and had been removed from their possession, was simply an assignment of a chose in action, within the meaning of the 11th section of the "Act to establish the judicial courts of the United States," approved September 24th, 1789. (United States Stat. at L., Vol. I., p. 79.) And as the banks could not themselves have maintained a suit in the federal court to recover said bank bills, if no assignment had been made, so a like disability attaches to their assignee; or, more properly speaking, as the court below could not take jurisdiction as between the banks and the defendant, so by the terms of said statute it is prohibited from taking cognizance as between the assignee of the banks and the defendant.

The words of the prohibition are as follows: "Nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange."

For the construction heretofore put upon this Act of Congress by the courts, see *Seré & Laralde v. Pilot et al.*, 6 Cranch, 832; *Bradford v. Jenks et al.*, 2 McLean, 130; *Gibson et al. v. Chen*, 16 Pet., 315; *Dromgoole et al. v. F. & M. Bank*, 2 How., 241; *Brown v. Noyes*, 2 Wood. & M., 80; *Sheldon et al. v. Sill*, 8 How., 441; 8 Porter, Ala., 240.

In this last-mentioned case, *Mr. Justice Grier*, in pronouncing *the opinion of [*630 the court, says: "The term 'chose in action' is one of comprehensive import. It includes the infinite variety of contracts covenants, and promises, which confer on one party a right to recover a personal chattel or a sum of money from another by action."

I shall insist that the only right (if any right there was) transferred by the banks of Cleveland to John G. Deshler, under the circumstances set forth in the plea, was a thing in action; a mere right to sue George C. Dodge to recover, in replevin, the bank bills, or in trover the value of the bank bills, if Dodge had improperly converted them. And hence the Circuit Court of the United States had no jurisdiction.

Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the District of Ohio.

The suit below was an action of replevin to recover the possession of a quantity of bank bills, in the hands of the defendant, upon banks

in the City of Cleveland, amounting in the whole to the sum of \$33, 592, and the title to which was derived by an assignment from the banks to the plaintiff. The declaration is in the usual form for wrongfully and unjustly detaining the possession of the property, the plaintiff averring that he is a citizen and resident of the State of New York, and the defendant a citizen and resident of the State of Ohio.

To this declaration, the defendant pleaded to the jurisdiction of the court, setting up that the defendant was acting treasurer of the County of Cuyahoga, Ohio, and had distrained the bills in question belonging to the banks to satisfy the taxes and penalties duly imposed upon them; and that after the said bills had been thus distrained and in his possession, the said banks being incorporated companies by the laws of the State of Ohio, and doing business in the City of Cleveland, sold, assigned and transferred the same to the plaintiff; and that all the right and title to the said bills belonging to him is derived from the aforesaid assignment: wherefore the defendant says, the supposed causes of action are not within the jurisdiction of the court, and prays judgment if it will take further cognizance of the suit.

To this plea the plaintiff demurred, and the defendant joined in demurrer, upon which judgment in the court below was given for the defendant.

The only question presented in the case by either of the parties is, whether or not the court below had jurisdiction of the case within the true meaning of the 11th section of the Judiciary Act of 1789, the material part of which is as **631*** follows: "Nor shall any *district or circuit court have cognizance of any suit to recover the contents of any promissory note, or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange." It is admitted the assignors in this case could not have maintained the suit in the federal courts. We are of opinion that this clause of the statute has no application to the case of a suit by the assignee of a chose in action to recover possession of the thing in specie, or damages for its wrongful caption or detention; and that it applies only to cases in which the suit is brought to recover the contents, or to enforce the contract contained in the instrument assigned.

In the case of a tortious taking, or wrongful detention of a chose in action against the right or title of the assignee, the injury is one to the right of property in the thing, and it is therefore unimportant as it respects the derivation of the title; it is sufficient if it belongs to the party bringing the suit at the time of the injury.

The distinction, as it respects the application of the 11th section of the Judiciary Act to a suit concerning a chose in action, is this: where the suit is brought to enforce the contract, the assignee is disabled unless it might have been brought in the court, if no assignment had been made; but if brought for a tortious taking or wrongful detention of the chattel, then the remedy accrues to the person who has the right of property or of possession at the time, the same as in case of a like wrong in respect to any other sort of personal chattel.

The principle governing the case will be found in the cases that have frequently been before us arising out of the assignment of mortgages, where it has been held, if the suit is brought to recover the possession of the mortgaged premises, the assignee may bring the suit in the federal courts, if a citizen of a state other than that of the tenant in possession, whether the mortgagee could have maintained it or not, within this section; but if brought to enforce the payment or collection of the debt by sale of the premises or by a decree against the mortgagor, then the assignee is disabled, unless the like suit could have been maintained by the mortgagee. (7 How., 198.) This distinction is stated by Mr. Justice Grier, in the case of *Sheldon et al. v. Sill*, 8 How., 441. The learned justice, in delivering the opinion of the court in that case, observed, "that the term 'chose in action' is one of comprehensive import. It includes the infinite variety of contracts, covenants and promises, which confers on one party a right to recover a personal chattel, or sum of money from another, by action." This paragraph has been relied on *to sus- ***632** tain the plea in question; but other portions of this opinion will show, that the phrase "right to recover a personal chattel," was not meant a recovery in specie, or damages for a tortious injury to the same, but a remedy on the contract for the breach of it, whether the contract was for the payment of money, or the delivery of a personal chattel. Indeed, upon a close examination, this is the fair import of the language used, as he was speaking of the contract in the instrument assigned, not of the sale or transfer of it.

We have looked simply at the question of jurisdiction in the case, as that is the only question raised by the plea, and as we are satisfied that the demurrer to it is well taken, the judgment of the court below should be reversed, with costs, and proceedings remitted, with directions that judgment be given for the plaintiff that the defendant answer over.

Mr. Chief Justice Taney, Messrs. Justices Catron, Daniel, and Campbell, dissented.

Mr. Justice Catron, dissenting:

The defendant, Dodge, was Treasurer and tax collector of Cuyahoga County, in Ohio, for the year 1852. There was assessed on the tax list of that year, against the Bank of Cleveland, \$10 580; against the Merchants' Bank of Cleveland, \$7,965; on the Canal Bank of Cleveland, \$9 216; and on the Commercial Bank of Cleveland, \$11,981—making \$38,981.

These respective amounts were distrained in bank notes from each Bank, and deposited by the tax collector with the Cleveland Insurance Company, to his credit. As the four Banks whose property was distrained were incapable of suing the tax collector (who was a citizen of Ohio) in the Circuit Court of the United States, they joined in a written transfer of the bank notes to John G. Deshler, the plaintiff, a citizen of New York, and he obtained a writ of replevin, and process founded on it, out of the Circuit Court of the United States, and declared as a citizen of New York. The defendant Dodge pleaded in abatement, alleging that the causes of action are not within the jurisdiction

of the court; to which plea there was a demurrer.

The first question is, whether this plea in abatement is the proper defense, or should the plea have been in bar.

The plea sets forth the distress for taxes due and unpaid from the banks to the State; that the defendant Dodge was the tax collector, and had the proper authority to make the distress; and did distrain, by virtue of his authority. By the laws of England, replevin does not lie for **§33*** goods taken in execution; nor in cases where goods are taken by distress according to an Act of Parliament, this being in the nature of an execution. (7 Bac. Abr., Replevin and Avowry, C. 71; 6 Com. Digest, Replevin, D. 218; *Isley v. Stubbs*, 5 Mass., 282, per Parsons, Ch. J.)

So the Statute of Ohio, under which the proceeding in this case was had, gives the writ of replevin, and prescribes the mode of proceeding, requiring an affidavit from the owner (or his agent) that the goods were his, that they are wrongfully detained by the defendants; "and that said goods and chattels were not taken in the execution, on any judgment against said plaintiff, nor for the payment of any tax, fine or amercement assessed against the plaintiff;" and it is further provided that any writ of replevin, issued without such affidavit, shall be quashed at the costs of the clerk issuing it; and that he and the plaintiff shall be liable in damages to the party injured. This affidavit, Deshler made, and got the property into his possession on giving bond as the law requires.

The plea distinctly shows that the property was in a condition not to be taken by the writ of replevin, and that the Circuit Court had no jurisdiction to issue the writ, or in anywise interfere with the property by that suit in replevin; and there being no jurisdiction to try title, or proceed further, the plea in abatement was the proper one. And so are the American decisions. (*Shaw v. Levy*, 17 S. & R., 99.)

The next question is, whether these corporations could lawfully assign to a third person their rights of action, to property out of their possession, and held adversely. On common law principles such an assignment is champerty. Blackstone says (Vol. IV., 135), *champart*, in French law, signified a similar division of profits: "In our sense of the word it signifies the purchasing of a suit, or right of suing; a practice so much abhorred by our law, that it is one main reason why a chose in action, or thing of which one hath the right, but not the possession, is not assignable at common law; because no man should purchase any pretense to sue in another's right."

I am not aware that this, as a general rule, has been disputed. It therefore follows, as I think, that the assignment was void, and that the causes of action belonged to the four banks as if it had never been made; and they alone, having the right to sue in any form, and being citizens of Ohio, no power to interfere with the tax collector, Dodge, or the property distrained, existed in the United States court.

A principal objection that I have heard urged is, that as the plea sets forth matter in bar, and commences and concludes in abatement, it is bad for this reason: if we were allowed to rely on such a barren technicality,

the assumption is not well founded. In a replevin for goods the defendant may **§634** plead property in another (or that the goods were taken in execution) either in abatement or bar. (1 Chit. Pl., 446; *Isley v. Stubbs*, 5 Mass., 284, 285; 1 Johns., 380; 1 Salk., 5.)

As the plaintiff had no title that he could assert, it is of no consequence to him who has, say some of the authorities; but if this second ground was doubtful, it is cured by the Act of Jeofails.

The thirty-second section of the Judiciary Act declares that no proceeding in civil causes shall be quashed or reversed for any defect of want of form, but that the courts shall proceed and give judgment according to the right of the cause without regarding such defects, or want of form in any pleading, except in cases of demurrer, where the party demurring shall have specially set down and expressed in his demurrer, the causes thereof. The demurrer here is general, and no mere technicality was allowable.

"The right of the matter in law," in this case, involves a very grave consideration, such as would, in all probability, deeply disturb the harmony of the Union, if taxpayers in larger classes, could combine together, let their property be distrained, and then assign it to a third person, a citizen of another state, and on the same day, as in this case, take it from the state authority by a federal court writ, and let it be taken beyond the state's jurisdiction.

It was said by the Supreme Court of Pennsylvania, in a case where property had been seized for taxes due, and taken from the officer's possession by a writ of replevin, "that the court will not support this form of action in such a case, nor suffer such an abuse of their process. If one man may bring replevin where his goods have been taken for taxes, so may every other person; and thus the collection of all taxes might be evaded. Independently of the Act of Assembly we are bound to quash this writ." (3 Yeates, 82.)

I deem the case before us to have been a very disreputable proceeding. The officers of these Banks could not make the necessary oath required to obtain a writ of replevin; and to evade the laws of Ohio, the device of an assignment of their separate causes of action to a non-resident was resorted to, who could swear that this property was not distrained for his taxes, and thus apparently comply with the law, so far as an oath was required; whereas he violated spirit, to bring into a tribunal of the Union controversy that a state court would not sanction, by practising a fraud on the laws of Ohio, and a fraud on the Constitution of the United States. And what adds to the grossness of this transaction is, the attempt to assign and vest in this plaintiff divers causes of action, by separate assignors, thus seeking to practice **§635** champerty, in a form and to an extent not heretofore devised. If four could assign, and their claims be combined in one suit, by the assignee, so could as many hundreds. To sanction the validity of an assignment to a non-resident of property adversely held, and let him sustain a suit for it, would throw open the United States courts to every matter of litigation where property was in dispute exceeding the value of \$500.

I feel quite confident that the Constitution did not contemplate this mode of acquiring jurisdiction to the courts of the Union, and am of opinion that the judgment of the Circuit Court sustaining the plea ought to be affirmed.

Mr. Justice Daniel:

I also dissent from the opinion of the court in this case, and concur in the views so conclusively taken of it by my brother Catron.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Ohio, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, for further proceedings to be had therein in conformity to the opinion of this court

Cited—16 How., 442; 18 How., 331, 333; 9 Wall., 391; 15 Otto, 686; 5 Blachtf., 114; 2 Curt. 584; 1 Bias., 101; 2 Dill., 185.

JOHN DOE, on the demise of LOT CLARK,
DAVID CLARKSON, JOSEPH D. BEERS, ANDREW TALCOTT, BRANTZ MAYER, AND HARRIET HACKLEY, *Plaintiff in Error*,

v.

JOSEPH ADDISON BRADEN.

Written declarations annexed to treaty at time of ratification, is obligatory as part of treaty—power of King of Spain is a political, not judicial question.

In the ratification, by the King of Spain, of the Treaty by which Florida was ceded to the United States, it was admitted that certain grants of land in Florida, amongst which was one to the Duke of Alagon, were annulled and declared void.

A written declaration, annexed to a treaty at the time of its ratification, is as obligatory as if the provision had been inserted in the body of the treaty itself.

Whether or not the King of Spain had power, according to the Constitution of Spain, to annul this grant, is a political and not a judicial question, and was decided when the Treaty was made and ratified.

636*] *A deed made by the Duke to a citizen of the United States, during the interval between the signature and ratification of the Treaty, cannot be recognized as conveying any title whatever. The land remained under the jurisdiction of Spain until the annulment of the grant.

THIS case came up by writ of error from the District Court of the United States for the Northern District of Florida.

It was an ejectment brought by the lessee of Clark and the other plaintiffs in error against Braden, to recover all that tract or parcel of land in Florida, which is described as follows, namely: Beginning at the mouth of the river heretofore called or known as the Amanina, where it enters the sea, to wit: at the point of the twenty-eighth degree and twenty-fifth minute of north latitude, and running along the right bank of that river to its head spring or main fountain source; thence by a right line to

the nearest point of the River St. John; then ascending said River St. John, along its left bank, to the lake Macaco; then from the most southern extremity of that lake, by a right line, to the head of the river heretofore known or called the Hijuelos; and then descending along the river's right bank to its mouth in the sea; thence continuing along the coast of the sea, including all the adjacent islands, to the mouth of the River Amanina, the beginning point aforesaid, containing twelve millions of acres of land.

The cause went on regularly by the appearance of the defendant, the confession of lease, entry, and ouster, and the admission of counsel on behalf of the United States to defend the suit.

In May, 1852, the case came up for trial at the City of St. Augustine.

The counsel for the plaintiff offered in evidence the following duly verified papers:

1. A memorial of the Duke of Alagon to the King of Spain, dated 12th July, 1817, praying the King to be pleased to grant him the uncultivated lands not already granted, in East Florida, situated between the banks of the River Santa Lucia and San Juan, as far as their mouths into the sea, and the coast of the Gulf of Florida and its adjacent islands, with the mouth of the River Hijuelos by the twenty-sixth degree of latitude, following along the left bank of said river up to its source; drawing thence a line to Lake Macaco; descending thence by the way of the River San Juan to Lake Valdez, and drawing another line from the extreme north part of said latter lake to the source of the River Amanina, thence pursuing the right bank of said river to its mouth by the twenty-eighth or twenty-fifth degrees of latitude, and continuing along the coast of the sea with all its adjacent islands, to the mouth of the River Hijuelos, in full property for himself and his heirs, and permitting him [*637 the importation of negroes free of duty to work and cultivate said lands, a favor which he hopes to obtain from the innate benevolence of your Majesty, whose precious life may God preserve many years, as he prays.

Madrid, 12th July, 1817.

2. The order of the King upon the above, addressed to the royal and supreme council of the Indies, as follows:

His Majesty having taken cognizance of the contents therein, and in consideration of the distinguished merit of this individual, and of his well-known zeal for the royal service, and likewise in consideration of the advantages which will result to the State by the increase of the population and civilization of the aforesaid territories, which he solicits, he has deigned to resolve, that the same be communicated to the Supreme Council, declaring to them that the favor which he solicits is granted to him, provided the same be not contrary to the laws; all of which I communicate to your Excellency by his royal order, for your information, and that of the Council, and for the other necessary ends. God preserve your Excellency many years.

Palace, December 17th, 1817.

3. A *cedula*, issued by the extinct Council of the Indies, addressed to the Governor, Captain-General of the Island of Cuba and its district,

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to the Intendant of the Army and Royal Exchequer of the Havana and its districts, and to the Governor of the Florida. This document bore date on the 6th of February, 1818, and after reciting the petition and grant concluded as follows:

Wherefore I command and require you, by this my royal *cedula*, that in conformity with the laws touching this matter, effectually to aid the execution of said gift, taking all the measures proper to carry it into effect without prejudice to the rights of a third party; and in order that the said Duke of Alagon may be enabled to put into execution his design, agreeably in every respect to my benevolent wishes, in furtherance of the agriculture and commerce of said possessions, which demand a population proportioned to the fertility of the soil and the defense and security of the coast, reporting hereafter successively the progress that may be made; it being understood that the importation of negroes, comprehended in said gift, is to be made, as far as the traffic in them is concerned, in conformity with the regulations prescribed in my royal order of the 19th of December *ultimo*, for such is my will; and that account be taken of this royal order in the Contaduria-General of the Indies. Given at the palace, this 6th day of February, 1818.

4. A power of attorney from the Duke of Alagon to Don Nicholas Garrido, dated 27th of February, 1818.

638*] *5. A decree of Coppinger, Governor of Florida, dated 27th of June, 1818, putting Garrido into possession of the land claimed.

6. A deed of conveyance, dated 29th of May, 1819, from the Duke of Alagon to Richard S. Hackley, of Richmond, Virginia. This deed conveyed a part of the lands in question to Richard S. Hackley & Company, for the purpose of immediately opening clearing, and settling them.

7. The deposition of Ann Rachel Hart, of Baltimore, Maryland, that Richard S. Hackley was a native born citizen of the United States.

8. A deed from Richard S. Hackley, dated 14th of September, 1836, to Joseph D. Beers, Lot Clark and David Clarkson, the lessors of the plaintiff.

9. An admission by the counsel for the United States that Braden, the defendant, was in possession of 567 $\frac{1}{10}$ acres of land, lying on the Manatee River, in the present County of Hillsborough, which was conveyed by the foregoing titles, and was of the value of \$2,000 and upwards.

The defendant, to prove the issue on his part, read in evidence certified copies of patents for his land from the United States.

A great number of other documents and testimony were offered by the defendant and plaintiff, but a particular notice of them is not deemed necessary in the present report.

On the conclusion of the argument the court instructed the jury as follows:

1st. The foundation of the plaintiff's title is the concession or order of the King of Spain of the 17th of December, 1817, and the *cedula* or royal order of the 6th of February, 1818, which, together, constitute the grant or concession to the Duke of Alagon to the lands in question. Whether the order of the 17th of December, 1817, was complete in itself, and

amounted to a grant, I deem it unimportant to inquire, because it was re-affirmed and made operative by the *cedula* or royal order of the 6th of February, 1818, which related back to the order of the 17th of December, 1817; and hence, that may be considered the date of the concession, explained and rendered more full and perfect by the order of the 6th of February, 1818, and it is so considered for the purposes of this suit.

Taking these two orders together, it is manifest, from their tenor and spirit, and it is more particularly apparent from the orders and proceedings of the King and the Council of the Indies, in the early part of 1818, that one object and intent, and one condition of the grant or concession to Alagon, and one of the principal inducements on the part of the King to make the *grant, was the colonization and [***639** settlement of the country, and the agricultural and commercial advantages which it was supposed would arise to the province therefrom. And it is equally clear that the grant was made subject to the laws of Spain, and particularly subject to such laws of the Indies as were applicable to the case; and that the Duke of Alagon, in his proceedings to carry into effect the objects of the grant, and to avail himself of its benefits, was bound to conform to those laws.

The testimony goes to show not only what those laws were, but that early in 1818, and before the Duke of Alagon had sold or conveyed any of these lands, his attention was distinctly called to them by the King and the Council of the Indies, or by the proper officials of the Spanish government, and that every effort was made on the part of the King of Spain to insure the due observance of them by the Duke of Alagon; and that he was especially cautioned and advised that he could not by law, and would not be permitted to alienate the lands, or any part of them, particularly to strangers or foreigners. After this, and before any treaty had been ratified and confirmed between the United States and Spain, and while the Province of East Florida was still under the dominion of Spain, and subject to the laws of Spain, the deed of May, 1819, was executed by Alagon to Richard S. Hackley.

Second. Therefore, if the jury are satisfied that the laws of Spain and the Indies were such as have been read to them, and that it was not lawful for a Spanish subject to sell or transfer lands to a stranger or foreigner, then this deed of May, 1819, from Alagon to Hackley, was in violation of law and void, and conferred no title upon Hackley.

The Duke of Alagon could not (if those laws have been correctly and satisfactorily proved) legally make any such conveyance; and had he attempted so to do here in the Province of East Florida, where it ought to have been done, if at all, he would have been prevented by the governor from doing it; and no notary here could have executed the papers without violation of law and of the royal order.

The same objection applies to the deed of conveyance to Hackley of the 30th of June, 1820. That conveyance was likewise in violation of law, and against the express injunctions of the King. It was made in Madrid instead of the Province of East Florida, and while the Spanish law was in full force and effect here.

Third. The court is further of opinion, that the grant to the Duke of Alagon was in fact formally annulled by the King on the final ratification of the Treaty, by and with the consent of the cortes, as appears from the evidence **640***] in the case; and *whether this revocation or annulment of the grant by the King and cortes was founded upon the fact that Alagon had justly forfeited all right to the lands by disregarding the objects and conditions of the grant, and by attempting to transfer the lands to a foreigner, or upon the right of eminent domain, and upon the ground that it was necessary, in order to complete the Treaty, and therefore for the public good and general welfare of the nation, to resume or revoke the grant, it was in either case a rightful and legitimate use of sovereign power, and one which cannot be questioned in a court of justice.

Fourth. The court is further of the opinion, that even if the grant was not rightfully annulled by the Treaty, yet it is not a grant which, by the terms of the Treaty, would stand ratified and confirmed, or which the United States are bound to confirm, although made before the 24th of January, 1818; that the United States are bound to ratify and confirm it only to the same extent that it would have been valid if the territory had remained under the dominion of Spain: and it is manifest, from the evidence in the case, that if the Treaty had not been made, the grant would not have been held valid by the Spanish government; it was in fact revoked and annulled by the King and cortes. The United States, therefore, are not bound either by the rules of public law, by the universal principles of right and justice, or by the terms of the 8th article of the Treaty, to recognize or confirm it.

Fifth. The court is further of the opinion, that inasmuch as this claim under the grant to the Duke of Alagon has never been recognized and confirmed by the United States, or by any board of commissioners or court authorized by Congress to adjudicate or decide upon the validity of the grant, it is therefore a claim "not recognized or confirmed," and within the meaning of the first section of the Act of Congress of 3d March, 1807 (relating to settlements, &c., on the public lands: 2d vol. Stat. at L. of the U. S., p. 445), and that the claimants, therefore, have only an equitable or inchoate title at best, and have not the right to take possession; but, on the contrary, are expressly forbidden so to do until their title has been confirmed. Consequently, that not having the right of possession, or the complete legal title, they cannot sustain an action of ejectment; that their only redress is by application to the political power or Legislative Department of the government; that the courts of justice cannot furnish it without a violation of law.

These points being fully conclusive as to the rights of the parties, the court deems it unnecessary to notice other points raised in the course of the trial and arguments.

641*] *From these views of the court, however, the jury are bound to find a verdict for the defendant, and are so instructed accordingly.

To all of which charge, and each and every paragraph or section of the same, the plaintiffs'

counsel excepted, and prayed their exception to be noted in the words following:

To all and every part of which instructions and directions, so far as adverse to the plaintiffs, the plaintiffs except, and especially to each and all of the directions and propositions and points contained in each of the articles or paragraphs of said instruction numbered, respectively, in the said instructions, 1 (one), 2 (two), 3 (three), 4 (four), and 5 (five).

And the plaintiff prays the court to sign and seal this his bill of exceptions, which is accordingly done this twenty-fourth day of May, eighteen hundred and fifty two.

(Signed) I. H. BRONSON, Judge. [SEAL.]

Upon this exception, the case came up to this court, and was argued by *Messrs. Mayer and Johnson* for the plaintiff in error, and by *Mr. Cushing* (Attorney-General) for the defendant.

Mr. Mayer prefaced his argument with a narrative, and inasmuch as a part of that historical narrative contained the foundation of one of his points, it is necessary to insert it, namely:

The royal order (constituting the grant to Alagon) of 17th December, 1817, declares that "His Majesty having taken cognizance of the contents [of the petition of the duke], and in consideration of the distinguished merit of this individual, and of his well-known zeal for the royal service, and likewise in consideration of the advantages which will result to the State by the increase of the population and civilization of the aforesaid territories which he solicits, he has deigned to resolve that the same be communicated to the Supreme Council, declaring to them that the favor which he solicits is granted to him, provided the same be not contrary to the laws." This order is addressed to the President of the Council of the Indies.

It may be here remarked that when this order was passed, and for more than two years afterwards, the King of Spain was absolute monarch, the cortes for that period not existing; but at the ratification by him of the Treaty the cortes had already been in renewed power for full seven months. Upon that ratification the sanction of the cortes was obtained for, and only for the 2d and 3d articles of the Treaty, which yielded the Spanish territory; and it was asked because by the Constitution the King could not alone alienate any part of the Spanish territory, nor any national property, but for the alienation needed the consent of the cortes. (Constitution, title 4, ch. 1, art. 172, secs. 4, 7.)

*Describing the King as a constitutional monarch, we further may advert to the 10th section of the same Article of the Constitution; that declaring that "he shall not take the property of any person or corporation, nor hinder or impede the free possession, use and benefit thereof"—and the same section proceeds to prescribe that "if at any time it shall be necessary for an object of acknowledged public utility to take the property of an individual; nevertheless, it shall not be done, unless he be at the same time indemnified and a fair equivalent be given him upon a sufficient inquiry made by fit and proper men."

The ancient laws of Spain on the general rights of property have always been authoritative as if constitutional rules; and, upholding

the sanctity of private property against the royal encroachment, the Laws of Spain and the Indies, Book 3, tit. 5, Law 1, ordain that "those things which the King gives to anyone cannot be taken from him either by the King or anyone else without some fault of his; and he to whom they are given shall dispose of them at his will, as of any other thing belonging to him:

The points made by *Mr. Mayer* were the following:

1. The royal acts (the order of 17th December, 1817, upon the duke's petition of the preceding July, and the *cedula* or missive to the Captain-General of Cuba of 6th February, 1818) constitute a grant, and an assurance of the legal estate in the lands, and taking date from the 17th December, 1817. That being the effective date of the grant, it is not affected by the 8th article of the Treaty with Spain, which condemns only grants of date after the 24th of January, 1818. The grant was consummated by all the formal possessions that it can be pretended the Spanish law demanded; and the possessory ceremony was by that law authorized through an attorney, on this occasion Garrido, whose conferred powers are fully testified. Moreover, this attorney was empowered to sell and settle and improve the granted lands in execution of the purpose declared by the duke's petition as his view in asking the grant. And the action of Garrido in his latter branch of his agency (shown in the testimony of the defendant himself) proves all diligence and *bona fides* in fulfilling what the petition indicated as the grantee's design. All in that respect was done that could within the brief period have been exacted, assuming the expression of purpose by the petitioner to have the effect, when shown to have induced the grant, to make the grant conditional, and that even precedently so. But the grant was not under a condition, either precedent or subsequent. The declaration of purpose in the petition for a grant from Spain, when the grant itself does not, upon that declaration, introduce it as a condition in terms, **643*** is not, as this court has determined, to be treated as a condition of any kind. The crown shows its content with the general assurance offered by the grantee, and rests upon his good faith; and so implies by not converting the general pledge or promise into terms of condition. If, however, a condition (for settling and improving the land) is to be implied, it can be but a condition subsequent, and agreeably to this court's adjudication, the fulfillment of the duty was prevented, and therefore excused, by the succeeding and so early transfer of the sovereignty of the region from Spain to the United States. And when a grant is conditional, and the condition has been performed, or has ceased to bind, the grant is deemed absolute *ab initio*.

(*Mr. Mayer* then proceeded to show, by reference to authorities, that the grant was founded on sufficient consideration.)

II. The deed of Alagon to Hackley bears date the 29th of May, 1819, and so, after the ratification by the United States of the Treaty with Spain. The Treaty was ratified anew by our government after Spain's ratification, and was re-ratified merely because it was necessary to waive the limitations of

six months specified in the Treaty for the exchange of ratifications. It was the original Treaty, bearing date the 22d of February, 1819, that was ratified. The proprietary rights of the United States took date from the date of the Treaty, and on the consummate ratification related to that period. No control of Spain is to be deemed to have rested in her after the Treaty's date over the territories of Florida as a domain, or for any purpose of legislation or of administration, referable to her interest, or within her polity, municipal or foreign. The validity of that deed, as to Hackley's capacity, being a foreigner, to take it, was, consequently, beyond any regulation of Spain, no matter how ancient, save only contingently, in the event of the Treaty not being definitely ratified.

III. This Treaty with Spain in the consideration of the 8th article, and of the clauses of territorial cession, has been by the Supreme Court always determined to design no departure from the great principle of civilized justice, and of modern international law, that in no transfer of a territory can any domain be passed or be accepted from the ceding nation than what belongs to the government—the public property. That property alone, and the sovereignty of the transferred region, are the only legitimate objects of such international transactions, and the sovereignty is to be esteemed the primary object. The court has said that the express terms of this Treaty deferring to private rights, were not needed for thus limiting the Treaty's scope; and the 8th article is not to be regarded as enlarging the cession of property. In other words, that article, even as to grants subsequent *to 24th of January, 1818, must be construed in subserviency to the sanctity that our own public law accords to the rights of contract and private property. (8 Pet., 445, 449, 450; *Arredondo's case*, 6 Ib., 735, 736; *Percheman's case*, 7 Ib., 86; 9 Ib., 133, 169, 170; 14 Ib., 349; 8 How., 306, 307; *Terrett v. Taylor*, 9 Cranch, 43.)

These cases affirm, too, the reformed doctrine of international law, that even by conquest the lands of individuals shall not be wrested from them, and in no respect are to be yielded even to the rights of war. Much less are they, then, to be conceded to the exactions of diplomatic bargaining. We may add to these authorities (not now adverting to all the treaties on international law where they enjoin the same doctrine): 1 Pet., 517; 12 Ib., 410, 411; 8 Wheat., 464; 4 Ib., 518; 4 Cranch, 323; *Fletcher v. Peck*, 6 Ib., 87; Wheat. Nat. Law, 269, b., 2, ch., sec. 16. All real property taken in war is entitled to postliminy.

IV. These views, under our third head, lead to the conclusion that no grants of Spain, in her Florida region, of portions already conceded to individuals, could be asked to be annulled; or could be accepted by our government from Spain, if even her King had had despotic power to thus despoil without redress (which immunity and irremediableness of wrong defines despotic government), except only where the individual interest could be shown to have expired from default justly imputable, and going to the forfeiture of the rights. Such a default would be the failure to fulfill conditions of the grants. It will be seen, that in the correspondence of our government prior to the

Treaty, and in the expostulations that followed our ratification of it throughout the negotiation, which the executive, unprompted by the Senate's counsel or instructions and so without full warrant we might say, embarked in, the vacating of grants of Spain actually made (no matter of what extent), was not claimed save upon the ground of their conditions having been violated, or having failed to be fulfilled. The gratuitous character of grants was not made the plea; and as little was, or could the area of the grants be the pretext; in both particulars the sovereignty of Spain giving her absolute discretion, and her policy, already adverted to, placing her liberality beyond suspicion in these territorial appropriations. Consistently, then, with what was assumed as the only basis of the pretension, as well as looking to the only grounds that could find shelter in the pure public law of the era, no grants under the Treaty could have been designed for denunciation, except those that were extinct for violation of their conditions. Let the expository terms used by the King in his ratification be deemed, then, more than what it merely is (and it is merely the expression of an **645***) opinion, and a *comment on the Treaty text), and let it be dignified or aggravated as a decree of forfeiture or of confiscation, and yet it must be interpreted relatively to the ground upon which we, or rather the executive, claimed the annulment to be just, and not as if we demanded it as a royal despotic assumption. It is well to remark here (as bearing on the idea that may be urged that Spain yielded the sacrifice of the Alagon grant, under a pressure as dire as if under belligerent duress), that the instructions to our Minister at Madrid, which our quotations on his head embrace, show that the exaction of the annulment was meant to be experimental, and that the terms were not to be insisted on if the Spanish government were found impracticable when remonstrated with. It will be perceived by the court that Don Onis, the Spanish Minister here, in his communication to our Secretary did—true to the principle that the annulment of no grants was to be arbitrary, and that no absolute power was assumed thus to reside in the Spanish crown—declared that if he had even known that the grant to Alagon (and the other obnoxious grants) bore date before the 24th of January, 1818, he would not have assented to their being declared void—that is, merely on an assumption of a particular date, for sweeping nullification, careless of the infirmity or the vigor of the grantee's rights or pretensions.

That the ratification of our government, which took place immediately on the signature of the Treaty, was regarded as definitive, and not as contingent upon any expansion (by Rider or by royal rescript or opinion) of the terms of the Treaty, is evident from the fact which the succeeding correspondence and instructions show, that the immediate occupation of the ceded territory was claimed under the auspices of the Treaty. In the testimony of our opponents, we have in the case the Executive Journal of the Senate, relative to the Treaty already referred to by us, showing the original and very prompt ratification by us of the Treaty and so giving its due weight and peculiar

character to the diplomatic movement following the ratification. Beside the passages mentioned of the Senate Executive Journal, we refer, with regard to the positions just submitted, to the following portions of the "State Papers," in the 4th volume, pp. 465, 509, 532, 627, 652, 653, 658, 659, 669, 683, 684, 687, 699

With this grant, then, no condition having been violated and no default to inflict forfeiture having occurred, it follows that the claim of Mr. Hackley could not have become void within the actual meaning of the parties to the Treaty, even giving to the King's declaratory ratification the extreme office of a decree of annulment, and supposing that his prerogative gave him power for such action.

*V. It cannot be said that the annul-**646** ment may be justified upon imputable fraud of Spain, assuming even that the grant was made after: instead, as is the fact of being made before (and of pending before the King more than six months), the period of proposing the cession; more than a year elapsing further before the Treaty was concluded. Under the theory of that imputation, the King's special ratification would be a concession of the fraud, and a decree not only against the grant, but against the honor of the Crown. Fraud is not ascribable to a sovereign state, in her compacts with other powers; and particularly not as to a subject of concession, over which her dominion was legally absolute until that subject actually, by her own act, the result of her own pleasure, were severed from her possessions.

This court has deemed the supreme right of disposal in the Spanish crown, or in any government power to alienate the domain of the State, too positive and absolute to allow complaint of any act within that power, no matter even how reasonable it be to infer that it was in anticipation of a surrender of sovereignty of the region, and designed to lessen the public domain of the succeeding sovereign. (*U. S. v. Clarke*, 8 Pet., 468.) That decision in effect affirms that fraud is not to be inferred, nor is chargeable against any act of a sovereign power, if merely it be coördinate with the sovereign legal rights and control. (15 Pet., 595; 11 Wheat., 359; 6 Cranch, 87.)

VI. The grant could not have been amended by the right of eminent domain residing in the King. The Constitution of Spain declares, art. 172, tit. 4, ch. 1, sec. 10, that the King "shall not take the property of any person or corporation, nor hinder or impede the free possession, use and benefit thereof, and if at any time it shall be necessary for an object of acknowledged public utility to take the property of an individual, nevertheless it shall not be done unless he be at the same time indemnified, and a fair equivalent be given him upon a sufficient inquiry made by fit and proper men." No indemnification is pretended to have been here at anytime provided for this deprivation of property, and no establishment of the necessity, nor of the object of "public utility" is testified from the only appropriate arbiter, the legislative authority of Spain, composed of cortes as well as King, in which Legislature resided the representative sovereignty of Spain. This determination of the urgency of the object for which the private property is to be granted by this eminent domain, is by all politi-

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cal law assigned to the sovereignty. It is emphatically so appropriated by the Spanish Constitution. Art. 3, tit. 1, ch. 1, declares **647*** "that 'the sovereignty resides essentially in the nation,' and by art. 15, tit. 2, ch. 8, the legislative power belongs to the cortes together with the King.

VII. Thus showing the limitation of the royal power and how special and narrowed it was, as shown even by the King's act of ratification, the action of the cortes as to the cession, and how that action, allowing only public estate to be ceded and excluding from cession private property, did, in effect, contradict the King's surrender (if his act be so construed) of the lands of Alagon and make his provisions in his ratification repugnant to the act and will of his constitutional partners in the sovereignty of Spain. What effect can be assigned to that ratification in its denunciation of the grant to the Duke? Recurring to the constitutional inhibitions upon the King's interference with private property, quoted under the preceding heads, and to the ancient laws we have cited, of equal obligation, we are at a loss to apprehend where, in himself, and in clear contradiction of the view, and even the determination of the cortes, there can be found a warrant for his repudiation of the grant, regarding now his act as a decree of annulment or of confiscation. Divorced from the public domain, for all power of alienation, by the positive interdict of the Constitution, and forbidden, beside, by the superadded terms of the Constitution from alienating "any portion of the Spanish territory," "however small," and whether public or private, and these limitations of prerogative and respect for private property solemnly consecrated by the King's oath; and, again, art. 4 of the constitution declaring that "the nation is bound to maintain and protect by wise and equitable laws the civil liberty, property, and other legal rights of the individuals who compose it," it seems only necessary to show that the Constitution of Spain was in force when the ratification occurred, to have the King's condemnation of our grant dismissed as a mere nullity. But it pretends not to be a decree or ordinance annulling the grant. It takes the Treaty as a text, and appends, by making the denunciation, only a version of the Treaty itself, or records testimony as to an "understanding," that by the very Treaty has failed to be carried out, and whose basis the 8th article of the Treaty shows to be erroneous. Viewed as an opinion (however it be a royal emanation), it can have no effect. As testimony to explain, or rather to prevail in contradicting the Treaty, it must likewise be unavailing. The declaration could legitimately serve but one purpose and as a memorial of fact; and that is to be found a claim by the United States against Spain for indemnification, for parting with property which she taught the United States to believe would pass to her in the general cession of territory. We **648*** "deny that even the King and cortes in combined legislative action, or under any title of power, could have annulled the grant. And we are in that aspect of the case independent of the testimony, given by our adversary, that the grant was not annulled by concurrence of the cortes, and the King's act had

in no respect their sanction. The Spanish Constitution vests no such power in the cortes and king even united to confiscate private property, unless, indeed, it were admissible under the prerogative of "eminent domain," an interpretation which we have shown to be here inapplicable. Can it be pretended that the King alone, divorced as he was from the power to alienate any portion of the public domain, and, more than that, any "portion of the Spanish territory," or interfere with private property, whether in the title to it or the use of it, could effect that by his decree, which, if legitimately practicable at all by the state, could be effected by only the sovereignty of the country, and that formed of the cortes and himself?

6 Cranch, 87. There this court defines legislative power; and denounces as alien to it, and as despotic, all pretension by a legislative authority to annul private rights, especially without compensation.

But we refer, as conclusive against the power to annul, in King, or in King and cortes, to the effect of the Treaty's relation to its date, as stated at page 81 hereof.

VIII. Conceding to the ratification the character of a decree, and the King's constitutional power to pass it, can the United States accept the land thus taken arbitrarily from an individual and enjoy the sacrifice of private rights? If, under other circumstances it could be accepted, can it be after all that has transpired in relation to this grant, and especially after our ratifying this Treaty—before this American citizen, Mr. Hackley, received his conveyance—without then intimating a complaint, much less interposing a protest, against the grant to Alagon—but lulling the world into the impression that private property was to be held sacred, and that (whatever might have been the suggestions, hostile to it, in course of the negotiation), the grant of Alagon was, by the limitation of date proclaimed in the Treaty, left inviolate, and committed to its intrinsic merits?

Our principles of public law reject the proffer of such an addition to the treaty domain; and by that law, as we recognize it under our political institutions, this case and the force of the King's act of confiscation are to be judged. If we cannot, because contrary to those principles, sanction the right to have decreed this regal spoil, how can the right to it be enforced by the United States, and if so, how, then, can any pretension be effective as a defense founded on such a supposed right. **649** * (Story's Conf. L., secs. 244, 326, and [***649** the cases there cited; 15 Pet., 595; 1 Gall., 375; *Fletcher v. Peck*, 6 Cranch, 87.)

If this view be true generally, as to all contracts, and pretensions of foreign source, repugnant to our maxims of political and social justice, it applies here most conclusively to this case of a native American citizen, as Mr. Hackley is proved to have been. He was protected by the Constitution of the United States, and (as the Supreme Court, in the case cited, says) "by the general principles common to our free institutions."

IX. It has been assumed by us that this is not a case for political action of our government, but for the judicial power directly.

This, in the case of our complete grant, since the cases of *Percheman*, in 7 Pet., and of *Arredondo*, in 6 Pet., and of *United States v. Wiggins*, 14 Pet., 349, is unquestionable. Nor have we made any remarks as to the sufficiency of authentication of our documentary testimony; that being in our opinion unnecessary after the decision of the court on that head. Among those decisions we may refer to 14 Pet., 345, 346.

Mr. Cushing (Attorney-General) rested his case upon the following point:

That the annulment of the grant to the Duke of Alagon, declared by the Treaty of Cession of the Floridas, is binding and absolutely conclusive upon all the departments of the government and upon the people of the United States.

By the Constitution of the United States, the political power of making treaties is vested in the President of the United States by and with the advice and consent of the Senate (art. 2, sec. 2).

"And all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land. (Art. 6, par. 2.)

Hence it follows that the Treaty of Cession of the Floridas, having been duly ratified, proclaimed and published in the statute book, operates of itself, in respect of these three annulled grants, as a supreme law.

The Congress of the United States passed the Act of the 3d of March, 1821, to carry into execution the Treaty between the United States and Spain, concluded at Washington on the 22d day of February, 1819 (3 Stat. at L., by Little & Brown, 637, ch. 39). The first section authorized the President to take possession of and occupy the "Territories of East and West Florida and the appendages and appurtenances thereof; and to transport the officers and soldiers of the King of Spain, being **650*** there, to the Havana, agreeably to the stipulations of the Treaty between the United States and Spain, concluded at Washington on the 22d day of February, in the year 1819, providing for the cession of said Territories to the United States." The same Act organized a territorial government, and extended the laws of the United States for collection of the revenue, and prohibiting the importation of persons of color over the said ceded Territories.

The Legislative and the Executive Departments of the United States government, in the exercise of their political powers, and His Catholic Majesty, in the exercise of his political power, have explicitly annulled the grant to the Duke of Alagon.

The explanation of the 8th article, so made before the ratifications of the Treaty, upon which explanation the Treaty was accepted and ratified by the President and Senate of the United States, and upon which explanation the ratifications were exchanged between the two contracting powers, is as much a part of the 8th article, and as much a part of the Treaty, as any other of the articles.

That explanation and express annulment of the grant to the Duke of Alagon, so affected by the political powers of the government of the United States, is binding upon, and to be followed by, the Judicial Department. (*Foster*

and *Elam v. Neilson*, 2 Pet., 307, 309, 312, 313; *Garcia v. Lea*, 12 Pet., 516, 517, 518, 519, 521; *United States v. Reynes*, 9 How., 153, 154.)

These three cases were decided upon the decision by Spain to the United States of the Floridas; and private claims asserted in those cases were granted by Spain after the Treaty of San Ildefonso, of 1800, after the cession of Louisiana to the United States, by the Treaty of Paris of 1803, and before the 24th of January, 1818. They were located between the rivers Iberville and Perdido, in the parish of Feliciana, within the disputed limits between Louisiana and West Florida, which had been repeatedly discussed, with talent and research, by the governments of the United States and Spain.

The private claimants insisted—

1st. Upon the right of Spain to the disputed territory, and invoked the decision of this court upon the true construction of the Treaty of San Ildefonso, of the 1st of October, 1800, by which Spain retroceded Louisiana to France, and of the Treaty of Paris of 30th of April, 1803, by which France ceded Louisiana to the United States.

2d. That their claims, granted by Spain, before the 24th of January, 1818, were expressly confirmed by the first member of the 8th article of the Treaty of 1819, for the cession of the Floridas to the United States.

*3d. That the explanatory clause, [**651** contained in the ratification of the Treaty, forms a part of the 8th article, in that the article so explained should be understood as if it had been written thus: "All the grants of land made before the 24th of January, 1818, by His Catholic Majesty, or his lawful authorities in the said Territories, ceded by his Majesty to the United States, except those made to the Duke of Alagon, the Count of Puñonrostro, and Don Pedro de Vargas shall be ratified and confirmed, &c."

To the first position, this court answered (2 Pet., 307): "The judiciary is not that department of the government to which the assertion of its interests against foreign powers is confided, and its duty commonly is to decide upon individual rights according to those principles which the Political Departments of the nation have established. If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous."

"We think, then, however individual judges might construe the Treaty of San Ildefonso, it is the province of the court to conform its decisions to the will of the Legislature, if that will has been clearly expressed."

The court then cited the Acts of Congress showing that the United States had, before the ratification of the Treaty for the Cession of the Floridas, distinctly declared that the boundary of Louisiana, as acquired under the Treaties of San Ildefonso, of 1800, and of Paris of 1803, extended east as far as to the River Perdido—had taken actual possession of territory according to such declaration of the boundary of Louisiana as acquired by the Treaties of San Ildefonso, of 1800, and of Paris, of 1803—and had annexed a part of the disputed territory to the State of Louisiana. Whereupon this court said (2 Pet., 209): "If those departments which are intrusted with the foreign intercourse of the nation, which assert and maintain its interests

against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a Treaty; if the Legislature has acted on the construction thus asserted, it is not in our own courts that this construction is to be denied. A question like this, respecting the boundaries of nations, is, as has been truly said, more a political than a legal question, and in its discussion the courts of every country must respect the pronounced will of the Legislature."

To the second position, this court answered (2 Pet., 310, 311), That His Catholic Majesty, by the 2d article of the Treaty, ceded to the United States "all the territories which belong to him," situated to the eastward of the **652***] River Mississippi, *known by the name of East and West Florida; that the words "which belong to him," limit the extent of the cession; that the United States cannot be considered as admitting by this article that the territory which, at the signature of the Treaty, composed a part of the State of Louisiana, rightfully belonged to His Catholic Majesty; that these terms were probably selected so as not to compromise the dignity of either government, and which each might understand consistently with its former pretensions; that the 6th article, stipulating for incorporating the inhabitants of the ceded Territories into the Union of the United States, is co-extensive with the cession, and did not include the Territory which was then a part of the State of Louisiana, which was already a member of the American confederacy; that the 8th article of the Treaty must be understood as limited to grants made by His Catholic Majesty within the ceded Territory, that is, within "the territories which belong to him."

To the third proposition this court answered (2 Pet., 312): "But an explanation of the 8th article has been given by the parties which (it is supposed) may vary this construction. It was discovered that three large grants, which had been supposed at the signature of the Treaty to have been made subsequent to the 24th of January, 1818, bore a date anterior to that period. Considering these grants as fraudulent, the United States insisted on an express declaration annulling them. This demand was resisted by Spain; and the ratification of the Treaty was for some time suspended. At length His Catholic Majesty yielded, and the following clause was introduced into his ratification: 'Desirous at the same time of avoiding any doubt or ambiguity concerning the meaning of the 8th article of the Treaty,' &c. (quoting the residue of the King's ratification).

One of these grants, that to Vargas, lies west of the Perdido.

"It has been argued, and with great force, that this explanation forms a part of the article. It may be considered as if introduced into it as a proviso or exception to the stipulation in favor of grants anterior to the 24th January, 1818."

" * * * These three large grants being made about the same time, under circumstances strongly indicative of unfairness, and two of them lying east of the Perdido" (and the third also being as to a part east of the Perdido), might be objected to on the ground of

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fraud common to them all; without implying any opinion that one of them, which was for lands lying within the United States, and most probably sold by the government, could have been otherwise confirmed. The government might well insist on closing all controversy relating to these grants, which might so materially interfere with its own rights and policy in its future disposition of the ceded lands, and not allow them to *become the subject [**653** of judicial investigation; while other grants, though deemed by it to be invalid, might be left to the ordinary course of the law * * *

An extreme solicitude to provide against injury or inconvenience, from the known existence of such large grants, by insisting upon a declaration of their absolute nullity, can, in their opinion, furnish no satisfactory proof that the government meant to recognize the small grants as valid, which in every previous act and struggle it had proclaimed to be void, as being for lands within the American territory."

The principles so adjudged in 1829, in *Foster and Elam v. Neilson*, were affirmed in *Garcia v. Lee*, in 1838, and again in 1850, in *United States v. Reynes*, before cited.

The Treaty ceding the Floridas to the United States, as explained in the ratification, expressly annuls the grants to the Duke of Alagon, the Count of Puñonrostro, and Don Pedro de Vargas; in this express declaration and understanding, it was accepted and ratified by the President and Senate of the United States; in this sense the ratifications were exchanged between the two contracting nations; in this understanding the Congress passed various statutes, whereof only two need be particularly noticed here. The first is "An Act for ascertaining claims and titles to land within the Territory of Florida," approved 8th May, 1822 (3 Stat. at L., by Little & Brown, p. 709, ch. 129), the fourth section of which alludes to the claims rejected by the Treaty, and excepts them from the powers of the commissioners, as hereinbefore quoted. The other is "An Act supplementary to the several Acts providing for the settlement and confirmation of private land claims in Florida," approved 23d May, 1828 (4 Stat. at L., by Little & Brown, 284), the sixth section whereof authorized claimants to lands in Florida, not decided and finally settled under the provisions of this Act, &c., to present their cases by petition to the judiciary, to try the validity of their claims: "Provided, that nothing in this section contained shall be construed to authorize said judges to take cognizance of any claim annulled by the said Treaty, or the decree ratifying the same by the King of Spain, nor any claim not presented to the commissioners, or register and receiver, in conformity to the several Acts of Congress, providing for the settlement of private land claims in Florida."

The explanation of the 8th article of the Treaty, so made and contained in the ratifications as exchanged between the two governments, forms a part of the 8th article.

In that the Legislative, the Executive, and the Judicial Departments of the United States have hitherto concurred.

The grants by His Catholic Majesty to the Duke of Alagon, *the Count of Puñ. [**654** onrostro, and Don Pedro de Vargas, are annulled by the Treaty.

The plaintiff, in ejectment, produces in evidence, this annulled Spanish grant to the Duke of Alagon as the foundation of his title to the land demanded, as the fulcrum of his action against the adverse possessor.

Upon the plaintiff's own evidence, upon his showing of the facts, the supreme law of the land pronounces that he has no title, no just cause of action.

All subsequent and subsidiary questions are vain.

Mr. Chief Justice Taney delivered the opinion of the court.

This controversy has arisen out of the Treaty with Spain by which Florida was ceded to the United States.

The suit was brought by the plaintiff in error against the defendant to recover certain lands in the State of Florida. It is an action of ejectment. And the plaintiff claims title under a grant from the King of Spain to the Duke of Alagon. This is the foundation of his title. And if this grant is null and void by the laws of the United States, the action cannot be maintained.

The Treaty in question was negotiated at Washington, by Mr. Adams, then Secretary of State, and Don Louis de Onis, the Spanish Minister. It was signed on the 23d of February, 1819; and by its terms the ratifications were to be exchanged within six months from its date.

It appears from the Treaty, that the negotiations commenced on the 24th of January, 1818, by a proposition from the Spanish government to cede the Floridas to the United States. The grant to the Duke of Alagon bears date February 6th, in the same year, and consequently was made after the King of Spain had authorized his minister to negotiate a Treaty for the cession of the territory, and after the negotiation had actually commenced. It embraces ten or twelve millions of acres.

The fact that this grant had been made came to the knowledge of the Secretary, pending the negotiation; and he also learned that two other grants—one to the Count of Puñonrostro, and the other to Don Pedro de Vargas, each containing some millions of acres, had also been made under like circumstances. These three grants covered all or nearly all of the public domain in the territory proposed to be ceded. And the Secretary naturally and justly considered that grants of this description made while the negotiation was pending, and without the knowledge or consent of the United States, were acts of bad faith on the part of Spain, and would be highly injurious to the interests of the United States, if Florida became a part **655** of their territory. For the possession and ownership of such vast tracts of country by three individuals would be altogether inconsistent with the principles and policy on which this government is founded. It would have greatly retarded its settlement, and diminished its value to the citizens of the United States. For no one could have become a land holder in this new territory without the permission of these individuals, and upon such conditions and at such prices as they might choose to exact.

Acting upon these considerations, the Secre-

tary insisted that if the negotiations resulted in a treaty of cession, an article should be inserted by which these three grants, and any others made under similar circumstances, should be annulled by the Spanish government.

The demand was so obviously just, and the conduct of Spain in this respect so evidently indefensible, that after much hesitation it was acceded to, and the 8th article introduced into the Treaty to accomplish the object. By this article "all grants made since the 24th of January, 1818, when the first proposal on the part of His Catholic Majesty for the cession of the Floridas was made, are thereby declared and agreed to be null and void;" and all grants made before that day are confirmed.

With this provision in it, the Treaty was submitted to the Senate, who advised and consented to its ratification on the 24th of February, 1819, and it was accordingly ratified by the President.

Before, however, the ratifications were exchanged, the Secretary of State was informed that the Duke of Alagon intended to rely on a royal order, of December 17, 1817 (which is recited in the grant hereinbefore mentioned), as sufficient to convey to him the land from that date; and upon that ground claimed that his title was confirmed and not annulled by the Treaty.

The Secretary, it appears, was satisfied that this royal order conveyed no interest to the Duke of Alagon; and that the grant in the sense in which that word is used in the Treaty, was not made until the instrument, dated the 6th of February, 1818, was executed.

But as a claim of this character, however unfounded, would cast a cloud upon the proprietary title of the United States, and as claims might also be set up under similar pretenses under the grants to the Count of Puñonrostro and Vargas, the Secretary deemed it his duty to place the matter beyond all controversy before the ratifications were exchanged. He therefore requested and received from Don Louis de Onis a written admission that these three grants were understood by both of them to have been annulled by the 8th article of the Treaty; and that it was negotiated *and signed under **656** that mutual understanding between the negotiators. And having obtained this admission, he notified the Spanish Minister that he would present a declaration to that effect upon the exchange of ratifications, and expect a similar one from the Spanish government to be annexed to the Treaty.

But the King of Spain for a long time refused to make the declaration required, or to ratify the Treaty with the declaration of the American government attached to it. And a great deal of irritating correspondence upon the subject took place between the two governments. Finally, however, the King of Spain ratified it on the 21st of October, 1820, and admitted, in his written ratification annexed to the Treaty, in explicit terms, that it was the positive understanding of the negotiators on both sides when the Treaty was signed, that these three grants were thereby annulled; and declared also that they had remained and did remain entirely annulled and invalid; and that neither of the three individuals mentioned, nor those who might have title or interest through

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them, could avail themselves of the grants at any time or in any manner.

With this ratification attached to the Treaty, it was again submitted by the President to the Senate, who on the 19th February, 1821, advised and consented to its ratification. It was ratified, accordingly, by the President, and the ratifications exchanged on the 22d of February, 1821. And Florida, on that day, became a part of the territory of the United States, under and according to the stipulations of Treaty—the rights of the United States relating back to the day on which it was signed.

We have made this statement in relation to the negotiations and correspondence between the two governments for the purpose of showing the circumstances which occasioned the introduction of the 8th article confirming Spanish grants made before the 24th of January, 1818, and annulling those made afterwards; and also for the purpose of showing how it happened that the three large grants by name were declared to be annulled in the ratification, and not by a stipulation in the body of the Treaty. But the statement is in no other respect material. For it is too plain for argument that where one of the parties to a treaty, at the time of its ratification annexes a written declaration explaining ambiguous language in the instrument or adding a new and distinct stipulation, and the treaty is afterwards ratified by the other party with the declaration attached to it, and the ratifications duly exchanged—the declaration thus annexed is a part of the Treaty and as binding and obligatory as if it were inserted in the body of the instrument. The intention of the parties is to be gathered from the whole instrument, as it stood when the ratifications were exchanged.

657*] *It is not material, therefore, to inquire whether the title of the Duke of Alagon takes date from the royal order of December 17th, 1817, or from the grant subsequently made on the 6th of February, 1818. In either case the Treaty by name declares it to be annulled.

It is said, however, that the King of Spain, by the Constitution under which he was then acting and administering the government, had not the power to annul it by treaty or otherwise; that if the power existed anywhere in the Spanish government it resided in the cortes; and that it does not appear, in the ratification, that it was annulled by that body or by its authority or consent.

But these are political questions and not judicial. They belong exclusively to the Political Department of the government.

By the Constitution of the United States, the President has the power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur. And he is authorized to appoint ambassadors, other public ministers and consuls, and to receive them from foreign nations; and is thereby enabled to obtain accurate information of the political condition of the nation with which he treats; who exercises over it the powers of sovereignty, and under what limitations, and how far the party who ratifies the Treaty is authorized, by its form of government, to bind the nation and persons and things within its territory and dominion, by treaty stipulations.

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And the Constitution declares that all treaties made under the authority of the United States should be the supreme law of the land.

The treaty is therefore a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States. It is their duty to interpret it and administer it according to its terms. And it would be impossible for the Executive Department of the government to conduct our foreign relations with any advantage to the country, and fulfill the duties which the Constitution has imposed upon it, if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power, by its Constitution and laws, to make the engagements into which he entered.

In this case the King of Spain has, by the Treaty, stipulated that the grant to the Duke of Alagon, previously made by him, had been and remained annulled, and that neither the Duke of Alagon nor any person claiming under him could avail himself of this grant. It was for the President and Senate to determine whether the King, by the Constitution and laws of Spain, was *authorized to make this stipulation and to ratify a treaty containing it. They have recognized his power by accepting this stipulation as a part of the compact, and ratifying the Treaty which contains it. The constituted and legitimate authority of the United States, therefore, has acquired and received this land as public property. In that character it became a part of the United States, and subject to and governed by their laws. And as the Treaty is by the Constitution the supreme law, and that law declared it public domain when it came to the possession of the United States, the courts of justice are bound so to regard it and treat it, and cannot sanction any title not derived from the United States.

Nor can the plaintiff's claim be supported unless he can maintain that a court of justice may inquire whether the President and Senate were not mistaken as to the authority of the Spanish monarch in this respect; or knowingly sanctioned an act of injustice committed by him upon an individual in violation of the laws of Spain. But it is evident that such a proposition can find no support in the Constitution of the United States; nor in the jurisprudence of any country where the judicial and political powers are separated and placed in different hands. Certainly no judicial tribunal in the United States ever claimed it, or supposed it possessed it.

The plaintiff seems to suppose that he has a stronger title than that of the Duke of Alagon. It is alleged that the Duke of Alagon, on the 29th of May, 1819, conveyed the greater part of the land granted to him by the King of Spain to Richard S. Hackley, a citizen of the United States. This deed to Hackley was after the signature of the Treaty and before the exchange of ratifications, and the plaintiff claims through Hackley, and contends that this American citizenship protected his title.

But if the deed from the Duke of Alagon to a citizen of the United States was valid by the laws of Spain, and vested the Spanish title in Hackley; yet the land in his hands remained

subject to the Spanish law and the authority and power of the Spanish government as fully as if it had continued the property of the original grantee. Hackley derived no title from the United States, nor were his rights in the land, if he had any, regulated by the laws of the United States, nor under their protection. It was a part of the territory of Spain, and in her possession and under her government, until the ratifications of the Treaty were exchanged. And until that time the rights of the individual owner, and the extent of authority which the government might lawfully exercise over it, depended altogether upon the laws of Spain. And whatever rights he may have had under the deed or the Duke of Alagon, they were 659*] extinguished by the *government from which he held them while the land remained a part of its territory and subject to its laws. It was public domain when it came to the posses-

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sion of the United States, and he had then no rights in it.

In this view of the case it is not necessary to examine the other questions which appear in the exception or have been raised in the argument. The Treaty is the supreme law, and the stipulations in it dispose of the case.

The judgment of the District Court must therefore be affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Florida, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and the same is hereby affirmed, with costs.

Cited—18 How., 285; 17 Wall., 242.

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GENERAL INDEX

TO THE

FOUR VOLUMES OF HOWARD CONTAINED IN THIS BOOK.
FORMED BY CONSOLIDATION.

N. B.—Figures at right of title show volume to whose index it belongs.

Figures in parenthesis refer to marginal paging of the volumes contained in this book respectively, while the black-faced figures indicate the page of this book on which the marginal paging referred to is found.

ABATEMENT—14.

1. It is a bad mode of pleading to unite pleas in abatement and pleas to the merits. And if after pleas in abatement, a defense be interposed, going to the merits of the controversy, the grounds alleged in abatement become thereby immaterial and are waived.

Sheppard v. Graves. (505) 518

2. In this case, as in the preceding, it is decided, that where the plaintiff averred enough to show the jurisdiction of the court, and the defendant pleaded in abatement that the plaintiff was disabled from bringing the suit, on account of residence, it was incumbent upon the defendant to sustain the allegation by proof.

Same v. Same. (512) 521

3. Until that was done, it was not necessary for the plaintiff to offer any evidence upon the subject.

Id. (1b.) 521

ACCOUNTS—16

1. There were two trustees of real and personal estate for the benefit of a minor. One of the trustees was also administrator *de bonis non* upon the estate of the father of the minor, and the other trustee was appointed guardian to the minor.

2. When the minor arrived at the proper age, and the accounts came to be settled, the following rules ought to have been applied.

3. The trustees ought not to have been charged with an amount of money, which the administrator trustee had paid himself as commission. That item was allowed by the Orphans' Court, and its correctness cannot be reviewed, collaterally, by another court.

Barney v. Saunders et al. (535) 1047

4. Nor ought the trustees to have been charged with allowances made to the guardian trustee. The guardian's accounts also were cognizable by the Orphans' Court. Having power under the will to receive a portion of the income, the guardian's receipts were valid to the trustees.

Id. (1b.) 1047

5. The trustees were properly allowed and credited by five per cent. on the principal of the personal estate, and ten per cent. on the income.

Id. (1b.) 1047

6. Under the circumstances of this case, the trustees ought not to have been charged upon the principle of six months' rests and compound interests.

Id. (1b.) 1047

7. The trustees ought to have been charged with all gains, as with those arising from usurious loans, unknown friends, or otherwise.

Id. (1b.) 1047

8. The trustees ought not to have been credited with the amount of a sum of money, deposited with a private banking house, and lost by its failure, so far as related to the capital of the estate, but ought to have been credited for so much of the loss as arose from the deposit of current collections of income.

Id. (1d.) 1047

ADMIRALTY—13.

1. The usage upon the River Ohio is, that when the steamboats are approaching each other in opposite

directions, and a collision is apprehended, the descending boat must stop her engine, ring her bell, and float; leaving the option to the ascending boat how to pass.

Williamson v. Barrett. (101) 68

2. The descending boat was not bound to back her engines, and it was correct in the Circuit Court to refuse leaving to the jury the question whether or not, in fact, such backing of the engines would have prevented the collision, where the ascending boat was manifesting an intention to cross the river.

Id. (1b.) 68

3. The proper measure of damages is a sum sufficient to raise the sunken boat, repair her and compensate the owners for the loss of her use during the time when she was being refitted.

Id. (1b.) 68

4. In a case of collision, upon the River Mississippi, between the steamboats Iowa and Declaration, whereby the Iowa was sunk, the weight of evidence was, that the Iowa was in fault, and the libel filed by her owners against the owners of the Declaration was properly dismissed.

Walsh et al. v. Rogers et al., (233) 147

5. *Ex-parte* depositions, under the Act of 1789, without notice, ought not be taken, unless in circumstances of absolute necessity, or in cases of mere formal proof or of some isolated fact.

Id. (1b.) 147

6. During the war with Mexico, the Admittance, an American vessel, was seized in a port of California, by the commander of a vessel of war of the United States, upon suspicion of trading with the enemy. She was condemned as a lawful prize by the chaplain belonging to one of the vessels of war upon that station, who had been authorized by the President of the United States to exercise admiralty jurisdiction in cases of capture.

Jecker et al. v. Montgomery, (498) 240

7. The owners of the cargo filed a libel against the captain of the vessel of war, in the Admiralty Court for the District of Columbia. Being carried to the Circuit Court, it was decided:

1. That the condemnation in California was invalid as a defense for the captors.

2. That the answer of the captors, having averred sufficient probable cause for the seizure of the cargo, and the libelants having demurred to this answer, upon the ground that the District Court had no right to adjudicate, because the property had not been brought within its jurisdiction, the demurrer was overruled, and judgment was entered against the libelants.

Id. (1b.) 240

8. The judgment of the Circuit Court, upon the first point, was correct, and upon the second point, erroneous.

Id. (1b.) 240

9. The Prize Court established in California was not authorized by the laws of the United States or the laws of nations.

Id. (1b.) 240

10. The grounds alleged for the seizure of the vessel and cargo in the answer, viz.: that the vessel sailed from New Orleans with the design of trading with the enemy, and did, in fact, hold illegal intercourse with them, are sufficient to subject both

to condemnation, if they are supported by testimony.

Jecker et al. v. Montgomery, (498) 240

11. And if they were liable to capture and condemnation, the reasons assigned in the answer for not bringing them into a port of the United States and libeling them for condemnation, viz.: that it was impossible to do so consistently with the public interests, are sufficient, if supported by proof, to justify the captors in selling vessel and cargo in California, and to exempt them from damages on that account.

Id. (Ib.) 240

12. The Admiralty Court in the district had jurisdiction of the case, and it was the duty of the court to order the captors to institute proceedings in that court, to condemn the property as prize, by a day to be named in the order; and in default thereof, to be proceeded against upon the libel for an unlawful seizure.

Id. (Ib.) 240

13. The Admiralty Court, in the District of Columbia, had jurisdiction of such a libel for condemnation, although the property was not brought within its jurisdiction; and, if they found it liable to condemnation, might proceed to condemn it, although it was not brought within the custody or control of the court.

Id. (Ib.) 240

14. The necessity of proceeding to condemn as prize, does not arise from any difference between the Instance Court and the Prize Court, as known in England. The same court here possesses the instance and prize jurisdiction. But because the property of the neutral is not divested by the capture, but by the condemnation in a prize court; and it is not divested until condemnation; although, when condemned, the condemnation relates back to the capture.

Id. (Ib.) 240

15. As this libel is for the restitution of the property or the proceeds, probable cause of seizure is no defense. It is a good defense against a claim for damages, when the property has been restored or lost, after seizure, without the fault of the captor. But, while the property or proceeds is withheld by the captor, and claimed as prize, probable cause of seizure is no defense.

Id. (Ib.) 240

16. The Circuit Court, therefore, erred in deciding that probable cause of seizure was a good defense.

Id. (Ib.) 240

ADMIRALTY—14.

Where a collision takes place between two vessels at sea, which is the result of inevitable accident, without the negligence or fault of either party, each vessel must bear its own loss.

Steinbach v. Rae, (532) 530

ADMIRALTY—16.

Where a libel was filed, claiming compensation for injuries sustained by a passenger in a steamboat, proceeding from Sacramento to San Francisco, in California, the case is within the admiralty jurisdiction of the courts of the United States.

Steamboat New World et al. v. King, (499) 1019

AGENTS—16.

1. A contract is void as against public policy, and can have no standing in court by which one party stipulates to employ a number of secret agents in order to obtain the passage of a particular law by the Legislature of a state, and the other party promises to pay a large sum of money in case the law should pass.

Marshall v. Baltimore and Ohio Railroad Company, (314) 953

2. It was also void, if, when it was made, the parties agreed to conceal from the members of the Legislature the fact that the one party was the agent of the other, and was to receive a compensation for his services in case of the passage of the law.

Id. (Ib.) 593

3. And if there was no agreement to that effect, there can be no recovery upon the contract, if in fact the agent did conceal from the members of the Legislature that he was an agent who was to receive compensation for his services in case of the passage of the law.

Id. (Ib.) 593

4. Where there is a special contract between principal and agent, by which the entire compensation is regulated and made contingent, there can be no recovery on a count for *quantum meruit*.

Id. (Ib.) 593

5. The circumstance that a passenger was a "steakboat man," and as such carried gratuitously, does not deprive him of the right of redress enjoyed by other passengers. It was the custom to carry such persons free.

Id. (Ib.) 593

6. The master had power to bind the boat by giving such free passages.

Steamboat New World et al. v. King, (499) 1019

7. The principle asserted in 14 How., 496, re-affirmed, namely: that, when carriers undertake to convey persons by the agency of steam, public policy and safety require that they should be held to the greatest possible care and diligence.

Id. (Ib.) 1019

8. The theory and cases examined relative to the three degrees of negligence, namely: slight, ordinary and gross.

Id. (Ib.) 1019

9. Skill is required for the proper management of the boilers and machinery of a steamboat; and the failure to exert that skill, either because it is not possessed, or from inattention, is gross negligence.

Id. (Ib.) 1019

10. The 18th section of the Act of Congress, passed on the 7th of July, 1838 (5 Stat. at Large, 309), makes the injurious escape of steam *prima facie* evidence of negligence; and the owners of the boat, in order to escape from responsibility, must prove that there was no negligence.

Id. (Ib.) 1019

ALABAMA—13.

Boundary line between Alabama and Georgia. See Georgia.

APPEAL—13.

An appeal does not lie to this court from the decision of a District Court in a case of bankruptcy.

Crawford v. Points, (11) 29

APPEAL—14.

See Chancery.

APPEAL—15.

1. Where the respondent in a chancery suit in the Circuit Court took two grounds of defense, and the judge, in giving his reasons for a decree dismissing the bill, upon one of the two grounds, expressed his opinion that the respondent had not established the other ground, he cannot appeal from this as a part of the decree.

Corning et al. v. The Troy Iron and Nail Factory, (451) 765

2. The decree was in the respondent's favor, dismissing the bill with costs, and no appeal lies from an opinion expressed by the judge upon the facts of the case, not affecting the decree.

Id. (Ib.) 765

3. Moreover, the decree complained of has already been argued before this court upon the appeal of the other party, and both grounds of defense decided to be insufficient, and the decree reversed. There is, therefore, no such decree as that appealed from.

Id. (Ib.) 765

4. Besides, the court below has not acted upon the mandate and entered a final decree: therefore there is no final decree to appeal from.

Id. (Ib.) 765

APPEAL—16.

See Practice and Chancery.

APPRAISERS—16.

See Duties.

ARBITRATION—13.

1. Where two partners assigned all their partnership property to a trustee with certain instructions how to dispose of it, and afterwards agreed between themselves to appoint an arbitrator, recognizing in their bonds the directions given to the trustee, the arbitrator had no right to deviate from these directions, and make other disposition of the property.

McCormick v. Gray, (57) 36

2. The reason given by the arbitrator, that he preferred creditors before awarding a certain sum to one of the partners, is insufficient.

Id. (Ib.) 36

3. Nor had the arbitrator a right to depart, in any particular, from the arrangement of the property which the partners had designated in their deed to the trustee.

Id. (Ib.) 36

ARKANSAS—15.

See Constitutional Law.

1. In June, 1844, Congress passed an Act, by virtue

HOWARD 13, 14, 15, 16.

of which the Circuit Court of the United States for the District of Arkansas, was vested with power to try offenses committed within the Indian country.

United States v. Dawson, (487) 775
2. In July, 1844, it was alleged that a murder was committed in that country. (Ib.) 775

3. In April, 1845, an indictment was found by a grand jury, in the Circuit Court of the United States for the District of Arkansas, against a person charged with committing the murder. (Ib.) 775

4. In March, 1851, Congress passed an Act, erecting nine of the Western counties and the Indian country into a new judicial district, directing the judge to hold two terms there, and giving him jurisdiction of all causes, civil or criminal, except appeals and writs of error, which are cognizable before a Circuit Court of the United States. (Ib.) 775

5. The residue of the State remained a judicial district to be styled the Eastern District of Arkansas. (Ib.) 775

6. This Act of Congress did not take away the power and jurisdiction of the Circuit Court of the United States for the Eastern District to try the indictment pending. (Ib.) 775

ARMY, OFFICERS OF THE—13.

1. During the war between the United States and Mexico, where a trader went into the adjoining Mexican provinces which were in possession of the military authorities of the United States, for the purpose of carrying on a trade with the inhabitants which was sanctioned by the executive branch of the government, and also by the commanding military officer, it was improper for an officer of the United States to seize the property upon the ground of trading with the enemy. (115) 75

2. Private property may be taken by a military commander to prevent it from falling into the hands of the enemy, or for the purpose of converting it to the use of the public; but the danger must be immediate and impending, or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. (Ib.) 75

3. The facts as they appeared to the officer must furnish the rule for the application of these principles. (Ib.) 75

4. But the officer cannot take possession of private property for the purpose of insuring the success of a distant expedition upon which he is about to march. (Ib.) 75

5. Whether or not the owner of the goods resumed the possession of them at any time after their seizure, was a fact for the jury. In this case, they found that he did not resume the possession, and in this they were sustained by legal evidence. (Ib.) 75

6. The officer who made the seizure cannot justify his trespass by showing the orders of his superior officer. An order to commit a trespass can afford no justification to the person by whom it was executed. (Ib.) 75

7. The trespass was committed out of the limits of the United States. But an action for it may be maintained in the Circuit Court for any district in which the defendant may be found upon process against him, where the citizenship of the respective parties gives jurisdiction to a court of the United States. (Ib.) 75

ASSIGNMENT—13.

1. The following paper, viz.:

"The President or Cashier of the Planters' and Merchants' Bank will please hold, subject to the order of Mr. J. G. Lindsey, all the debts referred to in the inclosed letter from Mr. McFarlin, except the two drafts of McCollier Minge, upon the Messrs. Elliotts, of Baltimore, which, when collected, please place to my credit"—Imports an authority to Lindsey to control the settlement and collection of these several demands; but not necessarily a transfer of the title to or interest in them. (441) 215

2. The circumstances of the case favor this construction. Lindsey had become personally responsible. (Ib.) 215

able for a sum of money, which these debts were intended in part to meet. As an honest transaction, it would answer all purposes, if he had only a power to collect the debts. (Ib.) 215

3. Where Lindsey, under this power, assigned an interest in one of these judgments, and the bill charged that the assignee knew of the interest of the original creditor, which the assignee, in his answer, did not deny, he failed to bring himself within the rules which protect a purchaser for a valuable consideration without notice, and his claim must be set aside. (Ib.) 215

4. Lindsey's having assigned this judgment to a third person, and then taken a re-assignment of it, does not vary the case. He stands then in his original position. (Ib.) 215

ATTACHMENT—16.

1. Where the debtor alleged that process of attachment had been laid in his hands as garnishee, attaching the debt which he owed to the creditor in question; and moved the court to stay execution until the rights of the parties could be settled in the State Court which had issued the attachment, and the court refused so to do, this refusal is not the subject of review by this court. The motion was addressed to the discretion of the court below, which will take care that no injustice shall be done to any party. (569) 1074

2. This court expresses no opinion, at present, upon the point whether an attachment from a state court can obstruct the collection of a debt by the process of the courts of the United States. (Ib.) 1074

ATTACHMENT LAW OF MARYLAND—14.

1. Under the attachment laws of Maryland, a share in the Baltimore Mexican Company, which had fitted out an expedition under General Mina, was not, in 1837, the subject of an attachment under a judgment, whether such share was held by the garnishee under a power of attorney to collect the proceeds, or under an equitable assignment to secure a debt. (610) 563

2. The answers of the garnishee to interrogatories filed, were literally correct. He had not in his hands any "funds, evidences of debt, stocks, certificates of stock," belonging to the debtor, nor "any acknowledgment by the Mexican government," on which an attachment could be laid. (Ib.) 563

ATTORNEY—15.

1. Where a contract was made with an attorney for the prosecution of a claim against Mexico for a stipulated proportion of the amount recovered, and services were rendered, the death of the owner of the claim did not dissolve the contract, but the compensation remained a lien upon the money when recovered. (415) 753

2. A court of equity can exercise jurisdiction over the case if a more adequate remedy can be thus obtained than in a court of law. (Ib.) 753

AUTHORITIES, LEGAL—16.

A distinction is to be made between cases which decide the precise point in question and those in which an opinion is expressed upon it incidentally. (275) 936

AWARD—15.

1. In the settlement of complicated partnership accounts by means of an arbitrator, Bispham was charged with one half of certain custom house bonds, which Archer, the other partner, was liable to pay, and which obligations had been incurred on partnership account. (162) 644

2. There was a reservation in the settlement as to certain liabilities, but this one was not included. (Ib.) 644

3. Archer's estate was afterwards exonerated from the payment of these bonds by a decision of this court, reported in 9 Howard, 83. (Ib.) 644

4. A bill cannot be brought by Bispham against Archer's executor to refund one half of the amount of the bonds, upon the ground that Archer had never paid it. (Ib.) 64

5. The reference to an arbitrator was lawful, and his award included many items which were the subject of estimates. It was accepted as perfectly satisfactory, and acquiesced in as such until long after the death of Archer.

Biapham v. Price. (162) 644

6. No fraud or mistake is charged in the bill, and if an error of judgment occurred, by which the chance was overrated that the custom house bonds would be enforced against Archer, this does not constitute a ground for the interference of a court of equity.

Id. (Ib.) 644

The Statute of Limitations also is a bar to the claim.

Id. (Ib.) 644

BAIL—13.

See Practice.

BALTIMORE—15

For McDonogh's Will, see "Wills."

BANKRUPTCY—13.

1. An appeal does not lie to this court, from the decision of a district court in a case of bankruptcy.

Crawford v. Points. (11) 29

2. Even if it would, the decree of the District Court in this case is not a final decree.

Id. (Ib.) 29

3. Where a bill in chancery was filed by the assignee of a bankrupt, claiming certain shares of bank stock the same being also claimed by the Bank and by other persons who were all made defendants, and the answer of the Bank set forth apparently valid titles to the stock, which were not impeached by the complainant in the subsequent proceedings in the cause, nor impeached by the other defendants, the Circuit Court decreed correctly in confirming the title of the Bank.

Buckingham v. McLean. (151) 91

4. A power of attorney to confess a judgment is a security within the second section of the Bankrupt Act, 5 Stat. at Large, 442.

Id. (Ib.) 91

5. And this security is void if given by the debtor in contemplation of bankruptcy. But by these terms is meant an act of bankruptcy on an application by himself to be decreed a bankrupt, and not a mere state of insolvency.

Id. (Ib.) 91

6. In this case there is evidence enough to show that the debtor contemplated a legal bankruptcy when the power of attorney was given.

Id. (Ib.) 91

BANKS—16.

1. In 1845 the Legislature of Ohio passed a general banking law, the fifty-ninth section of which required the officers to make semi-annual dividends, and the sixtieth required them to set off six per cent. of such dividends for the use of the State, which sum or amount so set off should be in lieu of all taxes to which the company, or the stockholders therein, would otherwise be subject.

2. This was a contract fixing the amount of taxation and not a law prescribing a rule of taxation until changed by the Legislature.

State Bank of Ohio v. Knoop. (369) 977

3. In 1851 an Act was passed, entitled "An Act to tax banks, and bank and other stocks, the same as property is now taxable by the laws of this State." The operation of this law being to increase the tax, the banks were not bound to pay that increase.

Id. (Ib.) 977

4. A municipal corporation, in which is vested some portion of the administration of the government, may be changed at the will of the Legislature. But a bank, where the stock is owned by individuals, is a private corporation. Its charter is a legislative contract, and cannot be changed without its assent.

Id. (Ib.) 977

5. The preceding case upon this subject, examined, and the case of The Providence Bank v. Billings, 4 Peters, 561, explained.

Id. (Ib.) 977

BILL OF EXCEPTIONS—13.

1. Where the only exceptions taken in the court below were to the refusals of the court to continue the case to the next term, and it appears that the continuance asked for below and the ruling out the writ of error, were only for the purpose of delaying the payment of a just debt, and no counsel appeared in this court on that side, the 17th rule will be applied and the judgment of the court below be affirmed with ten per cent. interest.

1104

Barrow v. Hill, (54) 48

2. In a trial in Louisiana, where the judge tried the whole case without the intervention of a jury, a bill of exceptions to the admission of testimony by the judge cannot be sustained in this court.

Wells v. George. (190) 108

BILL OF EXCEPTIONS—15.

1. In order to make a bill of exceptions valid, it must appear by the transcript not only that the instructions were given or refused at the trial, but also that the party who complains of them excepted to them while the jury was at the bar.

Phelps v. Moyer. (160) 643

2. The bill of exceptions need not be drawn out in form and signed before the jury retire; but it must be taken in open court, and must appear by the certificate of the judge who authenticates it to have been so taken.

Id. (Ib.) 643

3. Hence, when the verdict was rendered on the 13th December, and on the next day the plaintiff came into court and filed his exception, it is not properly before this court. And no error being assigned or appearing in the other proceedings, the judgment of the Circuit Court must be affirmed, with costs.

Id. (Ib.) 643

BILLS OF EXCEPTION—16.

It is not necessary that the bill of exceptions should be formally drawn and signed, before the trial is at an end. But the exception must be noted then, and must purport on its face so to have been, although signed afterwards *nunc pro tunc*.

Turner v. Yates. (14) 824

BILLS OF EXCHANGE AND PROMISSORY

NOTES—13.

See Commercial Law.

BOND—13.

1. In a suit upon a postmaster's bond, when treasury transcripts are offered in evidence, it is not necessary that they should contain the statements of credits claimed by the postmaster, and disallowed, in whole or in part, by the officers of the government.

U. S. v. Hodge et al., (478) 231

2. Nor is it a reason for rejecting the transcripts as evidence, that the items charged in the accounts, as balances of quarterly returns, did not purport, on the face of said accounts, to be balances acknowledged by the postmaster, nor were supported by proper vouchers; but merely purported to be the balances of said quarterly returns, as audited and adjusted by the officers of the government. The objection applied, if at all, to the accuracy of the accounts, and not to their admission as evidence.

Id. (Ib.) 231

3. The basis of an action against a postmaster is his bond and its breaches; and not the transcripts nor the quarterly returns, which are made evidence by the statute.

Id. (Ib.) 231

BONDS—15.

1. When the bonds of collectors of the customs begin to be effective, see

Broom v. United States. (143) 636

2. When a clerk of a court was sued upon his official bond, and the breach alleged was, that he had surrendered certain goods without taking a bond with good and sufficient sureties, and the plea was, that the bond which had been taken was assigned to the plaintiffs, who had brought suit, and received large sums of money in discharge of the bond—this plea was sufficient, and a demurrer to it was properly overruled.

Beebe v. Ramsey. (179) 652

BONDS—16.

For Surety Bonds, see Sureties.

CARRIERS—16.

1. The circumstance that a passenger was a "steambot man," and as such carried gratuitously, does not deprive him of the right of redress enjoyed by other passengers. It was the custom to carry such persons free.

Steamboat New World v. King. (466) 1019

HOWARD 13, 14, 15, 16.

2. The master had power to bind the boat by giving such a free passage.

Id. (1b.) 1019

3. The principle asserted in 15 How., 486, re-affirmed, namely: that, when carriers undertake to convey persons by the agency of steam, public policy and safety require that they should be held to the greatest possible care and diligence.

Id. (1b.) 1019

4. The theory and cases examined relative to the three degrees of negligence, namely: slight, ordinary and gross.

Id. (1b.) 1019

5. Skill is required for the proper management of the boilers and machinery of a steamboat, and the failure to exert that skill, either because it is not possessed, or from inattention, is gross negligence.

Id. (1b.) 1019

6. The 13th section of the Act of Congress, passed on the 7th of July, 1838 (5 Stat. at Large, 306), makes the injurious escape of steam *prima facie* evidence of negligence; and the owners of the boat, in order to escape from responsibility, must prove that there was no negligence.

Id. (1b.) 1019

See Jurisdiction. CHANCERY—13.

1. Where two partners assigned all their partnership property to a trustee with certain instructions how to dispose of it, and afterwards agreed between themselves to appoint an arbitrator, recognizing in their bonds the directions given to the trustee, the arbitrator had no right to deviate from these directions, and make other disposition of the property.

McCormick v. Gray, (26) 36

2. The reason given by the arbitrator, that he preferred creditors before awarding a certain sum to one of the partners, is insufficient.

Id. (1b.) 36

3. Nor had the arbitrator a right to depart, in any particular, from the arrangement of the property which the partners had designated in their deed to the trustee.

Id. 1b. 36

4. Where there was a contract for the sale of land for the purchase of which indorsed notes were given, but before the time arrived for the making of a deed, the purchaser failed, and the liability to pay the note became fixed upon the indorser; and a new contract was made between the vendor and the indorser, that, in order to protect the indorser, he should be substituted in place of the original purchaser, fresh notes being given and the time of payment extended, evidence was admissible to show that the latter contract was a substitute for the former.

Bradford v. Union Bank of Tennessee, (57) 49

5. A part of the land having been sold for taxes whilst the first set of notes was running to maturity (the vendee having been put into possession), and the vendor being ignorant of that fact when the contract of substitution was made, all that the indorser can claim of the vendor, is a deed for the land subject to the incumbrances arising from the tax sales. The notes given for the substituted contract must be paid.

Id. (1b.) 49

6. The indorser having filed a bill for a specific performance upon the title bond, which he had received from the vendor, this court will not content itself with dismissing his bill without prejudice, and thus give rise to further litigation, but proceed to pass a final decree, founded on the above principles.

Id. (1b.) 49

7. The Legislature of Virginia incorporated the stockholders of the Richmond, Fredericksburg and Potomac Railroad Company, and in the charter pledged itself not to allow any other railroad to be constructed between those places, or any portion of that distance; the probable effect would be to diminish the number of passengers traveling between the one city and the other upon the railroad authorized by that Act, or to compel the said company, in order to retain such passengers, to reduce the passage money.

Richmond Railroad Company v. Louisa Railroad Company, (71) 55

8. Afterwards the Legislature incorporated the Louisa Railroad Company, whose road came from the West and struck the first-named Company's track nearly at right angles, at some distance from Richmond; and the Legislature authorized the Louisa Railroad Company to cross the track of the other, and continue their road to Richmond.

Id. (1b.) 55

9. In this latter grant, the obligation of the contract with the first Company is not impaired within the meaning of the Constitution of the United States.

Id. (1b.) 55

10. In the first charter, there was an implied reservation of the power to incorporate companies to transport other articles than passengers; and if the Louisa Railroad Company should infringe upon the rights of the Richmond Company, there would be a remedy at law, but the apprehension of it will not justify an injunction to prevent them from building their road.

Id. (1b.) 55

11. Nor is the obligation of the contract impaired by crossing the road. A franchise may be condemned in the same manner as individual property.

Id. (1b.) 55

12. The Statute of Frauds in the State of Alabama declares void conveyances made for the purpose of hindering or defrauding creditors of their just debts.

Parish v. Murphree, (92) 65

13. Where a person made a settlement upon his wife and children, owing at that time a large sum of money, for which he was soon afterwards sued, and became insolvent, these circumstances, with other similar ones, are sufficient to set aside the deed as being fraudulent within the statute.

Id. (1b.) 65

14. Where a defendant in error or an appellee wishes to have a case dismissed because no citation has been served upon him, his counsel should give notice of the motion when his appearance is entered, or at the same term; and also that his appearance is entered for that purpose. A general appearance is a waiver of the want of notice.

Buckingham v. McLean, (150) 91

15. An appeal in equity brings up all the matters which were decided in the Circuit Court to the prejudice of the appellant; including a prior decree of that court from which an appeal was then taken, but which appeal was dismissed under the rules of this court.

Id. (1b.) 91

16. Where a bill in chancery was filed by the assignee of a bankrupt, claiming certain shares of bank stock, the same being also claimed by the Bank and by other persons who were all made defendants, and the answer of the Bank set forth apparently valid titles to the stock, which were not impeached by the complainant in the subsequent proceedings in the cause, nor impeached by the other defendants, the Circuit Court decreed correctly in confirming the title of the Bank.

Buckingham v. McLean, (151) 91

17. A power of attorney to confess a judgment is a security within the second section of the Bankrupt Act, 5 Stat. at Large, 442.

Id. (1b.) 91

18. And this security is void if given by the debtor in contemplation of bankruptcy. But by these terms is meant an act of bankruptcy on an application by himself to be decreed a bankrupt, and not a mere state of insolvency.

Id. (1b.) 91

19. In this case there is evidence enough to show that the debtor contemplated a legal bankruptcy when the power of attorney was given.

Id. (1b.) 91

20. It is not usury in a bank which has power by its charter to deal in exchange, to charge the market rates of exchange upon time bills.

Id. (1b.) 91

21. Where a person desired to purchase land from a party who was ignorant that he had any title to it, or where the land was situated; and the purchaser made fraudulent representations as to the quantity and quality of the land, and also, as to a lien which he professed to have for taxes which he had paid; and finally bought the land for a grossly inadequate price, the sale will be set aside.

Tyler et ux. v. Black, (231) 124

22. Inequity, where a creditor agrees to receive specific articles in satisfaction of a debt, even although it be a debt upon bond, secured by mortgage, he will be held to the performance of his agreement.

Very v. Levy, (345) 173

23. But, in order to bring a case within this principle, there must be,

1. An agreement not inequitable in its terms and effect.

2. A valuable consideration for such agreement.

3. A readiness to perform, and the absence of laches, on the part of the debtor.

Very v. Levy, (345) 173

24. Where the agreement to receive payment in goods was made by a person who acted under a power of attorney from the creditor, authorizing him to trade, sell, and dispose of notes, bills, bonds or mortgages, and under this power, a partial payment was received in goods, which was afterwards recognized as a payment by the creditor, the power was sufficient to authorize an agreement to receive the remaining amount, also in goods, at any time when called for within twelve months, especially as the bond had yet four years to run.

Id. (Ib.) 173

25. This agreement was not inequitable; there was a valuable consideration for it; and the debtor was always ready to comply with it, on his part.

Id. (Ib.) 173

26. The creditor cannot now allege fraud in his debtor. It is not charged in the bill; and although he may not have known of the agreement when the bill was framed, yet, when the answer came in, he might have amended his bill, and charged fraud.

Id. (Ib.) 173

27. Real property, in Louisiana, was bound by a judicial mortgage.

Fowler v. Hart, (373) 186

28. The owners of the property then took the benefit of the Bankrupt Act of the United States.

Id. (Ib.) 186

29. A creditor of the bankrupt then filed a petition against the assignee, alleging that he had a mortgage upon the same property, prior in date to the judicial mortgage, but that, by some error, other property had been named, and praying to have the error corrected. Of this proceeding the judgment creditor had no notice.

Id. (Ib.) 186

30. The court being satisfied of the error, ordered the mortgage to be reformed, and thus gave the judgment creditor the second lien instead of the first; and then decreed that the property should be sold free of all incumbrances. Of this proceeding, and also of the distribution of the proceeds of sale, the judgment creditor had notice, but omitted to protect his rights.

Id. (Ib.) 186

31. In consequence of this neglect, he cannot afterwards assert his claim against a purchaser, who has bought the property as being free from all incumbrances.

Id. (Ib.) 186

32. The following paper, viz.: "The President or Cashier of the Planters' and Merchants' Bank will please hold, subject to the order of Mr. J. G. Lindsey, all the debts referred to in the inclosed letter from Mr. McFarlin, except the two drafts of McCollister Minge, upon the Messrs. Ellicotts, of Baltimore, which, when collected, please place to my credit"—imports an authority to Lindsey to control the settlement and collection of these several demands; but not necessarily a transfer of the title to or interest in them.

Rogers v. Lindsey, (441) 215

33. The circumstances of the case favor this construction. Lindsey had become personally responsible for a sum of money, which these debts were intended in part to meet. As an honest transaction, it would answer all purposes, if he had only a power to collect the debts.

Id. (Ib.) 215

Where Lindsey, under this power, assigned an interest in one of these judgments, and the bill charged that the assignee knew of the interest of the original creditor, which the assignee, in his answer, did not deny, he failed to bring himself within the rules which protect a purchaser for a valuable consideration without notice, and his claim must be set aside.

Id. (Ib.) 215

35. Lindsey's having assigned this judgment to a third person, and then taken a re-assignment of it, does not vary the case. He stands then in his original position.

Id. (Ib.) 215

CHANCERY—14.

1. An appeal will not lie to this court from a refusal of the court below to open a prior decree, and grant a rehearing. The decision of this point rests entirely in the sound discretion of the court below.

Wylie v. Core, (1) 301

2. The case of *Brockett v. Brockett*, 2 How., 240, explained.

Id. (Ib.) 301

3. Two appeals having been taken, one from the original decree and the other from the refusal to open it, the latter must be dismissed, and the case stand for hearing upon the first appeal.

Id. (Ib.) 301

4. A motion for a mandate upon the court below, to carry the decree into execution, overruled.

Id. (Ib.) 301

5. A re-argument of a case decided by this court will not be granted, unless a member of the court, who concurred in the judgment, desires it; and when that is the case, it will be ordered without waiting for the application of counsel.

Brown v. Aspden, (25) 311

6. And this is so whether the decree of the court below was affirmed by an equally divided court or a majority, or whether the case is one at common law or chancery.

Id. (Ib.) 311

7. The rules of the English Court of Chancery have not been adopted by this court. Those which are applicable to a court of original jurisdiction, are not appropriate to an appellate court.

Id. (Ib.) 311

8. A court of equity has jurisdiction of a bill against the administrator of a deceased debtor and a person to whom real and personal property was conveyed by the deceased debtor, for the purpose of defrauding creditors.

Hagan v. Walker, (29) 312

9. In such a case, the court does not exercise an auxiliary jurisdiction to aid legal process, and consequently it is not necessary that the creditor should be in a condition to levy an execution, if the fraudulent obstacle should be removed.

Id. (Ib.) 312

10. It is proper to make a prior incumbrancer, who holds the legal title, a party to the bill, in order that the whole title may be sold under the decree; for the purpose of such a decree, the prior incumbrancer is a necessary party; but the court may order a sale subject to the incumbrance, without having the prior incumbrancer before it, and in all cases it will do so.

Id. (Ib.) 312

11. If the prior incumbrancer is out of the jurisdiction, or cannot be joined without defeating it, it is a fit cause to dispense with his presence, and order a sale subject to his incumbrance, which will not be affected by the decree.

Id. (Ib.) 312

12. Where real estate is in the custody of a receiver, appointed by a court of chancery, a sale of the property under an execution issued by virtue of a judgment at law, is illegal and void.

Weswall v. Sampson, (52) 312

13. The proper modes of proceeding pointed out, to be pursued by any person who claims title to the property, either by mortgage or judgment or otherwise.

Id. (Ib.) 312

14. Where there was a judgment at law against a defendant in Mississippi, and he sought relief in equity, upon the ground that the consideration of the contract was the introduction of slaves into the State, and consequently illegal; a court of equity will not grant relief, because the complainant was *in part delicto* with the other party.

Sample v. Barnes, (70) 330

15. Moreover, such a defense would have been good at law; and the averments, that deception was practiced to prevent the complainant from making the defense, are not sustained by the evidence in the case. And further, after the judgment, the complainant gave a forthcoming bond, thus recognizing the validity of the judgment.

Id. (Ib.) 330

16. Where an ante-nuptial contract was alleged to have been made, and the affidavits of the parties claiming under it alleged that they never possessed or saw it; that they had made diligent inquiry for it, but were unable to learn its present existence or place of existence; that inquiry had been made of the guardian of one of the children, who said that he had never been in possession of it, and did not know where it was; that inquiry had been made at the recording offices in vain, and that the affiants believed it to be lost; secondary proof of its contents ought to have been admitted.

DeLane v. Moore, (23) 400

17. Whether recorded or not, it was binding upon the parties. If recorded within the time prescribed by statute, or if re-acknowledged and recorded afterwards, notice would thereby have been given to all persons of its effect.

Id. (Ib.) 400

18. If it was regularly recorded in one state, and the property upon which it acted was removed to another state, the protection of the contract would follow the property into the state into which it was removed.

Id. (Ib.) 409

19. But where no suit was brought until eight or nine years after the death of the husband, and then the one which was brought was dismissed for want of prosecution; another suit against the executors who had divided the property, comes too late.

Id. (Ib.) 409

20. A court has a right to set aside its own judgment or decree, dismissing a bill in chancery, at the same term in which the judgment or decree was rendered, on discovering its own error in the law, or that the consent of the complainants to such dismissal was obtained by fraud.

Doss v. Tyack. (298) 428

21. A verdict on an issue to try whether a sale was fraudulent, finding the same to be fraudulent, will not be set aside on a certificate or affidavit of some of the jurors, afterwards made, as to what they meant.

Id. (Ib.) 428

22. A Chancellor does not need a verdict to inform his conscience, when the answer denies fraud in the abstract, whilst it admits all the facts and circumstances necessary to constitute it, in the concrete.

Id. (Ib.) 428

23. Releases given by the complainants, in the present case, decided to cover the matters in controversy, and therefore, to put an end to all claim by them; inasmuch as there is no proof that they were obtained by fraud or circumvention.

Perkins v. Kurnique. (313) 435

24. Where a title to land in the State of Coahuila and Texas was obtained, in 1833, by a mother for, and in the name of her daughter, and in 1836 the father of the daughter conveyed it away by a deed executed in Louisiana, this deed was properly set aside by the District Court of Texas.

Hoyt v. Hammelin. (346) 449

25. It was not executed either according to the laws of Louisiana, or those of Coahuila and Texas.

Id. (Ib.) 449

26. Two Statutes of Mississippi, one passed in 1843 and the other in 1848, provide that where the charter of a bank shall be declared forfeited, a trustee shall be appointed to take possession of its effects, and commissioners appointed to audit accounts against it.

Peale v. Phipps. (368) 459

27. Where these steps had been taken, and the commissioners had refused to allow a certain account, the Circuit Court of the United States had no right to entertain a bill filed by the creditors to compel the trustee to pay the rejected account. There was a want of jurisdiction.

Id. (Ib.) 459

28. The case is upon this point examined.

Id. (Ib.) 459

29. A claim by the trustee, in re-convention, was not a waiver of the exception to the jurisdiction.

Id. (Ib.) 459

30. A will, executed in 1777, which devised certain lands in Maine to trustees and their heirs to the use of Richard (the son of the testator) for life, remainder, for his life in case of forfeiture, to the trustees, to preserve contingent remainders; remainder to the sons of Richard, if any, as tenants in common in tail, with cross remainders, remainder to Richard's daughter Elizabeth, for life; remainder to trustees to preserve contingent remainders during her life; remainder to the sons of Elizabeth in tail—did not vest the legal estate in fee simple in the trustees. The life estate of Richard, and the contingent remainders limited thereon, were legal estates.

Wheeler v. Cooper. (489) 510

31. No duties were imposed on the trustees which could prevent the legal estate in these lands from vesting in the *cestui que use*; and although such duties might have been required of them relating to other lands in the devise, yet this circumstance would not control the construction of the devise as to these lands.

Id. (Ib.) 510

32. The devise to Elizabeth for life, remainder to her sons as tenants in common, share and share alike, and to the heirs of their bodies, did not give an estate tail to Elizabeth, under the rule in *Shelly's case*. But upon her death, her son (the party to the suit) took as a purchaser, an estate tail in one moiety of the land, as a tenant in common with his brother.

Id. (Ib.) 511

33. One of the conditions of the devise was, that this party, as soon as he should come into possession the lands, should take the name of the testator. But as he had not yet come into possession, and it was a condition subsequent, of which only the person to whom the lands were devised over, could take advantage, a non-compliance with it was no defense, in an action brought to recover possession of the land.

Id. (Ib.) 511

34. The son, taking an estate tail at the death of Elizabeth, in 1845, could maintain a writ of entry, and until that time had no right of possession. Consequently, the adverse possession of the occupant only began then.

Id. (Ib.) 511

35. A bill in chancery will not lie for the purpose of perpetually enjoining a judgment, upon the ground that there was a false return in serving process upon one of the defendants. Redress must be sought in the court which gave the judgment, or in an action against the marshal.

Walker v. Robbins. (584) 552

36. Moreover, the defendant in this case, by his actions, waived all benefit which he might have derived from the false return; and no defense was made on the trial at law, impeaching the correctness of the cause of action sued on, and in such a case, resort cannot be had to equity to supply the omission.

Id. (Ib.) 552

37. A Society called Separatists emigrated from Germany to the United States. They were very poor, and one of them, in 1817, purchased land in Ohio, for which he gave his bond, and took the title to himself. Afterwards, they adopted two constitutions, one in 1819 and one in 1824, which they signed, and in 1832 obtained an Act of Incorporation. The articles of association, or constitutions of 1819 and 1824, contained a renunciation of individual property.

Goesels v. Bimler. (590) 554

38. The heirs of one of the members who signed these conditions, and died in 1827, cannot maintain a bill of partition.

Id. (Ib.) 554

39. From 1817 to 1819, the contract between the members and the person who purchased the property, vested in parol, and was destitute of a consideration. No legal rights were vested in the members.

Id. (Ib.) 554

40. The ancestor of these heirs renounced all right of individual property, when he signed the articles, and did so upon the consideration that the society would support him in sickness and in health; and this was deemed by him an adequate compensation for his labor and property, contributed to the common stock.

Id. (Ib.) 554

41. The principles of the Association were, that land and other property were to be acquired by the members, but they were not to be vested with the fee of the land. Hence, at the death of one of them, no right of property descended to his heirs.

Id. (Ib.) 554

42. There is no legal objection to such a partnership; nor can it be considered a forfeiture of individual rights for the community to succeed to his share, because it was a matter of voluntary contract.

Id. (Ib.) 554

43. Nor do the articles of association constitute a perpetuity. The Society exists at the will of its members, a majority of whom may at any time order a sale of the property, and break up the association.

Id. (Ib.) 554

44. The evidence shows that they are a moral, religious, and industrious people.

Id. (Ib.) 554

45. Under the attachment laws of Maryland, a share in the Baltimore Mexican Company, which had fitted out an expedition under General Mina, was not, in 1827, the subject of an attachment under a judgment, whether such share was held by the garnishee under a power of attorney to collect the proceeds, or under an equitable assignment to secure a debt.

Deacon v. Otter. (610) 563

46. The answers of the garnishee to interrogatories filed, were literally correct. He had not in his hands any "funds, evidences of debt, stocks, certi-

ficates of stock," belonging to the debtor, nor "any acknowledgment by the Mexican government," on which an attachment could be laid.

Deacon v. Oliver,

(610) 563

CHANCERY—15.

1. Where a widow filed a bill in chancery, complaining that immediately upon the death of her husband, the son of that husband, together with another person, had imposed upon her by false representations, and induced her to part with all her right in her husband's estate for an inadequate price, the evidence in the case did not sustain the allegation.

Eyre et al. v. Potter et al.

(42) 592

2. It is not alleged to be a case of constructive fraud, arising out of the relative position of the parties towards each other, but of actual fraud.

Id.

(*Ib.*) 592

3. The answers deny the fraud and are made more emphatic by the complainants having put interrogatories to be answered by the defendants, and the evidence sustains the answers.

Id.

(*Ib.*) 592

4. It will not do to set up mere inadequacy of price as a cause for annulling a contract made by persons competent and willing to contract, and besides, there were other considerations acting upon the widow to induce her to make the contract.

Id.

(*Ib.*) 592

5. The testimony offered to prove the mental imbecility of the widow, should be received with great caution, and is not sufficient.

Id.

(*Ib.*) 592

6. In the settlement of complicated partnership accounts by means of an arbitrator, Bispham was charged with one half of certain custom house bonds, which Archer, the other partner, was liable to pay, and which obligations had been incurred on partnership account.

Bispham v. Price.

(162) 644

7. There was a reservation in the settlement as to certain liabilities, but this one was not included.

Id.

(*Ib.*) 644

8. Archer's estate was afterwards exonerated from the payment of these bonds by a decision of this court, reported in 9 Howard, 83.

Id.

(*Ib.*) 644

9. A bill cannot be brought by Bispham against Archer's executor, to refund one half of the amount of the bonds, upon the ground that Archer had never paid it.

Id.

(*Ib.*) 644

10. Reference to an arbitrator was lawful, and his award included many items which were the subject of estimates. It was accepted as perfectly satisfactory, and acquiesced in as such until long after the death of Archer.

Id.

(*Ib.*) 644

11. No fraud or mistake is charged in the bill; and if an error of judgment occurred, by which the chance was overrated that the custom house bonds would be enforced against Archer, this does not constitute a ground for the interference of a court of equity.

Id.

(*Ib.*) 644

12. The Statute of Limitations, also, is a bar to the claim.

Id.

(*Ib.*) 644

13. The Michigan Central Railroad Company, established in Michigan, made an agreement with the New Albany and Salem Railroad Company, established in Indiana, that the former would build and work a road in Indiana, under the charter of the latter.

N. Ind. R. R. Co. v. Mich. Cent. R. R. Company.

(233) 674

14. Another company, also established in Indiana, called the Northern Indiana Railroad Company, claiming an exclusive right to that part of Indiana, filed a bill in the Circuit Court of the United States for the District of Michigan, against the Michigan Company, praying an injunction to prevent the construction of the road under the above agreement.

Id.

(*Ib.*) 674

15. The Circuit Court had no jurisdiction over such a case.

Id.

(*Ib.*) 674

16. The subject matter of the controversy lies beyond the limits of the district, and where the process of the court cannot reach the *locus in quo*.

Id.

(*Ib.*) 674

17. Moreover, the rights of the New Albany Company are seriously involved in the controversy, and they are not made parties to the suit. The Act

1108

of Congress, providing for the non-joinder of parties who are not inhabitants of the district, does not apply to such a case as the present.

Id.

(*Ib.*) 674

18. Black, as agent for the owners, contracted to sell a large quantity of land in Maine, which contract was assigned by the vendee, until it came, through mere assignments, into the hands of Miller and others.

Garrow v. Davis.

(272) 692

19. Payments were made from time to time on account; but at length, in consequence of a failure to make the payments stipulated in the contract, and by virtue of a clause contained in it, the contract became void.

Id.

(*Ib.*) 692

20. In this state of things, Miller employed one Paulk to ascertain from Black the lowest price that he would take for the land, and then to sell to others for the highest price that he could get.

Id.

(*Ib.*) 692

21. Paulk sold and assigned the contract to Davis for \$1,050.

Id.

(*Ib.*) 692

22. Upon the theory that Paulk and Davis entered into a fraudulent combination, still Miller and others are not entitled to demand that a court of equity should consider Davis as a trustee of the lands for their use. They had no interest in them, legal or equitable, nor anything but a good will, which alone was the subject matter of the fraud, if there was any.

Id.

(*Ib.*) 692

23. But the evidence shows that this good will did not exist, for Black was not willing to sell to Miller and others for a less price than to any other person.

Id.

(*Ib.*) 692

24. Although Paulk represented himself to be acting for Miller and others, when in reality he was representing Davis, yet he did not obtain the land at a reduced price thereby; but, on the contrary, at its fair market value.

Id.

(*Ib.*) 692

25. The charges of fraud in the bill are denied in the answers, and the evidence is not sufficient to sustain the allegations.

Id.

(*Ib.*) 692

26. Where the respondent in a chancery suit in the Circuit Court took two grounds of defense, and the judge, in giving his reasons for a decree dismissing the bill, upon one of the two grounds, expressed his opinion that the respondent had not established the other ground, he cannot appeal from this as a part of the decree.

Corning v. Troy Iron and Nail Factory.

(451) 763

27. The decree was in the respondent's favor, dismissing the bill with costs, and no appeal lies from an opinion expressed by the Judge upon the facts of the case, not affecting the decree.

Id.

(*Ib.*) 763

28. Moreover, the decree complained of has already been argued before this court upon the appeal of the other party, and both grounds of defense decided to be insufficient, and the decree reversed. There is, therefore, no such decree as that appealed from.

Id.

(*Ib.*) 763

29. Besides, the court below has not acted upon the mandate and entered a final decree; therefore there is no final decree to appeal from.

Id.

(*Ib.*) 763

30. Where land was sold in New Jersey by order of the Orphans' Court of one of the counties, the conveyance was made not to the actual bidders, but to a person whom they appointed to represent them.

Kearney v. Taylor.

(494) 757

31. Afterwards, the Supreme Court of the State having decided that such a practice was irregular, the Legislature passed a law enacting, that upon proof of the absence of fraud, such deeds might be given in evidence. This cured the defect in the title.

Id.

(*Ib.*) 757

32. The purchasers were a company organized for the purpose of improving the land, and in their purchase there was neither actual nor constructive fraud.

Id.

(*Ib.*) 757

33. The law examined with respect to the bidding of associations at sales by public auction.

Id.

(*Ib.*) 757

34. In this instance the price obtained was greater than any previous estimate of the value of the property.

Id.

(*Ib.*) 757

HOWARD 13, 14, 15, 16.

35. There was no constructive fraud, because, according to the evidence, the guardian of the minor children and the commissioners who decided that the property ought to be sold, did not become interested in the company until some time after the sale.

Id. (1b.) 877

36. The circumstance that these persons became interested in the company before the first half of the purchase money was due, is not a sufficient reason for setting aside the sale.

Id. (1b.) 877

37. According to the preponderance of the evidence, the grave charge that the auctioneer who made the sale was one of the company, is not sustained.

Id. (1b.) 877

38. Where the assignors of a patent right were joined with the assignee for a particular locality, in a bill for an injunction to restrain a defendant from the use of the machine patented, and the defendant raised, in this court, and after a final decree, an objection arising from a misjoinder of parties, the objection comes too late.

Livingston v. Woodworth, (548) 809

39. Moreover, in the present case, the parties consented to the decree under which the account in controversy was adjusted.

Id. (1b.) 809

40. That consent having been given, however, to a decree by which an account should be taken of gains and profits, according to the prayer of the bill, the defendant was not precluded from objecting to the account upon the ground that it went beyond the order.

Id. (1b.) 809

41. The report having been recommitted to the master, with instructions to ascertain the amount of profits which might have been realized with due diligence, and the master having framed his report upon the theory of awarding damages, this report, and the order of the court confirming it, were both erroneous.

Id. (1b.) 809

42. Under the circumstances of this case, the decree should have been for only the actual gains and profits during the time when the machine was in operation, and during no other period.

Id. (1b.) 809

CHANCERY—16.

1. Where a bill in chancery was filed by a legatee against the person who had married the daughter and residuary devisee of the testator (there having been no administration in the United States upon the estate), this daughter or her representatives, if she were dead, ought to have been made a party defendant.

Lewis v. Darling, (1) 819

2. But if the complainant appears to be entitled to relief, the court will allow the bill to be amended, and even if it be an appeal, will remand the case for this purpose.

3. Where the will, by construction, shows an intention to charge the real estate with the payment of a legacy, it is not necessary to aver in the bill a deficiency of personal assets.

4. The real estate will be charged with the payment of legacies where a testator gives several legacies, and then, without creating an express trust to pay them, makes a general residuary disposition of the whole estate, blending the realty and the personality together in one fund. This is an exception to the general rule that the personal estate is the first fund for the payment of debts and legacies.

Id. (1b.) 819

5. Where it appears, by the admissions and proofs, that the defendant has substantially under his control a large property of the testator which he intended to charge with the payment of the legacy in question, the complainant is entitled to relief, although the land lies beyond the limits of the State in which the suit is brought.

Id. (1b.) 819

6. Where a person who was acting as guardian to a minor, but without any legal authority, being indebted to the minor, contracted to purchase real estate for the benefit of his ward, and transferred his own property in part payment therefor, the ward cannot claim to receive from the vendor the amount of property so transferred.

Yerger v. Jones, (30) 832

7. He can neither complete the purchase by paying the balance of the purchase money, or set aside the contract and look to his guardian for reimbursement; but in the absence of fraud, he cannot compel the vendor to return such part of the purchase money as had been paid by the guardian.

Id. (1b) 832

8. Whenever the parties to a suit and the subject in controversy between them are within the regular jurisdiction of a court of equity, the decree of that court is to every intent as binding as would be the judgment of a court of law.

Pennington v. Gilman, (65) 847

9. Whenever, therefore, an action of debt can be maintained upon a judgment at law for a sum of money awarded by such judgment, the like action can be maintained upon a decree in equity which is for a specific amount; and the records of the two courts are of equal dignity and binding obligation.

Id. (1b.) 847

10. A declaration was sufficient which averred that "at a general term of the Supreme Court of Equity for the State of New York," &c., &c. Being thus averred to be a court of general jurisdiction, no averment was necessary that the subject matter in question was within its jurisdiction. And the courts of the United States will take notice of the judicial decisions in the several States, in the same manner as the courts of those States.

Id. (1b.) 847

11. Where a case in equity was referred to a master, which came again before the court upon exceptions to the master's report, the court had a right to change its opinion from that which it had expressed upon the interlocutory order, and to dismiss the bill. All previous interlocutory orders were open for revision.

Fourniquet v. Perkins, (82) 854

12. The decree of dismissal was right in itself, because it conformed to a decision of this court in a branch of the same case, which decision was given in the interval between the interlocutory order and final decree of the Circuit Court.

Id. (1b.) 854

13. Where an appeal was taken from a decree in chancery, which decree was made by the court below during the sitting of this court in term time, the appellant is allowed until the next term to file the record; and a motion to dismiss the appeal, made at the present term, before the case has been regularly entered upon the docket, cannot be entertained, nor can a motion to award a *procedendo*.

Stafford v. Union Bank of Louisiana, (135) 876

14. This court, however, having a knowledge of the case, will express its views upon an important point of practice.

Id. (1b.) 876

15. Where the appeal is intended to operate as a *supersedeas*, the security given in the appeal bond must be equal to the amount of the decree, as it is in the case of a judgment at common law.

Id. (1b.) 876

16. The two facts, namely: first that, the receiver appointed by the court below had given bond to a large amount, and second, that the person to whom the property had been hired had given security for its safe keeping and delivery, do not affect the above result.

Id. (1b.) 876

17. The security must, notwithstanding, be equal to the amount of the decree.

Id. (1b.) 876

18. A mode of relief suggested.

Id. (1b.) 876

19. In order to act as a *supersedeas* upon a decree in chancery, the appeal bond must be filed within ten days after the rendition of the decree. In the present case, where the bond was not filed in time, a motion for a *supersedeas* is not sustained by sufficient reasons, and consequently must be overruled.

Adams v. Law, (144) 880

20. So, also, a motion is overruled to dismiss the appeal, upon the ground that the real parties in the case were not made parties to the appeal. The error is a mere clerical omission of certain words.

Id. (1b.) 880

21. A bill of review, in a chancery case, cannot be maintained where the newly discovered evidence, upon which the bill purports to be founded, goes to impeach the character of witnesses examined in the original suit.

Southard et al. v. Russell, (547) 1052

22. Nor can it be maintained where the newly discovered evidence is merely cumulative, and relates to a collateral fact in the issue, not of itself, if admitted, by any means decisive or controlling.

as the question of adequacy of price, when the main question was, whether a deed was a deed of sale or a mortgage.

Southard et al. v. Russell, (547) 1052

23. Where a case is decided by an appellate court, and a mandate is sent down to the court below to carry out the decree, a bill of review will not lie in the court below to correct errors of law alleged on the face of the decree. Resort must be had to the appellate court.

Id. (1*h.*) 1052

24. Nor will a bill of review lie, founded on newly discovered evidence, after the publication or decree below, where a decision has taken place on an appeal, unless the right is reserved in the decree of the appellate court, or permission be given on an application to that court directly for the purpose.

Id. (1*h.*) 1052

CHURCH, METHODIST EPISCOPAL—16.

1. In 1844 the Methodist Episcopal Church of the United States, at a General Conference, passed sundry resolutions providing for a distinct ecclesiastical organization in the slaveholding States, in case the annual conference of those States should deem the measure expedient.

Smith et al. v. Swormstedt et al. (288) 942

2. In 1845 these conferences did deem it expedient, and organized a separate ecclesiastical community, under the appellation of the Methodist Episcopal Church South.

Id. (1*h.*) 942

3. At this time there existed property, known as the Book Concern, belonging to the General Church, which was the result of the labors and accumulation of all the ministers.

Id. (1*h.*) 942

4. Commissioners appointed by the Methodist Episcopal Church South, may file a bill in chancery, in behalf of themselves and those whom they represent, against the trustees of the Book Concern, for a division of the property.

Id. (1*h.*) 942

5. The rule is well established that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others; and a bill may also be maintained against a portion of a numerous body of defendants, representing a common interest.

Id. (1*h.*) 942

6. The Methodist Church was divided. It was not a case of the secession of a part from the main body. Neither division lost its interest in the common property.

Id. (1*h.*) 942

7. The General Conference, of 1844, had the legitimate power to thus divide the church. In 1808, the General Conference was made a representative body, with six restrictive articles upon its powers. But none of these articles deprived it of the power of dividing the church.

Id. (1*h.*) 942

8. The sixth restrictive article provided that the General Conference should not appropriate the profits of the Book Concern to any other purpose than for the benefit of the traveling ministers, their widows, &c.; and one of the resolutions of 1844 recommended to all the annual conferences to authorize a change in the sixth restrictive article. This was not imposed as a condition of a separation, but merely a plan to enable the General Conference itself to carry out its purposes.

Id. (1*h.*) 942

9. The separation of the church into two parts being legally accomplished, a division of the joint property by a court of equity follows, as a matter of course.

Id. (1*h.*) 942

COLLISION BY LAND AND WATER—14.

1. Where a suit was brought against a Railroad Company, by a person who was injured by a collision, it was correct in the court to instruct the jury, that, if the plaintiff was lawfully on the road, at the time of the collision, and the collision and consequent injury to him were caused by the gross negligence of one of the servants of the defendants, then and there employed on the road, he was entitled to recover, notwithstanding the circumstances, that the plaintiff was a stockholder in the Company, riding by invitation of the President, paying no fare, and not in the usual passenger cars.

P. & R. R. Co. v. Derby, (468) 502

2. And also, that the fact that the engineer hav-

ing the control of the colliding locomotive, was forbidden to run on that track at the time, and had acted in disobedience of such orders, was no defense to the action.

Id. (1*h.*) 502

3. Where a collision takes place between two vessels at sea, which is the result of inevitable accident, without the negligence or fault of either party, each vessel must bear its own loss.

Steinbach v. Rae, (532) 530

COLLISION OF VESSELS—13.

See Admiralty.

COMMERCIAL LAW—13.

See Admiralty.

1. It is not usury in a bank which has power by its charter to deal in exchange, to charge the market rates of exchange upon time bills.

Buckingham v. McLean, (132) 91

2. Where an action was brought against certain persons for giving a commercial letter of recommendation with intention to defraud and deceive, whereby the party to whom the letter was addressed gave credit and sustained a loss, the question for the jury ought to have been whether or not there was fraud and an intention to deceive, in giving the letter.

Lord v. Goddard, (198) 111

3. If there was no such intention, if the parties honestly stated their own opinion, believing at the time that they stated the truth, they are not liable in this form of action, although the representation turned out to be entirely untrue.

Id. (1*h.*) 111

4. A statute of Ohio declares all promissory notes, drawn for a sum certain, payable to any person or order, or to any person or his assignees, negotiable by indorsement.

Miller v. Austen, (218) 119

5. The following paper, namely:

"No. 959. MISSISSIPPI UNION BANK,

JACKSON, MISS., February 8, 1840.

I hereby certify that Hugh Short has deposited in this bank, payable twelve months from 1st May, 1839, with five per cent. interest till due, fifteen hundred dollars, for the use of Henry Miller, and payable only to his order, upon the return of this certificate. \$1,500. Wm. P. Grayson, Cashier"—was negotiable by indorsement under the statute, and the indorsee had a right to maintain an action against an indorser.

Id. (1*h.*) 119

6. In a suit by the indorsee against the indorser of a bill, where the defense was usury, the drawer and drawee were incompetent witnesses, when offered to prove certain facts, which, when taken in conjunction with certain other facts, to be proved by other witnesses, would invalidate the instrument.

Saltmarsh v. Tuhiill, (229) 124

7. Being incompetent witnesses to establish the whole defense, they are also incompetent to establish a part.

Id. (1*h.*) 124

COMMERCIAL LAW—14.

1. Under a policy insuring against the usual perils of the sea, including barratry, the underwriters are not liable to repay to the insured, damages paid by him to the owners of another vessel and cargo, suffered in a collision occasioned by the negligence of the master or mariners of the vessel insured.

Gen. M. Ins. v. Sherwood, (352) 413

2. A policy cannot be so construed as to insure against all losses directly referable to the negligence of the master and mariners. But if the loss is caused by a peril of the sea, the underwriter is responsible, although the master did not use due care to avoid the peril.

Id. (1*h.*) 413

3. It is of no consequence whether the date of a promissory note be at the beginning or end of it.

Sheppard v. Graves, (505) 518

4. Where a warehouseman gave a receipt for wheat which he did not receive, and afterwards the quantity which he actually had was divided amongst the respective depositors, an action of replevin, brought by the assignee of the fictitious receipt, could not be maintained when, under it, one of these portions was seized.

Jackson v. Hale, (525) 536

5. Evidence offered to show that the wheat in question was assigned to the defendant, was objected to by the plaintiff in the replevin; but such ob-

HOWARD 13, 14, 15, 16.

jection was properly overruled. The plaintiff had shown no title in himself.

Id. (Ib.) 526

6. So, also, evidence was admissible to show that the receiver of the fictitious certificate had never deposited any wheat in the warehouse.

Id. (Ib.) 526

7. The defendants in this case were the assignees of the original warehouseman, and were not responsible, unless it could be shown that wheat was deposited, which had come into their possession.

Id. (Ib.) 526

COMMERCIAL LAW—15.

1. Where a note was given in the District of Columbia on the 11th of March, payable sixty days after date, and notice of its non-payment was given to the indorser on the 15th of May (being Monday), the notice was not in time.

Adams v. Otterback, (539) 805

2. Although evidence was given that since 1846, the bank which was the holder of the note had changed the pre-existing custom, and had held the paper until the fourth day after grace, giving notice to the indorser on Monday, when the note fell due on Sunday. This was not sufficient to establish an usage.

Id. (Ib.) 805

3. An usage, to the binding, must be general, as to place, and not confined to a particular bank, and in order to be obligatory, must have become acquiesced in, and become notorious.

Id. (Ib.) 805

COMMERCIAL LAW—16.

1. A bond, with sureties, was executed for the purpose of securing the repayment of certain money advanced for putting up and shipping bacon. William Turner was to have the management of the affair, and Harry Turner was to be his agent.

Turner v. Yates, (14) 824

2. After the money was advanced Harry made a consignment of meat and drew upon it. Whether or not this draft was drawn specially against this consignment was a point which was properly decided by the court from an interpretation of the written papers in the case.

Id. (Ib.) 824

3. It was also correct to instruct the jury that if they believed, from the evidence, that Harry was acting in this instance either upon his own account or as the agent of William, then the special draft drawn upon the consignment was first to be met out of the proceeds of sale, and the sureties upon the bond to be credited with only their proportion of the residue.

Id. (Ib.) 824

4. The consignor had a right to draw upon the consignment with the consent of the consignee, unless restrained by some contract with the sureties, of which there was no evidence. On the contrary, there was evidence that Harry was the agent of William, to draw upon this consignment, as well as for other purposes.

Id. (Ib.) 824

5. It was not improper for the court to instruct the jury that they might find Harry to have been either a principal or an agent of William.

Id. (Ib.) 824

6. An agreement by the respective counsel to produce upon notice at the trial table any papers which may be in his possession did not include the invoice of the consignment, because the presumption was, that it had been sent to London, to those to whom the boxes had been sent by their agent in this country.

Id. (Ib.) 824

7. A correspondence between the plaintiff and Harry, offered to show that Harry was acting in this matter as principal, was properly allowed to go to the jury.

Id. (Ib.) 824

CONSTITUTIONAL LAW—13.

1. The bills of a banking corporation, which has corporate property, are not bills of credit within the meaning of the Constitution, although the state which created the bank is the only stockholder, and pledges its faith for the ultimate redemption of the bills.

Darrington v. Bank of Alabama, (12) 30

2. The principles established in the cases of 3 How., 212, and 9 How., 477, again affirmed viz.: that after the admission of Alabama into the Union as a State, Congress could make no grant of land situated between high and low water marks.

Doe v. Beale, (25) 35

3. The Treaty of 1819, between the United States and Spain, contains the following stipulation, viz.: "The United States shall cause satisfaction to be made for the injuries, if any, which by process of law shall be established to have been suffered by the Spanish officers and individual Spanish inhabitants by the late operations of the American army in Florida."

United States v. Ferreira, (40) 42

4. Congress, by two Acts passed in 1823 and 1834 (3 Stat. at Large, 768, and 6 Stat. at Large, 569), directed the Judge of the Territorial Court of Florida to receive, examine, and adjudge all cases of claims for losses, and report his decisions, if in favor of the claimants, together with the evidence upon which they were founded, to the Secretary of the Treasury, who, on being satisfied that the same was just and equitable, within the provisions of the Treaty, should pay the amount thereof; and by an Act of 1849 (9 Stat. at Large, p. 788), Congress directed the Judge of the District Court of the United States for the Northern District of Florida to receive and adjudicate certain claims in the manner directed by the preceding Acts.

Id. (Ib.) 42

5. From the award of the District Judge, an appeal does not lie to this court.

Id. (Ib.) 42

6. As the Treaty itself designated no tribunal to assess the damages, it remained for Congress to do so by referring the claims to a commissioner according to the established practice of the government in such cases. His decision was not the judgment of a court, but a mere award, with a power to review it, conferred upon the Secretary of the Treasury.

Id. (Ib.) 42

7. The Legislature of Virginia incorporated the stockholders of the Richmond, Fredericksburg and Potomac Railroad Company, and in the charter pledged itself not to allow any other railroad to be constructed between those places, or any portion of that distance; the probable effect would be to diminish the number of passengers traveling between the one city and the other upon the railroad authorized by that Act, or to compel the said company, in order to retain such passengers, to reduce the passage money.

Richmond Railroad Company v.

Louisa Railroad Company, (71) 55

8. Afterwards the Legislature incorporated the Louisa Railroad Company, whose road came from the West and struck the first-named company's track nearly at right angles, at some distance from Richmond; and the Legislature authorized the Louisa Railroad Company to cross the track of the other, and continue their road to Richmond.

Id. (Ib.) 55

9. In this latter grant, the obligation of the contract with the first company is not impaired within the meaning of the Constitution of the United States.

Id. (Ib.) 55

10. In the first charter there was an implied reservation of the power to incorporate companies to transport other articles than passengers; and if the Louisa Railroad Company should infringe upon the rights of the Richmond Company, there would be a remedy at law, but the apprehension of it will not justify an injunction to prevent them from building their road.

Id. (Ib.) 55

11. Nor is the obligation of the contract impaired by crossing the road. A franchise may be condemned in the same manner as individual property.

Id. (Ib.) 55

12. During the war the United States and Mexico, where a trader went into the adjoining Mexican provinces which were in possession of the military authority of the United States, for the purpose of carrying on a trade with the inhabitants which was sanctioned by the executive branch of the government, and also by the commanding military officer, it was proper for an officer of the United States to seize the property upon the ground of trading with the enemy.

Mitchell v. Harmony, (115) 75

13. Private property may be taken by a military commander to prevent it from falling into the hands of the enemy, or for the purpose of converting it to the use of the public; but the danger must be immediate and impending, or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for.

Id. (Ib.) 75

14. The facts, as they appeared to the officer, must furnish the rule for the application of these principles.

Mitchell v. Harmony.

(115) 75

15. But the officer cannot take possession of private property for the purpose of insuring the success of a distant expedition upon which he is about to march.

Id.

(*Ib.*) 75

16. Whether or not the owner of the goods resumed the possession of them at any time after their seizure, was a fact for the jury. In this case, they found that he did not resume the possession, and in this they were sustained by legal evidence.

Id.

(*Ib.*) 75

17. The officer who made the seizure cannot justify his trespass by showing the orders of his superior office. An order to commit a trespass can afford no justification to the person by whom it was executed.

Id.

(*Ib.*) 75

18. The trespass was committed out of the limits of the United States. But an action for it may be maintained in the Circuit Court for any district in which the defendant may be found upon process against him, where the citizenship of the respective parties gives jurisdiction to a court of the United States.

Id.

(*Ib.*) 75

19. The courts of the United States, under the Constitution and laws, have equity jurisdiction. Unless the general principles of equity have been modified by the laws or usages of a particular state, those general principles will be carried out everywhere in the same manner, and equity jurisprudence be the same, when administered by the courts of the United States, in all the States.

Neves et al. v. Scott.

(268) 140

20. Hence, the decision of a state court, in a case which involved only the general principles of equity, and was not controlled by local law or usage, is not binding as authority upon this court.

Id.

(*Ib.*) 140

21. In the case of *Neves et al. v. Scott et al.*, reported in 9 Howard, 198, this court decided two points—one, that volunteers could, in that case, claim the interference of chancery to enforce the marriage articles in question; and the other, that the articles constituted an executed trust.

Id.

(*Ib.*) 140

22. The Supreme Court of Georgia does not agree with this court upon the first point. Nevertheless, this court does not change its decision.

Id.

(*Ib.*) 140

23. Moreover, the second point upon which this court rested the case does not appear to have been brought before the Supreme Court of Georgia; and, of course, it expressed no opinion upon the point.

Id.

(*Ib.*) 140

24. In 1802, when Georgia ceded her back lands to the United States, she had jurisdiction over the whole of the Chattahoochee River, from its source to the thirty-first degree of north latitude.

Howard et al. v. Ingersoll.

(381) 189

25. The rule is, that where a power possesses a river, and cedes the territory on the other side of it, making the river the boundary, that power retains the river, unless there is an express stipulation for the relinquishment of the rights of soil and jurisdiction over the bed of such river.

Id.

(*Ib.*) 199

26. When Georgia ceded to the United States all the land situated on the west of a line running along the western bank of the Chattahoochee River, she retained the bed of the river and all the land to the east of the line above mentioned.

Id.

(*Ib.*) 189

27. The river flows in a channel, between two banks, from fifteen to twenty feet high, between the bottom of which and the water, when the river is at a low stage, there are shelving shores, from thirty to sixty yards each in width.

Id.

(*Ib.*) 189

28. The boundary line runs along the top of this high western bank, leaving the bed of the river and the western shelving shore within the jurisdiction of Georgia.

Id.

(*Ib.*) 189

29. The State of Pennsylvania having constructed lines of canal and railroad, and other means of travel and transportation, which would be injured in their revenues by the obstruction in the River Ohio, created by a bridge at Wheeling, has a sufficiently direct interest to sustain an application to this court, in the exercise of original jurisdiction, for an injunction to remove the obstruction. The remedy at law would be incomplete.

Pennsylvania v. Wheeling Bridge. (519) 249

30. It is admitted that the federal courts have no jurisdiction of common law offenses, and that there is no abstract, pervading principle of the common law of the Union, under which this court can take jurisdiction; and that the case under consideration is subject to the same rules of action as if the suit had been commenced in the Circuit Court for the District of Virginia.

Id.

(*Ib.*) 249

31. But chancery jurisdiction is conferred on the courts of the United States by the Constitution, under certain limitations; and under these limitations, the usages of the High Court of Chancery, in England, which have been adopted as rules by this court, furnish the chancery law which is exercised in all the States, and even in those where no state chancery system exists.

Id.

(*Ib.*) 249

32. Under this system, where relief can be given by the English chancery, similar relief may be given by the courts of the Union.

Id.

(*Ib.*) 249

33. An indictment against a bridge, as a nuisance, by the United States, could not be sustained; but a proceeding against it, on the ground of a private and irreparable injury, may be sustained, at the instance of an individual or a corporation, either in the Federal or State Courts.

Id.

(*Ib.*) 249

34. In case of nuisance, if the obstruction be unlawful and the injury irreparable, by a suit at common law, the injured party may claim the extraordinary protection of a court of chancery.

Id.

(*Ib.*) 249

35. The Ohio is a navigable stream, subject to the commercial power of Congress, which has been exercised over it; and if the Act of Virginia authorized the structure of the bridge, so as to obstruct navigation, it would afford no justification to the Bridge Company.

Id.

(*Ib.*) 249

36. Congress has sanctioned the compact made between Virginia and Kentucky, viz.: "That the use and navigation of the River Ohio, so far as the Territory of Virginia or Kentucky is concerned, shall be free and common to the citizens of the United States." This compact is obligatory, and can be carried out by this court.

Id.

(*Ib.*) 249

37. Where there is a private injury from a public nuisance, a court of equity will interfere by injunction.

Id.

(*Ib.*) 249

38. In this case, the bridge is a nuisance. This is shown by measuring the height of the bridge, and of the water, and of the chimneys of the boats. The report of the commissioner, appointed by this court to ascertain these facts, is equivalent to the verdict of the jury.

Id.

(*Ib.*) 249

39. The report of the commissioner adverted to and commented upon; the extent of injury sustained by the boats explained; and the importance shown of maintaining the navigation of the river.

Id.

(*Ib.*) 249

40. If a structure be declared to be a nuisance, there is no room for a calculation and comparison between the injuries and benefits which it produces.

Id.

(*Ib.*) 249

41. Therefore, unless there be an elevation of the lowest parts of the bridge for three hundred feet over the channel of the river—not less than one hundred and eleven feet from the low water mark, the flooring of the bridge descending from the termini of the elevation at the rate of four feet in the hundred—or some other plan shall be adopted which shall relieve the navigation from obstruction, on or before the first of February next—the bridge must be abated.

Id.

(*Ib.*) 249

42. (In consequence of the intimation above alluded to, viz.: "that some other plan might be adopted" than elevating the bridge, the court, at the request of the counsel for the Bridge Company, referred the matter to an engineer. After receiving his report, the court decided as follows):

Id.

(*Ib.*) 249

43. The Bridge Company may, upon their own responsibility, try whether the western channel can be improved and made passable, by means of a draw, so as to afford a safe and unobstructed navigation for the largest class of boats, having chimneys eighty feet high, when they cannot pass under the suspension bridge. This is to be done, if at all, before the first Monday of February next, on which

day the plaintiff may move the court on the subject of the decree.

Id.

(*Id.*) 249

CONSTITUTIONAL LAW—14.

1. A state, under its general and admitted power to define and punish offenses against its own peace and policy, may repel from its borders an unacceptable population, whether paupers, criminals, fugitives or liberated slaves; and consequently, may punish her citizens and others who thwart this policy, by harboring, secreting, or in any way assisting such fugitives.

Moore v. People of Illinois.

(13) 306

2. It is no objection to such legislation that the offender may be liable to punishment under the Act of Congress for the same acts, when injurious to the owner of the fugitive slave.

Id.

(*Id.*) 306

3. The case of *Prigg v. The Commonwealth of Pennsylvania*, 16 Peters, 539, presented the following questions, which were decided by the court:

1. That under and in virtue of the Constitution of the United States, the owner of a slave is clothed with entire authority in every State in the Union, to seize and recapture his slave, wherever he can do it without illegal violence or a breach of the peace.

2. That the government of the United States is clothed with appropriate authority and functions to enforce the delivery, on claim of the owner, and has properly exercised it in the Act of Congress of 12th February, 1793.

3. That any state law or regulation which interrupts, impedes, limits, embarrasses, delays or postpones the right of the owner to the immediate possession of the slave, and the immediate command of his service, is void.

Id.

(*Id.*) 306

4. This court has not decided that state legislation in aid of the claimant, and which does not directly nor indirectly delay, impede or frustrate the master in the exercise of his right under the Constitution, or in pursuit of his remedy given by the Act of Congress, is void.

Id.

(*Id.*) 306

5. It belongs exclusively to the Political Department of the government to recognize or to refuse to recognize a new government in a foreign country, claiming to have displaced the old and established a new one.

Kennett v. Chambers.

(38) 316

6. Until the Political Department of the government acknowledged the independence of Texas, the judiciary were bound to consider the old order of things as having continued.

Id.

(*Id.*) 316

7. While the government of the United States acknowledged its treaty of limits and of amity and friendship with Mexico as still subsisting an obligatory, no citizen of the United States could lawfully furnish supplies to Texas to enable it to carry on a war with Mexico.

Id.

(*Id.*) 316

8. A contract, made in Cincinnati, after Texas declared itself independent, but before its independence was acknowledged by the United States, whereby the complainants agreed to furnish, and did furnish money to a General in the Texan army, to enable him to raise and equip troops to be employed against Mexico, was illegal and void, and cannot be enforced in a court of the United States.

Id.

(*Id.*) 316

9. The circumstance that the Texan officer agreed, in consideration of these advances of money, to convey to them certain lands in Texas of which he covenanted that he was then the owner, will not make the contract valid when it appears upon the face of it, and by the averments in the bill, that the object and intention of the complainants in advancing the money was to assist Texas in its military operations.

Id.

(*Id.*) 316

10. A contract made in the United States at that time for the purchase of land in Texas, would have been valid even if the money was afterwards used to support hostilities with Mexico. But in this case it was not an ordinary purchase, but the object of the complainants, as avowed in the contract and the bill, was to aid Texas in its war with Mexico.

Id.

(*Id.*) 316

11. The contract being absolutely void by the laws of the United States at the time it was made, the circumstance that it was valid in Texas, and that

Texas has since become a member of the Union, does not entitle the complainants to enforce it in the courts of the United States.

Id.

(*Id.*) 316

12. No contract can be enforced in the courts of the United States, no matter where made or where to be executed, if it is in violation of the laws of the United States, or is in contravention of the public policy of the government or in conflict with subsisting treaties.

Id.

(*Id.*) 316

13. By the law of Pennsylvania, the River Delaware is a public navigable river, held by its joint sovereigns in trust for the public.

Id.

Rundle v. Delaware & Raritan

Canal Co.,

(80) 335

14. Riparian owners, in that State, have no title to the river, or any right to divert its waters, unless by license from the States.

Id.

(*Id.*) 335

15. Such license is revocable, and in subjection to the superior right of the State, to divert the water for public improvements, either by the State directly, or by a corporation created for that purpose.

Id.

(*Id.*) 335

16. The proviso to the Provincial Acts of Pennsylvania and New Jersey, of 1771, does not operate as a grant of the usufruct of the waters of the river to Adam Hoops and his assigns, but only as a license, or toleration of his dam.

Id.

(*Id.*) 335

17. As, by the laws of his own State, the plaintiff could have no remedy against a corporation authorized to take the whole waters of the river for the purpose of canals, or improving the navigation, so, neither can he sustain a suit against a corporation created by New Jersey for the same purpose, who have taken part of the waters.

Id.

(*Id.*) 335

18. The plaintiffs being but tenants at sufferance in the usufruct of the water to the two States who own the river as tenants in common, are not in a condition to question the relative rights of either to use its waters without the consent of the other.

Id.

(*Id.*) 335

19. This case is not intended to decide whether a first license, for private emolument, can support an action against a later license of either sovereign or both, who, for private purposes, diverts the water to the injury of the first.

Id.

(*Id.*) 335

20. The case of *League v. DeYoung & Brown*, 11 How., 185, considered and again established.

Id.

(*Id.*) 335

21. Under the tenth article of the Treaty of 1842, between the United States and Great Britain, a warrant was issued by a commissioner, at the instance of the British Consul, for the apprehension of a person who, it was alleged, had committed an assault, with intent to murder, in Ireland.

In re Kaine.

(103) 345

22. The person being arrested, the Commissioner ordered him to be committed, for the purpose of abiding the order of the President of the United States.

Id.

(*Id.*) 345

23. A *habeas corpus* was then issued by the Circuit Court of the United States, the District Judge presiding, when, after a hearing, the writ was dismissed, and the prisoner remanded to custody.

Id.

(*Id.*) 345

24. A petition was then presented to the Circuit Judge, at his chambers, addressed to the Justices of the Supreme Court, and praying for writs of *habeas corpus*, which was referred by the Circuit Judge, after a hearing, to the Justices of the Supreme Court, in bank, at the commencement of the next term thereof.

Id.

(*Id.*) 345

25. At the meeting of the court, a motion was made, with the papers and proceedings presented to the Circuit Judge annexed to the petition, for writs of *habeas corpus* and *certiorari* to bring up the defendant and the record from the Circuit Court, for the purpose of having the decision of that court examined.

Id.

(*Id.*) 345

26. The motion was refused, the writs prayed for denied, and the petition dismissed.

Id.

(*Id.*) 345

27. Where the Supreme Court of a state certified that there was "drawn in question the validity of statutes of the State of Ohio," &c., without naming the statutes, this was not enough to give juris-

CONSTITUTIONAL LAW—16.

1. In the war with Mexico, the port of San Francisco was conquered by the arms of the United States, in the year 1846, and shortly afterwards the United States had military possession of all of Upper California. Early in 1847 the President of the United States, as constitutional commander-in-chief of the army and navy, authorized the military and naval commanders of the United States forces in California to exercise the belligerent rights of a conqueror, and to form a civil and military government for the conquered territory, with power to impose duties on imports and tonnage for the support of such government, and of the army, which had the conquest in possession.

Cross v. Harrison, (164) 889

2. This was done, and tonnage and import duties were levied under a war tariff, which had been established by the civil government for that purpose, until official notice was received by the civil and military Governor of California, that a treaty of peace had been made with Mexico, by which Upper California had been ceded to the United States.

Id. (Ib.) 889

3. Upon receiving this intelligence the Governor directed that import and tonnage duties should thereafter be levied in conformity with such as were to be paid in the other parts of the United States, by the Acts of Congress; and for such purpose he appointed the defendant in this suit, collector of the port of San Francisco.

Id. (Ib.) 889

4. The plaintiff now seeks to recover from him certain tonnage duties and imposts upon foreign merchandise paid by them to the defendant as collector between the 3d of February, 1848 (the date of the Treaty of Peace), and the 13th of November, 1849 (when the collector appointed by the President, according to law, entered upon the duties of his office), upon the ground that they had been illegally exacted.

Id. (Ib.) 889

5. The formation of the civil government in California, when it was done, was the lawful exercise of a belligerent right over a conquered territory. It was the existing government when the territory was ceded to the United States, as a conquest, and did not cease, as a matter of course, or as a consequence of the restoration of peace; and it was rightfully continued after peace was made with Mexico, until Congress legislated otherwise, under its constitutional power, to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.

Id. (Ib.) 889

6. The tonnage duties, and duties upon foreign goods imported into San Francisco, were legally demanded and lawfully collected by the civil governor, whilst the war continued, and afterwards, from the ratification of the Treaty of Peace until the revenue system of the United States was put into practical operation in California, under Acts of Congress passed for that purpose.

Id. (Ib.) 889

7. The constitutional privilege which a citizen of one state has to sue a citizen of another state in the federal courts cannot be taken away by the erection of the latter into a corporation by the laws of the state in which they live. The corporation itself may therefore be sued as such.

Marshall v. Baltimore and Ohio Railroad Co., (314.) 953

CONSTRUCTION OF STATUTES—13.

See Statutes.

CONTRACT—13.

1. Where there was a contract for the sale of land for the purchase of which indorsed notes were given, but before the time arrived for the making of a deed, the purchaser failed, and the liability to pay the note became fixed upon the indorser; and a new contract was made between the vendor and the indorser, that, in order to protect the indorser, he should be substituted in place of the original purchaser, fresh notes being given and the time of payment extended, evidence was admissible to show that the latter contract was a substitute for the former.

Bradford v. Union Bank of Tennessee, (57) 49

2. A part of the land having been sold for taxes whilst the first set of notes was running to maturity (the vendee having been put into possession), and the vendor being ignorant of that fact when

the contract of substitution was made, all that the indorser can claim of the vendor, is a deed for the land subject to the incumbrances arising from the tax sales. The notes given for the substituted contract must be paid.

Id. (Ib.) 49

3. The indorser having filed a bill for a specific performance upon the title bond, which he had received from the vendor, this court will not content itself with dismissing his bill without prejudice, and thus give rise to further litigation, but proceed to pass a final decree, founded on the above principles.

Id. (Ib.) 49

4. Where the covenant purported to be made between two persons by name, of the first part, and the corporate company, of the second part, and only one of the persons of the first part signed the instrument, and the covenant ran between the party of the first part and the party of the second part, it was proper for the person who had signed on the first part to sue alone; because the covenant inured to the benefit of those who were parties to it.

Philadelphia, Wilmington & Baltimore Railroad Company v. Howard, (308) 157

5. In this particular case, a covenant to finish the work by a certain day, on the one part, and a covenant to pay monthly on the other part, were distinct and independent covenants. And a right in the Company to annul the contract at any time, did not include a right to forfeit the earnings of the other party, for work done prior to the time when the contract was annulled.

Id. (Ib.) 157

6. A covenant to do the work according to a certain schedule, which schedule mentioned that it was to be done according to the directions of the engineer, bound the Company to pay for the work, which was executed according to such directions, although a profile was departed from which was made out before the contract was entered into.

Id. (Ib.) 157

7. So, also, where the contract was, to place the waste earth where ordered by the engineer, it was the duty of the engineer to provide a convenient place; and if he failed to do so, the other party was entitled to damages.

Id. (Ib.) 157

8. Where the contract authorized the Company to retain fifteen per cent. of the earnings of the contractor, this was by way of indemnity, and not forfeiture; and they were bound to pay it over, unless the jury should be satisfied that the Company had sustained an equivalent amount of damage by the default, negligence, or misconduct of the contractor.

Id. (Ib.) 157

9. Where, in the progress of the work, the contractor was stopped by an injunction issued by a court of chancery, he was not entitled to recover damages for the delay occasioned by it, unless the jury should find that the Company did not use reasonable diligence to obtain a dissolution of the injunction.

Id. (Ib.) 157

10. If the Company annulled the contract merely for the purpose of having the work done cheaper, or for the purpose of oppressing and injuring the contractor, he was entitled to recover damages for any loss of profit he might have sustained; and of the reasons which influenced the Company, the jury were to be the judges.

Id. (Ib.) 157

11. In equity, where a creditor agrees to receive specific articles in satisfaction of a debt, even although it be a debt upon bond, secured by mortgage, he will be held to the performance of his agreement.

Very v. Levy, (345) 173

12. But, in order to bring a case within this principle, there must be,

1. An agreement not inequitable in its terms and effect.

2. A valuable consideration for such agreement.

3. A readiness to perform, and the absence of laches, on the part of the debtor.

Id. (Ib.) 173

13. Where the agreement to receive payment in goods was made by a person who acted under a power of attorney from the creditor, authorizing him to trade, sell, and dispose of notes, bills, bonds, or mortgages, and under this power, a partial payment was received in goods, which was afterwards

recognized as a payment by the creditor, the power was sufficient to authorize an agreement to receive the remaining amount, also, in goods, at any time when called for within twelve months, especially as the bond had yet four years to run.

Very v. Levy. (345) 173

14. This agreement was not inequitable; there was a valuable consideration for it; and the debtor was always ready to comply with it, on his part.

Id. (Ib.) 173

15. The creditor cannot now allege fraud in his debtor. It is not charged in the bill; and although he may not have known of the agreement when the bill was framed, yet, when the answer came in, he might have amended his bill, and charged fraud.

Id. (Ib.) 173

CONTRACT—14.

For ante-nuptial contracts, see Chancery.

1. It belongs exclusively to the Political Department of the government to recognize or to refuse to recognize a new government in a foreign country, claiming to have displaced the old and established a new one.

Kennett v. Chambers. (38) 316

2. Until the Political Department of the government acknowledged the independence of Texas, the Judiciary were bound to consider the old order of things as having continued.

Id. (Ib.) 316

3. While the government of the United States acknowledged its treaty of limits and of amity and friendship with Mexico as still subsisting and obligatory, no citizen of the United States could lawfully furnish supplies to Texas to enable it to carry on the war against Mexico.

Id. (Ib.) 316

4. A contract, made in Cincinnati, after Texas declared itself independent, but before its independence was acknowledged by the United States, whereby the complainants agreed to furnish, and did furnish money to a General in the Texan army, to enable him to raise and equip troops to be employed against Mexico, was illegal and void, and cannot be enforced in a court of the United States.

Id. (Ib.) 316

5. The circumstances that the Texan officer agreed, in consideration of these advances of money, to convey to them certain lands in Texas, of which he covenanted that he was then the owner, will not make the contract valid when it appears upon the face of it, and by the averments in the bill, that the object and intentions of the complainants in advancing the money was to assist Texas in its military operations.

Id. (Ib.) 316

6. A contract made in the United States at that time for the purchase of land in Texas, would have been valid even if the money was afterwards used to support hostilities with Mexico. But in this case it was not an ordinary purchase; but the object of the complainants, as avowed in the contract and the bill was to aid Texas in its war with Mexico.

Id. (Ib.) 316

7. The contract being absolutely void by the laws of the United States at the time it was made, the circumstance that it was valid in Texas, and that Texas has since become a member of the Union, does not entitle the complainants to enforce it in the courts of the United States.

Id. (Ib.) 316

8. No contract can be enforced in the courts of the United States, no matter where made or where to be executed, if it is in violation of the laws of the United States, or is in contravention of the public policy of the government or in conflict with subsisting treaties.

Id. (Ib.) 316

9. Where there was a judgment at law against a defendant in Mississippi, and he sought relief in equity, upon the ground that the consideration of the contract was the introduction of slaves into the State, and consequently illegal; a court of equity will not grant relief, because the complainant was in *pari delicto* with the other party.

Sample v. Barnes. (70) 330

10. Moreover, such a defense would have been good at law, and the averments, that deception was practiced to prevent the complainant from making the defense, are not sustained by the evidence in the case. And further, after the judgment, the complainant gave a forthcoming bond, thus recognizing the validity of the judgment.

Id. (Ib.) 330

11. In 1834 Burden obtained a patent for a new and useful improvement in the machinery for man-

ufacturing wrought nails and spikes, which he assigned to the Troy Iron and Nail Factory, and also covenanted that he would convey to that company any improvement which he might thereafter make.

Troy Iron and Nail Factory v.

Corning. (183) 323

12. In 1840 he made such an improvement, for making hook and brad-headed spikes, with a bending lever, which he assigned to the Troy Iron and Nail Factory in 1848.

Id. (Ib.) 323

13. Before this last assignment, however, viz.: in 1845, Burden made an agreement with Corning, Horner and Winslow, in which, among other things, it was agreed that both parties might thereafter manufacture and vend spikes of such kind and character as they saw fit, notwithstanding their conflicting claims.

Id. (Ib.) 323

14. Owing to the peculiar attitude of the parties to each other at the time of making this agreement, and the language used in it, it cannot be construed into a permission to Corning, Horner and Winslow, to use the improved machinery patented by Burden in 1840; and the right to use it having passed to the Troy Iron and Nail Factory, a perpetual injunction upon Corning, Horner and Winslow, will be decreed.

Id. (Ib.) 323

15. Where the Marshal of the District of Columbia engaged the services of a clerk for a stipulated sum per annum, and the service continued without any new agreement, and the jury were instructed that they might imply a new agreement to pay the clerk at a different rate, this instruction was erroneous. There was nothing in the evidence from which the jury could imply such new agreement.

Nutt v. Minor. (464) 506

CONTRACT—15.

1. Black, as agent for the owners, contracted to sell a large quantity of land in Maine, which contract was assigned by the vendee, until it came, through means assignments, into the hands of Miller and others.

Garrow v. Davis. (372) 622

2. Payments were made from time to time on account; but at length, in consequence of a failure to make the payments stipulated in the contract, and by virtue of a clause contained in it the contract became void.

Id. (Ib.) 622

3. In this state of things, Miller employed one Paulk to ascertain from Black the lowest price that he would take for the land, and then to sell to others for the highest price that he could get.

Id. (Ib.) 622

4. Paulk sold and assigned the contract to Davis for \$1,050.

Id. (Ib.) 622

5. Upon the theory that Paulk and Davis entered into a fraudulent combination, still, Miller and others are not entitled to demand that a court of equity should consider Davis as a trustee of the lands for their use. They had no interest in them, legal or equitable, nor anything but a good will, which alone was the subject matter of the fraud, if there was any.

Id. (Ib.) 622

6. But the evidence shows that this good will did not exist; for Black was not willing to sell to Miller and others for a less price than to any other person.

Id. (Ib.) 622

7. Although Paulk represented himself to be acting for Miller and others, when in reality he was representing Davis, yet he did not obtain the land at a reduced price thereby; but, on the contrary, at its fair market value.

Id. (Ib.) 622

8. The charges of fraud in the bill are denied in the answers, and the evidence is not sufficient to sustain the allegations.

Id. (Ib.) 622

9. The City of New Orleans sold a lot in the city for a certain sum of money, the payment of which was not exacted, but the interest of it, payable quarterly, remained as a ground rent upon the lots. It was further stipulated, that if two of these payments should be in arrear, the city could proceed judicially for the recovery of possession, with damages, and the vendees were to forfeit their title.

Anderson v. Bock. (323) 714

10. Six years afterwards, the city conveyed the same lot to another person, who transferred it to an assignee.

Id. (Ib.) 714

11. The title of the first vendee could not be devised without some judicial proceeding, and the dissolution of the contract could not be inferred merely from the fact that the city had made a second conveyance.

Id. (Ib.) 714

12. Therefore, the deed to the second vendee, and from him to his assignee, were not, of themselves, evidence to support the plea of prescription. The city, not having resumed its title in the regular mode, could not transfer either a lawful title or possession to its second vendee.

Id. (Ib.) 714

CONTRACTS—18.

1. Where a contract was made to obtain a certain law from the Legislature of Virginia, and stated to be made on the basis of a prior communication, this communication is competent evidence in a suit upon the contract.

Marshall v. Baltimore and Ohio Railroad Co. (314) 953

2. A contract is void, as against public policy, and can have no standing in court by which one party stipulates to employ a number of secret agents in order to obtain the passage of a particular law by the Legislature of a state, and the other party promises to pay a large sum of money in case the law should pass.

Id. (Ib.) 953

3. It was also void if, when it was made the parties agreed to conceal from the members of the Legislature the fact that the one party was the agent of the other, and was to receive a compensation for his services in case of the passage of the law.

Id. (Ib.) 953

4. And if there was no agreement to that effect there can be no recovery upon the contract, if in fact the agent did conceal from the members of the Legislature that he was an agent who was to receive compensation for his services in case of the passage of the law.

Id. (Ib.) 953

5. Moreover, in this particular case, the law which was passed was not such a one as was stipulated for, and upon this ground there can be no recovery.

Id. (Ib.) 953

6. There having been a special contract between the parties by which the entire compensation was regulated and made contingent, there could be no recovery on account for quantum meruit.

Id. (Ib.) 953

7. In 1845 the Legislature of Ohio passed a general banking law, the fifty-ninth section of which required the officers to make semi-annual dividends, and the sixtieth required them to set off six per cent. of such dividends for the use of the State, which sum or amount so set off should be in lieu of all taxes to which the company, or the stockholders therein, would otherwise be subject.

Id. (Ib.) 953

8. This was a contract fixing the amount of taxation, and not a law prescribing a rule of taxation until changed by the Legislature.

State Bank of Ohio v. Knapp. (369) 977

9. In 1851, an Act entitled "An Act to tax banks, and bank and other stocks, the same as property is now taxable by the laws of this State." The operation of this law being to increase the tax, the banks were not bound to pay that increase.

Id. (Ib.) 977

10. A municipal corporation, in which is vested some portion of the administration of the government, may be changed at the will of the Legislature. But a bank, where the stock is owned by individuals, is a private corporation. Its charter is a legislative contract, and cannot be changed without its assent.

Id. (Ib.) 977

11. The preceding case upon this subject, examined, and the case of the Providence Bank v. Billings, 4 Peters, 561, explained.

Id. (Ib.) 977

12. In 1838 the Legislature of the Territory of Iowa authorized Fanning, his heirs and assigns, to establish and keep a ferry across the Mississippi River, at the Town of Dubuque, for the term of twenty years; and enacted further, that no court or board of county commissioners should authorize any person to keep a ferry within the limits of the Town of Dubuque.

HOWARD 13, 14, 15, 16.

13. In 1840 Fanning was authorized to keep a horse ferryboat instead of a steamboat.

14. In 1847 the General Assembly of the State of Iowa passed an Act to incorporate the City of Dubuque, the fifteenth section of which enacted that the "city council shall have power to license and establish ferries across the Mississippi River, from said city to the opposite shore, and to fix the rates of the same."

15. In 1851 the Mayor of Dubuque, acting by the authority of the city council, granted a license to Gregoire (whose agent Borg was), to keep a ferry for six years from the 1st of April, 1852, upon certain payments and conditions.

16. The right granted to Fanning was not exclusive of such a license as this. The prohibition to license another ferry did not extend to the Legislature, nor to the city council, to whom the Legislature had delegated its power.

Fanning v. Gregoire et al. (524) 1043

17. Nor was it necessary for the city council to act by an ordinance in the case. Corporations can make contracts through their agent without the formalities which the old rules of law require.

Id. (Ib.) 1043

COPYRIGHT—14.

1. Where the copyright of a map was taken out under the Act of Congress, and the copperplate engraving seized and sold under an execution, the purchaser did not acquire the right to strike off and sell copies of the map.

Stephens v. Cady. (528) 528

2. The court below decided that an injunction to prevent such striking off and selling, could not issue, without a return of the purchase money. This decision was erroneous.

Id. (Ib.) 528

3. A copyright is a "property in notion, and has no corporeal tangible substance," and is not the subject of seizure and sale by execution. It can be reached by a creditor's bill in chancery, but in such case, the court would probably have to decree a transfer in the mode pointed out in the Act of Congress.

Id. (Ib.) 528

CORPORATION—16.

See Taxes.

See Church, Methodist Episcopal.

1. A citizen of Virginia may sue the Baltimore and Ohio Railroad Company in the Circuit Court of the United States for Maryland, and an averment that the defendants are a body corporate, created by the Legislature of Maryland, is sufficient to give the court jurisdiction.

Marshall v. Baltimore and Ohio Railroad Company. (314) 953

2. The constitutional privilege which a citizen of one state has to sue the citizens of another state in the federal courts cannot be taken away by the erection of the latter into a corporation by the laws of the state in which they live. The corporation itself may therefore be used as such.

Id. (Ib.) 953

3. In 1838 the Legislature of the Territory of Iowa authorized Fanning, his heirs and assigns, to establish and keep a ferry across the Mississippi River, at the Town of Dubuque, for the term of twenty years; and enacted further, that no court or board of county commissioners should authorize any person to keep a ferry within the limits of the Town of Dubuque.

4. In 1840 Fanning was authorized to keep a horse ferryboat instead of a steamboat.

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7. The right granted to Fanning was not exclusive of such a license as this. The prohibition to license another ferry did not extend to the Legislature, nor to the council, to whom the Legislature had delegated its power.

Fanning v. Gregoire et al. (524) 1043

8. Nor was it necessary for the city council to act by an ordinance in the case. Corporations can make contracts through their agents without the formalities which the old rules of law require.

Id. (Ib.) 1043

COSTS—13.

1. Where there was a sale of an undivided moiety of a tract of land, and the purchaser undertook to extinguish certain liens upon it, which he failed to do; and in consequence of such failure the liens were enforced, and had to be paid by the heirs of the original owner, a suit by these heirs against the purchaser to recover damages for the non-fulfillment of his contract to extinguish the liens, was not within the prohibition of the 11th section of the Judiciary Act, 1 Stat. at Large, 78. The heirs, being aliens, had a right to sue in the Circuit Court.

Weems v. George, (190) 108
2. The extinguishment of the liens by the heirs of the original owner, was effected by process of law and attended with costs. It was proper that these costs also, as well as the amount of the liens, should be recovered by the heirs from the defaulting party who had failed to fulfill his contract. The article, 1229 of the Code of Louisiana, does not include this case, but it is included within article 1224.

Id. (Ib.) 108
3. The suit being brought by the owner of a mill dam below, against the owners of the mill above, for forcibly taking down a part of the dam, upon the allegation that it injured the mill above, it was proper for the court to charge the jury, that if they found for the plaintiff, upon the ground that his dam caused no injury to the mill above, they should allow, in damages, the cost of restoring so much of the dam as was taken down, and compensation for the necessary delay of the plaintiff's mill; and they might also allow such sum for the expenses of prosecuting the action, over and above the taxable costs, as they should find the plaintiff had necessarily incurred, for counsel fees, and the pay of engineers in making surveys, &c.

Day v. Woodworth, (363) 181
4. But if they should find for the plaintiff, on the ground that the defendants had taken down more of the dam than was necessary to relieve the mill above, then they would allow in damages the cost of replacing such excess, and compensation for any delay or damage occasioned by such excess; but not anything for counsel fees or extra compensation to engineers, unless the taking down of such excess was wanton and malicious.

Id. (Ib.) 181
5. In actions of trespass, and all actions on the case for torts, a jury may give exemplary or vindictive damages, depending upon the peculiar circumstances of each case. But the amount of counsel fees, as such, ought not to be taken as the measure of punishment, or a necessary element in its affiliation.

Id. (Ib.) 181
6. The doctrine of costs explained. (Ib.) 181
7. Whether the verdict would carry costs or not, was a question with which the jury had nothing to do.

Id. (Ib.) 181

COSTS—16.

1. Where a judgment in a patent case was affirmed by this court with a blank in the record for costs, and the Circuit Court afterwards taxed these costs at a sum less than two thousand dollars, and allowed a writ of error to this court, this writ must be dismissed on motion.

Stizer v. Many, (98) 861
2. The writ of error brings up only the proceedings subsequent to the mandate and there is no jurisdiction where the amount is less than two thousand dollars, either under the general law or the discretion allowed by the patent law. The latter only relate to cases which involve the construction of the patent laws and the claims and rights of patentees under them.

(Ib.) 861
3. As a matter of practice this court decides, that it is proper for circuit courts to allow costs to be taxed *nunc pro tunc*, after the receipt of the mandate from this court.

Id. (Ib.) 861

COVENANT—13.

See Contract.

COVENANT—16.

1. Where a lease was made by several owners of a house, reserving rent to each one in proportion to his interest, and there was a covenant on the part of the lessee that he would keep the premises in good repair and surrender them in like repair,

this covenant was joint as respects the lessors, and one of them (or two representing one interest) cannot maintain an action for the breach of it by the lessee.

Calvert et al. v. Bradley et al., (590) 1066
2. The question examined, whether the mortgage of a leasehold interest, remaining out of possession, is liable upon the covenants of the lease. The English and American cases reviewed and compared with the decisions of this court, upon kindred points. But the court abstains from an express decision, which is rendered unnecessary by the application of the principle first above mentioned to the case in hand.

Id. (Ib.) 1066

CUSTOM—15.

See Usage.

CUSTOM HOUSES—12.

See Duties.

CUSTOMS, COLLECTORS OF THE—15.

1. The Act of Congress, passed on 2d March, 1799 (1 Stat. at Large, 705), requires the bond given by a collector of the customs to be approved by the Comptroller of the Treasury.

(143) 636
2. But the date of such approval is not conclusive evidence of the commencement of the period when the bond began to run. On the contrary, it begins to be effective from the moment when the Collector and his sureties part with it in the course of transmission.

(Ib.) 636
3. Hence, where the surety upon the bond of a collector in Florida, died upon the 24th of July, and the approval of the Comptroller was not written upon the bond until the 31st of July, it was properly left to the jury to ascertain the time when the collector and his sureties parted with the bond to be sent to Washington; and they were instructed that before they could find a verdict for the surety, they must be satisfied from the evidence that the bond remained in the hands of the Collector, or the sureties, until after the 24th of July.

(Ib.) 636
4. Collectors are often disbursing officers; and they and their sureties are responsible for the money which a collector receives from his predecessor in office; and also for money transmitted to him by another contractor, upon his representation and requisition that it was necessary to defray the current expenses of his office, and advanced for that purpose.

Id. (Ib.) 636

DAMAGES—16.

1. In 1834 McCormick obtained a patent for a reaping machine. This patent expired in 1844.

2. In 1845 he obtained a patent for an improvement upon his patented machine; and in 1847 another patent for new and useful improvements in the reaping machine. The principal one of these last was in giving to the raker of the grain a convenient seat upon the machine.

3. In a suit for a violation of the patent of 1847, it was erroneous in the Circuit Court to say that the defendant was responsible in damages to the same extent as if he had pirated the whole machine.

Seymour et al. v. McCormick, (490) 1024
4. It was erroneous to lay down as a rule for the measure of damages, the amount of profits which the patentee would have made, if he had constructed and sold each one of the machines which the defendants constructed and sold. There was no evidence to show that the patentee could have constructed and sold any more than he actually did.

Id. (Ib.) 1024
5. The Acts of Congress and the rules for measuring damages, examined and explained.

Id. (Ib.) 1024

DEED—13.

1. Where a deed, executed in Wisconsin, and attested by the seal of a court, stamped upon the paper, instead of wax or a wafer, was offered in evidence upon a trial in Arkansas, it was properly received.

Pillow v. Roberts, (472) 228
2. Where a deed from the sheriff, for land sold at a tax sale, recited an assessment for taxes which remained unpaid; the advertisement of the land, and offering it for sale; its being struck down to the

HOWARD 18, 14, 15, 16

highest bidder, who paid the purchase money and received a certificate; this deed ought to have been received in evidence. The law of Arkansas says, that the deed shall be evidence of the regularity and legality of the sale.

Id. (Ib.) 228

3. But even if this deed had been sufficient as a proof title, it ought to have been received, in connection with proof of possession, to establish a defense under the Statute of Limitations.

Id. (Ib.) 228

4. Possession under this deed would have been sufficient proof for adverse possession.

Id. (Ib.) 228

DEED—14.

In the State of Ohio, it is not a sufficient description of taxable lands to say, "Cooper, James, 5 acres, section 24, T. 4, R. 1." A deed made in consequence of a sale for taxes under such a description, is void. The courts of Ohio have so decided, and this court adopts their decision.

Raymond v. Lougworth, (76) 333

DEED—15.

2. The City of New Orleans sold a lot in the city for a certain sum of money, the payment of which was not exacted, but the interest of it, payable quarterly, remained as a ground rent upon the lot. It was further stipulated, that if two of these payments should be in arrear, the city could proceed judicially for the recovery of possession, with damages, and the vendees were to forfeit their title.

Anderson v. Beck, (323) 714

2. Six years afterwards, the city conveyed the city conveyed the lot to another person, who transferred it to an assignee.

Id. (Ib.) 714

3. The title of the first vendee could not be devested without some judicial proceeding, and the dissolution of the contract could not be inferred merely from the fact that the city had made a second conveyance.

Id. (Ib.) 714

4. Therefore, the deed to the second vendee, and from him to his assignee, were not, of themselves, evidence to support the plea of prescription. The city, not having resumed its title in the regular mode, could not transfer either a lawful title or possession to its second vendee.

Id. (Ib.) 714

DEEDS, CONSTRUCTION OF—16.

1. On 6th November, 1836, W. F. Hamilton, William V. Robinson and wife, by deed, conveyed to the United States "the right and privilege to use, divert, and carry away from the fountain spring, by which the woolen factory of the said Hamilton & Robinson is now supplied, so much water as will pass through a pipe or tube of equal diameter with one that shall convey the water from the said spring, upon the same level therewith, to the factory of the said grantors, and to proceed from a common cistern or head to be erected by the said United States, and to convey and conduct the same, by tubes or pipes, through the premises of the said grantors in a direct line, &c., &c."

2. The distance to which the United States wished to carry their share of the water being much greater than that of the other party, it was necessary, according to the principles of hydraulics, to lay down pipes of a larger bore than those of the other party, in order to obtain one half of the water.

3. The grantors were present when the pipes were laid down in this way, and made no objection. It will not do for an assignee, whose deed recognizes the title of the United States to one half of the water, now to disturb the arrangement.

Irwin v. United States, (513) 1038

4. Under the circumstances, the construction to be given to the deed is, that the United States purchased a right to one half of the water, and had a right to lay down such pipes as were necessary to secure that object.

Id. (Ib.) 1038

DELAWARE RIVER—14.

See Pennsylvania.

DEVISES—14.

See Wills.

DEVISES—16.

See Wills.

HOWARD 13, 14, 15, 16.

DISTRICT OF COLUMBIA—14.

1. For some of the principles which govern sureties in bonds before the Orphans' Court, see *Ennis v. Smith*.

2. A master builder, undertaker or contractor, who undertakes by contract with the owner to erect a building, or some part or portion thereof, on certain terms, does not come within the letter or spirit of the Act of Congress passed March 2, 1833 (4 Stat. at Large 659), entitled "An Act to secure to mechanics and others, payment for labor done and materials furnished in the erection of buildings in the District of Columbia."

Winder v. Caldwell, (434) 487

DOMICIL—14.

1. General Kosciusko was sojourning in Switzerland when he died, but was domiciled in France, and had been for fifteen years.

Ennis v. Smith, (400) 472

2. His declarations are to be received as proof that his domicile was in France. Such declarations have always been received, in questions of domicile, in the courts of France, in those of England, and in the courts of the United States.

Id. (Ib.) 472

3. The presumption of law is, that the domicile of origin is retained, until residence elsewhere has been shown by him who alleges a change of it. But residence elsewhere repels the presumption, and casts upon him who denies it to be a domicile of choice, the burden of disproving it. The place of residence must be taken to be a domicile of choice, unless it is proved that it was not meant to be a principal and permanent residence. Contingent events, political or otherwise, are not admissible proofs to show, where one removes from his domicile of origin, for a residence elsewhere, that the latter was not meant to be a principal and permanent residence. But if one is exiled by authority from his domicile of origin, it is never presumed that he has abandoned all hope of returning back. The abandonment, however, may be shown by proof. General Kosciusko was not exiled by authority. He left Poland voluntarily, to obtain a civil status in France, which he conscientiously thought he could not enjoy in Poland, whilst it continued under a foreign dominion.

Id. (Ib.) 472

DUTIES—13.

1. The Tariff Law of 1846, passed on the 30th of July (9 Stat. at Large, 42), contains no special mention of imported sheepskins, dried with the wool remaining on them.

De Forest v. Lawrence, (274) 143

2. They must be regarded as a non-enumerated article, and charged with a duty of twenty per cent. *ad valorem*.

Id. (Ib.) 143

3. The Tariff Law of July 30, 1846 (9 Stat. at Large, 42), reduced the duties on imported coal, and was to take effect on the 2d of December, 1846. The sixth section provided that all goods, which might be in the public stores on that day, should pay only the reduced duty.

Tremblott v. Adams, (295) 152

4. On the 6th of August, 1846 (9 Stat. at Large, 53), Congress passed the Warehousing Act, authorizing importers, under certain circumstances, to deposit their goods in the public stores, and to draw them out and pay the duties at any time within one year.

Id. (Ib.) 152

5. But this right was confined to a port of entry, unless extended, by regulation of the Secretary of the Treasury, to a port of delivery.

Id. (Ib.) 152

6. Therefore, where New Bedford was the port of entry, and Wareham a port of delivery, the collector of New Bedford (acting under the directions of the Secretary of the Treasury) was right in refusing coal to be entered for warehousing at Wareham.

Id. (Ib.) 152

7. Where an importer deposited a sum of money, as estimated duties, with the collector, which, upon adjustment, was found to exceed the true duty by a small amount, and the collector offered to pay it back, but the importer refused to receive it, the existence of this small balance is not sufficient reason for reversing the judgment of the Circuit Court, which was in favor of the collector.

Id. (Ib.) 152

8. By the Tariff of 1846, the duty of one hundred per cent., *ad valorem*, upon brandy, ought to be

charged only upon the quantity actually imported, and not on the contents stated in the invoices.

Laurence v. Caswell, (4-8) 235

9. Duties illegally exacted are those which are paid under protest, and where there is an appeal to the judicial tribunals.

Id. (Ib.) 235

10. The Revenue Act of 1799 (1 Stat. at Large, 672) directed that an allowance of two per cent. for leakage should be made on the quantity of liquors which were subject to duty by the gallon. Where brandy was subjected to a duty *ad valorem*, it was no longer within the provisions of this Act, and the allowance of two per cent. ceased.

Id. (Ib.) 235

DUTIES—CUSTOM HOUSE—14.

1. The State of Texas was admitted into the Union on the 29th of December, 1845 (9 Stat. at Large, 108), and from that day the laws of the United States were extended over it.

Calkin & Co. v. Coche, (227) 398

2. Consequently, on the 30th of January, 1846, the revenue laws of Texas were not in force there, and goods seized for a non-compliance with those laws, were illegally seized.

Id. (Ib.) 398

DUTIES, CUSTOM HOUSE—16.

1. The twentieth section of the Tariff Act of 1842 provides, that on all articles manufactured from two or more materials, the duty shall be assessed at the highest rates at which any of its component parts may be chargeable. (5 Stat. at Large, 506).

Stuart v. Maxwell, (150) 883

2. This section was not repealed by the general clause in the Tariff Act of 1846, by which all Acts, and parts of Acts, repugnant to the provisions of that Act (1846), were repealed.

Id. (Ib.) 883

3. Consequently, where goods were entered as being manufactures of linen and cotton, it was proper to impose upon them a duty of twenty-five per cent. *ad valorem*, such being the duty imposed upon cotton articles. In Schedule D, by the Tariff Act of 1846. (9 Stat. at Large, 44.)

Id. (Ib.) 883

4. In the war with Mexico, the port of San Francisco was conquered by the arms of the United States, in the year 1846, and shortly afterwards the United States had military possession of all of Upper California. Early in 1847 the President to the United States, as constitutional commander-in-chief of the army and navy, authorized the military and naval commanders of the United States forces in California to exercise the belligerent rights of a conqueror, and to form a civil and military government for the conquered territory, with power to impose duties or imports and tonnage for the support of such government, and of the army, which had the conquest in possession.

Cross v. Harrison, (164) 889

5. This was done, and tonnage and import duties were levied under a war tariff, which had been established by the civil government for that purpose, until official notice was received by the civil and military Governor of California, that a treaty of peace had been made with Mexico, by which Upper California had been ceded to the United States.

Id. (Ib.) 889

6. Upon receiving this intelligence the governor directed that import and tonnage duties should thereafter be levied in conformity with such as were to be paid in the other parts of the United States, by the Acts of Congress; and for such purpose he appointed the defendant in this suit collector of the port of San Francisco.

Id. (Ib.) 886

7. The plaintiffs now seek to recover from him certain tonnage duties and imposts upon foreign merchandise paid by them to the defendant as collector between the 3d of February, 1848 (the date of the Treaty of Peace), and the 13th of November, 1849 (when the collector appointed by the President, according to law, entered upon the duties of his office), upon the ground that they had been illegally exacted.

Id. (Ib.) 889

8. The formation of the civil government in California, when it was done, was the lawful exercise of a belligerent right over a conquered territory. It was the existing government when the territory was ceded to the United States, as a conquest, and did not cease as a matter of course, or as a consequence of the restoration of peace; and it was

rightfull continued after peace was made with Mexico, until Congress legislated otherwise, under its constitutional power, to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.

Id. (Ib.) 889

9. The tonnage duties and duties upon foreign goods imported into San Francisco, were legally demanded and lawfully collected by the civil governor, whilst the war continued, and afterwards, from the ratification of the Treaty of Peace until the revenue system of the United States was put into practical operation in California, under the Acts of Congress, passed for that purpose.

Id. (Ib.) 889

10. By the Tariff Act of 1846, a duty of thirty per cent. *ad valorem* is imposed upon articles included within schedule C; amongst which are "clothing ready made and wearing apparel of every description; of whatever material composed, made up, or manufactured, wholly or in part by the tailor, sempstress or manufacturer."

Millard et al. v. Lawrence, (231) 933

11. By schedule D a duty of twenty-five per cent. only is imposed on manufactures of silk, or of which silk shall be a component material, not otherwise provided for; manufactures of worsted, or of which worsted is a component material, not otherwise provided for.

Id. (Ib.) 933

12. Shawls, whether worsted shawls, worsted and cotton shawls, silk and worsted shawls, barage shawls, merino shawls, silk shawls, worsted scarfs, silk scarfs, and mouseline de laine shawls, are wearing apparel, and therefore subject to a duty of thirty per cent. under schedule C.

Id. (Ib.) 933

13. The popular or received import of words furnishes the general rule for the interpretation of public laws as well as of private and social transactions.

Id. (Ib.) 933

14. By the Tariff Act of 1842, the custom house appraisers are directed to ascertain, estimate and appraise, by all reasonable ways and means in their power, the true and actual market value of goods, &c., and have power to require the production, on oath, of all letters, accounts, or invoices relating to the same. If the importer shall be dissatisfied with the appraisement, he may appeal to two merchant appraisers.

Bartlett v. Kane, (263) 931

15. Where there was an importation of Peruvian bark, and the appraisers directed a chemical examination to be made of the quantity of quinine which it contained, although the rule may have been inaccurate, yet it did not destroy the validity of the appraisement.

Id. (Ib.) 931

16. The importer having appealed, and the appraisers having then called for copies of letters, &c., the importer withdrew his appeal without complying with the requisition. The appraisement then stands good.

Id. (Ib.) 931

17. The appraisers having reported the value of the goods to be more than ten per cent. above that declared in the invoice, the collector assessed an additional duty of twenty per cent. under the eighth section of the Act of 1848 (9 Stat. at Large, 43). This additional duty was not entitled to be refunded, as draw-back, upon re-exportation.

Id. (Ib.) 931

EJECTMENT—13.

1. On the 15th of May, 1820, Congress passed an Act (3 Stat. at Large, 605) for the benefit of the inhabitants of the Village of Peoria, by which every person claiming a lot in the village was to give notice to the Register of the Land Office, whose report was to be laid before Congress.

Ballance v. Forryth, (18) 32

2. On the 3d of March, 1823, Congress passed another Act (3 Stat. at Large, 786), granting to each of the French and Canadian inhabitants and other settlers according to the report, the lot upon which they had settled; and directed the surveyor of the public lands to make a plat of the lots, for which patents were to be issued to the claimants.

Id. (Ib.) 32

3. This survey and plat were not made until April and May, 1837.

Id. (Ib.) 32

4. In November, 1837, a person who was not a set-

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tier, purchased at the Land Office, at private entry, the fractional quarter of land which included some of the above lots, and soon afterwards obtained a patent. Both the certificate and patent reserved the rights of the claimant under the Acts of Congress above mentioned.

Id. (Ib.) 32
5. In 1845 and 1847 these claimants obtained patents.

Id. (Ib.) 32
6. They were entitled to recover in ejectment from the persons who held under the private entry and patent.

Id. (Ib.) 32
7. The title of the plaintiffs was not divested by a tax sale in 1843. The whole fractional quarter section was taxed and one acre off of the east side sold. This sale was irregular.

Id. (Ib.) 32

EJECTMENT—14.

1. In the State of Ohio, it is not a sufficient description of taxable lands to say, "Cooper, James, 5 acres, section 24, T. 4, R. 1." A deed made in consequence of a sale for taxes under such a description, is void. The courts of Ohio have so decided, and this court adopts their decision.

Raymond v. Longworth, (76) 333

2. This court decided, in 8 Howard, 223, that the recitals in a patent for land, referring to titles of anterior date, were not of themselves sufficient to establish the titles thus recited.

Id. (Ib.) 333

3. The titles themselves being now produced, it is decided, that a permit, given by the Lieutenant-Governor of Upper Louisiana, in 1799, to a person to form an establishment on the Mississippi, followed by actual possession and improvement, entitle the occupant to 640 acres, including his improvements, although the Indian title was not then extinguished.

Marsh v. Brooks, (514) 522

4. It was not the practice of the Spanish government to make treaties with the Indian tribes, defining their boundaries, but to prevent settlements upon their lands without special permits. Such permits, however, were usual.

Id. (Ib.) 522

5. The construction of the Treaty between the United States and the Sac and Fox Indians, must be that the latter assented to an occupancy which was as notorious as their own.

Id. (Ib.) 522

6. The Act of Congress, approved April 29, 1816 (3 Stat. at Large, 328), confirming certain claims to land, confirmed this one, although the Recorder of Land Titles, in his report, made in 1815, had added these words, "if Indian title extinguished." These words were surplusage.

Id. (Ib.) 522

EJECTMENT—16.

Where a grant issued in 1772, by the French authorities of Louisiana, cannot be located by notes and bounds, it cannot serve as a title in an action of ejectment; and it was proper for the Circuit Court to instruct the jury to this effect.

Denise et al. v. Ruggles, (242) 922

ESTATES TAIL—14.

See Wills.

ESTOPPEL—13.

If the defendants had relied upon the paper in question to defeat the plaintiff in a former suit, they are estopped from denying its validity in this suit. It was not necessary to plead the estoppel, because the state of the pleadings would not have justified such a plea.

Philadelphia, Wilmington & Baltimore Railroad Company v. Howard, (308) 157

EVIDENCE—13.

1. Where there was a contract for the sale of land, for the purchase of which indorsed notes were given but before the time arrived for the making of a deed, the purchaser failed, and the liability to pay the note became fixed upon the indorser; and a new contract was made between the vendor and the indorser, that, in order to protect the indorser, he should be substituted in place of the original purchaser, fresh notes being given and the time of payment extended, evidence was admissible to show that the latter contract was a substitute for the former.

Bradford v. Union Bank of Tennessee (57) 49

2. In a suit by the indorsee against the indorser of a bill, where the defense was usury, the drawer

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and drawee were incompetent witnesses, when offered to prove certain facts, which, when taken in conjunction with certain other facts, to be proved by other witnesses, would invalidate the instrument.

Saltmarsh v. Tutthill, (229) 49

3. Being incompetent witnesses to establish the whole defense, they are also incompetent to establish a part.

Id. (Ib.) 49

4. In a case of collision upon the River Mississippi, between the steamboats Iowa and Declaration, whereby the Iowa was sunk, the weight of evidence was, that the Iowa was in fault, and the libel filed by her owners against the owners of the Declaration was properly dismissed.

Walsh v. Rogers, (283) 147

5. *Ex-parte* depositions, under the Act of 1789, without notice, ought not to be taken, unless in circumstances of absolute necessity, or in cases of mere formal proof or of some isolated fact.

Id. (Ib.) 147

6. In Maryland, the clerk of a county court was properly admitted to prove the verity of a copy of the docket entries made by him as clerk, because, by a law of Maryland, no technical record was required to be made.

Philadelphia, Wilmington & Baltimore Railroad Company v. Howard, (307) 157

7. And, moreover, the fact which was to be proved being merely the pendency of an action, proof that the entry was made on the docket by the proper officer, was proof that the action was pending, until the other party could show its termination.

Id. (Ib.) 157

8. Where the question was, whether or not the paper declared upon bore the corporate seal of the defendants (an incorporated company), evidence was admissible to show, that in a former suit, the defendants had treated and relied upon the instrument, as one bearing the corporate seal. And it was admissible, although the former suit was not between the same parties; and although the former suit was against one of three corporations, which had afterwards become merged into one, which one was the present defendant.

Id. (Ib.) 157

9. The admission of the paper as evidence only left the question to the jury. The burden of proof still remained upon the plaintiff.

Id. (Ib.) 157

10. The evidence of the President of the Company, to show that there was an understanding between himself and the plaintiff, that another person should also sign the paper before it became obligatory, was not admissible, because the understanding alluded to did not refer to the time when the corporate seal was affixed, but to some prior time.

Id. (Ib.) 157

11. In order to show that the paper in question bore the seal of the corporation, it was admissible to read in evidence the deposition of the deceased officer of the corporation, who had affixed the seal, and which deposition had been taken by the defendants in the former suit.

Id. (Ib.) 157

12. In an action of trespass, for forcibly invading a plantation, carrying off some slaves, and frightening others away, it was proper for the plaintiff to give in evidence the consequential damages which resulted to his wood and corn.

McAfee v. Crimford, (447) 217

13. It was proper, also, to allow the defendant to give in evidence a judgment against the owner of the plantation, as principal, and himself as surety, and his own payment of that judgment. It was allowable, both as an explanation of his motives, and to show how much he had paid; both reasons concurring to mitigate the damages.

Id. (Ib.) 217

14. Evidence was also allowable to show that arrangements had been entered into between the principal and surety, whereby time would be given for the payment of the debt. This was allowable, as a palliation of the conduct of the principal in removing his slaves without the State.

Id. (Ib.) 217

15. Evidence was also admissible to show that the surety had not been compelled to pay the debt, by showing that the creditor had been enjoined from collecting it. This was admissible, in order to rebut the evidence previously offered on the other side.

Id. (Ib.) 217

16. It was proper for the court to charge the jury

that in assessing damages, they had a right to take into consideration all the circumstances.

McAfee v. Crofford, (447) 217

17. The relations of privacy between executors and their testators in Louisiana, do not differ from those which exist at common law.

Hill v. Tucker, (458) 223

18. The interest of an executor in the testator's estate is what the testator gives him; that of an administrator, only that which the law of his appointment enjoins.

Id. (Ib.) 223

19. Hence, executors in different states are, as regards the creditors of the testator, executors in privacy, bearing to the creditors the same responsibilities as if there was only one executor.

Id. (Ib.) 228

20. Although a judgment obtained against an executor in one state is not conclusive upon an executor in another state, yet it may be admissible in evidence to show that the demand had been carried into judgment, and that the other executors were precluded by it from pleading prescription or the Statute of Limitations upon the original cause of action.

Id. (Ib.) 223

21. Therefore, where a person appointed executors in Virginia, and also in Louisiana, and the creditors obtained judgments against the Virginian executors, without being able to obtain payment, and then sued the executors in Louisiana, the Virginian judgments were admissible evidence for the above-mentioned purposes.

Id. (Ib.) 223

22. The law of Louisiana bars, by prescription, all actions brought upon instruments negotiable or transferable by indorsement or delivery, unless such actions are brought within five years. But this does not include due-bills or judgments.

Id. (Ib.) 223

23. Where a deed, executed in Wisconsin, and attested by the seal of a court, stamped upon the paper, instead of wax or a wafer, was offered in evidence upon a trial in Arkansas, it was properly received.

Pillme v. Roberts, (472) 227

24. Where a deed from the sheriff, for land sold at a tax sale, recited an assessment for taxes which remained unpaid; the advertisement of the land, and offering it for sale; its being struck down to the highest bidder, who paid the purchase money and received a certificate; this deed ought to have been received in evidence. The law of Arkansas says, that the deed shall be evidence of the regularity and legality of the sale.

Id. (Ib.) 228

25. But, even if this deed had been insufficient as a proof title, it ought to have been received, in connection with proof of possession, to establish a defense under the Statute of Limitations.

Id. (Ib.) 228

26. Possession under this deed would have been sufficient proof for adverse possession.

Id. (Ib.) 228

27. In a suit upon a postmaster's bond, when treasury transcripts are offered in evidence, it is not necessary that they should contain the statements of credits claimed by the postmaster, and disallowed, in whole or in part, by the officers of the government.

United States v. Hodges et al., (478) 231

28. Nor is it a reason for rejecting the transcripts as evidence, that the items charged in the accounts, as balances of quarterly returns, did not purport, on the face of said accounts, to be balances acknowledged by the postmaster, nor were supported by proper vouchers; but merely purported to be the balances of said quarterly returns, as audited and adjusted by the officers of the government. The objection applied, if at all, to the accuracy of the accounts, and not to their admission as evidence.

Id. (Ib.) 231

29. The basis of an action against a postmaster is his bond and its breaches; and not the transcripts nor the quarterly returns, which are made evidence by the statute.

Id. (Ib.) 231

EVIDENCE—14.

1. The court having erroneously refused to allow the plaintiff to offer a paper in evidence as a disclaimer of part of a patent, afterwards refused to allow the defendants to offer the same paper in evidence for the purpose of prejudicing the plaintiff's rights. This last refusal was correct. The rea-

son given was erroneous, but this is not a sufficient cause for reversing the judgment.

Silby v. Foote, (219) 394

2. The courts of the United States have no the power to order a nonsuit against the wishes of the plaintiff.

Id. (Ib.) 394

3. Under a notice given by the defendant, that the invention claimed by the plaintiff was described in Ure's Dictionary of Arts, Manufactures and Mines, and had been used by Andrew Ure, of London, it was not competent to give in evidence a very large book. The place in the book should have been specified.

Id. (Ib.) 394

4. Nor, under the notice, was the book competent evidence, that Andrew Ure, of London, had a prior knowledge of the thing patented. The notice does not state the place where the same was used.

Id. (Ib.) 394

5. Where a certificate of deposit in a bank, payable at a future day, was handed over by a debtor to his creditor, it was no payment, unless there was an express agreement on the part of the creditor to receive it as such; and the question, whether there was or was not such an agreement, was one of fact to be decided by the jury.

Downey v. Hicks, (240) 404

6. The bank being insolvent when the certificate of deposit became due, there was no ground for imputing negligence in the collection of the debt by the holder, as no loss occurred to the original debtor.

Id. (Ib.) 404

7. If the evidence showed that, after the maturity of the certificate, the original debtor admitted his liability to make it good, the jury should have been instructed that this evidence conduced to prove that the certificate was not taken in payment.

Id. (Ib.) 404

8. Where an ante-nuptial contract was alleged to have been made, and the affidavits of the parties claiming under it alleged that they never possessed or saw it; that they had made diligent inquiry for it, but were unable to learn its present existence or place of existence; that inquiry had been made of the guardian of one of the children, who said that he had never been in possession of it, and did not know where it was; that inquiry had been made at the recording offices in vain, and that the affiants believed it to be lost, secondary proof of its contents ought to have been admitted.

De Lane v. Moore, (253) 409

9. Whether recorded or not, it was binding upon the parties. If recorded within the time prescribed by statute, or if re-acknowledged and recorded afterwards, notice would thereby have been given to all persons of its effect.

Id. (Ib.) 409

10. If it was regularly recorded in one state, and the property upon which it acted was removed to another state, the protection of the contract would follow the property into the state into which it was removed.

Id. (Ib.) 409

11. But where no suit was brought until eight or nine years after the death of the husband, and then the one which was brought was dismissed for want of prosecution; another suit against the executors who had divided the property, comes too late.

Id. (Ib.) 409

12. Personal property, wherever it may be, is to be disturbed in case of intestacy, according to the law of the domicile of the intestate. This rule may be said to be a part of the *jus gentium*.

Emm v. Smith, (400) 473

13. What that law is when a foreign law applies, must be shown by proof of it, and in the case of written law, it will be sufficient to offer, as evidence, the official publication of the law, certified satisfactorily to be such. Unwritten foreign laws, must be proved by experts. There is no general rule for authenticating foreign laws in the courts of other countries, except this, that no proof shall be received, "which presupposes better testimony behind, and attainable by the party." They may be verified by an oath, or by an exemplification of a copy under the great seal of the state or nation whose law it may be, or by a copy proved to be a true copy by a witness who has examined and compared it with the original, or by the certificate of an officer authorized to give the law, which certificate must be duly proved. Such modes of proof are not exclusive of others, especially of oaths and accepted histories of the law of a country. See, also, the cases of *Church v. Hubbard*, in 2 Cranch, 181.

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and Talbot v. Seeman, in 1 Cranch, 7. In this case, the Code Civil of France, with this indorsement, "Les Garde des Soeux de France a la Cour Suprem des Etats Unis," was offered as evidence to prove that the law of France was for the distribution of the funds in controversy. This court ruled that such indorsement was a sufficient authentication to make the Code evidence in this case, and in any other case in which it may be offered. By that Code, the complainants named in this suit as the collateral relations of General Kosciusko are entitled to receive the funds in controversy, in such proportions as are stated in the mandate of this court to the court below.

Id. (Ib.) 472

14. The documentary proofs in this cause, from the Orphans' Court, of the genealogy of the Kosciusko family, and of the collateral relationship of the persons entitled to a decree, and also of the wills of Kosciusko, are properly in evidence in this suit.

Id. (Ib.) 472

15. The record from Grodno is judicial; not a judgment *inter partes*, but a foreign judgment *in rem*, which is evidence of the facts adjudicated against all the world.

Id. (Ib.) 472

16. Where the contract between the owner and the builder (who was also the carpenter), stipulated for a forfeiture per diem in case the carpenter should delay the work, the court below ought to have allowed evidence of such delay to be given to the jury by the defendant, under a notice of set-off, and also evidence that the work and materials found and provided upon and for the building, were defective in quality and character, and far inferior in value to what the contract and specification called for.

Winder v. Caldwell. (434) 487

17. Where the marshal of the District of Columbia engaged the service of a clerk for a stipulated sum per annum, and the service continued without any new agreement, and the jury were instructed that they might imply a new agreement to pay the clerk at a different rate, this instruction was erroneous. There was nothing in the evidence from which the jury could imply such new agreement.

Nut v. Minor. (464) 500

18. The Statute of Frauds in Massachusetts is substantially the same as that of 2d Chas. II., and declares that no contract for the sale of goods, &c., shall be valid, &c., "unless some note or memorandum in writing of the bargain be made and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized."

Salmon Falls Co. v. Goddard. (447) 493

19. The following memorandum, viz.: "Sept. 19, W. W. Goddard, 12 ms. 200 bales S. F. drills, 7 1/2; 190 cases blue do. 3 1/2. Credit to commence when ship sails; not after December 1st, delivered free of charge for truckage. The blue, if color satisfactory to purchasers. R. M. W. W. G."—is sufficient to take the case out of the statute.

Id. (Ib.) 493

20. If the terms are technical or equivocal on the face of the instrument, or made so by reference to extraneous circumstances, parol evidence of the usage and practice in the trade is admissible to explain the meaning.

Id. (Ib.) 493

21. It was competent also to refer to the bill of parcels delivered for the purpose of explanation. It was made out and delivered by the seller, in the course of the fulfillment of the contract, acquired in by the buyer, and the goods ordered to be delivered after it was received.

Id. (Ib.) 493

22. Where a warehouseman gave a receipt for wheat which he did not receive, and afterwards the quantity which he actually had was divided amongst the respective depositors, an action of replevin, brought by the assignee of the fictitious receipt, could not be maintained when, under it, one of these portions was seized.

Jackson v. Hale. (525) 526

23. Evidence offered to show that the wheat in question was assigned to the defendant, was objected to by the plaintiff in the replevin; but such objection was properly overruled. The plaintiff had shown no title in himself.

Id. (Ib.) 526

24. So, also, evidence was admissible to show that the receiver of the fictitious certificate had never deposited any wheat in the warehouse.

Id. (Ib.) 526

25. The defendants in this case were the assignees

of the original warehouseman, and were not responsible, unless it could be shown that wheat was deposited, which had come into their possession.

Id. (Ib.) 526

26. Where an action was brought against the Commissioner of Patents for refusing to give copies of papers in his office, and no special damage was set out in the declaration, evidence of the professional pursuits of the applicant was not admissible.

Burden v. Burke. (575) 548

27. Where the application was made through a third person, letters of both parties to this third person were admissible in evidence, as part of the *res gestæ*.

Id. (Ib.) 548

EVIDENCE—15.

1. In a suit brought for an infringement of a patent right, the defendant ought to be allowed to give in evidence the patent under which he claims, although junior to the plaintiff's patent.

Corning v. Burden. (252) 683

2. Burden's patent, for "a new and useful machine for rolling pudders' balls and other masses of iron in the manufacture of iron," was a patent for a machine, and not a process, although the language of the claim was equivocal.

Id. (Ib.) 683

3. The difference explained between a process and a machine.

Id. (Ib.) 683

4. Hence, it was erroneous for the Circuit Court to exclude evidence offered to show that the practical manner of giving effect to the principle embodied in the machine of the defendants was different from that of Burden, the plaintiff: that the machine of the defendants produced a different mechanical result from the other; and that the mechanical structure and mechanical action of the two machines were different.

Id. (Ib.) 683

5. Evidence offered as to the opinion of the witness upon the construction of the patent, whether it was for a process or a machine, was properly rejected.

Id. (Ib.) 683

6. A Statute of Mississippi, passed in 1846, declares that no record of any judgment recovered in a foreign court against a citizen of that State, shall be received as evidence after the expiration of three years from the time of the rendition of such judgment, without the limits of the State.

Murray v. Gibson. (421) 755

7. This Statute has no application to judgments rendered before its passage. Hence, where it was pleaded as a defense in a suit brought upon a judgment recovered in Louisiana, in 1844, the plea was bad and a demurrer to it sustained.

Id. (Ib.) 755

EVIDENCE—16.

1. The testimony of an attorney was admissible reciting conversations between himself and the attorney of the other parties in their presence, which declarations of the attorney were binding on the last-mentioned parties.

Turner v. Yates. (14) 824

2. Evidence was admissible to show that a charge of one per cent. upon the advance made upon the consignment, was a proper charge according to the usage and custom of the place.

Id. (Ib.) 824

3. In 11 How. 480, it is said: "Where a witness was examined for the plaintiff, and the defendant offered in evidence declarations which he had made of a contradictory character, and then the plaintiff offered to give in evidence others, affirmatory of the first, these last affirmatory declarations were not admissible, being made at a time posterior to that at which he made the contradictory declarations given in evidence by the defendant."

Conrad v. Griffee. (38) 835

4. The case having been remanded to the Circuit Court under a *rentra facias de novo*, the plaintiff gave in evidence, upon the new trial, the deposition taken under a recent commission, of the same witness whose deposition was the subject of the former examination, when the defendant offered to give in evidence the same affirmatory declarations which upon the former trial were offered as rebutting evidence by the plaintiff.

Id. (Ib.) 835

5. The object of the defendant being to discredit and contradict the deposition of the witness taken under the recent commission, the evidence was not admissible. He should have been interrogated

respecting the statements, when he was examined under the commission.

Conrad v. Grifey, (38) 835

6. If his declarations had been made subsequent to the commission, a new commission should have been sued out, whether his declarations had been written or verbal.

Id. (Ib.) 835

7. Evidence that the name of the tract of land, conveyed by a deed, was the same with the name given in an early patent; that it had long been held by the persons under whom the party claimed; and that there was no proof of any adverse claim, was sufficient to warrant the jury in finding that the land mentioned in the deed was the same with that mentioned in the patent.

Carroll v. Lessee of Carroll et al., (275) 936

8. Where a contract was made to obtain a certain law from the Legislature of Virginia, and stated to be made on the basis of a prior communication, this communication is competent evidence in a suit upon the contract.

Marshall v. Baltimore and Ohio Railroad Company, (314) 953

9. In 1812 Congress passed an Act (2 Stat. at Large, 748), entitled "An Act making further provision for settling the claims to land in the Territory of Missouri. It confirmed the titles to town or village lots, out lots, &c., in several towns and villages, and amongst them the Town of Carondelet, where they had been inhabited, cultivated or possessed, prior to the 20th day of December, 1803.

10. In 1824 Congress passed another Act (4 Stat. at L., 65) supplementary to the above, the first section of which made it the duty of the individual owners or claimants, whose lots were confirmed by the Act of 1812, to proceed within 18 months to designate their lots by proving cultivation, boundaries, &c., before the recorder of land titles. The third section made it the duty of this officer to issue a certificate of confirmation for each claim confirmed, and furnish the Surveyor-General with a list of the lots so confirmed.

11. This list was furnished in 1827.

12. Afterwards, in 1839, another recorder gave a certificate of confirmation; an extract from the registry showing that this second recorder entered the certificate in 1839; and an extract from the additional list of claims, which addition was that of a single claim, being the same as above.

13. These three papers were not admissible as evidence in an ejectment brought by the owners of this claim. The time had elapsed within which the recorder could confirm a claim.

Gamache et al. v. Phylagant et al., (451) 1012

14. The thirteenth section of the Act of Congress passed on the 7th of July, 1838 (5 Stat. at Large, 306), makes the injurious escape of steam *prima facie* evidence of negligence, and the owners of the boat upon which such injurious escape occurs, to avoid responsibility, must prove that there was no negligence.

Steamboat New World et al. v. King, (469) 1019

15. Where an Act of Congress confirmed the titles or claims to certain lots which had been inhabited, cultivated or possessed prior to a certain day; and a subsequent Act of Congress made it the duty of claimants of such lots to designate them by proving before the recorder the fact of inhabitation, the boundaries, &c., and directed the recorder to issue certificates thereof;

16. Held, that as no forfeiture was imposed for non-compliance, and as the government did not by the latter Act impair the effect or operation of the former, claimants might still establish, by parol evidence, the facts of inhabitation, &c.

Gutard et al. v. Stoddard, (464) 1030

17. A bill of review, in a chancery case, cannot be maintained where the newly discovered evidence upon which the bill purports to be founded, goes to impeach the character of witnesses examined in the original suit.

Southard et al. v. Russell, (247) 923

18. Nor can it be maintained where the newly discovered evidence is merely cumulative, and relates to a collateral fact in the issue, not of itself, if admitted, by any means decisive or controlling; such as the question of adequacy of price, when the main question was, whether a deed was a deed of sale or mortgaged.

Id. (Ib.) 923

19. Nor will a bill of review lie founded on newly discovered evidence, after the publication or decree below, where a decision has taken place on an appeal, unless the right is reserved in the decree of

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the appellate court, or permission be given on an application to that court directly for the purpose.

Id. (Ib.) 923

EXECUTION—14.

1. Where real estate is in the custody of a receiver, appointed by a court of chancery, a sale of the property under an execution, issued by virtue of a judgment at law, is illegal and void.

Winall v. Sampson, (52) 323

2. The proper modes of proceeding, pointed out, to be pursued by any person who claims title to the property, either by mortgage or judgment, or otherwise.

Id. (Ib.) 323

3. Where the copyright of a map was taken out under the Act of Congress, and the copperplate engraving seized and sold under an execution, the purchaser did not acquire the right to strike off and sell copies of the map.

Stephens v. Cady, (528) 528

4. The court below decided that an injunction to prevent such striking off and selling could not issue without a return of the purchase money. This decision was erroneous.

Id. (Ib.) 528

5. A copyright is a "property in notion, and has no corporeal, tangible substance," and is not the subject of seizure and sale by execution. It can be reached by a creditor's bill in chancery, but in such case, the court would probably have to decree a transfer in the mode pointed out in the Act of Congress.

Id. (Ib.) 528

6. A sale of land by a marshal on a *venditioni exponas*, after he is removed from office, and a new marshal appointed and qualified, is not void.

Doullie v. Bryan, (555) 543

7. Such a sale being returned to the court and confirmed by it, on motion, and a deed ordered to be made to the purchaser at the sale, by the new marshal, such sale being made, is valid.

Id. (Ib.) 543

See Attachment Laws of Maryland.

EXECUTION—15.

1. Three judgments were entered up against a debtor on the same day.

Rockhill v. Hanna, (189) 656

2. One of the creditors issued a *captas ad satisfaciendum* in February, and the other two issued writs of *fieri facias* upon the same day, in the ensuing month of March.

Id. (Ib.) 656

3. Under the *ca. sa.* the defendant was taken and imprisoned, until discharged by due process of law. The plaintiff then obtained leave to issue a *f. fa.* which was levied upon the same land previously levied upon. The marshal sold the property under all the writs.

Id. (Ib.) 656

4. The executions of the first *f. fa.* creditors are entitled to be first satisfied out of the proceeds of sale.

Id. (Ib.) 656

5. Each creditor having elected a different remedy, is entitled to a precedence in that which he had elected.

Id. (Ib.) 656

6. Besides, the *ca. sa.* creditor, by imprisoning the debtor, postponed his lien, because it may happen, under certain circumstances, that the judgment is forever extinguished. If these do not happen, his lien is not restored as against creditors who have obtained a precedence during such suspension.

Id. (Ib.) 656

7. A plaintiff in a judgment having the defendant in execution under a *ca. sa.* entered into an agreement with him that the plaintiff should, without prejudice to his rights and remedies against the defendant, permit him to be forthwith discharged from custody under the process, and that the defendant should go to the next session of the Circuit Court of the United States, and on the law side of that court make up an issue with the plaintiff, to try the question whether the defendant was possessed of the means, in or out of a certain marriage settlement, of satisfying the judgment against him.

Magniac v. Thompson, (281) 696

8. The debtor was released; the issue made up; the cause tried in the Circuit Court; brought to this court, and reported in 7 Pet., 348.

Id. (Ib.) 696

9. By suing out the *ca. sa.* taking the defendant into custody, entering into the arrangement above

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mentioned, and discharging the defendant from custody, the plaintiff, in all legal intentment, admitted satisfaction of his demand, released the defendant from all liability therefor, and destroyed every effect of his judgment as the foundation of legal rights.

Id. (Ib.) 696

10. In such a state of things a court of equity will not interfere at the instance of the plaintiff.

Id. (Ib.) 696

11. The allocation of fraud in the marriage contract is not sustained by the evidence; nor was the refusal of the defendant to apply the property which accrued to him upon the death of his wife, to the discharge of the debt, a violation of the agreement under which he was released.

Id. (Ib.) 696

12. The averment in the bill that the rights of the plaintiff under the judgment remained unimpaired, is incompatible with a right to resort to a court of equity.

Id. (Ib.) 696

EXECUTION—16.

1. By the laws of Alabama, where property is taken in execution, if the sheriff does not make the money, the plaintiff is allowed to suggest to the court that the money might have been made with due diligence, and thereupon the court is directed to frame an issue in order to try the fact.

Chapman v. Smith. (114) 868

2. In a suit upon a sheriff's bond, where the plea was that this proceeding had been resorted to by the plaintiff and a verdict found for the sheriff, a replication to this plea alleging that the property in question in that trial was not the same property mentioned in the breach assigned in the declaration, was a bad replication, and demurrable.

Id. (Ib.) 868

3. Where the sheriff pleaded that the property which he had taken in execution was not the property of the defendant, against whom he had process, and the plaintiff demurred to this plea, the demurrer was properly overruled.

Id. (Ib.) 868

4. The original judgment having omitted to name interest, and this court having affirmed the judgment as it stood, it was proper for the court below to issue an execution for the amount of the judgment and costs, leaving out interest.

Early v. Rogers et al., (599) 1074

EXECUTORS—13.

1. The relations of privity between executors and their testators in Louisiana, do not differ from those which exist at common law.

Hill v. Tucker, (458) 223

2. The interest of an executor in the testator's estate is what the testator gives him; that of an administrator, only that which the law of his appointment enjoins.

Id. (Ib.) 223

3. Hence, executors in different states are, as regards the creditors of the testator, executors in privity, bearing to the creditors the same responsibilities as if there was only one executor.

Id. (Ib.) 223

4. Although a judgment obtained against an executor in one state is not conclusive upon an executor in another state, yet it may be admissible in evidence to show that the demand had been carried into judgment, and that the other executors were precluded by it from pleading prescription or the Statute of Limitations upon the original cause of action.

Id. (Ib.) 223

5. Therefore, when a person appointed executors in Virginia, and also in Louisiana, and the creditors obtained judgments against the Virginian executors, without being able to obtain payment, and then sued the executors in Louisiana, the Virginian judgments were admissible evidence for the above-mentioned purposes.

Id. (Ib.) 223

6. The law of Louisiana bars, by prescription, all actions brought upon instruments negotiable or transferable by indorsement or delivery, unless such actions are brought within five years. But this does not include due-bills or judgments.

Id. (Ib.) 223

EXECUTORS AND ADMINISTRATORS—14.

See *Willis.*

FRAUD—13.

See *Chancery.*

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FRAUD—15.

See *Chancery.*

FRAUDS, STATUTE OF—13.

1. The Statute of Frauds, in the State of Alabama, declares void conveyances made for the purpose of hindering or defrauding creditors of their just debts.

Parish v. Murphree, (93) 65
2. Where a person made a settlement upon his wife and children, owing at that time a large sum of money, for which he was soon afterwards sued, and became insolvent, these circumstances, with other similar ones, are sufficient to set aside the deed as being fraudulent within the statute.

Id. (Ib.) 65

FRAUDS, STATUTE OF—14.

1. The Statute of Frauds in Massachusetts is substantially the same as that of 29 Car. II., and declares that no contract for the sale of goods, &c., shall be valid, &c., "unless some note or memorandum, in writing, of the bargain be made, and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized."

Salmon Falls Co. v. Goddard, (47) 493

2. The following memorandum, viz.: "Sept. 19th, W. W. Goddard, 12 mos. 300 bales S. F. drills, 7½; 190 cases blue do. 8½. Credit to commence when ship sails, not after December 1st; delivered free of charge for truckage. The blues, if color satisfactory to purchaser. R. M. M. W. W. G."—is sufficient to take the case out of the statute.

Id. (Ib.) 493

3. If the terms are technical or equivocal on the face of the instrument, or made so by reference to extraneous circumstances, parol evidence of the usage and practice in the trade, is admissible to explain the meaning.

Id. (Ib.) 493

4. It was competent, also, to refer to the bill of parcels delivered for the purpose of explanation. It was made out and delivered by the seller, in the course of fulfillment of the contract, acquiesced in by the buyer, and the goods ordered to be delivered after it was received.

Id. (Ib.) 493

GEORGIA—13.

1. In 1802, when Georgia ceded her back lands to the United States, she had jurisdiction over the whole of the Chattahoochee River, from its source to the thirty-first degree of north latitude.

Howard et al. v. Ingersoll, (381) 189

2. The rule is, that where a power possesses a river, and cedes the territory on the other side of it, making the river the boundary, that power retains the river, unless there is an express stipulation for the relinquishment of the rights of soil and jurisdiction over the bed of such river.

Id. (Ib.) 189

3. When Georgia ceded to the United States all the land situated on the west of a line running along the western bank of the Chattahoochee River, she retained the bed of the river and all the land to the east of the line above mentioned.

Id. (Ib.) 189

4. The river flows in a channel, between two banks from fifteen to twenty feet high, between the bottom of which and the water, when the river is at a low stage, there are shelving shores, from thirty to sixty yards each in width.

Id. (Ib.) 189

5. The boundary line runs along the top of this high western bank, leaving the bed of the river and the western shelving shore within the jurisdiction of Georgia.

Id. (Ib.) 189

GUARDIAN—16.

1. Where a person who was acting as guardian to a minor, but without any legal authority, being indebted to the minor, contracted to purchase real estate for the benefit of his ward, and transferred his own property in part payment therefor, the ward cannot claim to receive from the vendor the amount of property so transferred.

Yerger v. Jones, (30) 832

2. He can either complete the purchase by paying the balance of the purchase money, or set aside the contract and look to his guardian for reimbursement; but in the absence of fraud, he cannot compel the vendor to return such part of the purchase money as had been paid by the guardian.

Id. (Ib.) 832

INDIANA, STATE OF—14.

1. In 1804, Congress passed an Act (2 Stat. at Large, 297), "making provision for the disposal of the public lands in the Indiana Territory, and for other purposes," in which it reserved from sale a township in each one of three districts, to be located by the Secretary of the Treasury, for the use of a seminary of learning.

Trustees, &c., v. Indiana, (269) 416
2. In 1806, the Secretary of the Treasury located a particular township in the Vincennes district, for the use of that district; and when, in 1806, the territorial government incorporated a "Board of Trustees of the Vincennes University," the grant made in 1804 attached to this Board, although for the two preceding years there had been no grantees in existence.

Id. (Ib.) 416
3. Under the Ordinance of 1787, made applicable to Indiana by an Act of Congress, the territorial government of Indiana had power to pass this Act of Incorporation.

Id. (Ib.) 416
4. The language of the Act of Congress, by which Indiana was admitted into the Union, did not vest the above township in the Legislature of the State.

Id. (Ib.) 416
5. The Board of Trustees of the University was not a public corporation, and had no political powers. The donation of land for its support was like a donation by a private individual; and the Legislature of the State could not rightfully exercise any power by which the trust was defeated.

Id.

INJUNCTION—16.

Where a complainant filed a bill on the equity side of the Circuit Court, for an injunction to prevent the sale of slaves which had been taken in execution as the property of another person, and the evidence showed that they were the property of the complainant, the Circuit Court was directed to make the Injunction perpetual.

Amie et al. v. Myers,

(492) 1029

INSURANCE—14.

1. Under a policy insuring against the usual perils of the sea, including barratry, the underwriters are not liable to repay to the insured, damages paid by him to the owners of another vessel and cargo, suffered in a collision occasioned by the negligence of the master or mariners of the vessel insured.

Gen. M. Ins. Co. v. Sherwood,

(351) 452

2. A policy cannot be so construed as to insure against all losses directly referable to the negligence of the master and mariners. But if the loss is caused by a peril of the sea, the underwriter is responsible, although the master did not use due care to avoid the peril.

Id.

(Ib.) 452

INTEREST—14.

1. The sixty-second rule of this court (13 Howard) is as follows: "In cases where a writ of error is prosecuted to the Supreme Court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied from the date of the judgment below, until the same is paid, at the same rate that similar judgments bear interest, in the courts of the state where such judgment is rendered. The same rule shall be applied to decrees for the payment of money, in cases in chancery, unless otherwise ordered by this court. This rule to take effect on the first day of December Term, 1852."

Perkins v. Fourniquet,

(328) 441

2. Before this rule, interest was to be calculated at six per cent., from the date of the judgment in the Circuit Court to the day of affirmation here; and the confirmation of the report of the clerk. In the case of Mitchell v. Harmony, 13 Howard, 149, was under the rules then existing.

Id.

(Ib.) 441

3. So, also, where a case from Mississippi was affirmed at December Term, 1851, the mandate from this court should have been construed to allow interest at six per cent. from the date of the decree in the court below, to the date of the affirmation in this court. Therefore, it was erroneous either to allow six per cent. until paid, or to allow the current rate of interest in Mississippi, in addition to the six per cent. allowed by this court.

Id.

(Ib.) 441

4. The several rules upon this subject examined and explained.

Id.

(Ib.) 441

INTERVENTION—15.

A person cannot intervene here who was no party to the suit in the court below.

United States v. Patterson,

(10) 578

JUDGMENT—13.

1. By the laws of Mississippi, deeds of trust and mortgages are valid, as against creditors, and purchasers only from the time when they are recorded.

Taylor v. Doe,

(238) 149

2. A judgment is a lien from the time of its rendition.

Id.

(Ib.) 149

3. Therefore, where a judgment was rendered, in the interval between the execution and recording of a deed, it was a lien upon the land of the debtor.

Id.

(Ib.) 149

4. A *fiert facias*, being issued upon this judgment, was levied upon the land; but before the issuing of a *venditioni exponas*, the debtor died.

Id.

(Ib.) 149

5. It was not necessary to revive the judgment by a *scire facias*; but the sheriff who had thus levied upon the land could proceed to sell it, under a *venditioni exponas*; and a purchaser, under this sale, could not be ejected by a claimant under the deed given by the debtor.

Id.

(Ib.) 149

6. How far a judgment against executors in one state is evidence against other executors of the same person in another state.

Hill v. Tucker,

(458) 223

JUDGMENT—14.

1. A court has a right to set aside its own judgment or decree, dismissing a bill in chancery, at the same term in which the judgment or decree was rendered, on discovering its own error in the law, or that the consent of the complainants to such dismissal was obtained by fraud.

Dove v. Tynack,

(297) 428

2. A statute of Mississippi directs that where the defendant cannot be found, a writ of *capias ad respondendum* shall be served, by leaving a copy thereof with the wife of the defendant, or some free white person above the age of sixteen years, then and there being one of the family of the defendant, and found at his usual place of abode; or leaving a copy thereof at some public place, at the dwelling house or other known place of residence of such defendant, he being from home, and no such free white person being found there willing to receive the same.

Harris v. Hardeman,

(334) 444

3. The Circuit Court of the United States adopted a rule that the *capias* should be served personally, or if the defendant be not found, by leaving a copy thereof at his or her residence, or usual place of abode, at least twenty days before the return day thereof.

Id.

(Ib.) 444

4. The marshal made the following return to a writ of *capias*: "Executed on the defendant Hardeman, by leaving a true copy at his residence."

Id.

(Ib.) 444

5. This service was neither in conformity with the statute nor the rule.

Id.

(Ib.) 444

6. Therefore, when the court gave judgment, by default, against Hardeman, and an execution was issued, upon which a forthcoming bond was given, and another execution issued, and at a subsequent day the court quashed the proceedings, and set aside the judgment by default, this order was correct.

Id.

(Ib.) 444

7. When the judgment by default was given, the court was not in a condition to exercise jurisdiction over the defendant, because there was no regular service of process, actual or constructive.

Id.

(Ib.) 444

8. The cases upon this point examined.

Id.

(Ib.) 444

9. Moreover, when the proceedings were quashed, they were still in *fiert*, and not terminated; and any irregularity could be corrected, on motion.

Id.

(Ib.) 444

10. A bill in chancery will not lie for the purpose of perpetually enjoining a judgment, upon the ground that there was a false return in serving process upon one of the defendants. Redress must be sought in the court which gave the judgment, or in an action against the marshal.

Walker v. Robbins,

(564) 552

11. Moreover, the defendant in this case, by his actions, waived all benefit which he might have derived from the false return; and no defense was made on the trial at law, impeaching the correctness of the cause of action sued on, and in such a case, resort cannot be had to equity to supply the omission.

Id.

(*lb.*) 552

JUDGMENT—15.

1. A plaintiff in a judgment, having the defendant in execution under a *ca. sa.*, entered into an agreement with him that the plaintiff should, without prejudice to his rights and remedies against the defendant, permit him to be forthwith discharged from custody under the process, and that the defendant should go to the next session of the Circuit Court of the United States, and on the law side of that court make up an issue with the plaintiff, to try the question whether the defendant was possessed of the means, in or out of a certain marriage settlement, of satisfying judgment against him.

Magniac v. Thompson.

(281) 696

2. The debtor was released; the issue made up; the cause tried in the Circuit Court; brought to this court, and reported in 7 Peters, 348.

Id.

(*lb.*) 696

3. By suing out the *ca. sa.*, taking the defendant into custody, entering into the arrangement above mentioned, and discharging the defendant from custody, the plaintiff, in all legal intendment, admitted satisfaction of his demand, released the defendant from all liability therefor, and destroyed every effect of his judgment as the foundation of legal rights.

Id.

(*lb.*) 696

4. In such a state of things, a court of equity will not interfere at the instance of the plaintiff.

Id.

(*lb.*) 696

5. The allegation of fraud in the marriage contract is not sustained by the evidence; nor was the refusal of the defendant to apply the property which accrued to him upon the death of his wife, to the discharge of the debt, a violation of the agreement under which he was released.

Id.

(*lb.*) 696

6. The averment in the bill, that the rights of the plaintiff under the judgment remained unimpaired, is incompatible with a right to resort to a court of equity.

Id.

(*lb.*) 696

JUDGMENT—16.

1. Whenever the parties to a suit and the subject in controversy between them are within the regular jurisdiction of a court of equity, the decree of that court is to every intent as binding as would be the judgment of a court of law.

Pennington v. Gibson.

(65) 847

2. Whenever, therefore, an action of debt can be maintained upon a judgment at law for a sum of money awarded by such judgment, the like action can be maintained upon a decree in equity which is for a specific amount; and the records of the two courts are of equal dignity and binding obligation.

Id.

(*lb.*) 847

3. The lessee of the plaintiffs having claimed, in the declaration, a term of fifteen years in three undivided fourth parts of the land, and the judgment being that the lessee do recover his term aforesaid yet to come and unexpired, this judgment was correct.

Carroll v. Lessee of Carroll et al.

(275) 936

4. Where a case controverted was, by agreement of the parties, entered settled, and the terms of settlement were that the debtor should pay by a limited day, and the creditor agreed to receive a less sum than that for which he had obtained a judgment; and the debtor failed to pay on the day limited, the original judgment became revived in full force.

Early v. Rogers et al.

(599) 1074

5. The original judgment having omitted to name interest, and this court having affirmed the judgment as it stood, it was proper for the court below to issue an execution for the amount of the judgment and costs, leaving out interest.

Id.

(*lb.*) 1074

JURISDICTION—13.

1. An appeal does not lie to this court, from the decision of a District Court in a case of bankruptcy.

Crawford v. Points.

(11) 29

2. Even if it would, the decree of the District Court in this case is not a final decree.

Id.

(*lb.*) 29

3. The Treaty of 1819, between the United States

HOWARD 13, 14, 15, 16.

and Spain, contains the following stipulation, viz.: "The United States shall cause satisfaction to be made for the injuries, if any, which, by process of law, shall be established to have been suffered by the Spanish officers and individual Spanish inhabitants by the late operations of the American army in Florida."

United States v. Ferreira.

(40) 42

4. Congress, by two Acts, passed in 1823 and 1824 (3 Stat. at Large, 768, and 6 Stat. at Large, 599), directed the Judge of the Territorial Court of Florida to receive, examine, and adjudicate all cases of claims for losses, and report his decisions, if in favor of the claimants, together with the evidence upon which they were founded, to the Secretary of the Treasury, who, on being satisfied that the same was just and equitable, within the provisions of the Treaty, should pay the amount thereof; and by an Act of 1849 (9 Stat. at Large, 738) Congress directed the Judge of the District Court of the United States for the Northern District of Florida, to receive and adjudicate certain claims in the manner directed by the preceding Acts.

Id.

(*lb.*) 42

5. From the award of the district judge, an appeal does not lie to this court.

Id.

(*lb.*) 42

6. As the Treaty itself designated no tribunal to assess the damages, it remained for Congress to do so, by referring the claims to a commissioner, according to the established practice of the government in such cases. His decision was not the judgment of a court, but a mere award, with a power to review it conferred upon the Secretary of the Treasury.

Id.

(*lb.*) 42

7. By the eleventh section of the Judiciary Act (1 Stat. at Large, 73), no action can be brought in the federal courts upon a promissory note, or other chose in action, by an assignee, unless the action could have been maintained if there had been no assignment. But an indorsee may sue his own immediate indorser.

Coffee v. Planters' Bank.

(183) 105

8. Hence, where an action was brought by an indorsee upon checks which had been indorsed from one person to another in the same state, and some of the counts of the declaration traced the title through these indorsements, no recovery could have been had upon those counts.

Id.

(*lb.*) 105

9. But the declaration also contained the common money counts; and upon the trial, these were the only counts which remained, all the rest having been stricken out. The suit against the maker, and also against all the indorsers, except one, had been discontinued.

Id.

(*lb.*) 105

10. The statute of the state where the trial took place authorized a suit upon such an instrument as if it were a joint and several contract.

Id.

(*lb.*) 105

11. The dismissal of the suit against all the indorsers except one, and the striking out of all the counts against him except the common money counts, freed the judgment against him from all objection; and therefore, when brought up for review upon a writ of error, it must be affirmed.

Id.

(*lb.*) 105

12. Where there was a sale of an undivided moiety of a tract of land, and the purchaser undertook to extinguish certain liens upon it, which he had failed to do; and in consequence of such failure, the liens were enforced, and had to be paid by the heirs of the original owner, a suit by these heirs against the purchaser, to recover damages for the non-fulfilment of his contract to extinguish the liens, was not within the prohibition of the 11th section of the Judiciary Act, 1 Stat. at Large, 78. The heirs, being aliens, had a right to sue in the Circuit Court.

Weems v. George.

(190) 108

13. The Act of June 17, 1844 (5 Stat. at Large, 676), reviving the Act of 1844, gives jurisdiction to the District Courts in cases only where the title set up to lands, under grants from former governments, is equitable and inchoate, and where there is no grant purporting to convey a legal title.

United States v. McCullagh.

(216) 118

14. Grants from the British government, as well as those of France and Spain, are equally within this restriction.

Id.

(*lb.*) 118

15. The courts of the United States, under the Constitution and laws, have equity jurisdiction. Unless the general principles of equity have been

modified by the laws or usages of a particular state, those general principles will be carried out everywhere in the same manner, and equity jurisprudence be the same, when administered by the courts of the United States, in all the States.

Neves et al. v. Scott et al., (208) 140

16. Hence, the decision of a state court in a case which involved only the general principles of equity, and was not controlled by local law or usage, is not binding as authority upon this court.

Id. (14.) 140

17. In the case of *Neves et al. v. Scott et al.*, reported in 9 Howard, 190, this court decided two points: one, that volunteers could, in that case, claim the interference of chancery to enforce the marriage articles in question; and the other, that the articles constituted an executed trust.

Id. (1b.) 140

18. The Supreme Court of Georgia does not agree with this court upon the first point. Nevertheless, this court does not change its decision.

Id. (1b.) 140

19. Moreover, the second point upon which this court rested the case does not appear to have been brought before the Supreme Court of Georgia; and of course, it expressed no opinion upon the point.

Id. (1b.) 140

20. During the war with Mexico, the *Admittance*, an American vessel, was seized in a port of California, by the commander of a vessel of war of the United States, upon suspicion of trading with the enemy. She was condemned, as a lawful prize, by the chaplain belonging to one of the vessels of war upon that station, who had been authorized by the President of the United States to exercise admiralty jurisdiction in cases of capture.

Jecker et al. v. Montgomery, (498) 240

21. The owners of the cargo filed a libel against the captain of the vessel of war, in the Admiralty Court for the District of Columbia. Being carried to the Circuit Court, it was decided:

1. That the condemnation in California was invalid as a defense for the captors.

2. That the answer of the captors, having averred sufficient probable cause for the seizure of the cargo, and the libelants having demurred to this answer, upon the ground that the District Court had no right to adjudicate, because the property had not been brought within its jurisdiction, the demurrer was overruled, and judgment was entered against the libelants.

Id. (1b.) 240

22. The judgment of the Circuit Court, upon the first point, was correct, and upon the second point erroneous.

Id. (1b.) 240

23. The Prize Court established in California was not authorized by the laws of the United States or the laws of nations.

Id. (1b.) 240

24. The grounds alleged for the seizure of the vessel and cargo in the answer, viz.: that the vessel sailed from New Orleans with the design of trading with the enemy, and did in fact hold illegal intercourse with them, are sufficient to subject both to condemnation, if they are supported by testimony.

Id. (1b.) 240

25. And if they were liable to capture and condemnation, the reasons assigned in the answer for not bringing them into a port of the United States and libeling them for condemnation, viz.: that it was impossible to do so consistently with the public interests, are sufficient, if supported by proof, to justify the captors in selling vessel and cargo in California, and to exempt them from damages on that account.

Id. (1b.) 240

26. The Admiralty Court in the district had jurisdiction of the case, and it was the duty of the court to order the captors to institute proceedings in that court, to condemn the property as prize, by a day to be named in the order; and in default thereof, to be proceeded against upon the libel for an unlawful seizure.

Id. (1b.) 240

27. The Admiralty Court, in the District of Columbia, had jurisdiction of such a libel for condemnation, although the property was not brought within its jurisdiction; and if they found it liable to condemnation, might proceed to condemn it, although it was not brought within the custody or control of the court.

Id. (1b.) 240

28. The necessity of proceeding to condemn as prize, does not arise from any difference between

the Instance Court and the Prize Court, as known in England. The same court here possesses the instance and prize jurisdiction. But because the property of the neutral is not divested by the capture, but by the condemnation in a prize court; and it is not divested until condemnation, although, when condemned, the condemnation relates back to the capture.

Id. (1b.) 240

29. As this libel is for the restitution of the property or the proceeds, probable cause of seizure is no defense. It is a good defense against a claim for damages, when the property has been restored, or lost after seizure, without the fault of the captor. But while the property or proceeds is withheld by the captor, and claimed as prize, probable cause of seizure is no defense.

Id. (1b.) 240

30. The Circuit Court, therefore, erred in deciding that probable cause of seizure was a good defense.

Id. (1b.) 240

31. The State of Pennsylvania having constructed lines of canal and railroad, and other means of travel and transportation, which would be injured in their revenues by the obstruction in the River Ohio, created by a bridge at Wheeling, has a sufficiently direct interest to sustain an application to this court, in the exercise of original jurisdiction, for an injunction to remove the obstruction. The remedy at law would be incomplete.

Pennsylvania v. Wheeling Bridge, (519) 249
32. It is admitted that the federal courts have no jurisdiction of common law offenses, and that there is no abstract, pervading principle of the common law of the Union under which this court can take jurisdiction; and that the case under consideration is subject to the same rules of action as if the suit had been commenced in the Circuit Court for the District of Virginia.

Id. (1b.) 249

33. But chancery jurisdiction is conferred on the courts of the United States by the Constitution, under certain limitations; and under these limitations, the usages of the High Court of Chancery in England, which have been adopted as rules by this court, furnish the chancery law which is exercised in all the States, and even in those where no state chancery system exists.

Id. (1b.) 249

34. Under this system, where relief can be given by the English chancery, similar relief may be given by the courts of the Union.

Id. (1b.) 249

35. An indictment against a bridge, as a nuisance, by the United States, could not be sustained; but a proceeding against it, on the ground of a private and irreparable injury, may be sustained, at the instance of an individual or a corporation, either in the federal or state courts.

Id. (1b.) 249

36. In case of nuisance, if the obstruction be unlawful, and the injury irreparable, by a suit at common law, the injured party may claim the extraordinary protection of a court of chancery.

Id. (1b.) 249

37. The Ohio is a navigable stream, subject to the commercial power of Congress, which has been exercised over it; and if the Act of Virginia authorized the structure of the bridge, so as to obstruct navigation, it would afford no justification to the Bridge Company.

Id. (1b.) 249

38. Congress has sanctioned the compact made between Virginia and Kentucky, viz.: "That the use and navigation of the River Ohio, so far as the territory of Virginia or Kentucky is concerned, shall be free and common to the citizens of the United States." This compact is obligatory, and can be carried out by this court.

Id. (1b.) 249

39. Where there is a private injury from a public nuisance, a court of equity will interfere by injunction.

Id. (1b.) 249

40. In this case the bridge is a nuisance. This is shown by measuring the height of the bridge, and of the water, and of the chimneys of the boats. The report of the commissioner appointed by this court to ascertain these facts, is equivalent to the verdict of a jury.

Id. (1b.) 249

41. The report of the commissioner adverted to and commented upon; the extent of injury sustained by the boats explained; and the importance shown of maintaining the navigation of the river.

Id. (1b.) 249

42. If a structure be declared to be a nuisance, there is no room for a calculation and comparison between the injuries and benefits which it produces.

Id.

(*Id.*) 349

43. Therefore, unless there be an elevation of the lowest parts of the bridge, for three hundred feet over the channel of the river—nor less than one hundred and eleven feet from the low water mark, the flooring of the bridge descending from the terminl of the elevation at the rate of four feet in the hundred—or some other plan shall be adopted which shall relieve the navigation from obstruction, on or before the first of February next—the bridge must be abated.

Id.

(*Id.*) 349

44. In consequence of the intimation above aluded to, viz.: "that some other plan might be adopted," then elevating the bridge, the court, at the request of the counsel for the Bridge Company, referred the matter to an engineer. After receiving his report, the court decided as follows: The Bridge Company may, upon their own responsibility, try whether the western channel can be improved and made passable, by means of a draw, so as to afford a safe and unobstructed navigation for the largest class of boats, having chimneys eighty feet high, when they cannot pass under the suspension bridge. This is to be done, if at all, before the first Monday of February next, on which day the plaintiff may move the court on the subject of the decree.

Id.

(*Id.*) 349

JURISDICTION—14.

1. Where a motion was made under the 12th section of the Judiciary Act to remove a cause from a state court to the Circuit Court of the United States, notwithstanding which the State Court retained cognizance of the case, and it was ultimately brought to this court under the 25th section of the Judiciary Act, a motion to dismiss it for want of jurisdiction cannot be sustained. The question will remain to be decided upon the full hearing of the case.

Kannise v. Martin,

(23) 310

2. A court of equity has jurisdiction of a bill against the administrator of a deceased debtor, and a person to whom real and personal property was conveyed by the deceased debtor, for the purpose of defrauding creditors.

Hagan v. Walker,

(29) 312

3. In such a case, the court does not exercise an auxiliary jurisdiction to aid legal process, and consequently it is not necessary that the creditor should be in a condition to levy an execution, if the fraudulent obstacle should be removed.

Id.

(*Id.*) 312

4. It is proper to make a prior incumbrancer, who holds the legal title, a party to the bill, in order that the whole title may be sold under the decree; for the purpose of such a decree, the prior incumbrancer is a necessary party; but the court may order a sale subject to the incumbrance, without having the prior incumbrancer before it, and in fit cases it will do so.

Id.

(*Id.*) 312

5. If the prior incumbrancer is out of the jurisdiction, or cannot be joined without defeating it, it is a fit cause to dispense with his presence, and order a sale subject to his incumbrance, which will not be affected by the decree.

Id.

(*Id.*) 312

6. Under the tenth article of the Treaty of 1842, between the United States and Great Britain, a warrant was issued by a commissioner, at the instance of the British Consul, for the apprehension of a person who, it was alleged, had committed an assault, with intent to murder, in Ireland.

In re Kaine,

(103) 345

7. The person being arrested, the Commissioner ordered him to be committed, for the purpose of abiding the order of the President of the United States.

Id.

(*Id.*) 345

8. A *habeas corpus* was then issued by the Circuit Court of the United States, the District Judge presiding, when, after a hearing, the writ was dismissed, and the prisoner remanded to custody.

Id.

(*Id.*) 345

9. A petition was then presented to the Circuit Judge, at his chambers, addressed to the Justices of the Supreme Court, and praying for a writ of *habeas corpus*, which was referred by the Circuit Judge, after a hearing, to the Justices of the Supreme Court, in bank, at the commencement of the next term thereof.

Id.

(*Id.*) 345

HOWARD 13, 14, 15, 16.

10. At the meeting of the court, a motion was made, with the papers and proceedings presented to the Circuit Judge annexed to the petition, for writs of *habeas corpus* and *certiorari* to bring up the defendant and the record from the Circuit Court, for the purpose of having the decision of that court examined.

Id.

(*Id.*) 345

11. The motion was refused, the writs prayed for denied, and the petition dismissed.

Id.

(*Id.*) 345

12. Where the Supreme Court of a state certifi'd that there was "drawn in question the validity of statutes of the State of Ohio," &c., without naming the statutes, this was not enough to give jurisdiction to this court, under the 23th section of the Judiciary Act.

Lawler v. Walker,

(149) 364

13. Nor, in this case, would the court have had jurisdiction if the statutes had been named, because.

In 1816 the Legislature of Ohio passed an "Act to prohibit the issuing and circulation of unauthorized bank paper," and, in 1839, an Act amendatory thereof; and the question was, whether or not a canal company, incorporated in 1837, was subject to these Acts. In deciding that it was, the Supreme Court of Ohio only gave a construction to an Act of Ohio, which neither of itself, nor by its application, involved in any way a repugnancy to the Constitution of the United States, by impairing the obligation of a contract.

Id.

(*Id.*) 364

15. The case of *The Commercial Bank of Cincinnati v. Buckingham's Executors*, 5 How., 317, examined and sustained.

Id.

(*Id.*) 364

16. Two statutes of Mississippi, one passed in 1843, and the other in 1846, provide that where the charter of a bank shall be declared forfeited, a trustee shall be appointed to take possession of its effects, and commissioners appointed to audit accounts against it.

Peale v. Phipps,

(368) 459

17. Where these steps had been taken, and the commissioners had refused to allow a certain account, the Circuit Court of the United States had no right to entertain a bill filed by the creditors to compel the trustee to pay the rejected account. There was a want of jurisdiction.

Id.

(*Id.*) 459

18. The cases upon this point examined.

Id.

(*Id.*) 459

19. A claim by the trustee, in reconvention, was not a waiver of the exception to the jurisdiction.

Id.

(*Id.*) 459

20. When a plea is filed to the jurisdiction of the court, upon the ground that the plaintiff is a resident of the same state with the defendant, it is incumbent on the defendant to prove the allegation.

Sheppard v. Graves,

(505) 518

21. Where the marshal of the District of Wisconsin attached property at the suit of creditors in New York, and then gave it up upon the execution of a bond to himself, for the use of those creditors, it was within the jurisdiction of the District Court of the United States for Wisconsin, to entertain a suit by the marshal, suing upon the bond for the New York creditors, against the claimants in Wisconsin, although both parties resided in the same state.

Huff v. Hutchinson,

(587) 553

22. The name of the marshal was merely formal; the real plaintiffs were averred to be citizens of New York.

Id.

(*Id.*) 553

23. It was not a good exception upon the ground of variation between the evidence and declaration, that the latter stated the bond to have been given to Hutchinson as marshal of the District of Wisconsin, and the former said the State of Wisconsin. They mean the same thing.

Id.

(*Id.*) 553

24. Judgment having been rendered for the plaintiffs in the attachment, by a court having jurisdiction over the subject, it was too late to object to those proceedings in a suit upon the bond, in which they were collaterally introduced.

Id.

(*Id.*) 553

25. The bond given to the marshal was in conformity with the statute.

Id.

(*Id.*) 553

26. The objections, that the declaration on the bond did not show the jurisdiction of the court in the attachment suit; that the verdict was entered

for the amount due instead of the penalty of the bond, and that the recovery was for a sum greater than was claimed by the *ad damnum* in the declaration, were not sufficient for a new trial.

Huff v. Hutchinson. (587) 553

JURISDICTION—15.

1. Where a citizen of New Jersey was sued in a state court in New York, and filed his petition to remove the case into the Circuit Court of the United States, offering a bond with surety, the amount claimed in the declaration being \$1,000, it became the duty of the state court to accept the surety, and proceed no further in the cause.

Kanawase v. Martin. (198) 696

2. Consequently, it was erroneous to allow the plaintiff to amend the record and reduce his claim to \$499.

Id. (Ib.) 696

3. The case having gone on to judgment, and been carried by writ of error to the Superior Court, without the petition for removal into the Circuit Court of the United States, it was the duty of the Superior Court to go behind the technical record, and inquire whether or not the judgment of the court below was erroneous.

Id. (Ib.) 696

4. The defendant was not bound to plead to the jurisdiction of the court below; such a step would have been inconsistent with his right that all proceedings should cease when his petition for removal was filed.

Id. (Ib.) 696

5. The Superior Court being the highest court to which the case could be carried, a writ of error lies to examine its judgment, under the 25th section of the Judiciary Act.

Id. (Ib.) 696

6. The Michigan Central Railroad Company, established in Michigan, made an agreement with the New Albany and Salem Railroad Company, established in Indiana, that the former would build and work a road in Indiana, under the charter of the latter.

Northern Indiana Railroad Company v. Michigan Central Railroad Company. (233) 674

7. Another company, also established in Indiana, called the Northern Indiana Railroad Company, claiming an inclusive right to that part of Indiana, filed a bill in the Circuit Court of the United States for the District of Michigan, against the Michigan Company, praying an injunction to prevent the construction of the road under the above agreement.

Id. (Ib.) 674

8. The Circuit Court had no jurisdiction over such a case.

Id. (Ib.) 674

9. The subject matter of the controversy lies beyond the limits of the district, and where the process of the court cannot reach the *locus in quo*.

Id. (Ib.) 674

10. Moreover, the rights of the New Albany Company are seriously involved in the controversy, and they are not made parties to the suit. The Act of Congress, providing for the non-joinder of parties who are not inhabitants of the district, does not apply to such a case as the present.

Id. (Ib.) 674

11. In 1836 the Legislature of Arkansas incorporated a bank, with the usual banking powers of discount, deposit and circulation, the State being the sole stockholder.

Curran v. State of Arkansas. (304) 705

12. The bank went into operation, and issued bills in the usual form, but in November, 1839, suspended specie payments.

Id. (Ib.) 705

13. Afterwards, the Legislature passed several Acts of the following description:

1843, January, continuing the corporate existence of the bank, and subjecting its affairs to the management of a financial receiver and an attorney, who were directed to cancel certain bonds of the State, held by the bank, for money borrowed by the State, and reduce the State's capital in the bank by an equal amount.

1843, February, directing the officers to transfer to the State a certain amount of specie, for the purpose of paying the members of the Legislature.

1845, January, requiring the officers to receive the bonds of the State, which had been issued as part of the capital of the bank, in payment for debts due to the bank.

1845, January, another Act, taking away certain specie and par funds for the purpose of paying members of the Legislature, and placing other funds to the credit of the State, subject to be drawn out by appropriation.

1846, vesting in the State all titles to real estate or other property taken by the bank in payment for debts due to it.

1849, requiring the officers to receive, in payment of debts due to the bank, not only the bonds of the State, which had been issued to constitute the capital of the bank, but those also which had been issued to constitute the capital of other banking corporations, which were then insolvent.

Id. (Ib.) 705

14. Upon general principles of law, a creditor of an insolvent corporation can pursue its assets into the hands of all other persons, except *bona fide* creditors or purchasers, and there is nothing in the character of the parties in the present case, or in the laws transferring the property, to make it an exception to the general rule. For the Supreme Court of Arkansas has decided that the State can be sued in this case.

Id. (Ib.) 705

15. The bills of the bank being payable on demand, there was a contract with the holder to pay them; and these laws, which withdrew the assets of the bank into a different channel, impaired the obligation of this contract.

Id. (Ib.) 705

16. Nor does the repeal or modification of the charter of the bank by the Legislature prevent this conclusion from being drawn. But in this case the charter of the bank has never been repealed.

Id. (Ib.) 705

17. Besides the contract between the bill holder and the bank, there was a contract between the bill holder and the State, which had placed funds in the bank for the purpose of paying its debts, and which had no right to withdraw those funds after the right of a creditor to them had accrued.

Id. (Ib.) 705

18. The State had no right to pass these laws, under the circumstances, either as a creditor of the bank, or as a trustee taking possession of the real estate for the benefit of all the creditors.

Id. (Ib.) 705

19. The several laws examined.

Id. (Ib.) 705

20. The Supreme Court of the State held these laws to be valid, and consequently, the jurisdiction of this court attaches under the 25th section of the Judiciary Act.

Id. (Ib.) 705

21. Where a case was decided in a state court against a party, who was ordered to convey certain land, and he brought the case up to this court upon the ground that the contract for the conveyance of the land was contrary to the laws of the United States, this is not enough to give jurisdiction to this court under the 25th section of the Judiciary Act.

Walworth v. Kneland. (348) 724

22. The State Court decided against him upon the ground that the opposite party was innocent of all design to contravene the laws of the United States.

Id. (Ib.) 724

23. But even if the State Court had enforced a contract, which was fraudulent and void, the losing party has no right which he can enforce in this court, which cannot therefore take jurisdiction over the case.

Id. (Ib.) 724

24. Where a contract was made with an attorney for the prosecution of a claim against Mexico for a stipulated proportion of the amount recovered, and services were rendered, the death of the owner of the claim did not dissolve the contract, but the compensation remained a lien upon the money when recovered.

Wylie v. Cox. (416) 753

25. A court of equity can exercise jurisdiction over the case, if a more adequate remedy can be thus obtained than in a court of law.

Id. (Ib.) 753

26. The want of jurisdiction should have been alleged in the court below, either by plea or answer, if the defendant intended to avail himself of it. It is too late to urge it in an appellate court, unless it appears on the face of the proceedings.

Id. (Ib.) 753

27. A person was sued in the Territorial Court of Florida.

Carter v. Bennett. (354) 727

28. After the admission of Florida as a State, the case was transferred to a state court. (Ib.) 737

29. The defendant appeared, and pleaded the general issue. (Ib.) 737

30. The verdict was given against him. (Ib.) 737

31. He then moved in arrest of judgment, upon the ground that the case ought to have been transferred to the District Court of the United States, instead of a state court. (Ib.) 737

32. The motion was overruled, and judgment entered up against him. (Ib.) 737

33. Upon an appeal to the Supreme Court of Florida, this judgment was affirmed. (Ib.) 737

34. This court has no jurisdiction under the 25th section of the Judiciary Act, to review that decision. (Ib.) 737

35. What the State Court decided, was the motion in arrest of judgment, where the record only is examined, and no new evidence admitted. There was nothing in the pleadings to show that the defendant was a citizen of Georgia, and no defect of jurisdiction was apparent. (Ib.) 737

36. The defendant might have pleaded in abatement that he was a citizen of Georgia, but not having done so, it was too late to introduce the matter upon a motion in arrest of judgment. (Ib.) 737

37. As it does not appear, therefore, that the Supreme Court of the State must have decided adversely to the party now claiming the interposition of this court, and decided so upon the construction of an Act of Congress, the writ of error must be dismissed for want of jurisdiction. (Ib.) 737

38. In June, 1844, Congress passed an Act, by virtue of which the Circuit Court of the United States for the District of Arkansas was vested with power to try offenses committed within the Indian country. (Ib.) 737

United States v. Dawson, (467) 775
39. In July, 1844, it was alleged that a murder was committed in that country. (Ib.) 775

40. In April, 1845, an indictment was found by a grand jury, in the Circuit Court of the United States for the District of Arkansas, against a person charged with committing the murder. (Ib.) 775

41. In March, 1851, Congress passed an Act erecting nine of the Western counties and the Indian country into a new judicial district, directing the judge to hold two terms there, and giving him jurisdiction of all causes, civil or criminal, except appeals and writs of error, which are cognizable before a circuit court of the United States. (Ib.) 775

42. The residue of the State remained a judicial district, to be styled the Eastern District of Arkansas. (Ib.) 775

43. This Act of Congress did not take away the power and jurisdiction of the Circuit Court of the United States for the Eastern District to try the indictment pending. (Ib.) 775

JURISDICTION—16.

1. Where it appears by the admission and proofs that the defendant has substantially under his control a large property of the testator which he intended to charge with the payment of the legacy in question, the complainant is entitled to redress, although the land lies beyond the limits of the state in which the suit is brought. (I) 819

Lewis v. Darling, (I) 819
3. No equitable and inchoate title to land in Missouri, arising under the Treaty with France can be tried in the State Court. (48) 839

Burgess v. Gray, (48) 839
3. Under the twenty-second section of the Judiciary Act of 1789, this court cannot reverse the judgment of the court below, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court. (104) 863

Piquignot v. Pennsylvania Railroad Company, (104) 863

4. In Pennsylvania it is not usual to make a record of the judgment in any legal form. But there is no HOWARD 13, 14, 15, 16.

necessity that the courts of the United States should follow such careless precedents. (Ib.) 863

5. Where a suit was brought in which the plaintiff was described as a citizen of France, against the Pennsylvania Railroad Company, without any averment that the defendants were a corporation under the laws of Pennsylvania, or that the place of business of the corporation was there, or that its incorporators, managers or directors were citizens of Pennsylvania, the absence of such an averment was fatal to the jurisdiction of the court. (Ib.) 863

6. In the State of Mississippi, a judgment of forfeiture was rendered against the Commercial Bank of Natchez, and a trustee appointed to take charge of all promissory notes in possession of the Bank. *Robertson v. Cneller,* (108) 864

7. The trustee brought an action upon one of these promissory notes. (Ib.) 864

8. The defendant pleaded that the plaintiff, as trustee, had collected and received of the debts, effects and property of the bank, an amount of money sufficient to pay the debts of the Bank, and all costs, charges and expenses incident to the performance of the trust. (Ib.) 864

9. To this plea the plaintiff demurred. (Ib.) 864

10. The action was brought in a state court, and the highest court of the State overruled the demurrer, and gave judgment for the defendant. (Ib.) 864

11. This court has no jurisdiction, under the twenty-fifth section of the Judiciary Act, to review this decision. The question was merely one of construction of a statute of the State, as to the extent of the powers of the trustee under the statute. (Ib.) 864

12. A citizen of Virginia may sue the Baltimore and Ohio Railroad Company in the Circuit Court of the United States for Maryland, and an averment that the defendants are a body corporate, created by the Legislature of Maryland, is sufficient to give the court jurisdiction. *Marshall v. Baltimore and Ohio Railroad Co.,* (314) 953

13. Where a libel was filed, claiming compensation for injuries sustained by a passenger in a steamboat, proceeding from Sacramento to San Francisco, in California, the case is within the admiralty jurisdiction of the courts of the United States. *Steamboat New World et al. v. King,* (469) 1019

14. Upon an appeal from the District Court of the United States for the Northern District of California, where it did not appear, from the proceedings, whether the land claimed was within the Northern or Southern District, this court will reverse the judgment of the District Court and remand the case for the purpose of making its jurisdiction apparent (if it should have any), and of correcting any other matter of form or substance which may be necessary. *Cervantes v. United States,* (619) 1083

15. The eleventh section of the Judiciary Act of 1789, says, "nor shall any circuit or district court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange." (622) 1084

16. This clause has no application to the case of a suit by the assignee of a chose in action to recover possession of the thing in specie, or damages for its wrongful caption or detention. *Deshler v. Dodge,* (622) 1084

17. Therefore, where an assignee of a package of bank notes brought an action of replevin for the package, the action can be maintained in the Circuit Court, although the assignor could not himself have sued in that court. (Ib.) 1084

JURY—14.

1. Upon a trial in New York, a juror became ill, and was discharged before any evidence was given, and before the plaintiff's counsel had concluded his opening address. The court ordered another juror to be sworn, and proceeded with the trial. The defendant cannot object to this. It is the practice in New York, and the Circuit Court had a right to follow it. *Susby v. Foote,* (218) 394

2. One of the specifications of the patent being for a combination of certain parts of mechanism necessary to produce the desired result, it was proper for the court to instruct the jury that the defendants had not infringed the patent, unless they had used all the parts embraced in the plaintiff's combination; and the jury were to find what those parts were, and whether the defendants had used them.

Silaby v. Foote, (218) 394

3. When a claim does not point out and designate the particular elements which compose a combination, but only declares, as it properly may, that the combination is made up of so much of the described machinery as effects a particular result, it is a question of fact which of the described parts are essential to produce that result; and to this extent, not the construction of the claim, strictly speaking, but the application of the claim, should be left to the jury.

Id. (Ib.) 394

4. Where a certificate of deposit in a bank, payable at a future day, was handed over by a debtor to his creditor, it was no payment, unless there was an express agreement, on the part of the creditor, to receive it as such; and the question, whether there was or was not such an agreement, was one of fact, to be decided by the jury.

Danney v. Hicks, (240) 404

5. The bank being insolvent when the certificate of deposit became due, there was no ground for imputing negligence in the collection of the debt by the holder, as no loss occurred to the original debtor.

Id. (Ib.) 404

6. If the evidence showed that, after the maturity of the certificate, the original debtor admitted his liability to make it good, the jury should have been instructed that this evidence conduced to prove that the certificate was not taken in payment.

Id. (Ib.) 404

LANDS, PUBLIC—13.

1. Where a grant of land, in Louisiana, was made by the Spanish Governor, in February, 1799, but no possession was ever taken by the grantee, during the existence of the Spanish government, or since the cession to the United States, and no proof of the existence of the grant until 1835, when the grantee sold his interest to a third person, the presumption arising from this neglect is, that the grant, if made, had been abandoned.

United States v. Hughes, (1) 25

2. The regulations of Gayoso, who made the grant, were, that the settler should forfeit the land, if he failed to establish himself upon it within one year, and put under labor ten arpents in every hundred within three years.

Id. (Ib.) 25

3. The court again decides, as in the preceding case, that where a Spanish grant was made in 1798, and no evidence was offered that possession was taken under the grant, nor any claim of right or title made under it until 1837, nor any evidence given to account for the neglect, the presumption is that the claim had been abandoned.

Id. (Ib.) 25

4. In this case, also, there was no proof that the persons who purported to convey as heirs, were actually the heirs of the party whom they professed to represent.

Id. (Ib.) 25

5. This court again decides, as in 9 How., 127, and 10 How., 606, that French grants of land in Louisiana, made after the Treaty of Fontainebleau, by which Louisiana was ceded to Spain, are void, unless confirmed by the Spanish authorities before the cession to the United States.

United States v. Pullerlin et al., (9) 28

6. But if there has been continued possession under the grants so as to lay the foundation for presuming a confirmation by Spain, then the cases are not included within the Acts of 1824 and 1844, which look only to inchoate and equitable titles. The District Court of the United States has therefore no jurisdiction.

Id. (Ib.) 28

7. On the 15th of May, 1820, Congress passed an Act (3 Stat. at Large, 605), for the benefit of the inhabitants of the Village of Peoria, by which every person claiming a lot in the village was to give notice to the Register of the Land Office, whose report was to be laid before Congress.

Ballance v. Forsyth, (18) 32

8. On the 2d of March, 1823, Congress passed an-

other Act (3 Stat. at Large, 786), granting to each of the French and Canadian inhabitants, and other settlers, according to the report, the lot upon which they had settled; and directed the surveyor of the public lands to make a plat of the lots for which patents were to be issued to the claimants.

Id. (Ib.) 32

9. This survey and plat were not made until April and May, 1837.

Id. (Ib.) 32

10. In November, 1837, a person who was not a settler, purchased at the Land Office, at private entry, the fractional quarter of land which included some of the above lots, and soon afterwards obtained a patent. Both the certificate and patent reserved the rights of the claimant, under the Acts of Congress above mentioned.

Id. (Ib.) 32

11. In 1845 and 1847 these claimants obtained patents.

Id. (Ib.) 32

12. They were entitled to recover in ejectment from the persons who held under the private entry and patent.

Id. (Ib.) 32

13. The title of the plaintiffs was not divested by a tax sale in 1843. The whole fractional quarter section was taxed, and one acre off of the east side sold. This sale was irregular.

Id. (Ib.) 32

14. The principles established in the cases of 3 How., 212, and 9 How., 477, again affirmed, viz.: that after the admission of Alabama into the Union as a State, Congress could make no grant of land situated between high and low water marks.

Doe v. Beebe, (25) 35

15. The Act of June 17, 1844 (5 Stat. at Large, 676), reviving the Act of 1844, gives jurisdiction to the district courts, in cases only where the title set up to lands, under grants from former governments, is equitable and inchoate, and where there is no grant purporting to convey a legal title.

United States v. McCullagh, (216) 18

16. Grants from the British government, as well as those of France and Spain, are equally within this restriction.

Id. (Ib.) 118

17. On the 20th of May, 1826, Congress passed an Act (4 Stat. at Large, 179) giving school lands to such townships, in the various land districts of the United States, as had not been before provided for, which were to be selected for such townships by the Secretary of the Treasury, out of any unappropriated public lands within the land district where the township was situated for which the selection was made.

Campbell et al. v. Doe, (244) 130

18. The Secretary of the Treasury, through the Land Office, directed the registers to make selections and return lists thereof, to be submitted to him for his approbation.

Id. (Ib.) 130

19. Under this direction, the land in question was selected and reserved from sale.

Id. (Ib.) 130

20. Afterwards, the Register withdrew the selection, by authority of the Commissioner of the Land Office, and permitted a person to enter and take it up, this person knowing the circumstances under which it had been reserved from sale.

Id. (Ib.) 130

21. Finally, the Secretary of the Treasury selected the land in question, under the authority given to him by the Act of 1826.

Id. (Ib.) 130

22. This selection was good, and conferred a title, overruling the intermediate entry.

Id. (Ib.) 130

23. In 1795, Baron de Carondelet, the Governor-General of Louisiana, made a grant of land on the Mississippi River, upon condition that a road and clearing should be made within one year, and an establishment made on the land within three years.

Heirs of De Villemont v. United States, (251) 135

24. Neither of these conditions was complied with, nor was possession taken under the grant till after the cession of the country to the United States.

Id. (Ib.) 135

25. The excuses for these omissions, namely: that the grantee was commandant at the post of Arkansas, and that the Indians were hostile, are not sat-

isfactory; because the grantee must have known these circumstances when he obtained the grant.

Id. (Ib.) 138

26. According to the principles established in the preceding case of *Glenn and Thruston v. The United States*, the Spanish authorities would not have confirmed this grant, neither can this court confirm it.

Id. (b.) 138

27. Moreover, in this case, the land claimed cannot be located by a survey.

Id. (Ib.) 138

28. In 1796, when Delassus was commandant of the port of New Madrid, he exercised the powers of sub-delegate, and had authority, under the instructions of the Governor-General of Louisiana, to make conditional grants of land.

Glenn et al v. United States, (250) 133

29. He made a grant to Clamorgan, who stipulated upon his part that he would introduce a colony from Canada, for the purpose of cultivating hemp and making cordage.

Id. (Ib.) 133

30. This obligation he entirely failed to perform.

Id. (Ib.) 133

31. By the laws and ordinances of Spanish colonial government (which this court is bound, under the Act of 1844, to adopt, as one of their rules of decision), this condition had to be performed before Clamorgan could become possessed of a perfect title.

Id. (Ib.) 133

32. The difference between this case and that of *Arredondo* explained.

Id. (Ib.) 133

33. If the Spanish Governor would have refused to complete the title, this court, acting under the laws of Congress, must also decline to confirm it.

Id. (Ib.) 133

34. After the cession of the Province of Louisiana to the United States, Clamorgan could not legally have taken any steps to fulfill his condition. He was forbidden by law. By the Treaty of Cession, no particular time was allowed for grantees to complete their imperfect grants. It was left to the Political Department of the government, and Congress accordingly acted upon the subject.

Id. (Ib.) 133

35. The 3d day of March, 1804, was the time fixed by Congress, and the grant must now be judged of as it stood upon that day.

Id. (Ib.) 133

LANDS, PUBLIC—14.

1. This court again decides, as in 11 Howard, 590, that under the Acts of Congress of 1824 and 1844, the District Court had no power to act upon evidence of mere naked possession, unaccompanied by written evidence conferring, or professing to confer, a title of some description.

U. S. v. Heirs of Rilleaux, (189) 381

2. By the Treaty of 1763, the land in question passed from France to Great Britain; and the certificate of two French officers in 1766, certifying that the claimant had been for a long time in possession, furnished no evidence of title. No application was made to the British government for a grant.

Id. (Ib.) 381

3. A purchase from the Indians, whilst the province was under French authority, conveyed no title unless sanctioned by that authority.

Id. (Ib.) 381

4. In this case, also, there is no proof that the claimants are the heirs of the party originally in possession.

Id. (Ib.) 381

5. On the 25th of December, 1824, Cunningham applied to the Land Office at Batesville, in Arkansas, to become the purchaser of a quarter section of land under a Cherokee certificate which had become vested in him.

Cunningham v. Ashley, (377) 462

6. This application was refused, upon the ground that two New Madrid certificates had been laid upon the land in 1820. The right under these certificates was claimed by Ashley.

Id. (Ib.) 462

7. In 1830 Cunningham said that Brumbach had an improvement on the same quarter section, which Brumbach assigned to Ashley. The law sanctioned the division of a quarter section, under such circumstances.

Id. (Ib.) 462

8. In 1831 Cunningham claimed a pre-emption right under the Act of 20th May, 1830. The claims

under this Act, and under the Cherokee float, were not inconsistent with each other.

Id. (Ib.) 462

9. In 1838 two floats were entered upon the same quarter section, viz.: one by Plummer, for the east half of it, under the Act of 1830, and the supplemental Act of 1832; the other for the west half by Jenbeau, under the Act of 1834, and the circular of the General Land Office of 1837. Patents were issued, and the title became vested in Ashley.

Id. (Ib.) 462

10. The title of Cunningham is better than that derived from these floats. The title under the New Madrid certificates is not decided in this case, or affected in any way by the decision. Cunningham is therefore entitled to the half of the quarter section which he claimed separately from Brumbach.

Id. (Ib.) 462

11. The patents obtained by Ashley and Beebe, being founded upon entries which were void, are void also, so far as they interfere with the pre-emptive right of Cunningham.

Id. (Ib.) 462

12. This court decided, in 8 Howard, 223, that the recitals in a patent for land, referring to titles of anterior date, were not of themselves sufficient to establish the titles thus recited.

Id. (Ib.) 462

13. The titles themselves being now produced, it is decided, that a permit given by the Lieutenant-Governor of Upper Louisiana, in 1779, to a person to form an establishment on the Mississippi, followed by actual possession and improvement, entitled the occupant to 640 acres, including his improvements, although the Indian title was not then extinguished.

Marsh v. Brooks, (514) 522

14. It was not the practice of the Spanish government to make treaties with the Indian tribes, defining their boundaries; but to prevent settlements upon their lands without special permits; such permits, however, were usual.

Id. (Ib.) 522

15. The construction of the Treaty between the United States and the Sac and Fox Indians, must be that the latter assented to an occupancy which was as notorious as their own.

Id. (Ib.) 522

16. The Act of Congress, approved April 29, 1816 (3 Stat. at Large, 328), confirming certain claims to land, confirmed this one, although the Recorder of Land Titles, in his report, made in 1815, had added these words, "if Indian title extinguished." These words were surplusage.

Id. (Ib.) 522

LANDS, PUBLIC—15.

1. Two grants of land in the country known as the neutral territory, lying between the Sabine River and the Arroyo Hondo, confirmed, namely: one for La Nana, granted in 1798, and the other for Los Ormezas granted in 1796.

United States v. Davenport's Heirs, (1) 575

2. These grants were made by the commandant of the Spanish post of Nacogdoches, who at that time had power to make inchoate grants.

Id. (Ib.) 575

3. In both cases the grants had defined metes and bounds, and the grantees were placed in possession by a public officer, and exercised many acts of ownership.

Id. (Ib.) 575

4. The evidence of the grants was copies made by the commandant of the post, and also copies made by the Land Office in Texas. These copies, under the circumstances, are sufficient.

Id. (Ib.) 575

5. At the date of these grants, it was necessary to obtain the ratification of the civil and military governor before the title became perfected. This not having been done in the present case, the title was imperfect, although the petition alleges that it was perfect, and the District Court had jurisdiction under the Acts of 1824 and 1844.

Id. (Ib.) 575

6. But the District Court ought not to have decreed that floats should issue where the United States had sold portions of the land, because these vendees were not made parties to the proceedings.

Id. (Ib.) 575

7. A claimant of a share of the grants spoken of in the preceding case, having failed to produce evidence of the right of his grantor to convey to him, cannot have a decree in his favor.

United States v. Patterson, (10) 578

8. A person cannot intervene here who was not

party to the suit in the District Court. And even if the practice of this court sanctioned such intervention, there is nothing to show his right to do so in this case.

United States v. Patterson, (10) 578

9. The heirs of D'Autrieuve claimed a tract of land near the River Mississippi, upon two grounds, viz.: 1st. Under a grant to Duvernay by the Western or Mississippi Company in 1717, and a purchase from him by D'Autrieuve, the ancestor, accompanied by the possession and occupation of the tract from 1717 to 1780; and 2d. Under an order of survey of Unzaga, Governor of the Province of Louisiana in 1772, an actual survey made, and a confirmation thereof by the Governor.

United States v. D'Autrieuve, (14) 580

10. With respect to the first ground of title, there is no record of the grant to Duvernay, nor any evidence of its extent. It is therefore without boundaries or location; and is free from these objections, it would be a perfect title, and therefore not within the jurisdiction of the District Court, under the Acts of 1824 and 1844.

Id. (1b.) 580

11. With respect to the second ground of title, if the proceedings of Unzaga be regarded as a confirmation of the old French grant, then the title would become a complete one, and beyond the jurisdiction of the District Court.

Id. (1b.) 580

12. If they are regarded as an incipient step in the derivation of a title under the Spanish government, then the survey did not extend to the back lands which are the property in question, but only included the front upon the river, which was surrendered to the Governor in 1780.

Id. (1b.) 580

13. Neither the upper or lower side line, nor the field notes, justify the opinion that the survey included the back lands. A letter addressed to Unzaga by the surveyor is so ambiguous that it must be controlled by the field notes and map.

Id. (1b.) 580

14. The neglect of the parties to set up a claim from 1780 to 1821, and the acts of the Spanish government in granting concessions within the limits now claimed, furnish a presumption of the belief of the parties that the whole property was surrendered in 1780.

Id. (1b.) 580

15. Under the laws of 1824 and 1844, relating to the confirmation of land titles, where a claimant filed his petition, alleging a patent under the French government of Louisiana, confirmed by Congress, and claiming floats for land which had been sold, within his grant, by the United States to other persons, the mere circumstance that the court had jurisdiction to decree floats in cases of incomplete titles, did not give it jurisdiction to decree floats in cases of complete titles.

United States v. Rowell et al., (31) 587

16. This title having been confirmed by Congress, without any allowance for the sales of lands included within it, the confirmation must be considered as a compromise accepted by the other party, who thereby relinquished his claim to floats.

Id. (1b.) 587

17. If the title be considered as a perfect title, this court has already adjudged (3 How., 143) that the District Court had no jurisdiction over such titles.

Id. (1b.) 587

18. The claimant in this case prayed that the side lines of his tract might be widened by diverging instead of parallel lines; but this court, in this same case, formerly (3 How., 698) recognized the validity of a decree of the Supreme Court of Louisiana, which decided that the lines should be parallel and not divergent. The District Court of the United States ought to have conformed its judgment to this opinion.

Id. (1b.) 587

19. Moreover, the claimant in this case did not state in his petition what lands had been granted by the United States, nor to whom, nor did he make the grantees parties; all of which ought to have been done before he could have been entitled to floats.

Id. (1b.) 587

20. Where a party claimed title to a tract of land in Louisiana, under a judicial sale in 1780, and alleged that he and those under whom he claimed had been in peaceable possession ever since the sale, a case of perfect title is presented which is not within the jurisdiction of the District Court, under the Acts of 1824 and 1844.

Id. (1b.) 587

21. Upon the sufficiency of the evidence to sustain the title, no opinion is expressed.

Id. (1b.) 587

22. A grant of land in Louisiana by the French authorities in 1764, is void. The province was ceded to Spain in 1762. (See 10 How., 610.)

United States v. Ducros, (38) 591

23. In 1793, certain legal proceedings were had before Baron de Carondelet in his judicial capacity, wherein the property now claimed is described as part of the estate of the grantor of the present claimant. But this did not amount to a confirmation of the title in his political character; and if it did, the title would be a perfect one, and beyond the jurisdiction of the District Court, under the Acts of 1824 and 1844.

Id. (1b.) 591

24. By two Acts, passed in 1820 and 1823, Congress granted a lot in the Village of Peoria, in the State of Illinois, to each settler who "had not heretofore received a confirmation of claim or donation of any tract of land or village lot from the United States."

Forsyth v. Reynolds, (358) 739

25. Lands granted to settlers in Michigan, prior to the surrender of the western posts by the British government, and which grants were made out to carry out Jay's Treaty in 1794, were not donations so as to exclude a settler in Peoria from the benefit of the two Acts of Congress above mentioned.

Id. (1b.) 739

26. In 1841 Congress passed an Act (5 Stat. at Large, 455) declaring that there shall be granted to each State, &c. (Louisiana being one), five hundred thousand acres of land.

Foley v. Harrison, (433) 761

27. This Act did not convey the fee to any land whatever, but left the land system of the United States in full operation as to regulation of titles, as to prevent conflicting entries.

Id. (1b.) 761

28. Hence, where a plaintiff claimed under a patent from the State of Louisiana, and entries only in the United States office; and the defendant claimed under patents from the United States, the title of the latter is the better in a petitory action.

Id. (1b.) 761

29. The defendant has also the superior equity, because his entries were prior in time to those of the plaintiff, and the decision of the board, consisting of the Secretary of the Treasury, the Attorney-General, and the Commissioner of the Land Office, to whom the matter had been referred by an Act of Congress, was in favor of the defendant.

Id. (1b.) 761

30. The several Acts of Congress, passed in relation to claims to land in Missouri, under Spanish concessions, reserved such lands from sale from time to time. But there was an intermission of such legislation from the 20th of May, 1829, to the 9th of July, 1832; and during this interval, lands so claimed were upon the footing of other public lands, as to sale, entry, and so forth.

Delauriere v. Emison, (525) 800

31. By an Act of the 6th of March, 1830 (3 Stat. at Large, 545), Congress gave a certain amount of land to the State of Missouri, to be selected by the Legislature thereof, on or before the 1st of January, 1835; and by another Act, passed on the 3d of March, 1831 (4 Stat. at Large, 482), the Legislature were authorized to sell this land.

Id. (1b.) 800

32. Before the 1st of January, 1835, the Legislature selected certain lands which were then claimed under Spanish concessions, and reserved from sale under the Acts of Congress first mentioned.

Id. (1b.) 800

33. In November, 1831, the land so selected was sold by the Legislature, in conformity with the Act of Congress of the preceding March.

Id. (1b.) 800

34. This sale having been made in the interval between May, 1829, and July, 1832, conveyed a valid title, although the claimant to the same land was subsequently confirmed in his title by Congress, in 1838.

Id. (1b.) 800

LANDS, PUBLIC—16.

1. No equitable and inchoate title to land in Missouri, arising under the Treaty with France, can be tried in the State Court.

Burgess v. Gray, (45) 839

2. The Act of Congress, passed on the 2d of March, 1807 (2 Stat. at Large, 440), did not *proprio rigore* vest

the legal title in any claimants; for it required the favorable decision of the Commissioner, and then a patent before the title was complete.

Id. (Ib.) 839

8. The Act of 12th April, 1814 (3 Stat. at Large, 121), confirmed those claims only which had been rejected by the Recorder upon the ground that the land was not inhabited by the claimant on the 20th of December, 1803.

Id. (Ib.) 839

4. Where it did not appear by the report of the Recorder that a claim was rejected upon this specific ground, this Act did not confirm it.

Id. (Ib.) 839

5. The question whether or not the Recorder committed an error in point of fact, was not open in the State Court of Missouri upon a trial of the legal title.

Id. (Ib.) 839

6. The mere possession of the public land, without title, for any time, however long, will not enable a party to maintain a suit against anyone who enters upon it; and more especially against a person who derives his title from the United States.

Id. (Ib.) 839

7. The Act of Congress, passed on the 3d of March, 1807 (2 Stat. at L., 440), declared that all claims to land in Missouri should be void unless notice of the claim should be filed with the Recorder of Land Titles, prior to the 1st of July, 1808.

McCabe v. Worthington. (86) 856

8. Hence, in the year 1824, a claim which had not been thus filed had no legal existence.

Id. (Ib.) 856

9. The Act of the 26th May, 1824 (4 Stat. at L., 52), authorizing the institution of proceedings to try the validity of claims, did not reserve from sale lands, the claims to which had not been filed as above.

Id. (Ib.) 856

10. Therefore, when the owner of such a claim filed his petition in 1824, which was decided against him; and he brought the case to this court, which was decided in his favor in 1836, but in the mean time entries had been made for parts of the land, the latter were the better titles.

Id. (Ib.) 856

11. Moreover, the Act of May 24, 1828 (4 Stat. at L., 298), provides that confirmations and patents under the Act of 1824 should only operate as a relinquishment on the part of the United States. Therefore, the confirmation by this court in 1836 was subject to this Act.

Id. (Ib.) 856

12. On the 23d of September, 1788, the tribe of Indians called the Foxes, situated on the west bank of the Mississippi, sold to Julien Dubuque a permit to work at the mine as long as he should please; and also sold and abandoned to him all the coast and the contents of the mine discovered by the wife of Peosta, so that no white man or Indian should make any pretension to it without the consent of Dubuque.

Choteau v. Molmy. (203) 905

13. On the 22d of October, 1796, Dubuque presented a petition to the Baron de Carondelet for a grant of the land, which he alleged that he had bought from the Fox Indians, who had subsequently assented to the erection of certain monuments for the purpose of designating the boundaries of the land.

Id. (Ib.) 905

14. The Governor referred the petition to Andrew Todd, an Indian trader, who had received a license for the monopoly of the Indian trade, who reported that as to the land nothing occurred to him why the Governor should not grant it, if he deemed it advisable to do so, provided Dubuque should be prohibited from trading with the Indians, unless with Todd's consent, in writing.

Id. (Ib.) 905

15. Upon this report the Governor made an order, granted as asked, under the restrictions expressed in the information given by the merchant, Andrew Todd.

Id. (Ib.) 905

16. This grant was not a complete title, making the land private property, and therefore excepting it from what was conveyed to the United States by the Treaty of Paris of April 30, 1803.

Id. (Ib.) 905

17. The words of the grant from the Indians do not show any intention to sell more than a mining privilege; and even if the words were ambiguous, there are no extrinsic circumstances in the case to justify the belief that they intended to sell the land.

Id. (Ib.) 905

18. The Governor, in his subsequent grant, intended only to confirm such rights as Dubuque had previously received from the Indians. The usual mode of granting land was not pursued. Dubuque obtained no order for a survey from Carondelet, nor could he have obtained one from his successor, Gayoso.

Id. (Ib.) 905

19. By the laws of Spain, the Indians had a right of occupancy; but they could not part with this right except in the mode pointed out by Spanish laws, and these laws and usages did not sanction such a grant as this from Carondelet to Dubuque.

Id. (Ib.) 905

20. Moreover, the grant included a large Indian village, which it is unreasonable to suppose that the Indians intended to sell.

Id. (Ib.) 905

21. Where a grant issued in 1722, by the French authorities of Louisiana, cannot be located by metes and bounds, it cannot serve as a title in an action of ejectment; and it was proper for the Circuit Court to instruct the jury to this effect.

Denise et al. v. Kuggler. (242) 922

22. In 1812 Congress passed an Act (2 Stat. at Large, 748), entitled "An Act making further provision for settling the claims to land in the Territory of Missouri." It confirmed the titles to town or village lots, out lots, &c., in several towns and villages, and amongst them the Town of Carondelet, where they had been inhabited, cultivated or possessed, prior to the 20th day of December, 1803.

23. In 1824 Congress passed another Act (4 Stat. at Large, 65), supplementary to the above, the first section of which made it the duty of the individual owners or claimants, whose lots were confirmed by the Act of 1812, to proceed within 18 months to designate their lots by proving cultivation, boundaries, &c., before the Recorder of Land Titles. The third section made it the duty of this officer to issue a certificate of confirmation for each claim confirmed, and furnish the Surveyor-General with a list of the lots so confirmed.

24. This list was furnished in 1827.

25. Afterwards, in 1830, another recorder gave a certificate of confirmation; an extract from the registry showing that this second recorder entered the certificate in 1830; and an extract from the additional list of claims, which addition was that of a single claim, being the same as above.

Gamache et al. v. Piquinol et al. (451) 1012

26. These three papers were not admissible as evidence in an ejectment brought by the owners of this claim. The time had elapsed within which the recorder could confirm a claim.

27. The Act of Congress passed on the 18th of June, 1812 (2 Stat. at Large, 748), entitled "An Act for the settlement of land claim in Missouri," confirmed the rights, title and claims to town or village lots, out lots, common field lots and commons, in, adjoining and belonging to the several towns and villages therein named (including St. Louis), which lots had been inhabited, cultivated or possessed, prior to the 20th of December, 1803.

28. This confirmation was absolute, depending only upon the facts of inhabitation, cultivation, or possession, prior to the day named. It was not necessary for the confirmee to have received from the Spanish government a grant or survey, or permission to cultivate the land.

29. In 1824 Congress passed a supplementary Act (4 Stat. at Large, 65), making it the duty of claimants of town and village lots to designate them by proving before the recorder the fact of inhabitation, the boundaries, &c., and directing the recorder to issue certificates thereof. But no forfeiture was imposed for non-compliance, nor did the government, by that Act, impair the effect and operation of the Act of 1812. Claimants may still establish, by parol evidence, the facts of inhabitation, &c.

Guitard et al. v. Stoddard. (494) 1030

30. In the Act of 1812 the surveyor was directed to survey and mark the out boundary lines of the towns or villages, so as to include the out lots, common field lots and commons. This was done. Whether a claimant can recover land lying outside of this line, or whether the evidence in this case is sufficient to establish the plaintiff's title, this court does not now decide.

31. In the ratification, by the King of Spain, of the Treaty by which Florida was ceded to the United States, it was admitted that certain grants of land in Florida, amongst which was one to the Duke of Alagon, were annulled and declared void.

32. A written declaration, annexed to a treaty at

Doe et al. v. Braden. (385) 1090

the time of its ratification, is as obligatory as if the

provision had been inserted in the body of the Treaty itself.

Doe et al. v. Braden, (635) 1090
33. Whether or not the King of Spain had power, according to the Constitution of Spain, to annul this grant, is a political and not a judicial question, and was decided when the Treaty was made and ratified.

Id. (Ib.) 1090
34. A deed made by the duke to a citizen of the United States, during the interval between the signature and ratification of the Treaty, cannot be recognized as conveying any title whatever. The land remained under the jurisdiction of Spain until the annulment of the grant.

Id. (Ib.) 1090
LAWS, CONSTRUCTION OF—18.

The popular or received import of words furnishes the general rule for the interpretation of public laws as well as of private and social transactions.

Maillard et al. v. Lawrence, (251) 925
LEASE—15.

When broken, the lessor must recover possession and regain title by a judicial proceeding.

Anderson v. Buck, (323) 714

LEGACIES—18.

See Wills.

LIEN—18.

1. By the laws of Mississippi, deeds of trust and mortgages are valid, as against creditors and purchasers, only from the time when they are recorded.

Taylor v. Doe, (288) 149
2. A judgment is a lien from the time of its rendition.

Id. (Ib.) 149
3. Therefore, where a judgment was rendered in the interval between the execution and recording of a deed, it was a lien upon the land of the debtor.

Id. (Ib.) 149
4. A *scire facias*, being issued upon this judgment, was levied upon the land; but before the issuing of a *venditioni exponas*, the debtor died.

Id. (Ib.) 149
5. It was not necessary to revive the judgment by a *scire facias*; but the sheriff who had thus levied upon the land could proceed to sell it, under a *venditioni exponas*; and a purchaser, under this sale, could not be ejected by a claimant under the deed given by the debtor.

Id. (Ib.) 149
6. Real property, in Louisiana, was bound by a judicial mortgage.

Finley v. Hart, (373) 186
7. The owners of the property then took the benefit of the Bankrupt Act of the United States.

Id. (Ib.) 186
8. A creditor of the bankrupt then filed a petition against the assignee, alleging that he had a mortgage upon the same property, prior in date to the judicial mortgage, but that, by some error, other property had been named, and praying to have the error corrected. Of this proceeding the judgment creditor had no notice.

Id. (Ib.) 186
9. The court being satisfied of the error, ordered the mortgage to be reformed, and thus gave the judgment creditor the second lien instead of the first; and then decreed that the property should be sold free of all incumbrances. Of this proceeding, and also of the distribution of the proceeds of sale, the judgment creditor had notice, but omitted to protect his rights.

Id. (Ib.) 186
10. In consequence of this neglect, he cannot afterwards assert his claim against a purchaser, who has bought the property as being free from all incumbrances.

Id. (Ib.) 186

LIEN—14.

1. Where a *scire facias* was issued to enforce a lien upon a house under the Lien Law of the District of Columbia, there was no necessity to file a declaration.

Winder v. Caldwell, (434) 487
2. Where the contract between the owner and the builder (who was also the carpenter), stipulated for a forfeiture per diem in case the carpenter should delay the work, the court below ought to have allowed evidence of such delay to be given to the jury by the defendant, under a notice of set-off, and also evidence that the work and materials found and provided upon, and for the building,

were defective in quality and character, and far inferior in value to what the contract and specifications called for.

Id. (Ib.) 487

3. A master builder, undertaker, or contractor, who undertakes by contract with the owner to erect a building, or some part or portion thereof, on certain terms, does not come within the letter or spirit of the Act of Congress passed March 2, 1833 (4 Stat. at Large, 629), entitled "An Act to secure to mechanics and others, payment for labor done and materials furnished in the erection of buildings in the District of Columbia."

Id. (Ib.) 487

LIMITATIONS OF ACTIONS, AND STATUTE OF—16.

1. The mere possession of the public land, without title, for any time, however long, will not enable a party to maintain a suit against anyone who enters upon it; and more especially against a person who derives a title from the United States.

Burgess v. Gray, (48) 839
2. The Statute of Limitations of New York allows ten years within which an action must be brought by the heirs of a person under disability, after that disability is removed.

Thorp v. Raymond, (247) 923
3. But the right of entry would be barred if an adverse possession, including those ten years, had then continued twenty years; and the right of title would be barred, if the adverse possession had continued twenty-five years, including those ten years.

Id. (Ib.) 923
4. Cumulative disabilities are not allowed in the one case or in the other.

Id. (Ib.) 923
5. Therefore, where a right of entry accrued to a person who was in a state of insanity, the limitation did not begin to run until the death of that person; but began to run then, although the heir was under coverture.

Id. (Ib.) 923
6. A mortgagor and his heirs cannot avail themselves of a defect in the proceedings under which the mortgaged premises were sold, after the property had been adversely and quietly held for a long period (more than twenty years).

Slizer et al. v. Bank of Pittsburg, (571) 1063

LOUISIANA—15.

1. McDonogh, a citizen of Louisiana, made a will, in which, after bequeathing certain legacies not involved in the present controversy, he gave, willed and bequeathed all the rest, residue and remainder of his property to the corporations of the cities of New Orleans and Baltimore forever, one half to each, for the education of the poor in those cities.

McDonogh's Executors v. Murdock, (357) 732
2. The estate was to be converted into real property, and managed by six agents, three to be appointed by each city.

Id. (Ib.) 732
3. No alienation of this general estate was ever to take place, under penalty of forfeiture, when the States of Maryland and Louisiana were to become his residuary devisees for the purpose of educating the poor of those States.

Id. (Ib.) 732
4. Although there is a complexity in the plan by which the testator proposed to effect his purpose, yet his intention is clear to make the cities his legatees; and his directions about the agency are merely subsidiary to the general objects of his will, and whether legal and practicable, or otherwise, can exert no influence over the question of its validity.

Id. (Ib.) 732
5. The City of New Orleans, being a corporation established by law, has a right to receive a legacy for the purpose of exercising the powers which have been granted to it, and amongst these powers and duties is that of establishing public schools for gratuitous education.

Id. (Ib.) 732
6. The civil and English law upon this point compared.

The dispositions of the property in this will are not "substitutions, or *adeli commissas*," which are forbidden by the Louisiana Code.

Id. (Ib.) 732
7. The meaning of those terms explained and defined.

The testator was authorized to define the use and destination of his legacy.

Id. (Ib.) 732

HOWARD 18. 14, 15, 16.

8. The conditions annexed to this legacy, the prohibition to alienate or to divide the estate, or to separate in its management the interest of the cities, or their care and control, or to deviate from the testator's scheme, do not invalidate the bequest, because the Louisiana Code provides that "in all dispositions *inter vivos* and *mortis causa*, impossible conditions, those which are contrary to the laws or to morals, are reputed, not written."

Id.

(*Id.*) 732

9. The difference between the civil and common law, upon this point, examined:

The City of Baltimore is entitled and empowered to receive this legacy under the laws of Maryland; and the laws of Louisiana do not forbid it. The article in the Code of the latter State, which says that "Donations may be made in favor of a stranger, when the laws of his country do not prohibit similar dispositions in favor of a citizen of this State," does not, most probably, apply to the citizens or corporations of the States of the Union. Moreover, the laws of Maryland do not prohibit similar dispositions in favor of a citizen of Louisiana.

Id.

(*Id.*) 732

10. The destination of the legacy to public uses in the City of Baltimore, does not affect the valid operation of the bequest in Louisiana.

Id.

(*Id.*) 732

11. The cities of New Orleans and Baltimore, having the annuities charged upon their legacies, would be benefited by the invalidity of these legacies. Upon the question of their validity, this court expresses no opinion. But the parties to this suit, viz.: the heirs at law, could not claim them.

Id.

(*Id.*) 732

12. In case of the failure of the devise to the cities, the limitation over to the States of Maryland and Louisiana would have been operative.

Id.

(*Id.*) 732

MAINE, STATE OF—14.

See Constitutional Law.

MANDAMUS—14.

1. A rule will be refused for the Judges of the Circuit Court of the District of Columbia to show cause why a *mandamus* should not issue, unless a case is presented which *prima facie* requires the interposition of this court.

Ex-parte Taylor.

(3) 302

2. Such a case is not presented where the Circuit Court decided that, under an Act of Congress, an affidavit was sufficient to hold a party to special bail. That court had the power, by the Act, to exercise its judicial discretion.

Id.

(*Id.*) 302

3. This Act of Congress regulated the subject, and not the Statute of Maryland, passed in 1715.

Id.

(*Id.*) 302

4. Where there was a blank in the record of the Circuit Court in the taxation of the costs recovered by the plaintiff, and the judgment being affirmed by this court, a mandate with the same blank went down to the Circuit Court; and a motion was there made to open the original judgment for the purpose of taxing the costs, which motion was refused by the court, such refusal cannot be reached by a *mandamus* from this court.

Ex-parte Many.

(24) 311

5. The refusal of the court was not a ministerial act, but an exercise of judicial discretion. This court could issue a *mandamus* for the Circuit Court to proceed to judgment, but such a writ would not be appropriate to the present case.

Id.

(*Id.*) 311

MASTER AND SERVANT—14.

A master is liable for the tortious acts of his servant, when done in the course of his employment, although they may be done in disobedience of the master's orders.

P. & R. R. Co. v. Derby.

(468) 502

MISSISSIPPI—15.

See Statutes, Construction of.

MORTGAGE—18.

See Lien.

MORTGAGES—18.

1. Where there was a mortgage of land in the City of Pittsburgh, Pennsylvania, the mortgagee caused a writ of *scire facias* to be issued from the Court of Common Pleas, there being no chancery court in

U. S., Book 14.

that State. There was no regular judgment entered upon the docket, but a writ of *scire facias* was issued, under which the mortgaged property was tried upon and sold. The mortgagee, the Bank of Pittsburgh, became the purchaser.

2. This took place in 1820.

3. In 1831 the court ordered the record to be amended by entering up the judgment regularly, and by altering the date of the *scire facias*.

Slicer et al. v. Bank of Pittsburgh. (571) 1063

4. Although the judgment in 1831 was not regularly entered up, yet it was confessed before a prisonitary, who had power to take the confession. The docket upon which the judgment should have been regularly entered, being lost, and entry must be presumed to have been made.

Id.

(*Id.*) 1063

5. Moreover, the court had power to amend its record in 1831.

Id.

(*Id.*) 1063

Even if there had been no judgment, the mortgagee or his heirs could not have availed themselves of the defect in the proceedings, after the property had been adversely and quietly held for so long a time.

Id.

(*Id.*) 1063

7. The question examined whether a mortgagee of a leasehold interest, remaining out of possession, is liable upon the covenants of the lease. The English and American cases reviewed and compared with the decisions of this court, upon kindred points. But the court abstains from an express decision which is rendered unnecessary by the application of the principle first mentioned to the case in hand.

Calvert et al. v. Bradley et al.,

(580) 1066

NEW JERSEY—15.

The soil under the public navigable waters of East New Jersey belongs to the State and not to the proprietors. This court so decided in the case of *Martin v. Waddell*, 16 Peters, 367; and the principle covers a case where land has been reclaimed from the water under an Act of the Legislature.

Den v. Jersey Company,

(428) 757

NEW ORLEANS—15.

For McDonogh's Will, see "Wills."

NONSUIT—14.

The courts of the United States have not the power to order a nonsuit against the wishes of the plaintiff.

Silby v. Foote,

(219) 394

NONSUIT—16.

The consequences of a nonsuit examined.

Homer v. Brown,

(354) 970

NOTICE—16.

1. Where the language of the statute was "That public notice of the time and place of the sale of real property for taxes due to the corporation of the City of Washington shall be given by advertisement inserted in some newspaper published in said city, once in each week for at least twelve successive weeks," it must be advertised for twelve full weeks, or eighty-four days.

Early v. Doe,

(610) 1079

2. Therefore, where property was sold after being advertised for only eighty-two days, the sale was illegal, and conveyed no title.

Id.

(*Id.*) 1079

NUISANCE—13.

See Chancery.

ORPHANS' COURT—16.

Where an Orphans' Court had allowed a certain commission to an administrator, the correctness of that allowance cannot be reviewed collaterally by another court in which the administrator credited himself with the amount of such commission, in an account as trustee.

Barney v. Saunders et al.,

(585) 1047

PARTIES—16.

1. The rule is well established that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the

others; and a bill may also be maintained against a portion of a numerous body of defendants, representing a common interest.

Smith et al. v. Swornstedt et al., (288) 942

2. Where a lease was made by several owners of a house, reserving rent to each person in proportion to his interest, and there was a covenant on the part of the lessee that he would keep the premises in good repair and surrender them in like repair, this covenant was joint as respects the lessors, and one of them (or two representing one interest) cannot maintain an action for the breach of it by the lessee.

Calvert et al. v. Bradley et al., (580) 1066

PARTNERSHIP—13.

See Chancery.

PATENTS—14.

1. In a patent for improvements upon the machinery used for making pipes and tubes from lead or tin, when in a set or solid state, by forcing it, under great pressure, from out of a receiver, through apertures, dies and cores, the claim of the patentees was thus stated: "What we claim as our invention, and desire to secure by letters patent, is the combination of the following parts, above described, to wit: the core and bridge, or guidepiece, the chamber and the die, when used to form pipes of metal, under heat and pressure, in the manner set forth, or in any other manner substantially the same."

Le Roy v. Tatham, (156) 367

2. The Circuit Court charged the jury, "that the originality did not consist in the novelty of the machinery, but in bringing a newly discovered principle into practical application, by which an useful article of manufacture is produced, and wrought pipe made as distinguished from cast pipe."

Id. (Ib.) 367

3. This instruction was erroneous.

Id. (Ib.) 367

4. Under the claim of the patent, the combination of the machinery must be novel. The newly discovered principle, to wit: that lead could be forced, by extreme pressure, when in a set or solid state, to cohere and form a pipe, was not in the patent, and the question whether it was or was not the subject of a patent, was not in the case.

Id. (Ib.) 367

5. In 1834 Burden obtained a patent for a new and useful improvement in the machinery for manufacturing wrought nails and spikes, which he assigned to the Troy Iron and Nail Factory, and also covenanted that he would convey to that company any improvement which he might thereafter make.

Troy Iron and Nail Factory v. Corning, (193) 383

6. In 1840 he made such an improvement for making hook and brad-headed spikes, with a bending lever, which he assigned to the Troy Iron and Nail Factory in 1848.

Id. (Ib.) 383

7. Before this last assignment, however, viz.: in 1845, Burden made an agreement with Corning, Horner, and Winslow, in which, amongst other things, it was agreed that both parties might thereafter manufacture and vend spikes of such kind and character as they saw fit, notwithstanding their conflicting claims.

Id. (Ib.) 383

8. Owing to the peculiar attitude of the parties to each other at the time of making this agreement, and the language used in it, it cannot be construed into a permission to Corning, Horner, and Winslow, to use the improved machinery patented by Burden in 1840; and the right to use it, having passed to the Troy Iron and Nail Factory, a perpetual injunction upon Corning, Horner, and Winslow will be decreed.

Id. (Ib.) 383

9. Under a notice given by the defendant that the invention claimed by the plaintiff was described in Ure's Dictionary of Arts, Manufactures and Mines, and had been used by Andrew Ure, of London, it was not competent to give in evidence a very large book. The place in the book should have been specified.

Silby v. Fude, (219) 394

10. Nor, under the notice, was the book competent evidence that Andrew Ure, of London, had a prior knowledge of the thing patented. The notice does not state the place where the same was used.

Id. (Ib.) 394

11. One of the specifications of the patent being for a combination of certain parts of mechanism necessary to produce the desired result, it was proper for the court to instruct the jury that the defendants had not infringed the patent, unless they had used all the parts embraced in the plaintiff's combination; and the jury were to find what those parts were, and whether the defendants had used them.

Id. (Ib.) 394

12. When a claim does not point out and designate the particular elements which compose a combination, but only declares, as it properly may, that the combination is made up of so much of the described machinery as affects a particular result, it is a question of fact which of the described parts are essential to produce that result, and to this extent, not the construction of the claim, strictly speaking, but the application of the claim, should be left to the jury.

Id. (Ib.) 394

13. The patent for Woodworth's planing machine was extended from 1842 to 1843, by the Board of Commissioners.

Bloomer v. McQueen, (539) 539

14. Under that extension, this court decided, in *Wilson v. Rousseau*, 4 How., 668, that an assignee had a right to continue the use of the machine which he then had.

Id. (Ib.) 539

15. In 1845, Congress, by a special Act, extended the time still further from 1849 to 1856.

Id. (Ib.) 539

16. Under that extension, an assignee has still the same right.

Id. (Ib.) 539

17. By the cases of *Evans v. Eaton*, 3 Wheat., 454, and *Wilson v. Rousseau*, 4 How., 668, these two propositions are settled, viz.:

1. That a special Act of Congress in favor of a patentee, extending the time beyond that originally limited, must be considered as ingrafted on the general law.

2. That, under the general law in force when this special Act of Congress was passed, a party who had purchased the right to use a planing machine during the period to which the patent was first limited, was entitled to continue to use it during the extension authorized by that law, unless there is something in the law itself to forbid it.

Id. (Ib.) 539

18. But there is nothing in the Act of Congress, passed in 1845, forbidding such use; and therefore, the assignee has the right.

Id. (Ib.) 539

19. Where an action was brought against the Commissioner of Patents for refusing to give copies of papers in his office, and no special damage was set out in the declaration, evidence of the professional pursuits of the applicant was not admissible.

Bynden v. Burke, (576) 548

20. Where the application was made through a third person, letters of both parties to this third person were admissible in evidence, as part of the *res gesta*.

Id. (Ib.) 548

21. Patents are public records, and it is the duty of the Commissioner to give authenticated copies to any person, on payment of the legal fees.

Id. (Ib.) 548

22. But the party entitled to such service must request their performance in a proper manner, and not accompany his demand with insult and abuse.

Id. (Ib.) 548

23. Hence, the Commissioner could not be held responsible for refusing to comply with a demand couched in such language.

Id. (Ib.) 548

24. But when a second application was made, in a proper manner, the Commissioner ought to have complied with it.

Id. (Ib.) 548

PATENTS—16.

1. In 1834 McCormick obtained a patent for a reaping machine. This patent expired in 1848.

2. In 1845, he obtained a patent for an improvement upon his patented machine; and in 1847, another patent for new and useful improvements in the reaping machine. The principal one of these last was in giving to the rake of the grain a convenient seat upon the machine.

3. In a suit for a violation of the patent of 1847, it was erroneous in the Circuit Court to say that the defendant was responsible in damages to the

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same extent as if he had pirated the whole machine.

Seymour et al. v. McCormick, (480) 1024
4. It was also erroneous to lay down as a rule for the measure of damages, the amount of profits which the patentee would have made, if he had constructed and sold each one of the machines which the defendants constructed and sold. There was no evidence to show that the patentee could have constructed and sold any more than he actually did.

Id. (Ib.) 1024
5. The Acts of Congress and the rules for measuring damages, examined and explained.

Id. (Ib.) 1024

PATENTS FOR LAND—15.

1. In 1841 Congress passed an Act (5 Stat. at Large, 455), declaring that there shall be granted to each State, &c. (Louisiana being one), five hundred thousand acres of land.

Foley v. Harrison, (433) 761
2. This Act did not convey the fee to any lands whatever; but left the land system of the United States in full operation as to regulation of titles, so as to prevent conflicting entries.

Id. (Ib.) 761
3. Hence, where a plaintiff claimed under a patent from the State of Louisiana, and entries only in the United States office; and the defendant claimed under patents from the United States, the title of the latter is the better in a pendency action.

Id. (Ib.) 761
4. The defendant has also the superior equity; because his entries were prior in time to those of the plaintiff, and the decision of a board, consisting of the Secretary of the Treasury, the Attorney-General, and the Commissioner of the Land Office, to whom the matter had been referred by an Act of Congress, was in favor of the defendant.

Id. (Ib.) 761

PATENT RIGHTS—15.

1. Morse was the first and original inventor of the electro-magnetic telegraph, for which a patent was issued to him in 1840, and re-issued in 1848. His invention was prior to that of Steinheil, of Munich, or Wheatstone or Davy, of England.

O'Reilly et al. v. Morse et al., (63) 601
2. Their respective dates compared.

Id. (Ib.) 601
3. But even if one of these European inventors had preceded him for a short time, this circumstance would not have invalidated his patent. A previous discovery in a foreign country does not render a patent void, unless such discovery or some substantial part of it had been before patented or described in a printed publication. And these inventions are not shown to have been so.

Id. (Ib.) 601
4. Besides, there is a substantial and essential difference between Morse's and theirs; that of Morse being decidedly superior.

Id. (Ib.) 601
5. An inventor does not lose his right to a patent because he has made inquiries or sought information from other persons. If a combination of different elements be used, the inventors may confer with men as well as consult books to obtain this various knowledge.

Id. (Ib.) 601
6. There is nothing in the additional specifications in the re-issued patent of 1848, inconsistent with those of the patent of 1840.

Id. (Ib.) 601
7. The first seven inventions, set forth in the specifications of his claims, are not subject to exception. The eighth is too broad and covers too much ground. It is this: "I do not propose to limit myself to the specific machinery or parts of machinery described in the foregoing specifications and claims; the essence of my invention being the use of the motive power of the electric or galvanic current, which I call electro-magnetism, however developed, for making or printing intelligible characters, signs or letters, at any distances, being a new application of that power, of which I claim to be the first inventor or discoverer."

Id. (Ib.) 601
8. The case of *Neilson et al. v. Harford et al.*, in the English Exchequer Reports, examined; and also the American decisions. The Acts of Congress do not justify a claim so extensive.

Id. (Ib.) 601
9. But although the patent is illegal and void so far as respects the eighth claim, yet the patentee is
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within the Act of Congress, which gives him a right to disclaim, and thus save the portion to which he is entitled. No disclaimer having been entered before the institution of this suit, the patentee is not entitled to costs.

Id. (Ib.) 601

10. In 1846 Morse obtained a second patent for the local circuits, which was re-issued in 1848. It is no objection to this patent that it was embraced in the eighth claim of the former one, because that eighth claim was void. Nor is it an objection to it, that it was an improvement upon the former patent, because a patentee has a right to improve his own invention.

Id. (Ib.) 601

11. This new patent and its re-issue were properly issued. The improvement was new and not embraced in the former specification.

Id. (Ib.) 601

12. These two patents of 1848, being good with the exception of the eighth claim, are substantially infringed upon by O'Reilly's telegraph, which uses the same means both upon the main line and upon the local circuits.

Id. (Ib.) 601

13. The preceding case of O'Reilly v. Morse having settled the principles involved in the controversy between them, this court declines to hear an argument upon technical points of pleading in a branch of the case coming from another state.

Smith v. Ely, (137) 634

14. The case is remanded to the Circuit Court.

Id. (Ib.) 634

15. A machine for planing boards and reducing them to an equal thickness throughout, which was patented by Norcross, decided not to be an infringement of Woodworth's planing machine, for which a patent was obtained in 1823, re-issued in 1845.

Brooks et al. v. Wake, (212) 665

16. The operation of both machines explained.

Id. (Ib.) 665

17. In a suit brought for an infringement of a patent right, the defendant ought to be allowed to give in evidence the patent under which he claims, although junior to the plaintiff's patent.

Corning v. Burden, (252) 683

18. Burden's patent, for "a new and useful machine for rolling puddlers' balls and other masses of iron in the manufacture of iron," was a patent for a machine, and not a process, although the language of the claim was equivocal.

Id. (Ib.) 683

19. The difference explained between a process and a machine.

Id. (Ib.) 683

20. Hence, it was erroneous for the Circuit Court to exclude evidence offered to show that the practical manner of giving effect to the principle embodied in the machine of the defendants was different from that of Burden, the plaintiff; that the machine of the defendants produced a different mechanical result from the other; and that the mechanical structure and mechanical action of the two machines were different.

Id. (Ib.) 683

21. Evidence offered as to the opinion of the witness upon the construction of the patent, whether it was for a process or a machine, was properly rejected.

Id. (Ib.) 683

22. A patent was taken out for making the body of a burden railroad car of sheet iron, the upper part being cylindrical, and the lower part in the form of a frustum of a cone, the under edge of which has a flange secured upon it, to which flange a movable bottom is attached.

Wheats v. Denmead, (330) 717

23. The claim was this: "What I claim as my invention and desire to secure by letters patent, is, making the body of a car for the transportation of coal, &c., in the form of a frustum of a cone, substantially as herein described, whereby the force exerted by the weight of the load presses equally in all directions and does not tend to change the form thereof, so that every part resists its equal proportion, and by which also the lower part is so reduced as to pass down within the truck frame and between the axles, to lower the center of gravity of the load without diminishing the capacity of the car as described. I also claim extending the body of the car below the connecting pieces of the truck frame and the line of draught, by passing the connecting bars of the truck frame and the draught bar through the body of the car, substantially described."

Id. (Ib.) 717

24. This patent was not for merely changing the form of a machine, but by means of such change to introduce and employ other mechanical principles or natural powers, or a new mode of operation, and thus attain a new and useful result.

Winans v. Denmead, (330) 717

25. Hence, where, in a suit brought by the patentee against persons who had constructed octagonal and pyramidal cars, the District Judge ruled that the patent was good for conical bodies, but not for rectilinear bodies; this ruling was erroneous.

Id. (Ib.) 717

26. The structure, the mode of operation, and the result attained, were the same in both, and the specification claimed in the patent covered the rectilinear cars. With this explanation of the patent, it should have been left to the jury to decide the question of infringement as a question of fact.

Id. (Ib.) 717

27. Where the assignors of a patent right were joined with the assignee for a particular locality, in a bill for an injunction to restrain a defendant from the use of the machine patented, and the defendant raised, in this court, and after a final decree, an objection arising from a misjoinder of parties, the objection comes too late.

Livingston v. Woodworth, (516) 809

28. Moreover, in the present case, the parties consented to the decree under which the account in controversy was adjusted.

Id. (Ib.) 809

29. That consent having been given, however, to a decree by which an account should be taken of gains and profits, according to the prayer of the bill, the defendant was not precluded from objecting to the account upon the ground that it went beyond the order.

Id. (Ib.) 809

40. The report having been recommended to the master, with instructions to ascertain the amount of profits which might have been realized with due diligence, and the master having framed his report upon the theory of awarding damages, this report, and the order of the court confirming it, were both erroneous.

Id. (Ib.) 809

31. Under the circumstances of this case, the decree should have been for only the actual gains and profits during the time when the machine was in operation, and during no other period.

Id. (Ib.) 809

PAYMENT—14.

See evidence.

PENALTY—13.

1. The fourth section of the Act of Congress, approved on the 12th day of February, 1793 (1 Stat. at Large, 302), entitled "An Act respecting fugitives escaping from justice, and persons escaping from the service of their masters," is repealed, so far as relates to the penalty, by the Act of Congress approved September 18th, 1850 (9 Stat. at Large, 462), entitled "An Act to amend, and supplementary to, the above Act."

Norris v. Crocker, (429) 210

2. Therefore, where an action for the recovery of the penalty prescribed in the Act of 1793 was pending at the time of the repeal, such repeal is a bar to the action.

Id. (Ib.) 210

PENNSYLVANIA—14.

1. By the law of Pennsylvania the River Delaware is a public navigable river, held by its joint sovereigns in trust for the public.

Rundle v. Delaware & Raritan Canal Co., (80) 335

2. Riparian owners, in that State, have no title to the river, or any right to divert its waters, unless by license from the States.

Id. (Ib.) 335

3. Such license is revocable, and in subjection to the superior right of the State, to divert the water for public improvements, either by the State directly, or by a corporation created for that purpose.

Id. (Ib.) 335

4. The proviso to the Provincial Acts of Pennsylvania and New Jersey of 1771 does not operate as a grant of the usufruct of the waters of the river to Adam Hoops and his assigns, but only as a license or toleration of his dam.

Id. (Ib.) 335

5. As by the laws of his own State, the plaintiff could have no remedy against a corporation authorized to take the whole waters of the river for the purpose of canals, or improving the naviga-

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tion; so, neither can he sustain a suit against a corporation created by New Jersey for the same purpose, who have taken part of the waters.

Id. (Ib.) 335

6. The plaintiffs being but tenants at sufferance in the usufruct of the water to the two States who own the river as tenants in common, are not in a condition to question the relative rights of either to use these waters without consent of the other.

Id. (Ib.) 335

7. This case is not intended to decide whether a first license, for private emolument, can support an action against a later license of either sovereign, or both, who, for private purposes, diverts the water to the injury of the first.

Id. (Ib.) 335

PLANING MACHINE—15.

1. A machine for planing boards, and reducing them to an equal thickness throughout, which was patented by Norcross, decided not to be an infringement of Woodworth's planing machine, for which a patent was obtained in 1823, re-issued in 1845.

Brooks v. Fish, (212) 665

2. The operation of both machines explained.

Id. (Ib.) 665

PLEAS AND PLEADINGS—13.

1. Where a declaration contained two counts, one of which set out an injunction bond with the condition thereto annexed, and averred a breach, and the second count was merely for the debt in the penalty; and the pleas were all applicable to the first count, which was upon the trial stricken out by the plaintiff, and the court gave judgment upon the second count for want of a plea, this judgment was proper, and must be affirmed.

Hogan v. Rimes, (173) 100

2. By the eleventh section of the Judiciary Act (1 Stat. at Large, 78), no action can be brought in the federal courts upon a promissory note or other chose in action, by an assignee, unless the action could have been maintained, if there had been no assignment. But an indorsee may sue his own immediate indorser.

Coffee v. Planters' Bank, (183) 105

3. Hence, where an action was brought by an indorsee upon checks which had been indorsed from one person to another, in the same state, and some of the counts of the declaration traced the title through these indorsements, no recovery could have been had upon those points.

Id. (Ib.) 105

4. But the declaration also contained the common money counts; and upon the trial, these were the only counts which remained, all the rest having been stricken out. The suit against the maker, and also against all the indorsers, except one, had been discontinued.

Id. (Ib.) 105

5. The statute of a state where the trial took place authorized a suit upon such an instrument as if it were a joint and several contract.

Id. (Ib.) 105

6. The dismissal of the suit against all the indorsers, except one, and the striking out of all the counts against him, except the common money counts, freed the judgment against him from all objections; and therefore, when brought up for review upon a writ of error, it must be affirmed.

Id. (Ib.) 105

7. In Maryland, it is correct to take a cognizance of bail before two justices of the peace.

Morrell v. Hall, (212) 117

8. Where a *scire facias* was issued against special bail, who pleaded two pleas, to the first of which the plaintiff took issue, and demurred to the second; and the cause went to trial upon that state of the pleadings, without a joinder in demurrer, and the court gave a general judgment for the plaintiff, this was not error.

Id. (Ib.) 117

9. The refusal or omission to join in demurrer was a waiver of the plea demurred to.

Id. (Ib.) 117

10. In this case, if the plea had been before the court, it was bad; because, being a plea that the note was paid before the original judgment, it called upon the party to prove a second time what had been once settled by a judgment. The omission of the court to render a judgment upon the plea could not be assigned as error.

Id. (Ib.) 117

11. A judgment of a court upon a motion to enter an *exoneretur* of bail is not the proper subject of a writ of error.

Id. (Ib.) 117

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12. Where the covenant purported to be made between two persons by name, of the first part, and the corporate company, of the second part, and only one of the persons of the first part signed the instrument, and the covenant ran between the party of the first part and the party of the second part, it was proper for the person who had signed on the first part to sue alone; because the covenant inured to the benefit of those who were parties to it.

Philadelphia, Wilmington & Baltimore Railroad Company v. Howard,

(308) 157

PLEAS AND PLEADINGS—14.

1. Where the declaration, in an action of *assumpsit*, contained the following counts: 1. On a promissory note; 2. *Indehitatus assumpsit* for the hire of slaves; 3. An account stated; 4. *Quantum valebat* for the services of slaves; 5. Work and labor, goods sold and delivered, and money lent and advanced; 6. Money had and received; 7. An account stated; 8. A special agreement for the hire of slaves: And the defendant pleaded, 1. The general issue; 2. Statute of Limitations; 3. Payment; and the jury found a verdict for "the defendant upon the issue joined as to the within note of \$450, and the within account"—this verdict, although informal, was sufficient to authorize to enter a general judgment for the defendant.

Dunne v. Hicks,

(240) 404

2. In Texas, the technical forms of pleading, fixed by the common law, are dispensed with, but the principles which regulate the merits of a trial by effectment and the substance of a plea of title to such an action, are preserved.

Chisley v. Scott,

(282) 429

3. Therefore, where the plaintiff filed a petition alleging that he was seised in his demesne as of fee of land from which the defendant had ejected him, and the defendant pleaded, that if the plaintiff had any paper title, it was under a certain grant which was not valid, this plea was bad.

Id.

(Ib.) 429

4. So, also, was a plea denying the right of the plaintiff to receive his title, because he was not then a citizen of Texas. These pleas would have been appropriate objections to the plaintiff's title when produced upon the trial.

Id.

(Ib.) 429

5. So, also, where, under a plea of the Statute of Limitations, the defendant claimed certain lands by metes and bounds, and disclaimed a not included within them. There is nothing to show that the land so included was a part of the land claimed by the plaintiff.

6. So, also, where the plea was in substance that the plaintiff had no good title against Texas, no title in the defendant being shown. For the action may have been maintainable, although the true title was not in the plaintiff.

Id.

(Ib.) 429

7. Where a *scire facias* was issued to enforce a lien upon a house under the Lien Law of the District of Columbia, there was no necessity to file a declaration.

Winder v. Caldwell,

(434) 487

8. It is a bad mode of pleading to unite pleas in abatement, and pleas to the merits. And if, after pleas in abatement, a defense be interposed, going to the merits of the controversy, the grounds alleged in abatement become thereby immaterial and are waived.

Sheppard v. Graves,

(506) 518

9. When a plea is filed to the jurisdiction of the court, upon the ground that the plaintiff is a resident of the same state with the defendant, it is incumbent on the defendant to prove the allegation.

Id.

(Ib.) 518

10. It is of no consequence whether the date of a promissory note be at the beginning or end of it.

Id.

(Ib.) 518

11. In this case, as in the preceding, it is decided that where the plaintiff averred enough to show the jurisdiction of the court, and the defendant pleaded in abatement that the plaintiff was disabled from bringing the suit on account of residence, it was incumbent upon the defendant to sustain the allegation by proof.

Same v. Same,

(512) 521

12. Until that was done, it was not necessary for the plaintiff to offer any evidence upon the subject.

Id.

(Ib.) 521

13. Where the marshal of the District of Wisconsin attached property at the suit of creditors in New York, and then gave it up upon the execution

of a bond to himself, for the use of those creditors, it was within the jurisdiction of the District Court of the United States for Wisconsin, to entertain a suit by the marshal, suing upon the bond for the New York creditors, against the claimants in Wisconsin, although both parties resided in the same State.

Huff v. Hutchinson,

(585) 553

14. The name of the marshal was merely formal; the real plaintiffs were averred to be citizens of New York.

Id.

(Ib.) 553

15. It was not a good exception upon the ground of variation between the evidence and declaration, that the latter stated the bond to have been given to Hutchinson as marshal of the District of Wisconsin, and the former said the State of Wisconsin. They mean the same thing.

Id.

(Ib.) 553

16. Judgment having been rendered for the plaintiffs in the attachment, by a court having jurisdiction over the subject, it was too late to object to those proceedings in a suit upon the bond, in which they were collaterally introduced.

Id.

(Ib.) 553

17. The bond given to the marshal was in conformity with the statute.

Id.

(Ib.) 553

18. The objections, that the declaration on the bond did not show the jurisdiction of the court in the attachment suit; that the verdict was entered for the amount due instead of the penalty of the bond, and that the recovery was for a sum greater than was claimed by the *ad damnum* in the declaration, were not sufficient for a new trial.

Id.

(Ib.) 553

PLEAS AND PLEADINGS—15.

1. Where a clerk of a court was sued upon his official bond, and the breach alleged was, that he had surrendered certain goods without taking a bond with good and sufficient securities, and the plea was, that the bond which had been taken was assigned to the plaintiffs, who had brought suit, and received large sums of money in discharge of the bond—this plea was sufficient, and a demurrer to it was properly overruled.

Betins v. Ramsey,

(179) 652

2. Where a citizen of New Jersey was sued in a state court in New York, and filed his petition to remove the case into the Circuit Court of the United States, offering a bond with surety, the amount claimed in the declaration being one thousand dollars, it became the duty of the state court to accept the surety, and proceed no further in the cause.

Kanouse v. Martin,

(198) 660

3. Consequently, it was erroneous to allow the plaintiff to amend the record, and reduce his claim to four hundred and ninety-nine dollars.

Id.

(Ib.) 660

4. The case having gone on to judgment, and been carried by writ of error to the Superior Court, without the petition for removal into the Circuit Court of the United States, it was the duty of the Superior Court to go behind the technical record, and inquire whether or not the judgment of the court below was erroneous.

Id.

(Ib.) 660

5. The defendant was not bound to plead to the jurisdiction of the court below; such a step would have been inconsistent with his right, that all proceedings should cease when his petition for removal was filed.

Id.

(Ib.) 660

6. The Superior Court being the highest court to which the case could be carried, a writ of error lies to examine its judgment, under the 25th section of the Judiciary Act.

Id.

(Ib.) 660

7. Prescription cannot be pleaded, where the assignor of the party who offers to plead it was a lessor, and had not regained possession, by a judicial proceeding, of the property which had been previously leased.

Anderson v. Beck,

(323) 714

8. A Statute of Mississippi, passed in 1846, declares that no record of any judgment recovered in a foreign court against a citizen of that State, shall be received as evidence after the expiration of three years from the time of the rendition of such judgment, without the limits of the State.

Murray v. Gibson,

(421) 755

9. This Statute has no application to judgments rendered before its passage. Hence, where it was pleaded as a defense in a suit brought upon a judg-

ment recovered in Louisiana, in 1844, the plea was bad and a demurrer to it sustained.

Murray v. Gibson, (421) 755

PLEAS AND PLEADING—16.

1. Where a bill in chancery was filed by a legatee against the person who had married the daughter and residuary devisee of the testator (there having been no administration in the United States upon the estate), this daughter, or her representatives, if she were dead, ought to have been a party defendant.

Lewis v. Darling, (1) 819

2. But if the complainant appears to be entitled to relief, the court will allow the bill to be amended, and even if it be an appeal, will remand the case for this purpose.

Id. (Ib.) 819

3. Where the will by construction shows an intention to charge the real estate with the payment of a legacy, it is not necessary to aver in the bill a deficiency of personal assets.

Id. (Ib.) 819

4. It is not necessary that the bill of exceptions should be formally drawn and signed before the trial is at an end. But the exception must be noted then, and must purport on its face, so to have been, although signed afterwards *nunc pro tunc*.

Turner et al. v. Yates, (14) 824

5. A declaration was sufficient which averred that "at a general term of the Supreme Court in Equity for the State of New York," &c., &c. Being thus averred to be a court of general jurisdiction, no averment was necessary that the subject matter in question was within its jurisdiction. And the courts of the United States will take notice of the judicial decisions in the several States in the same manner as the courts of those States.

Pennington v. Gibson, (65) 847

6. Under the twenty-second section of the Judiciary Act of 1789, this court cannot reverse the judgment of the court below, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court.

Piquinut v. Pennsylvania Railroad Company, (104) 863

7. In Pennsylvania it is not usual to make a record of the judgment in any legal form. But there is no necessity that the courts of the United States should follow such careless precedents.

Id. (Ib.) 863

8. Where a suit was brought in which the plaintiff was described as a citizen of France, against the Pennsylvania Railroad Company, without any averments that the defendants were a corporation under the laws of Pennsylvania, or that the place of business of the corporation was there, or that its corporators, managers or directors, were citizens of Pennsylvania, the absence of such an averment was fatal to the jurisdiction of the court.

Id. (Ib.) 863

9. By the laws of Alabama, where property is taken in execution, if the sheriff does not make the money, the plaintiff is allowed to suggest to the court that the money might have been made with due diligence, and thereupon the court is directed to frame an issue in order to try the fact.

Chapman v. Smith, (114) 868

10. In a suit upon a sheriff's bond, where the plea was that this proceeding had been resorted to by the plaintiff and a verdict found for the sheriff, a replication to this plea alleging that the property in question in that trial was not the same property mentioned in the breach assigned in the declaration, was a bad replication and demurrable.

Id. (Ib.) 868

11. Where the sheriff pleaded that the property which he had taken in execution was not the property of the defendant, against whom he had process, and the plaintiff demurred to this plea, the demurrer was properly overruled.

Id. (Ib.) 868

12. Where there is a special contract between principal and agent, by which the entire compensation is regulated and made contingent, there can be no recovery on a count for *quantum meruit*.

Marshall v. The Baltimore and Ohio Railroad Company, (314) 953

13. A judgment of *nunc pro tunc* given by a state court in a case between the same parties, for the same property, was not a sufficient plea in bar to prevent a recovery under the writ of right; nor was the agreement of the plaintiff to submit his case to that court upon a statement of facts, sufficient to prevent his recovery in the Circuit Court.

Homer v. Brown, (364) 970

14. The consequences of a nonsuit examined.

Id. (Ib.) 970

15. Where a lease was made by several owners of a house, reserving rent to each one in proportion to his interest, and there was a covenant on the part of the lessee that he would keep the premises in good repair, and surrender them in like repair, this covenant was joint as respects the lessors, and one of them (or two representing one interest), cannot maintain an action for the breach of it by the lessee.

Calvert et al. v. Bradley et al., (580) 1066

16. The eleventh section of the Judiciary Act of 1789 says, "nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange."

17. This clause has no application to the case of a suit by the assignee of a chose in action to recover possession of the thing in specie, or damages for its wrongful caption or detention.

Deshler v. Dodge, (622) 1084

18. Therefore, where an assignee of a package of bank notes brought an action of replevin for the package, the action can be maintained in the Circuit Court, although the assignor could not himself have sued in that court.

Id. (Ib.) 1084

POSTMASTER'S BOND—13.

See Bond.

POWER OF ATTORNEY—13.

See Contract and Assignment.

PRACTICE—13.

1. Where the only exceptions taken in the court below were to the refusals of the court to continue the case to the next term; and it appears that the continuance asked for below and the suing out the writ of error were only for the purpose of delaying the payment of a just debt, and no counsel appeared in this court on that side, the 17th rule will be applied and the judgment of the court below be affirmed with ten per cent. interest.

Barrow v. Hill, (54) 43

2. In some of the States, it is the practice for the court to express its opinion upon facts, in a charge to the jury. In these States, it is not improper for the Circuit Court of the United States to allow the same practice.

Mitchell v. Harmony, (115) 75

3. Where a defendant in error or an appellee wishes to have a case dismissed because no citation has been served upon him, his counsel should give notice of the motion when his appearance is entered, or at the same term; and also that his appearance is entered for that purpose. A general appearance is a waiver of the want of notice.

Buckingham v. McLean, (150) 91

4. An appeal in equity brings up all the matters which were decided in the Circuit Court to the prejudice of the appellant; including a prior decree of that court from which an appeal was then taken, but which appeal was dismissed under the rules of this court.

Id. (Ib.) 91

5. In a trial in Louisiana, where the judge tried the whole case without the intervention of a jury, a bill of exceptions to the admission of testimony by the judge, cannot be sustained in this court.

Weems v. George, (190) 103

6. In Maryland, it is correct to take a recognition of bail before two justices of the peace.

Morrell v. Hall, (212) 117

7. Where a *scire facias* was issued against special bail, who pleaded two pleas, to the first of which the plaintiff took issue, and demurred to the second; and the cause went to trial upon that state of the pleadings without a joinder in demurrer; and the court gave a general judgment for the plaintiff; this was not error.

Id. (Ib.) 117

8. The refusal or omission to join a demurrer was a waiver of the plea demurred to.

Id. (Ib.) 117

9. In this case, if the plea had been before the court, it was bad; because, being a plea that the note was paid before the original judgment, it called upon the party to prove a second time what had been once settled by a judgment. The omission of the court to render a judgment upon the plea could not be assigned as error.

Id. (Ib.) 117

HOWARD 13, 14, 15, 16.

10. A judgment of a court upon a motion to enter an *exoneretur* of bail is not the proper subject of a writ of error.

Id. (1b.) 117

11. Where an action of trespass *quare clausum fregit* was brought, and the defendants justified, and the court allowed the defendants, upon the trial, to open and close the argument, this ruling of the court is not a proper subject for a bill of exceptions.

Day v. Woodworth, (363) 181

PRACTICE—14.

1. An appeal will not lie to this court from a refusal of the court below to open a prior decree and grant a rehearing. The decision of this point rests entirely in the sound discretion of the court below.

Wylie v. Cox, (1) 301

2. The case of *Brockett v. Brockett*, 2 How., 240, explained.

Id. (1b.) 301

3. Two appeals having been taken, one from the original decree, and the other from the refusal to open it, the latter must be dismissed, and the case stand for hearing upon the first appeal.

Id. (1b.) 301

4. A motion for a mandate upon the court below, to carry the decree into execution, overruled.

Id. (1b.) 301

5. A rule will be refused for the judge of the Circuit Court of the District of Columbia, to show cause why a *mandamus* should not issue, unless a case is presented which *prima facie* requires the interposition of this court.

Ex-parte Taylor, (3) 302

6. Such a case is not presented where the Circuit Court decided that, under an Act of Congress, an affidavit was sufficient to hold a party to special bail. That court had the power, by the Act, to exercise its judicial discretion.

Id. (1b.) 302

7. This Act of Congress regulated the subject, and not the Statute of Maryland, passed in 1715.

Id. (1b.) 302

8. Where a motion was made, under the 12th section of the Judiciary Act, to remove a cause from a state court to the Circuit Court of the United States, notwithstanding which the state court retained cognizance of the case, and it was ultimately brought to this court under the 25th section of the Judiciary Act, a motion to dismiss it for want of jurisdiction cannot be sustained. The question will remain to be decided upon the full hearing of the case.

Kanouse v. Martin, (23) 310

9. Where there was a blank in the record of the Circuit Court, in the taxation of costs recovered by the plaintiff, and the judgment being affirmed by this court, a mandate with the same blank went down to the Circuit Court; and a motion was there made to open the original judgment for the purpose of taxing the costs, which motion was refused by the court, such a refusal cannot be reached by a *mandamus* from this court.

Ex-parte Manly, (24) 310

10. The refusal of the court was not a ministerial act, but an exercise of judicial discretion. This court could issue a *mandamus* for the Circuit Court to proceed to judgment, but such a writ would not be appropriate to the present case.

Id. (1b.) 310

11. A re-argument of a case decided by this court will not be granted, unless a member of the court, who concurred in the judgment desires it; and when that is the case, it will be ordered without waiting for the application of counsel.

Brown v. Asplen, (25) 311

12. And this is so, whether the decree of the court below was affirmed by an equally divided court or a majority; or whether the case is one at common law or chancery.

Id. (1b.) 311

13. The rules of the English Court of Chancery have not been adopted by this court. Those which are applicable to a court of original jurisdiction, are not appropriate to an appellate court.

Id. (1b.) 311

14. Upon a trial in New York, a juror became ill, and was discharged before any evidence was given, and before the plaintiff's counsel had concluded his opening address. The court ordered another juror to be sworn, and proceeded with the trial. The defendant cannot object to this. It is the prac-

tice in New York, and the Circuit Court had a right to follow it.

Sibley v. Foote,

(218) 394

15. The court having erroneously refused to allow the plaintiff to offer a paper in evidence, as a disclaimer of part of a patent, afterwards refused to allow the defendants to offer the same paper in evidence for the purpose of prejudicing the plaintiff's rights. This last refusal was correct. The reason given was erroneous; but this is not a sufficient cause for reversing the judgment.

Id. (1b.) 394

16. The courts of the United States have not the power to order a nonsuit against the wishes of the plaintiff.

Id. (1b.) 394

17. Where the declaration, in action of *assumpsit*, contained the following counts: 1. On a promissory notes; 2. *Indebitatus assumpsit* for the hire of slaves; 3. An account stated; 4. *Quantum valebat* for the services of slaves; 5. Work and labor, goods sold and delivered, and money lent and advanced; 6. Money had and received; 7. An account stated; 8. A special agreement for the hire of slaves: And the defendant pleaded, 1. The general issue; 2. Statute of Limitations; 3. Payment; and the jury found a verdict for "the defendant upon the issue joined as to the within note of four hundred and fifty-six dollars, and the within account"—this verdict, although informal, was sufficient to authorize to enter a general judgment for the defendant.

Downey v. Hicks, (240) 404

18. An objection cannot be made in this court to a release under which a witness was sworn, unless the objection was made in the court below, and an exception taken.

Id. (1b.) 404

19. The sixty-second rule of this court (13 Howard) is as follows: "In cases where a writ of error is prosecuted to the Supreme Court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied from the date of the judgment below, until the same is paid, at the same rate that similar judgments bear interest, in the courts of the state where such judgment is rendered. The same rule shall be applied to decrees for the payment of money, in cases in chancery, unless otherwise ordered by this court. This rule to take effect on the 1st day of December Term, 1852."

Perkins v. Foraniquet, (228) 441

20. Before this rule, interest was to be calculated at six per cent. from the date of the judgment in the Circuit Court to the day of affirmance here; and the confirmation of the report of the clerk, in the case of *Mitchell v. Harmony*, 13 Howard, 149, was under the rules then existing.

Id. (1b.) 441

21. So, also, where a case from Mississippi was affirmed, at December Term, 1851, the mandate from this court should have been construed to allow interest at six per cent. from the date of the decree in the court below, to the date of the affirmance in this court. Therefore, it was erroneous either to allow six per cent. until paid, or to allow the current rate of interest in Mississippi, in addition to the six per cent. allowed by this court.

Id. (1b.) 441

22. The several rules upon this subject examined and explained.

Id. (1b.) 441

23. A statute of Mississippi directs that where the defendant cannot be found, a writ of *capias ad respondendum* shall be served, by leaving a copy thereof with the wife of the defendant, or some free white person above the age of sixteen years, then and there being one of the family of the defendant, and found at his usual place of abode, or leaving a copy thereof at some public place, at the dwelling house or other known place of residence of such defendant, he being from home, and no such free white person being found there willing to receive the same.

Harris v. Hardeman, (334) 444

24. The Circuit Court of the United States adopted a rule that the *capias* should be served personally, or, if the defendant be not found, by leaving a copy thereof at his or her residence, or usual place of abode, at least twenty days before the return day thereof.

Id. (1b.) 444

25. The marshal made the following return to a writ of *capias*: "Executed on the defendant Hardeman, by leaving a true copy at his residence."

Id. (1b.) 444

26. This service was neither in conformity with the statute nor the rule.

Id.

(*Ib.*) 444

27. Therefore, when the court gave judgment, by default, against Hardeman, and an execution was issued, upon which a forthcoming bond was given, and another execution issued, and at a subsequent day the court quashed the proceedings, and set aside the judgment by default, this order was correct.

Id.

(*Ib.*) 444

28. When the judgment by default was given, the court was not in a condition to exercise jurisdiction over the defendant, because there was no regular service of process, actual or constructive.

Id.

(*Ib.*) 444

29. The cases upon this point, examined.

Id.

(*Ib.*) 444

30. Moreover, when the proceedings were quashed, they were still *in fieri*, and not terminated; and any irregularity could be corrected, on motion.

Id.

(*Ib.*) 444

31. A sale of land by a marshal, on a *venditioni exponas*, after he is removed from office, and a new marshal appointed and qualified, is not void.

Do-ittle v. Bryan,

(563) 543

32. Such a sale being returned to the court, and confirmed by it on motion, and a deed ordered to be made to the purchaser at the sale, by the new marshal, such sale, being made, is valid.

Id.

(*Ib.*) 543

PRACTICE—15.

See Appeal and Chancery.

1. The preceding case of O'Reilly and Morse having settled the principles involved in the controversy between them, this court declines to hear an argument upon technical points of pleading in a branch of the case coming from another state.

Smith v. Ely,

(137) 634

2. The case is remanded to the Circuit Court.

Id.

(*Ib.*) 634

3. In order to make a bill of exceptions valid, it must appear by the transcript not only that the instructions were given or refused at the trial, but also that the party who complains of them excepted to them while the jury were at the bar.

Phelps v. Moyer,

(160) 643

4. The bill of exceptions need not be drawn out in form and signed before the jury retire; but it must be taken in open court, and must appear by the certificate of the judge who authenticates it, to have been so taken.

Id.

(*Ib.*) 643

5. Hence, when the verdict was rendered on the 18th December, and on the next day the plaintiff came into court and filed his exception, it is not properly before this court. And no error being assigned or appearing in the other proceedings, the judgment of the Circuit Court must be affirmed, with costs.

Id.

(*Ib.*) 643

6. Three judgments were entered up against a debtor on the same day.

Rockhill v. Hanna,

(189) 656

7. One of the creditors issued a *captas ad satisfaciendum* in February, and the other two issued writs of *fieri facias* upon same the same day, in the ensuing month of March.

Id.

(*Ib.*) 656

8. Under the *ca. sa.* the defendant was taken and imprisoned, until discharged by due process of law. The plaintiff then obtained leave to issue a *f. fa.*, which was levied upon the land previously levied upon. The marshal sold the property under all the writs.

Id.

(*Ib.*) 656

9. The executions of the first *f. fa.* creditors are entitled to be first satisfied out of the proceeds of sale.

Id.

(*Ib.*) 656

10. Each creditor having elected a different remedy, is entitled to a precedence in that which he has elected.

Id.

(*Ib.*) 656

11. Besides, the *ca. sa.* creditor, by imprisoning the debtor, postponed his lien, because it may happen, under certain circumstances, that the judgment is forever extinguished. If there do not happen, his lien is not restored as against creditors who have obtained a precedence during such suspension.

Id.

(*Ib.*) 656

12. The Circuit Court having instructed the jury that, in its opinion, and the written proofs and law of the case, the plea of prescription must pre-

vail, and the written proofs not being in the record, this court cannot test the accuracy of its conclusion.

Anderson v. Bock,

(323) 714

13. Where the assignors of a patent right were joined with the assignee for a particular locality, in a bill for an injunction to restrain a defendant from the use of the machine patented, and the defendant raised in this court, and after a final decree, an objection arising from a misjoinder of parties, the objection comes too late.

Livingston v. Woodworth,

(546) 809

PRACTICE—16.

1. Where a case in equity was referred to a master, which came again before the court upon exceptions to the master's report, the court had a right to change its opinion from that which it had expressed upon the interlocutory order, and to dismiss the bill. All previous interlocutory orders were open for revision.

Fourquet v. Perkins,

(32) 854

2. The decree of dismissal was right in itself, because it conformed to a decision of this court in a branch of the same case, which decision was given in the interval between the interlocutory order and final decree of the Circuit Court.

Id.

(*Ib.*) 854

3. Where a judgment in a patent case was affirmed by this court with a blank in the record for costs, and the Circuit Court afterwards taxed these costs at a sum less than \$2,000, and allowed a writ of error to this court, this writ must be dismissed on motion.

Sizer v. Marcy,

(36) 861

4. The writ of error brings up only the proceedings subsequent to the mandate; and there is no jurisdiction where the amount is less than \$2,000, either under the general law or the discretion allowed by the patent law. The latter only relates to cases which involve the construction of the patent laws and the claims and rights of patentees under them.

Id.

(*Ib.*) 861

5. As a matter of practice this court decides, that it is proper for circuit courts to allow costs to be taxed, *nunc pro tunc*, after the receipt of the mandate from this court.

Id.

(*Ib.*) 861

6. Where an appeal was taken from a decree in chancery, which decree was made by the court below during the sitting of this court in term time, the appellant is allowed until the next term to file the record; and a motion to dismiss the appeal, made at the present term, before the case has been regularly entered upon the docket, cannot be entertained, nor can a motion to award a *procedendo*.

Stafford v. Union Bank of Louisiana,

(135) 876

7. This court, however, having a knowledge of the case, will express its views upon an important point of practice.

Id.

(*Ib.*) 876

8. Where the appeal is intended to operate a *superedeas*, the security given in the appeal bond must be equal to the amount of the decree, as it is in the case of a judgment at common law.

Id.

(*Ib.*) 876

9. The two facts, namely: first, that the receiver appointed by the court below had given bond to a large amount; and second, that the persons to whom the property had been hired, had given security for its safe keeping and delivery, do not affect the above result.

Id.

(*Ib.*) 876

10. The security must, notwithstanding, be equal to the amount of the decree.

Id.

(*Ib.*) 876

11. A mode of relief suggested.

Id.

(*Ib.*) 876

12. 1. Where the judgment is not properly described in the writ of error;

13. 2. Where the bond is given to a person who is not a party to the judgment;

14. 3. Where the citation issued, is issued to a person who is not a party; the writ of error will be dismissed on motion.

Davenport v. Fletcher,

(143) 880

15. In order to act as a *superedeas* upon a decree in chancery, the appeal bond must be filed within ten days after the rendition of the decree. In the present case, where the bond was not filed in time, a motion for a *superedeas* is not sustained by sufficient reasons, and consequently must be overruled.

Adams v. Law,

(144) 880

16. So, also, a motion is overruled to dismiss the appeal, upon the ground that the real parties in

the case, were not made parties to the appeal. The error is a mere clerical omission of certain words. (Ib.) 880

17. Where there was a mortgage of land to the City of Pittsburgh, Pennsylvania, the mortgagee caused a writ of *scire facias* to be issued from the Court of Common Pleas, there being no chancery court in that State. There was no regular judgment entered upon the docket, but a writ of *levari facias* was issued, under which the mortgaged property was levied upon and sold. The mortgagee, the Bank of Pittsburgh, became the purchaser.

18. This took place in 1820.

19. In 1836, the court ordered the record to be amended by entering up the judgment regularly, and by altering the date of the *scire facias*.

20. Although the judgment in 1820 was not regularly entered up, yet it was confessed before a prothonotary, who had power to take the confession. The docket upon which the judgment should have been regularly entered, being lost, the entry must be presumed to have been made.

Sheer et al. v. Bank of Pittsburgh, (571) 1063

21. Moreover, the court had power to amend its record in 1836. (Ib.) 1063

22. Upon an appeal from the District Court of the United States for the Northern District of California, where it did not appear, from the proceedings, whether the land claimed was within the Northern or Southern District, this court will reverse the judgment of the District Court, and remand the case, for the purpose of making its jurisdiction apparent (if it should have any), and of correcting any other matter of form or substance which may be necessary.

Cervantes v. United States, (619) 1083

RAILROADS—14.

1. Where a suit was brought against a railroad company, by a person who was injured by a collision, it was correct in the court to instruct the jury, that if the plaintiff was lawfully on the road at the time of the collision, and the collision and consequent injury to him were caused by the gross negligence of one of the servants of the defendants, then and there employed on the road, he was entitled to recover, notwithstanding the circumstances that the plaintiff was a stockholder in the company, riding by invitation of the president, paying no fare, and not in the usual passenger cars.

P. & R. R. Co. v. Derby, (468) 503

2. And also, that the fact that the engineer having the control of the colliding locomotive, was forbidden to run on that track at the time, and had acted in disobedience of such orders, was no defense to the action. (Ib.) 503

3. A master is liable for the tortious acts of his servant, when done in the course of his employment, although they may be done in disobedience of the masters orders. (Ib.) 503

RAILROADS—15.

1. A patent was taken out for making the body of a burden railroad car of sheet iron, the upper part being cylindrical, and the lower part in the form of a frustum of a cone, the under edge of which has a flange secured upon it, to which flange a movable bottom is attached.

Winans v. Denmead, (380) 717

2. The claim was this: "What I claim as my invention, and desire to secure by letters patent, is, making the body of a car for the transportation of coal, &c., in the form of a frustum of a cone, substantially as herein described, whereby the force exerted by the weight of the load presses equally in all directions, and does not tend to change the form thereof, so that every part resists its equal proportion, and by which, also, the lower part is so reduced as to pass down within the truck frame and between the axles, to lower the center of gravity of the load, without diminishing the capacity of the car, as described. I also claim extending the body of the car below the connecting pieces of the truck frame and the line of draught, by passing the connecting bars of the truck frame and the draught bar, through the body of the car substantially described."

3. This patent was not for merely changing the form of a machine, but by means of such change to introduce and employ other mechanical principles or natural powers, or a new mode of operation, and thus attain a new and useful result. (Ib.) 717

4. Hence, where, in a suit brought by the patentee against persons who had constructed octagonal and pyramidal cars, the District Judge ruled that the patent was good for conical bodies, but not for rectilinear bodies; this ruling was erroneous. (Ib.) 717

5. The structure, the mode of operation, and the result attained, were the same in both, and the specification claimed in the patent covered the rectilinear cars. With this explanation of the patent, it should have been left to the jury to decide the question of infringement as a question of fact. (Ib.) 717

RELEASES—14.

Releases given by the complainant, in the present case, decided to cover the matters in controversy, and therefore, to put an end to all claim by them; inasmuch as there is no proof that they were obtained by fraud or circumvention.

Perkins v. Fourniquet, (313) 435

REPLEVIN—14.

See Commercial Law.

SET-OFF—14.

See Evidence.

SHIP OR VESSELS, COLLISION OF—14.

See Admiralty.

SLAVES, FUGITIVE—14.

See Constitutional Law.

STATUTE OF FRAUDS—14.

See Frauds.

STATUTES, CONSTRUCTION OF—13.

1. The fourth section of the Act of Congress, approved on the 12th day of February, 1793 (1 Stat. at Large, 302), entitled "An Act respecting fugitives escaping from justice, and persons escaping from the service of their masters," is repealed, so far as relates to the penalty, by the Act of Congress approved September 18th, 1850 (9 Stat. at Large, 463), entitled, "An Act to amend, and supplementaty to, the above Act."

Norris v. Crocker, (429) 210

2. Therefore, where an action for the recovery of the penalty prescribed in the Act of 1793 was pending at the time of the repeal, such repeal is a bar to the action. (Ib.) 210

STATUTES, CONSTRUCTION OF—15.

1. A Statute of Mississippi, passed in 1846, declares that no record of any judgment recovered in a foreign court against a citizen of that State, shall be received as evidence after the expiration of three years from the time of the rendition of such judgment, without the limits of the State.

Murray v. Gibson, (421) 755

2. This Statute has no application to judgments rendered before its passage. Hence, where it was pleaded as a defense in a suit brought upon a judgment recovered in Louisiana, in 1844, the plea was bad and a demurrer to it sustained. (Ib.) 755

SURETIES—15.

1. The Act of Congress, passed on 2d March, 1799 (1 Stat. at Large, 705), requires the bond given by a collector of the customs to be approved by the Comptroller of the Treasury.

Broome v. United States, (143) 636

2. But the date of such approval is not conclusive evidence of the commencement of the period when the bond began to run. On the contrary, it begins to be effective from the moment when the collector and his sureties part with it in the course of transmission. (Ib.) 636

3. Hence, where the surety upon the bond of a collector in Florida, died upon the 24th of July, and the approval of the Comptroller was not written upon the bond until the 31st of July, it was properly left to the jury to ascertain the time when the collector and his sureties parted with the bond to be sent to Washington; and they were instructed that, before they could find a verdict for the surety, they must be satisfied from the evidence that the

bond remained in the hands of the collector, or the sureties, until after the 24th of July.

Byrnie v. United States, (143) 636

4. Collectors are often disbursing officers; and they and their sureties are responsible for the money which a collector receives from his predecessor in office; and also for money transmitted to him by another collector upon his representation and requisition that it was necessary to defray the current expenses of his office, and advanced for that purpose.

Id. (Ib.) 636

SURETIES—16.

1. A bond, with sureties, was executed for the purpose of securing the repayment of certain money advanced for putting up and shipping bacon. William Turner was to have the management of the affair, and Harvey Turner was to be his agent.

Turner v. Yates, (14) 824

2. After the money was advanced, Harvey made a consignment of meat, and drew upon it. Whether or not this draft was drawn specially against this consignment was a point which was properly decided by the court from an interpretation of the written papers in the case.

Id. (Ib.) 824

3. It was also correct to instruct the jury that if they believed, from the evidence, that Harvey was acting in this instance either upon his own account, or as the agent of William, then the special draft drawn upon the consignment was first to be met out of the proceeds of sale, and the sureties upon the bond to be credited only with their proportion of the residue.

Id. (Ib.) 824

4. The consignor had a right to draw upon the consignment with the consent of the consignee, unless restrained by some contract with the sureties, of which there was no evidence. On the contrary, there was evidence that Harvey was the agent of William, to draw upon this consignment as well as for other purposes.

Id. (Ib.) 824

5. It was not improper for the court to instruct the jury that they might find Harvey to have been either a principal or an agent of William.

Id. (Ib.) 824

SURETIES UPON EXECUTORS' BONDS—14.

See *Willis*.

TARIFF—13.

See *Duties*.

TARIFF—16.

1. The twentieth section of the Tariff Act of 1842 provides, that on all articles manufactured from two or more materials, the duty shall be assessed at the highest rates at which any of its component parts may be chargeable. (5 Stat. at L. 586.)

Stuart v. Maxwell, (150) 883

2. This section was not repealed by the general clause in the Tariff Act of 1846, by which all Acts, and parts of Acts, repugnant to the provisions of that Act (1846), were repealed.

Id. (Ib.) 883

3. Consequently, where goods were entered as being manufactures of linen and cotton, it was proper to impose upon them a duty of twenty-five per cent. *ad valorem*, such being the duty imposed upon cotton articles, in Schedule D, by the Tariff Act of 1846. (9 Stat. at L. 46.)

Id. (Ib.) 883

TAXES—16.

1. In 1845 the Legislature of Ohio passed a general banking law, the 59th section of which required the officers to make semi-annual dividends, and the 6th required them to set off six per cent. of such dividends for the use of the State, which sum or amount so set off should be in lieu of all taxes to which the company or the stockholders therein would otherwise be subject. This was a contract fixing the amount of taxation and not a law prescribing a rule of taxation until changed by the Legislature.

State Bank of Ohio v. Knapp, (309) 977

2. In 1851 an Act was passed entitled "An Act to tax banks, and bank and other stocks, the same as property is now taxable by the laws of this State." The operation of this law being to increase the tax, the banks were not bound to pay that increase.

Id. (Ib.) 977

3. In 1834 the Legislature of Ohio passed an Act

incorporating the Ohio Life Insurance and Trust Company, with power amongst other things to issue bills or notes until the year 1843. One section of the charter provided that no higher taxes should be levied on the capital stock or dividends of the company than are or may be levied on the capital stock or dividends of incorporated banking institutions in the State.

4. In 1836 the Legislature passed an Act to prohibit the circulation of small bills. This Act provided, that if any bank should surrender the right to issue small notes, the treasurer should collect a tax from such bank of five per cent. upon its dividends; if not, he should collect twenty per cent. The Life Insurance and Trust Company surrendered the right.

5. In 1838 this law was repealed.

6. In 1845 an Act was passed to incorporate the State Bank of Ohio and other banking companies. The 60th section provided that each company should pay, annually, six per cent. upon its profits, in lieu of all taxes to which such company or the stockholders thereof, on account of stocks owned therein, would otherwise be subject.

7. In 1851 an Act was passed to tax banks, and bank and other stocks, the same as other property was taxable by the laws of the State.

8. There was nothing in previous legislation to exempt the Life Insurance and Trust Company from the operation of this Act.

Ohio Life Insurance and Trust Company v. Debolt, (416) 997

TELEGRAPH—15.

See *Patent Rights*.

TEXAS—14.

1. The case of *League v. De Young and Brown*, 11 Howard, 185, considered and again established, 72.

2. The State of Texas was admitted into the Union on the 29th of December, 1845 (9 Stat. at Large, 108), and from that day the laws of the United States were extended over it.

Calkin & Co. v. Cooke, (227) 396

3. Consequently, on the 30th day of January, 1846, the revenue laws of Texas were not in force there, and goods seized for a non-compliance with those laws, were illegally seized.

Id. (Ib.) 396

4. In Texas, the technical form of pleading, fixed by the common law, are dispensed with, but the principles which regulate the merits of a trial by ejectment, and the substance of a plea of title to such an action, are preserved.

Christy v. Scott, (282) 422

5. Therefore, where the plaintiff filed a petition alleging that he was seized in his demesne as of fee of land from which the defendant had ejected him, and the defendant pleaded, that if the plaintiff had any paper title, it was under a certain grant which was not valid, this plea was bad.

Id. (Ib.) 422

6. So also was a plea denying the right of the plaintiff to receive his title, because he was not then a citizen of Texas. These pleas would have been appropriate objections to the plaintiff's title when produced upon the trial.

Id. (Ib.) 422

7. So also where, under a plea of the Statute of Limitations, the defendant claimed certain land by metes and bounds, and disclaimed all not included within them. There is nothing to show that the land so included was part of the land claimed by the plaintiff.

Id. (Ib.) 422

8. So, also, where the plea was in substance that the plaintiff had no good title against Texas, no title in the defendant being shown. For the action may have been maintainable, although the true title was not in the plaintiff.

Id. (Ib.) 422

9. Where a title to land in the State of Coahuila and Texas, was obtained in 1833, by a mother for, and in the name of her daughter, and in 1836 the father of the daughter conveyed it away by a deed executed in Louisiana, this deed was properly set aside by the District Court of Texas.

Hoyt v. Hammekin, (346) 449

10. It was not executed either according to the laws of Louisiana, or those of Coahuila and Texas.

Id. (Ib.) 449

TITLE—16.

1. Where the language of the statute was "That public notice of the time and place of the sale of real property for taxes due to the Corporation of the City of Washington shall be given by adver-

HOWARD 13, 14, 15, 16.

tisement inserted in some newspaper published in said city, once in each week for at least twelve successive weeks," it must be advertised for twelve full weeks, or eighty-four days.

2. Therefore, where property was sold after being advertised for only eighty-two days, the sale was illegal, and conveyed no title.

Early v. Doe,

(610) 1079

TREATIES—16.

1. In the ratification by the King of Spain of the Treaty by which Florida was ceded to the United States, it was admitted that certain grants of land in Florida, amongst which was one to the Duke of Alagon, were annulled and declared void.

2. A written declaration, annexed to a treaty at the time of its ratification, is as obligatory as if the provision had been inserted in the body of the Treaty itself.

Doe et al v. Braden,

(635) 1090

3. Whether or not the King of Spain had power, according to the Constitution of Spain, to annul this grant, is a political and not a judicial question, and was decided when the Treaty was made and ratified.

Id.

(1b.) 1090

4. A deed made by the duke to a citizen of the United States, during the interval between the signature and ratification of the Treaty, cannot be recognized as conveying any title whatever. The land remained under the jurisdiction of Spain until the annulment of the grant.

Id.

(1b.) 1090

TREATY—15.

1. By two Acts, passed in 1820 and 1823, Congress granted a lot in the Village of Peoria, in the State of Illinois, to each settler who "had not heretofore received a confirmation of claim or donation of any tract of land or village lot from the United States."

Forreth v. Reynolds,

(358) 729

2. Lands granted to settlers in Michigan, prior to the surrender of the western posts by the British government, and which grants were made out to carry out Jay's Treaty in 1794, were not donations so as to exclude a settler in Peoria from the benefit of the two Acts of Congress above mentioned.

Id.

(1b.) 729

TRESPASS—13.

1. Where an action of trespass *quare clausum fregit* was brought, and the defendants justified, and the court allowed the defendants, upon the trial, to open and close the argument, this ruling of the court is not a proper subject for a bill of exceptions.

Day v. Woodworth,

(363) 181

2. The suit being brought by the owner of a mill dam below, against the owners of a mill above, for forcibly taking down a part of the dam, upon the allegation that it injured the mill above, it was proper for the court to charge the jury, that, if they found for the plaintiff upon the ground that his dam caused no injury to the mill above, they should allow, in damages, the cost of restoring so much of the dam as was taken down, and compensation for the necessary delay of the plaintiff's mill; and they might also allow such sum for the expenses of prosecuting the action, over and above the taxable costs, as they should find the plaintiff had necessarily incurred, for counsel fees, and the pay of engineers in making surveys, &c.

Id.

(1b.) 181

3. But if they should find for the plaintiff, on the ground that the defendants had taken down more of the dam than was necessary to relieve the mill above, then, they would allow in damages the cost of replacing such excess, and compensation for any delay or damage occasioned by such excess; but not anything for counsel fees or extra compensation to engineers, unless the taking down of such excess was wanton and malicious.

Id.

(1b.) 181

4. In actions of trespass, and all actions on the case for torts, a jury may give exemplary or vindictive damages, depending upon the peculiar circumstances of each case. But the amount of counsel fees, as such, ought not to be taken as a measure of punishment, or a necessary element in its infliction.

Id.

(1b.) 181

5. The doctrine of costs explained.

Id.

(1b.) 181

6. Whether the verdict would carry costs or not,

was a question with which the jury had nothing to do.

Id.

(1b.) 181

7. In an action of trespass, for forcibly invading a plantation, carrying off some slaves, and frightening others away, it was proper for the plaintiff to give in evidence the consequential damages which resulted to his wood and corn.

McAfee v. Crofford,

(447) 217

8. It was proper, also, to allow the defendant to give in evidence a judgment against the owner of the plantation, as principal, and himself as surety, and his own payment of that judgment. It was allowable, both as an explanation of his motives, and to show how much he had paid; both reasons concurring to mitigate the damages.

Id.

(1b.) 217

9. Evidence was also allowable to show that arrangements had been entered into between the principal and surety, whereby time would be given for the payment of a debt. This was allowable, as a palliation of the conduct of the principal in removing his slaves without the State.

Id.

(1b.) 217

10. Evidence was also admissible to show that the surety had not been compelled to pay the debt, by showing that the creditor had been enjoined from collecting it. This was admissible, in order to rebut the evidence previously offered on the other side.

Id.

(1b.) 217

11. It was proper for the court to charge the jury that, in assessing damages, they had a right to take into consideration all the circumstances.

Id.

(1b.) 217

TRUSTEES—16.

1. There were two trustees of real and personal estate for the benefit of a minor. One of the trustees was also administrator *de bonis non* upon the estate of the father of the minor, and the other trustee was appointed guardian to the minor.

2. When the minor arrived at the proper age, and the accounts came to be settled, the following rules ought to have been applied:

3. The trustees ought not to have been charged with an amount of money, which the administrator trustee had paid himself as commission. That item was allowed by the Orphans' Court, and its correctness cannot be reviewed, collaterally, by another court.

Barney v. Saunders,

(535) 1047

4. Nor ought the trustees to have been charged with allowance made to the guardian trustee. The guardian's accounts also were cognizable by the Orphans' Court. Having power under the will to receive a portion of the income, the guardian's receipts were valid to the trustees.

Id.

(1b.) 1047

5. The trustees were properly allowed and credited by five per cent. on the principal of the personal estate, and ten per cent. on the income.

Id.

(1b.) 1047

6. Under the circumstances of this case, the trustees ought not to have been charged upon the principal of six months' rests and compound interest.

Id.

(1b.) 1047

7. The trustees ought to have been charged with all gains, as with those arising from usurious loans, unknown friends, or otherwise.

Id.

(1b.) 1047

8. The trustees ought not to have been credited with the amount of a sum of money deposited with a private banking house, and lost by its failure, so far as related to the capital of the estate, but ought to have been credited for so much of the loss as arose from the deposit of current collections of income.

Id.

(1b.) 1047

USAGE—15.

1. Where a note was given in the District of Columbia on the 11th of March, payable sixty days after date, and notice of its non-payment was given to the indorser on the 15th of May (being Monday), the notice was not in time.

Adams v. Otterback,

(539) 805

2. Although evidence was given that since 1846, the bank which was the holder of the note had changed the pre-existing custom, and had held the paper until the fourth day of grace, giving notice to the indorser on Monday, when the note fell due on Sunday; this was not sufficient to establish an usage.

Id.

(1b.) 805

3. An usage, to be binding, must be general, as to place, and not confined to a particular bank, and in order to be obligatory, must have been acquiesced in, and become notorious.

Adams v. Otterback, (530) 805

VENTITIONI EXPONAS—13.

See Lien.

VENTITIONI EXPONAS—14.

See Execution.

VERDICT—14.

1. A verdict on an issue to try whether a sale was fraudulent, finding the same to be fraudulent, will not be set aside on a certificate or affidavit of some of the jurors, afterwards made, as to what they meant.

Dows v. Tyack, (208) 428
2. A chancellor does not need a verdict to inform his conscience, when the answer denies fraud in the abstract, whilst it admits all the facts and circumstances necessary to constitute it, in the concrete. *Id.* (Ib.) 428

WAREHOUSE LAW—13.

See Duties.

WATER RIGHTS—18.

1. On 6th November, 1838, W. F. Hamilton, William V. Robinson, and wife, by deed, conveyed to the United States "the right and privilege to use, divert and carry away from the fountain spring, by which the woolen factory of said Hamilton and Robinson is now supplied, so much water as will pass through a pipe or tube of equal diameter with one that shall convey the water from the said spring, upon the same level therewith, to the factory of the said grantors, and to proceed from a common cistern or head to be erected by the said United States, and to convey and conduct the same, by tubes or pipes, through the premises of the said grantors in a direct line, &c., &c."

2. The distance to which the United States wished to carry their share of the water being much greater than that of the other party, it was necessary, according to the principles of hydraulics, to lay down pipes of a larger bore than those of the other party, in order to obtain one half of the water.

3. The grantors were present when the pipes were laid down in this way, and made no objection. It will not do for an assignee, whose deed recognizes the title of the United States to one half of the water, now to disturb the arrangement.

Irwin v. United States, (513) 1038
4. Under the circumstances, the construction to be given to the deed is, that the United States purchased a right to one half of the water, and had a right to lay down such pipes as were necessary to secure that object.

WHEELING BRIDGE—13.

See Constitutional Law.

WILLS—14.

1. James Bosley, in his will, after sundry specific devises and bequests, devised and bequeathed all his lands and other real estate in Baltimore, Cecil, and Alleghany counties, in Maryland, and also in Florida, and his house and lot in Santa Croix, and all the real estate he might have elsewhere, to his wife Elizabeth, her heirs and assigns, in trust to sell the same and divide the net proceeds thereof, with all the residue of his estate, equally between herself and the children of his brother.

Bosley v. Bosley, (390) 468
2. After making his will, he sold all of the lands, particularly mentioned in the residuary clause of the will above stated, except some lands lying in Baltimore County. At the time of making the codicil hereafter mentioned, he held some of the proceeds of these sales in bonds and other securities, and with the residue had purchased other property.

Id. (Ib.) 468
3. He afterwards made a codicil, by which he devised his summer residence in Baltimore County, to his wife, and also the securities he held for the lands sold in Cecil County, and directed all the property he had acquired after the date of his will to be sold, and the proceeds to be equally divided between his wife and her sister Margaret. Then

followed a residuary clause in the following words: "Lastly, my pew in St. Paul's Church and all my other property, real or personal, and all money in bank belonging to me at the time of my decease, I give, devise and bequeath unto my said wife Elizabeth and her heirs forever; and I ratify and confirm my said last will in everything except where the same is hereby revoked and altered as aforesaid."

Id. (Ib.) 468
4. The residuary clause in this codicil is inconsistent with that in the will, and consequently revokes it. But the devise of the property, specifically mentioned in the will, is not revoked by the clause in the codicil.

Id. (Ib.) 468
5. After the execution of the codicil, the testator agreed to lease some land for the term of ninety-nine years, renewable forever, a ground rent being reserved upon the same. The lessee was to pay cash for a part, and the residue of the purchase money was to remain on interest, as ground rent, which the lessee could extinguish at any time by the payment of the principal sum.

Id. (Ib.) 468
6. This property was a part of that which was specifically mentioned in the will, and not revoked by the clause in the codicil.

Id. (Ib.) 468
7. But the conduct of the testator, in making this agreement, so altered the condition of the property that it amounted to a revocation of the devise, and manifests an intention on his part, when taken in connection with other circumstances of the case, to give it to his wife under the residuary clause in the codicil.

Id. (Ib.) 468
8. General Kosciusko made four wills. One in the United States, in 1798; another in Paris, in 1805; the third and fourth were made at Soleure, in Switzerland, whilst he was sojourning there in 1816 and 1817.

Ennis v. Smith, (400) 472
9. The first and second wills were revoked by the third, and he died intestate as to his estate in the United States.

Id. (Ib.) 472
10. But the first will, before it was known that he had made the others, was probated by Mr. Jefferson, in Virginia, and when Mr. Jefferson learned that the General had made other wills, he transferred the fund to the Orphans' Court of the District of Columbia. The Orphans' Court managed the fund for some time, and then Benjamin L. Lear was appointed the administrator of Kosciusko, with the will annexed. He died, leaving a will, and George Bomford one of his executors. Bomford qualified as such, and afterwards became the administrator of Kosciusko *de bonis non*. He took into his possession, as executor, the estate of Lear, and also the funds of Kosciusko, which had been administered by Lear, and first made his return to the Orphans' Court of the administered funds of Kosciusko, as executor of Lear. Afterwards they were returned by him to the Orphans' Court, as administrator *de bonis non* of Kosciusko. The Orphans' Court deeming that his sureties as administrator *de bonis non* of Kosciusko, were insufficient, or that they were not liable for any waste of them, on account of the funds having been received by him as executor of Lear, and not as administrator *de bonis non*, called upon him for other sureties, under the Act of Congress of the 20th February, 1846. He complied with the call, and gave as sureties, Stott, Carrico, and George C. Bomford, and Gideon, Ward, and Smith.

Id. (Ib.) 472
11. The original bonds of Bomford were given to the Orphans' Court, under the law of Maryland, which prevailed without alteration in that part of the District of Columbia which had been ceded by Maryland, until Congress passed the Act of the 30th February, 1846. The defendant, Stott, Carrico, and George C. Bomford, and Smith, Ward, and Gideon, became the sureties of Bomford, as administrator *de bonis non* of Kosciusko, under the Act of 30th February, 1846.

Id. (Ib.) 472
12. In the State of Maryland, if an executor or administrator changes any part of an estate from what it was, into something else, it is said to be administered. If an administrator *de bonis non* possesses himself of such changed estate, of whatever kind it may be, and charges himself with it as assets, his sureties to his original bond, as administrator *de bonis non*, are not liable for his waste of

them. They are only liable for such assets of the deceased as remain in specie, unadministered by his predecessor, in the administration. Such is the law of Maryland, applicable to the sureties of Bondford, in the bond given when he was appointed administrator *de bonis non* of Kosciusko.

Id. (Ib.) 472
13. But when other sureties are called for by the Orphans' Court, under the third section of the Act of February 20, 1846, and are given, they do not bear the same relation to the administrator that his original sureties did, and they will be bound for the waste of their principal to the amount of the estate, or funds which he has charged himself by his return to the Orphans' Court, as administrator *de bonis non*, when it called for additional sureties, and for such as the administrator may afterwards receive.

Id. (Ib.) 472
14. The bonds taken by the Orphans' Court in this case, were properly taken under the Act of the 20th February, 1846.

Id. (Ib.) 472
15. General Kosciusko's olographic will, of 1816, contains a revoking clause of all other wills previously made by him, and not having disposed of his American funds in that will, nor in the will of 1817, he died intestate as to such funds. The second article in the will of 1817, "*Je Lègue tous mes effets, ma voiture, et mon cheval y comprise à Madame et à Monsieur Xavier Zellner, les hommes ce dessus*," record 106, is not a residuary bequest to them of the rest of the estate, nor specifically disposed of in the wills of 1816 and 1817.

Id. (Ib.) 472
16. General Kosciusko was sojourning in Switzerland when he died, but was domiciled in France, and had been for fifteen years.

Id. (Ib.) 472
17. His declarations are to be received as proof that his domicile was in France. Such declarations have always been received, in questions of domicile, in the courts of France, in those of England, and in the courts of the United States.

Id. (Ib.) 472
18. The presumption of law is, that the domicile of origin is retained, until residence elsewhere has been shown by him who alleges a change of it. But residence elsewhere repels the presumption, and casts upon him who denies it to be a domicile of choice, the burden of disproving it. The place of residence must be taken to be a domicile of choice, unless it is proved that it was not meant to be a principal and permanent residence. Contingent events, political or otherwise, are not admissible proofs to show, where one removes from his domicile of origin for a residence elsewhere, that the latter was not meant to be a principal and permanent residence. But if one is exiled by authority from his domicile of origin, it is never presumed that he has abandoned all hope of returning back. The abandonment, however, may be shown by proof. General Kosciusko was not exiled by authority. He left Poland voluntarily, to obtain a civil status in France, which he conscientiously thought he could not enjoy in Poland, whilst it continued under a foreign dominion.

Id. (Ib.) 472
19. Personal property, wherever it may be, is to be disturbed in case of intestacy, according to the law of the domicile of the intestate. This rule may be said to be a part of the *ius gentium*.

Id. (Ib.) 472
20. What that law is when a foreign law applies, must be shown by proof of it, and in the case of written law, it will be sufficient to offer, as evidence, the official publication of the law, certified satisfactorily to be such. Unwritten foreign laws must be proved by experts. There is no general rule for authenticating foreign laws in the courts of other countries except this, that no proof shall be received "which presupposes better testimony behind, and attainable by the party." They may be verified by an oath, or by an exemplification of a copy under the great seal of the State or nation whose law it may be, or by a copy, proved to be a true copy by its witnesses who have examined and compared it with the original, or by the certificate of an officer authorized to give the law, which certificate must be duly proved. Such modes of proof are not exclusive of others, especially of oaths and accepted histories of the law of a country. See, also, the cases of Church v. Hubbard, in 2 Cranch, 181, and Talbot v. Seeman, in 1 Cranch, 7. In this case, the Code Civil of France, with this indorsement, "*Les Garde des Sceaux de France à la Cour*" HOWARD 13, 14, 15, 16.

Supreme des Etats Unis," was offered as evidence to prove that the law of France was for the distribution of the funds in controversy. This court ruled that such indorsement was a sufficient authentication to make the Code evidence in this case, and in any other case in which it may be offered. By that Code, the complainants named in this suit as the collateral relations of General Kosciusko, are entitled to receive the funds in controversy, in such proportions as are stated in the mandate of this court to the court below.

Id. (Ib.) 472
21. The documentary proofs in this cause, from the Orphans' Court, of the genealogy of the Kosciusko family, and of the collateral relationship of the persons entitled to a decree, and also of the wills of Kosciusko, are properly in evidence in this suit.

Id. (Ib.) 472
22. The record from Grodno is judicial; not a judgment *inter partes*, but a foreign judgment *in rem*, which is evidenced of the facts adjudicated against all the world.

Id. (Ib.) 472
23. A will executed in 1777, which devised certain lands in Maine to trustees and their heirs, to the use of Richard (the son of the testator) for life, remainder for his life, in case of forfeiture, to the trustees, to preserve contingent remainders; remainder to the sons of Richard, if any, as tenants in common in tail, with cross remainders; remainder to Richard's daughter, Elizabeth, for life; remainder to trustees, to preserve contingent remainders during her life; remainder to the sons of Elizabeth in tail—did not vest the legal estate in fee simple in the trustees. The life estate of Richard, and the contingent remainders limited thereon, were legal estates.

Webster v. Cooper, (488) 510
24. No duties were imposed on the trustees which could prevent the legal estate in these lands from vesting in the *cestui que use*; and although such duties might have been required of them relating to other lands in the devise, yet this circumstance would not control the construction of the devise as to these lands.

Id. (Ib.) 510
25. The devise to Elizabeth for life, remainder to her sons, as tenants in common, share and share alike, and to the heirs of their bodies, did not give an estate tail to Elizabeth, under the rule in Shelly's case. But upon her death, her son (the party to the suit) took, as a purchaser, an estate tail in one moiety of the land, as a tenant in common with his brother.

Id. (Ib.) 510
26. One of the conditions of the devise was, that this party, as soon as he should come into possession of the lands, should take the name of the testator. But as he had not yet come into possession, and it was a condition subsequent, of which only the person to whom the lands were devised over, could take advantage, a non-compliance of it was no defense, in an action brought to recover possession of the land.

Id. (Ib.) 510
27. The son, taking an estate tail at the death of Elizabeth, in 1845, could maintain a writ of entry, and until that time had no right of possession. Consequently, the adverse possession of the occupant only began then.

Id. (Ib.) 510
28. In 1848, the Legislature of Maine passed an Act declaring that no real or mixed action should be commenced or maintained against any person in possession of lands, where such person had been in actual possession for more than forty years, claiming to hold the same in his own right, and which possession should have been adverse, open, peaceable, notorious, and exclusive. This Act was passed two years after the suit was commenced.

Id. (Ib.) 510
29. The effect of this Act was to make the seisin of the occupant during the lifetime of Elizabeth, adverse against her son, when he had no right of possession.

Id. (Ib.) 510
30. This act, which thus purported to take away property from one man and vest it in another, was contrary to the constitution of the State of Maine, as expounded by the highest courts of law in that State. And as this court looks to the decisions of the courts of a state to explain its statutes, there is no reason why it should not also look to them to expound its constitution.

Id. (Ib.) 510

WILLS—15.

1. McDonogh, a citizen of Louisiana, made a will, in which, after bequeathing certain legacies not involved in the present controversy, he gave, willed and bequeathed all the residue, and remainder of his property to the corporations of the cities of New Orleans and Baltimore forever, one half to each, for the education of the poor, in those cities.

McDonogh's Executors v. Murdoch. (367) 732

2. The estate was to be converted into real property, and managed by six agents, three to be appointed by each city.

Id. (Ib.) 732

3. No alienation of this general estate was ever to take place, under penalty of forfeiture, when the States of Maryland and Louisiana were to become his residuary devisees for the purpose of educating the poor of those States.

Id. (Ib.) 732

4. Although there is a complexity in the plan by which the testator proposed to effect his purpose, yet his intention is clear to make the cities his legatees; and his directions about the agency are merely subsidiary to the general objects of his will, and whether legal and practicable, or otherwise, can exert no influence over the question of its validity.

Id. (Ib.) 732

5. The City of New Orleans, being a corporation established by law, has a right to receive a legacy for the purpose of exercising the powers which have been granted to it, and amongst these powers and duties is that of establishing public schools for gratuitous education.

Id. (Ib.) 732

6. The civil and English law upon this point compared:

The dispositions of the property in this will are not "substitutions, or *Adel commissæ*," which are forbidden by the Louisiana Code.

Id. (Ib.) 732

7. The meaning of those terms explained and defined:

The testator was authorized to define the use and destination of his legacy.

Id. (Ib.) 732

8. The conditions annexed to this legacy, the prohibition to alienate or to divide the estate, or to separate in its management the interest of the cities, or their care and control, or to deviate from the testator's scheme, do not invalidate the bequest, because the Louisiana Code provides that "in all dispositions *inter vivos* and *mortis causa*, impossible conditions, those which are contrary to the laws or to morals, are reputed not written."

Id. (Ib.) 732

9. The difference between the civil and common law, upon this point, examined:

The City of Baltimore is entitled and empowered to receive this legacy under the laws of Maryland; and the laws of Louisiana do not forbid it. The article in the Code of the latter State, which says that "Donations may be made in favor of a stranger, when the laws of his country do not prohibit similar dispositions in favor of a citizen of this State," does not most probably apply to the citizens or corporations of the States of the Union. Moreover, the laws of Maryland do not prohibit similar dispositions in favor of a citizen of Louisiana.

Id. (Ib.) 732

10. The destination of the legacy to public uses in the City of Baltimore, does not affect the valid operation of the bequest in Louisiana.

Id. (Ib.) 732

11. The cities of New Orleans and Baltimore, having the annuities charged upon their legacies, would be benefited by the invalidity of these legacies. Upon the question of their validity, this court expresses no opinion. But the parties to this suit, viz.: the heirs at law, could not claim them.

Id. (Ib.) 732

12. In case of the failure of the devise to the cities, the limitation over to the States of Maryland and Louisiana would have been operative.

Id. (Ib.) 732

WILLS—16.

1. Where a bill in chancery was filed by a legatee against the person who had married the daughter and residuary devisee of the testator (there having been no administration in the United States upon the estate), this daughter, or her representatives, if she were dead, ought to have been made a party defendant.

Lewis v. Darling. (1) 819

2. But if the complainant appears to be entitled to relief, the court will allow the bill to be amended,

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and even if it be an appeal, will remand the case for this purpose.

Id. (Ib.) 819

3. Where the will, by construction, shows an intention to charge the real estate with the payment of a legacy, it is not necessary to aver in the bill a deficiency of personal assets.

Id. (Ib.) 819

4. The real estate will be charged with the payment of legacies, where a testator gives several legacies, and then, without creating an express trust to pay them, makes a general residuary disposition of the whole estate, blending the realty and personally together in one fund. This is an exception to the general rule that the personal estate is the first fund for the payment of debts and legacies.

Id. (Ib.) 819

5. Where it appears, by the admissions and proofs, that the defendant has substantially under his control a large property of the testator which he intended to charge with the payment of the legacy in question, the complainant is entitled to relief, although the land lies beyond the limits of the state in which the suit is brought.

Id. (Ib.) 819

6. By the common law of Maryland, lands of which the testator was not seized at the time of making his will, could not be devised thereby.

Carroll v. Lessee of Carroll et al. (275) 936

7. In 1850 the Legislature passed the following Act:

8. Sec. 1. Be it enacted, &c., That every last will and testament executed in due form of law, after the first day of June next, shall be construed with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed on the day of the death of the testator or testatrix, unless a contrary intention shall appear by the will.

9. Sec. 2. That the provisions of this Act shall not apply to any will executed, before the passage of this Act, by any person who may die before the first day of June next, unless in such will the intention of the testator or testatrix shall appear that the real and personal estate which he or she may own at his or her death, should thereby pass.

10. Sec. 3. That this law shall take effect on the first day of June next.

Id. (Ib.) 936

11. In 1837 Richard B. Carroll duly executed his will, making his wife, Jane, his residuary legatee and devisee. After the execution of his will, he acquired the lands in controversy, and died in August, 1851.

Id. (Ib.) 936

12. The lands which he purchased in 1842 did not pass to the devisee, but descended to the heirs.

Id. (Ib.) 936

13. The cases upon the subject examined.

Id. (Ib.) 936

14. In April, 1815, William Brown, of Massachusetts, made his will by which he made sundry bequests to his youngest son, Samuel. One of them was of the rent or improvement of the store and wharf privilege of the Stoddard property, during his natural life, and the premises to descend to his heirs. After two other similar bequests, the will then gave to Samuel, absolutely, a share in certain property when turned into money.

15. In May, 1816, the testator made a codicil, revoking that part of the will wherein any part of the estate was devised and bequeathed to Samuel, and in lieu thereof, bequeathing to him only the income, interest or rent. At his decease it was to go to the legal heirs.

16. Under the circumstances of this will and codicil, the revoking part applied only to such share of the estate as was given to Samuel, absolutely; leaving in the Stoddard property a life estate in Samuel, with a remainder to his heirs, which remainder was protected by the laws of Massachusetts until Samuel's death.

Homer v. Brown. (354) 970

17. At the death of Samuel the title to the property became vested in fee simple in the two children of Samuel.

WRIT OF ERROR—16.

1. Where the debtor alleged that process of attachment had been laid in his hands as garnishee, attaching the debt which he owed to the creditor in question; and moved the court to stay execution until the rights of the parties could be settled in the State Court which had issued the attachment, and the court refused so to do, this refusal is not the subject of review by this court. The

HOWARD 13, 14, 15, 16.

motion was addressed to the discretion of the court below, which will take care that no injustice shall be done to any party.

Early v. Rogers et al. (599) 1074

2. This court expresses no opinion, at present, upon the point whether a writ of error was the proper mode of bringing the present question before this court.

Id.

WRIT OF RIGHT—16.

1. A tenant in common may bring a real action by a writ of right for his undivided moiety of the property in the Circuit Courts.

Homer v. Brown,

(364) 970

HOWARD 13, 14, 15, 16.

2. The writ of right was abolished by Massachusetts, in 1840, but was previously adopted as a process by the Acts of Congress of 1789 and 1792. Its repeal by Massachusetts did not repeal it as a process in the Circuit Court of the United States.

Id.

(17.) 670

3. A judgment of *non pros* given by the State Court in a case between the same parties, for the same property, was not a sufficient plea in bar to prevent a recovery under the writ of right; nor was the agreement of the plaintiff to submit his case to that court upon a statement of facts, sufficient to prevent his recovery in the Circuit Court.

Id.

(1b.) 970

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